MAINE REPORTS

149

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

JUNE 3, 1953 to JANUARY 27, 1954

MILTON A. NIXON

REPORTER

AUGUSTA, MAINE
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OF THE
SUPREME JUDICIAL COURT
DURING THE TIME OF THESE REPORTS

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HON. RAYMOND FELLOWS
[1] HON. WILLIAM B. NULTY
HON. ROBERT B. WILLIAMSON
HON. FRANK A. TIRRELL, JR.
[2] HON. DONALD W. WEBBER

1 Died September 11, 1953
2 Qualified October 8, 1953

HON. LESLIE E. NORWOOD, *Clerk*
HON. HAROLD C. FULLER, *Clerk*

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OF THE
SUPREME JUDICIAL COURT
HON. EDWARD P. MURRAY

JUSTICES OF THE SUPERIOR COURT

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HON. RANDOLPH WEATHERBEE
[2]HON. CECIL J. SIDDALL
[3]HON. LEONARD F. WILLIAMS

1 Qualified Associate Justice Supreme Judicial Court, October 8, 1953
2 Qualified August 19, 1953
3 Qualified November 4, 1953

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OF THE
SUPERIOR COURT

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[1]HON. ARTHUR E. SEWALL

1 Resigned September 11, 1953

Attorney General

HON. ALEXANDER A. LAFLEUR

Reporter of Decisions

MILTON A. NIXON

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CASES
IN THE
SUPREME JUDICIAL COURT
OF THE
STATE OF MAINE

AMELIA BALAVICH

vs.

WALTER P. AND ELIZABETH M. YARNISH

Oxford. Opinion, June 3, 1953.

Jurors. Misconduct. New Trial.

The discretion exercised by a presiding justice in finding a lack of alleged improprieties of a juror should not be disturbed unless there is evidence from which it can be inferred that the justice abused his discretion.

The fact that the brother of the defendant participated as a juror in the selection of the foreman to the regular panel, mingled with the jury during the course of the trial and rode in the same car with the foreman of the jury are not in and of themselves sufficient evidence of misconduct or a violation of R. S., 1944, Chap. 100, Sec. 112.

To justify a new trial there must be some evidence of improprieties, and not the accidental or innocent meeting and association of jurors with each other, or jurors with a party.

ON EXCEPTIONS.

This is an action for assault and battery with a jury verdict for defendant. The case is before the Law Court on plaintiff's exceptions to the denial of a motion for new trial. Exceptions overruled.

Jacobson & Jacobson, for plaintiff.

Berman & Berman, for defendants.

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

FELLOWS, J. The action was for assault and battery brought by Amelia Balavich against Walter P. Yarnish and his wife Elizabeth M. Yarnish. After a verdict for the defendants had been rendered by the jury in the Superior Court in Oxford County, a motion for new trial was filed by the plaintiff on the alleged ground that there was misconduct on the part of certain jurors. The presiding justice held hearing on the motion. The evidence was presented. The motion was denied and exceptions taken by the plaintiff to this denial.

Briefly, the facts appear to be these: The declaration in the case for assault and battery alleged that the defendants on February 10, 1952 threw water on the plaintiff, and also that one of the defendants struck the plaintiff with a kettle. The pleas were the general issue with brief statements that what was done by the defendants, or either of them, was solely in defense of their own persons, using no more force than was necessary. Upon trial at the November term, 1952, the jury found for the defendants.

This assault case was the first trial of the term, and among the traverse jurors summoned, and selected for the first or regular panel, was Charles C. Aleck, Jr. of Mexico, Maine, brother of Elizabeth Yarnish a defendant in the first case tried. Before any case was heard, the members of the regular panel were instructed by the presiding justice to go to their jury room to elect a foreman, which they did, and reported the election of Albert W. Smith of Dixfield, Maine. The counsel for the plaintiff in the assault case, while the regular panel was being selected, stated his inten-

tion to challenge Charles C. Aleck, Jr., and when the jury returned after election of a foreman, Charles C. Aleck, Jr. was excused from service by the presiding justice, and Dorothy K. Moore of Bethel, Maine served on the case in his stead.

During the trial, juryman Charles C. Aleck, Jr. sat in the rear of the court room with the supernumeraries, because the court had told all jurors, not sitting on the case then being tried, to remain in the room during the entire trial that they might hear his instructions given in this first case.

The trial was commenced on Friday, November 7, 1952, and the arguments and charge came on Saturday morning, November 8th. Before adjournment on Friday afternoon, the presiding justice carefully instructed all jurors not to talk with anyone about the case on trial, and not to permit any person to talk to them.

On November 18, 1952, the counsel for the plaintiff filed a motion for new trial alleging misconduct of several jurors and Charles C. Aleck, Jr. the brother of defendant Elizabeth M. Yarnish, in that Charles C. Aleck, Jr. "mingled with the jury during the course of the trial and after the testimony had been presented and before argument of counsel and the charge by the presiding justice." It was also alleged that "Charles C. Aleck, Jr. rode in the same car with the foreman of the jury and at least one other member of the regular jury from South Paris to Rumford, Maine, all of which the said Amelia Balavich alleges to be improper conduct entitling her to have the verdict set aside."

The testimony, at the hearing on the motion, showed that Charles C. Aleck, Jr. did "mingle" with other jurors during the trial because he and other supernumerary jurors were ordered by the court to remain. Charles Aleck lunched at the same eating place with other jurors. The testimony

further showed that Charles C. Aleck, Jr. rode home with Smith the foreman of the trial jury and another juror named Wilma Tibbetts. The testimony showed that jurors Aleck, Smith, and McGregor were all employees of the Oxford Paper Company, and all three had been summoned to appear as jurors at the November term of the Superior Court to be held at South Paris, Maine. It was agreed between these jurors before court convened that one car only was necessary, and one of them would take his car on one day of court, and that the others would use their cars on the succeeding days to go to and from home, and so on. When Mr. Smith took his car, Mr. Smith paid for gas, and when Mr. Aleck used his car, Mr. Aleck bought the gas. When Mr. McGregor took his car, Mr. McGregor paid for the gas. Mr. Aleck testified, as did Mr. Smith, that the case was not mentioned or discussed by him with any other juror, or with anyone. Mr. Aleck further testified that no information came from him to any other juror that Mrs. Yarnish was his sister. Any member of the jury who knew of such relationship, obtained their information from other sources, or from the fact that the presiding justice excused Mr. Aleck before the commencement of the trial.

The presiding justice, after hearing the evidence, decided that there was no misconduct and denied the motion for new trial.

Revised Statutes 1944, Chapter 100, Section 112 is as follows:

> "If either party, in a cause in which a verdict is returned, during the same term of the court, before or after the trial, gives to any of the jurors who try the cause, any treat or gratuity, or purposely introduces among the papers delivered to the jury when they retire with the cause, any papers which have any connection with it, but were not offered in evidence, the court on motion of the adverse party, may set aside the verdict and order a new trial."

Where a treat or gratuity has had, or might have had, an effect unfavorable to the opposing party, the verdict should be set aside, even though it appears to be the correct verdict. *Derosby* v. *Mathieu,* 136 Me. 91, wherein a ride was given a juror by the plaintiff after verdict. See also *Ellis* v. *Emerson,* 128 Me. 379, invitation to dinner by plaintiff's attorney, and *State* v. *Brown,* 129 *Me.* 169, where deputy sheriff, an officer of the State, gave free transportation; *Bean* v. *Fuel Co.,* 125 Me. 260, attorney giving juror ride.

The foregoing statute relates to a gratuity given by a party, or his attorney, before or after trial during the term. It is, however, the well established rule that any misconduct on the part of juror, or friend of a party, may be ground for new trial. *Rioux* v. *Water District,* 132 Me. 307, witness riding with juror, if juror influenced; *York* v. *Wyman,* 115 Me. 353, statements in jury presence; *Bradbury* v. *Cony,* 62 Me. 223, where son of party showed locus to jurors; *Walker* v. *Bradford,* 117 Me. 147, plaintiff entertained by juror; *Driscoll* v. *Gatcomb,* 112 Me. 289, juryman making investigation; *Winslow* v. *Morrill,* 68 Me. 362, juror seeking evidence.

The presiding justice in this case heard the testimony, and participated in the examination of all persons who were alleged to be guilty of any misconduct or against whom there was any alleged suspicion. There was no evidence of any attempt by a party, or by the non-sitting juror related to a party, to influence any trial juror. There was no evidence of conversation or attempted conversation with any trial juror. The discretion exercised by the presiding justice should not be disturbed because there is no evidence, and because there are no circumstances, from which it can be inferred that he abused that discretion. See *Rioux* v. *Water District,* 132 Me. 307.

This is not a case of a gratuity or offer of gratuity. It is common practice in some counties in Maine for two or more

jurors to travel together and either share the expense, or take turns in using their own cars. It is not a gratuity from anyone, and with Maine's distances it is often an economic necessity. It is also true that in many of our counties several jurors working in the same place of employment may be drawn for jury duty. They may be friends, and one may be related to some litigant. It is also well recognized that with the small population of some counties it would be difficult to pick jurors who bear no relationship to some party in litigation. In fact, the presiding justice usually inquires of a jury, before trial commences, regarding possible relationship to the parties or any of them.

After a "heated" trial before a jury, or a trial wherein the facts are closely contested, the defeated party often attributes the loss of his case to what he "guesses" or "suspects" in some improper outside influence, and not to the real cause which is lack of merit. Unfounded rumors, which accompany many law suits, coupled with the suspicions of the defeated party gained from the gossip of bystanders or from the irresponsible "pity" of sympathetic friends, should not be permitted to be successful ground for a new trial. There must be some evidence of improprieties, and not the accidental or innocent meeting and association of jurors with each other, or jurors with a party. See *Gifford* v. *Clark*, 70 Me. 94.

This court has not hesitated to condemn a verdict and grant the opportunity for a new trial where it has been shown that some improper act has been done that might affect the purity of the verdict, or it appears that some outside influence was exerted or attempted on a juryman. Many cases in the Maine Reports, hereinbefore cited, so indicate. In this case, however, the presiding justice heard the evidence on the motion, that alleged misconduct on the part of a juror or jurors, and found as a fact that there was no misconduct, and no fact that tended to prevent the jury

from deciding the case upon the law and the evidence. *Rioux* v. *Water District,* 132 Me. 307.

We have carefully examined the record of the testimony heard by the presiding justice, and we cannot disagree with his decision. He exercised his discretion properly in denying the motion for a new trial. *Walker* v. *Bradford,* 117 Me. 147.

Exceptions overruled.

REAL SAVOY
vs.
CHARLES L. BUTLER

York. Opinion, June 3, 1953.

Negligence. Lumbering. Employer - Employee. Damages: Pain and Suffering.

It is not negligence as a matter of law for a woodsman, ordered to measure logs, to rely upon a warning from his employer engaged in falling trees in the immediate vicinity.

A verdict of $2900 with approximately $2400 allotted to pain and suffering is not excessive where the evidence discloses fractures of three transverse processes of the spine and severe pain.

ON MOTION FOR NEW TRIAL.

This is a negligence action before the Law Court on motion for a new trial after verdict for plaintiff. Motion overruled.

Paul LeSieur, for plaintiff.

Lausier & Donahue,
Simon Spill,
Armstrong, Marshall & Melnick, for defendant.

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

WILLIAMSON, J. In this tort action the plaintiff employee was struck by a tree felled by the defendant employer. Two issues are presented by the defendant's motion for a new trial: (1) contributory negligence of the plaintiff, and (2) damages. The defendant in argument agrees that the evidence warrants a finding of negligence on his part.

It will serve no useful purpose to review the record in detail. The evidence we must consider in the light most favorable to the plaintiff. In brief, the plaintiff and defendant on a clear winter day were engaged in cutting wood. The plaintiff was "scarfing" or "notching" trees before the defendant cut them down with a power saw. After a rest for a cigarette the defendant instructed the plaintiff to measure the logs in a given area. While the plaintiff was engaged in this task, the defendant without warning and at a distance of twenty feet to twenty-five feet cut down the tree which in falling struck and injured the plaintiff.

The plaintiff knew that the defendant was engaged in cutting trees in the immediate neighborhood. Obviously he did not keep watch of the defendant for he did not see the tree fall. He relied upon a warning from the defendant and in this reliance he was, in our view, justified. He was working at the time and place under the instructions of the defendant. We see no reason why a jury could not properly find, as they did, that in the exercise of due care the plaintiff could rely upon defendant giving warning of impending danger created by defendant's action.

The case plainly presented a question of fact for the jury. Was the plaintiff a reasonably prudent man under the circumstances? We cannot say as a matter of law that a woodsman ordered to measure logs by his employer may

not rely upon warning from his employer engaged in felling trees in the immediate neighborhood. See *Rhoades* v. *Varney*, 91 Me. 222, 39 A. 552; *LeBlanc* v. *Sturgis*, 128 Me. 374, 147 A. 701; *Jenkins* v. *Banks*, 147 Me. 438, 92 A. (2nd) 323.

The jury returned a verdict of $2900. The plaintiff received a fracture of three transverse processes of the spine, and suffered severe pain. The medical bills were $273.90, and there was a loss of wages from $250 to $300. The jury measured the pain and suffering at approximately $2400.

The verdict, while large, does not indicate to our minds the operation of bias, prejudice, or any other improper influence upon the finders of fact. The defendant has failed to show that the judgment of the jury was not fairly reached.

Motion overruled.

GEORGE W. DIETZ
vs.
FORREST MORRIS

Lincoln. Opinion, June 9, 1953.

Automobiles. Negligence.

A plaintiff automobile driver who does not see what is plainly visible right in front of him, or rushes into a place where his vision is obscured so he cannot stop within the distance illuminated by his own headlights is guilty of contributory negligence.

ON EXCEPTIONS.

This is a negligence action before the Law Court upon plaintiffs exceptions to a verdict directed in favor of defendant. Exceptions overruled.

John A. Wilson,
Ralph A. Gallagher, for plaintiff.

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

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

THAXTER, J. This is an action based on the defendant's negligence in parking his truck in the night time on No. 1 highway in the town of Warren. Taking the evidence as we must most favorably for the plaintiff, as we recently said in the case of *Savoy* v. *Butler,* 149 Me. 7 (1953), it appears that the defendant's truck was driven by his agent and employee, who left it parked in the night time on said highway facing westerly, without lights or flares as required by statute. The defendant concedes that so far as his own negligence is concerned there was sufficient evidence to go to the jury. While the truck was so left on said highway, the plaintiff collided with it while approaching it from the rear travelling in a general westerly or southwesterly direction. The action is for personal injuries and damages to the plaintiff's automobile. The plaintiff had been travelling at a speed of forty or forty-five miles an hour as he approached the defendant's truck.

The defendant pleaded the general issue. The burden was thereby placed on the plaintiff to establish his own due care. At the conclusion of all the evidence the defendant, claiming that the plaintiff had failed to establish such due care, asked for a directed verdict which the presiding justice granted on the authority of *Spang* v. *Cote,* 144 Me. 338, 68 A. (2nd) 823. The case is before us on an exception to this ruling.

The black top or travelled part of the road was 22 feet in width with hard shoulders on each side of approximately

two and one-half feet. The night was clear and the road dry. The plaintiff was coming out of a wide curve from the east; the defendant's car was parked about 270 feet ahead of him as he emerged on the straightaway. How far he could see from the curve down the straightaway does not clearly appear; but it must have been more than 100 yards. No sudden emergency could have been created as he came out of the curve. The left-hand wheels of the defendant's truck were resting about eight feet on the travelled part of the highway. In spite of these seemingly favorable conditions he did not see the parked truck on his side of the highway in front of him until he was within 30 or 40 feet of it. He then jammed on his brakes and veered to the left, too late to avoid the collision. He lays his failure to avoid the accident to the lights of an oncoming trailer truck. There is nothing else to explain his failure to see the parked truck farther away, and it is doubtful how much those lights of the oncoming truck, even though dimmed, contributed to the collision, for he saw them, as he admits, 1000 feet away. There is no doubt that he either did not see what was plainly visible right in front of him, or that he rushed into a place where his vision was obscured so that he could not stop within the distance illumined by his own headlights. *Spang* v. *Cote, supra,* p. 243. In either case he was contributorily negligent as a matter of law and his recovery is barred. We are unable to see any distinction between this case and the case of *Spang* v. *Cote, supra.* The verdict for the defendant was properly directed.

Exceptions overruled.

AIME GIGUERE
vs.
ELAINE WEBBER

Kennebec. Opinion, June 11, 1953.

Conflict of Laws. Implied Contracts.
Executors and Administrators.
Funeral Expenses.

Suit against a resident of Maine upon an alleged implied contract to pay for funeral services rendered in Quebec is governed by the law of Quebec.

In testing the validity of a verdict directed for the defendant the evidence and the inferences reasonably to be drawn therefrom must be viewed in the light most favorable to the plaintiff.

At common law there is a presumption that funeral expenses are incurred upon the credit of decedent's estate.

The facts that defendant, a niece of decedent, selected the casket, approved the funeral arrangements and represented decedent's family is not sufficient too overcome the common law presumption so as to render defendant primarily liable for funeral expenses.

ON EXCEPTIONS.

This is an action of assumpsit upon an account annexed for funeral services. At the close of plaintiff's evidence the presiding justice granted a directed verdict for defendant. The case is before the Law Court on plaintiff's exceptions. Exceptions overruled.

Jerome Daviau, for plaintiff.

Goodspeed & Goodspeed, for defendant.

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

WILLIAMSON, J. This is an action of assumpsit upon an account annexed brought by the plaintiff, a funeral director in St. Georges in the Province of Quebec, against the defendant a resident of Augusta in the State of Maine. The entire action on which the suit is based took place in St. Georges. The plaintiff seeks to recover his charges for funeral services for the defendant's uncle on an implied contract by the defendant to pay therefor. The case is before us on exceptions to the direction of a verdict for defendant at the close of the evidence.

Under Maine law such a contract is governed by the law of Quebec. *Carey* v. *Mackey,* 82 Me. 516, 20 A. 84, 9 L. R. A. 113, 17 Am. St. Rep. 500 (1890) ; *Emerson Co.* v. *Proctor,* 97 Me. 360, 54 A. 849 (1903) ; *Flynn* v. *Currie,* 130 Me. 461, 157 A. 310 (1931) ; 2 *Beale, Conflict of Laws* 1140 (1935). For purposes of the case it is stipulated that the applicable law of Quebec and of Maine are the same. It follows that the issue is to be determined in accord with the common law of Maine. We are not concerned with the statute law of either Maine or Quebec.

The issue is whether, taking the evidence and the inferences reasonably to be drawn therefrom in the light most favorable to the plaintiff, a jury could properly have found for the plaintiff. The rule is stated by Chief Justice Murchie in *Glazier* v. *Tetrault,* 148 Me. 127, 90 A. (2nd) 809 and in the cases there cited. If, under the rule, a jury could —not that it must—have found for the plaintiff, then the exceptions should be sustained; otherwise overruled. What the plaintiff asks is a chance to "go to the jury."

An examination of the record shows that a jury could have found the following situation set forth briefly and not in detail.

The decedent died in July 1952 at his home in St. Georges, leaving neither widow nor children. On the day following

the defendant with her husband and her mother and father, the decedent's brother, reached St. Georges. The defendant met Miss Lorraine Vaillancourt, her uncle's housekeeper, and together they examined caskets on display at the plaintiff's establishment to which the body had been taken shortly after death.

After the housekeeper had left, the plaintiff in the presence of Mr. Pozer, Chief of Police, asked the defendant which of two caskets she wished. The defendant selected the less expensive in accordance with her uncle's wish as she then in substance stated.

The plaintiff did not speak English, except apparently to inquire about the choice of a casket, and the defendant did not speak French. Mr. Pozer acted as interpreter for them.

The defendant insists that the selection of the casket was made in the presence of Miss Vaillancourt and denies the conversation with the plaintiff in the presence of Mr. Pozer. For the purpose of testing the exceptions, however, we accept the plaintiff's version.

On the morning after the funeral the plaintiff, accompanied by Mr. Pozer who again acted as interpreter, presented the bill to the defendant. The defendant denied liability and said in substance that "Lorraine Vaillancourt got everything. She ought to pay." Further she then told the plaintiff that decedent in April 1952 gave her $1000 in bonds and informed her that he had transferred his property to Miss Vaillancourt under an agreement whereby the latter would care for him and pay expenses of his last sickness and funeral. Before the plaintiff's bill was shown to her the defendant had obtained a copy of her uncle's will, executed March 1, 1952, and in the possession of a notary and this she showed the plaintiff. In the will, after providing for payment of debts and expressing a wish to be buried in a "not too costly coffin," the decedent gave and be-

queathed all of his property to Miss Vaillancourt "who is in my service since some time, and whom I make my general and universal legatee," to quote from the English translation of the will which was written in French.

The liability of the defendant rests upon whether or not she had agreed to pay the plaintiff for the funeral expenses prior to or at the time she selected the casket. The plaintiff says that at that moment there was an implied contract on her part to pay the expenses; and this the defendant denies.

The case presents the not unusual picture of a close relative making necessary decisions for a funeral without expressing any agreement to pay the expense. Without question the funeral arrangements with the plaintiff were approved by the defendant. The record shows further that the defendant secured and paid for the services of an Anglican minister and provided flowers for the funeral.

We may fairly infer from the record that the defendant had a close relationship with her uncle. Surely it was not unnatural that the niece should take a more active part in arranging for the funeral than did her mother or her father, aged 76 years, or that in view of the differences of religion the niece and not the housekeeper should attend, for example, to the securing of the services of an Anglican minister.

There is no evidence: (1) that the defendant expressly promised to pay the plaintiff; or (2) that the plaintiff ever requested that the defendant agree to pay therefor until the bill was presented; or (3) that she indicated in any manner responsibility on her part for the expense.

At common law there is a presumption that funeral expenses are incurred upon the credit of the estate of the decedent. There are three typical situations: (1) the undertaker against the estate; (2) a third party against the estate for reimbursement, and (3) the undertaker against

a third party making the arrangements. Examples of the first and second situations are found in our reports with clear statements of the underlying reasons.

The court said in *Phillips* v. *Phillips,* 87 Me. 324, 325, 32 A. 963:

> "The necessity of a decent burial arises immediately after the decease, and the law, both ancient and modern, pledges the credit of the estate for the payment of such reasonable sums as may be necessary for that purpose, even though such expenses may have been incurred after the death and before the appointment of an administrator."
> (by way of defense — reimbursement by third party from estate);

and in *Fogg* v. *Holbrook,* 88 Me. 169, 172, 33 A. 792, 793:

> "When such expenses are incurred, necessarily after the death of a person, there is no one legally authorized to represent the estate. The services must be rendered and necessary articles furnished immediately; it is better that these things should be done upon the credit of the estate, than that there should be hesitation and inquiry as to who is liable to pay."
>
> (undertaker v. executor in his representative capacity)

The presumption is equally applicable in the case of the undertaker against the third party. *Waterman & Sons* v. *Hook,* 246 Mass. 522, 141 N. E. 596, 30 A. L. R. 440, with annotation; *Breen* v. *Burns,* 280 Mass. 222, 182 N. E. 294; *Sugarman* v. *Cohen,* 53 R. I. 242, 165 A. 899; 34 C. J. S. 135, "Executors and Administrators," Sec. 384; 21 *Am. Jur.* 568, "Executors and Administrators," Sec. 330. See also *Wilson, Maine Probate Law* (1896), page 285; *Jackson, The Law of Cadavers* (2d. Ed. 1950), pages 67 and 468.

How would the plaintiff overcome the presumption that the expense was incurred on the credit of the estate? In

the final analysis his claim is based upon the facts that the defendant selected the casket, approved the funeral arrangements and represented the decedent's family. There is nothing in the defendant's actions after the arrangements were completed, and in particular at the meeting with the plaintiff following the funeral, which could by any possibility have reasonably indicated an agreement to pay on her part. The present situation has been well expressed in the words of the Rhode Island Court in *Sugarman* v. *Cohen, supra,* as follows:

> "The presumption of law is that funeral expenses are a charge against the estate of the deceased. Someone from the necessities of the case must engage a funeral director, and this is usually some member of the family or a relative of the deceased, since an administrator cannot be appointed in time to act in this behalf. O'Reilly v. Kelly, 22 R.I. 151, 46 A. 681, 50 L.R.A. 483, 84 Am. St. Rep. 833; Tucker v. Whaley, 11 R.I. 543; Rice v. New York Central & H.R.R. Co., 195 Mass. 507, 81 N.E. 285. The presumption is, even in the case of the widow of the deceased, that she, in engaging a funeral director, is doing so in behalf of the estate. Waterman & Sons v. Hook, 246 Mass. 522, 141 N.E. 596, 30 A.L.R. 440.
>
> "In Hayden v. Maher, 67 Mo. App. 434, the court said: 'Primarily the estate of a decedent, and not his widow, is responsible for his funeral expenses. The mere fact that the widow requests the burial cannot change the rule. * * * If the undertaker desires to hold the widow responsible, he must protect himself by her valid promise to pay. No promise to pay can be implied on her part from a bare request.'
>
> "The plaintiff does not rely on an express promise on the part of the defendant, and he has not testified to any facts or circumstances from which a promise could be implied other than the request by defendant that he conduct the funeral. This is not sufficient to overcome the presumption that the

services were rendered on the credit of the deceased's estate.

"The defendant's exception to the denial of her motion for a directed verdict is sustained."

It is our view that no implied promise to pay for the funeral, at least in the first instance as we shall later discuss, arose from the evidence taken in the light most favorable to the plaintiff. The presumption that the parties dealt with each other on the credit of the estate remains undisturbed. Whether there is a secondary liability in the event the plaintiff does not receive payment from the estate or otherwise presents a different question.

The plaintiff seeks to show that the defendant has proved that there are no assets in the estate. There is a suggestion in the plaintiff's argument that the defendant is thus liable for the reason there is no estate available to pay the bill. In other words, the plaintiff indicates a secondary liability on the part of the defendant.

The evidence of the defendant, however, on the score of the decedent's estate does not go to the extent urged by the plaintiff. It satisfactorily appears that the decedent some months before his death had property in St. Georges and that he left all of his property, whatever it may have been, to his housekeeper, as we have pointed out. There may be property of value in the estate. There is the possibility that there may be a liability on the housekeeper's part to pay the funeral expenses to the extent of the property, if any, received by her from the decedent.

We think the undertaker should proceed against the estate of the decedent, and, if necessary, against persons who may have acquired an interest in his property during his lifetime under conditions suggesting liability for the funeral expenses. As between the undertaker and defendant niece, however, we are of the view that there was no implied con-

tract for the payment of the funeral expenses. At most the evidence would indicate an implied agreement to pay if the undertaker did not otherwise collect his charges. However, it is not on this theory that the case was tried or the ruling before us made. We do not indicate what our opinion might be if it developed that such was the agreement. The verdict on the record was properly directed for the defendant.

Exceptions overruled.

INHABITANTS OF THE TOWN OF BEALS
vs.
URIAH H. BEAL

Washington. Opinion, June 16, 1953.

Ferries. Franchises. Federal Licenses. Equity. Injunction. Statutory Remedies.

A ferry is a liberty, or a right, to have a boat for passage across a body of water in order to carry passengers or freight for reasonsonable toll. It is a continuation of a highway.

There is no proprietorship in a ferry in this state except by franchise conferred by statute.

The power to establish ferries is not exercised by the Federal Government but lies within the scope of those undelegated powers reserved to the States.

The grant of a ferry franchise, unless it is limited by a general law, or restricted in the grant itself, is exclusive to the extent of the privilege conferred; but it is not exclusive unless expressly so stated, or the conclusion necessarily arises by implication.

A license from the United States to carry passengers for hire on navigable waters is not a license to operate a ferry.

Whenever a legal right is wholly created by statute, and a legal remedy for its violation is also given by the same statute, a court

of equity has no authority to interfere with its reliefs even though the statutory remedy is difficult, uncertain, and incomplete.

ON REPORT.

This is a bill in equity with prayers for injunctive relief. The case is before the Law Court upon agreed statement of facts. Bill dismissed without prejudice.

Blaisdell & Blaisdell, for plaintiff.

Dunbar & Vose,
Nathan W. Thompson, for defendant.

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

FELLOWS, J. This action is a Bill in Equity brought by the inhabitants of the town of Beals, a municipal corporation located in the County of Washington, State of Maine, against Uriah H. Beal of Beals, Maine, asking for an injunction, both temporary and permanent, to restrain the defendant from operating a ferry between the town of Beals and Jonesport, and comes to the Law Court upon an agreed statement of facts.

The bill alleges that by Private and Special Laws of Maine 1951, Chapter 135, the plaintiffs were authorized to establish and maintain a ferry between the town of Beals and the town of Jonesport in Washington County, Maine; that the plaintiffs have continuously maintained and operated such a ferry since September 1, 1951; that the plaintiffs have acquired boats and necessary equipment and have constructed landing places; that plaintiffs have expended money in maintenance and operation; that the defendant, Uriah H. Beal, without legal authority has operated and maintained a ferry between the towns of Beals and Jonesport since August 20, 1951 and still does operate and main-

tain; that the operation of a ferry by the defendant "will hereafter cause irreparable loss to the plaintiffs *if allowed to continue;*" that plaintiffs "have no plain, adequate and complete remedy at law." The plaintiffs pray temporary and permanent injunction restraining defendant from operating a ferry, and "such other and further relief as the nature of the case may require." The bill does not allege a multiplicity of suits at law past or the future, or that because of threatened invasion of plaintiff's alleged rights many suits will be necessary. There is no allegation that the defendant will continue operation of a ferry or that he threatens to continue.

The principal agreed facts are as follows: By Private and Special Laws of Maine, 1951, Chapter 135, plaintiffs were authorized to establish and maintain a ferry between the towns of Beals and Jonesport. Pursuant to the law the plaintiffs have established and continually maintained since September 1, 1951, a ferry for the purposes set forth in the act and have acquired boats and engines and established suitable landing places necessary for the operation of the ferry.

The defendant has a license from the U. S. Coast Guard to operate or navigate motor boats carrying passengers for hire. The license states: "This is to certify that Uriah H. Beal has given satisfactory evidence to the undersigned officer in charge, Marine Inspection in the District of Portland, Maine, that he can safely be intrusted with the duties and responsibilities of operation of motor boats as defined in the Act of April 25, 1940, when carrying passengers for hire on the navigable waters of the United States and is hereby licensed to act as such operator for the term of five years from this date. Given under my hand this twenty-seventh day of April, 1949. A. H. Nesbit, Officer in Charge Marine Inspection."

Moose-a-bec is that body of navigable tide water lying between the towns of Jonesport and Beals over which the ferry is operated.

Three actions of debt are now pending in the Superior Court, Washington County, Inhabitants of the Town of Beals vs. Uriah H. Beal, for operating a ferry between Beals and Jonesport without authorization of the town of Beals; that the defendant has operated a ferry and is now operating a ferry without authorization of the town of Beals.

The defendant, Uriah H. Beal, has been operating a ferry between the town of Jonesport and Beals and other portions of Moose-a-bec Reach since May 15, 1935. He has made a substantial investment for ferry purposes in two boats, shore privileges on the Jonesport side, and a wharf on the Beals side. The defendant applied, approximately eight years ago to the Public Utilities Commission for a franchise to operate a passenger-ferry service in Moose-a-bec Reach but was informed by the Public Utilities Commission that it had no jurisdiction. Between 1941 and September 1, 1951 at the time of the establishment of the ferry by the town, the defendant was continually operating a ferry service for passengers in Moose-a-bec Reach.

Following the passage of Chapter 135 of the Private and Special Laws of Maine, 1951, the town of Beals voted that it would not authorize defendant Uriah H. Beal to operate a passenger ferry. At a special town meeting on October 8, 1951 the town voted to choose a committee to take charge of matters concerning the town ferry, and the following committee was chosen by ballot vote: Edward G. Beal, Chairman; Marshall Kelley, Secretary; Charles Beal, Treasurer, Peter Fagonde, Guy Carver.

Under Chapter 135 of the Private and Special Laws of Maine, 1951, the town of Beals is authorized to establish and maintain a ferry and to employ such persons as may be nec-

essary, or to lease the right to operate to any responsible person or persons "who shall be legal residents of Beals." The act contains provisions relative to hours of operation, negligence of ferry man, ramps and landings, rates, supervision of equipment by selectmen, and the purchase of boats and materials by the town. The act further provides that "the selectmen of the town of Beals shall have supervision of the ferry and be directly responsible to the people of the town for such supervision and management of the prudential affairs of the ferry." Section 5 of the act is as follows: "Any person who operates a ferry between Beals and Jonesport without authorization of the town of Beals, or who furnishes for hire a boat or other craft for such purposes, forfeits $4 for each time of transportation, to be recovered by the town of Beals by an action of debt."

A ferry is a liberty, or a right, to have a boat for passage across a body of water in order to carry passengers or freight for a reasonable toll. It is a continuation of a highway. *State* v. *Wilson,* 42 Me. 9, Bouvier's Law Dictionary (Rawles Third Revision), "Ferry." There is no proprietorship in a ferry in this state except by franchise conferred by a statute. Any individual has a right to keep and use boats for his own accommodation if not carrying for hire. *Peru* v. *Barrett,* 100 Me. 213; *Ferry Co.* v. *Casco Bay Lines,* 121 Me. 108. For the history of early Maine and Massachusetts ferries see *Day, et als.* v. *Stetson,* 8 Me. 365.

The power to establish ferries is not exercised by the Federal government but lies within the scope of those undelegated powers reserved to the state. *Waukeag Ferry* v. *Arey et als.,* 128 Me. 108; *Ferry Co.* v. *Casco Bay Lines,* 121 Me. 108; see *Port Richmond Ferry* v. *Hudson County,* 234 U. S. Sup. Ct., 317; 58 L. Ed. 1330; 36 Corpus Juris Secundum, "Ferries," 682, Sec. 7; 22 Am. Jur. "Ferries," 557, Secs. 9-11.

The grant of a ferry franchise, unless it is limited by a general law, or a restriction in the grant itself, is exclusive

to the extent of the privilege conferred; but it is not exclusive unless expressly so stated, or the conclusion necessarily arises by implication. The grant will be construed in favor of the sovereign and against the grantee. *Waukeag Ferry* v. *Arey,* 128 Me. 108. All ferries in Maine are governed by general or special statute, and not by common law. *Ferry Co.* v. *Casco Bay Lines,* 121 Me. 108.

A license from the United States to carry passengers for hire on navigable waters is not a license to operate a ferry. *Midland Terminal & Ferry Co.* v. *Wilson,* 28 N. J. Equity, 537; *City of New York* v. *Starin,* 12 N. E. 631. See 22 Am. Jur. "Ferries," 576, Secs. 36, 37.

Under Section 526 F of Title 46 U. S. Code Annotated, referred to as the "Act of April 25, 1940," containing certain safety provisions regarding motor boats, the defendant was licensed to operate a motor boat "carrying passengers for hire." The license from the United States did not and did not attempt to give a right to operate a ferry. Title 49, Section 903, Par. 1, U. S. Code Annotated provides that "nothing in this chapter shall be construed to interfere with the exclusive exercise of each state of the power to regulate intrastate commerce by water carriers within the jurisdiction of the state."

This court has recently said: "The adequacy of the statutory remedy against an injury existing only by virtue of the statute is for the legislature and not for the court to determine. 'Whenever a legal right is wholly created by statute, and a legal remedy for its violation is also given by the same statute, a court of equity has no authority to interfere with its reliefs, even though the statutory remedy is difficult, uncertain, and incomplete.' " *Perry et al.* v. *Dodge,* 144 Me. 219, 67 Atl. (2nd) 425. In *Almy* v. *Harris,* 5 Johnson Reports (N. Y.), 174, which was a suit for disturbing enjoyment of a ferry, on certiorari the court say: "Harris had no exclusive right at the common law, nor any right but what

he derived from the statute. Consequently, he can have no right, since the statute, but those it gives; and his remedy, therefore, must be under the statute, and penalty only can be recovered."

Chapter 135 of the Private and Special Laws of 1951 provides that "any person who operates a ferry between Beals and Jonesport without authorization of the Town of Beals * * * forfeits $4 for each time of transportation, to be recovered by the Town of Beals by an action of debt." The statute gives to the Town of Beals the legal right to operate a ferry, and the same statute gives a legal remedy if or when an unauthorized person operates a ferry in competition.

Neither the bill in equity nor the agreed statement of facts goes further than to state that the defendant has continuously operated and maintained a ferry, between Jonesport, Beals, and other portions of Moose-a-bec Reach since 1935, and is now operating. It is admitted that the defendant has made a substantial investment in boats and equipment, but he never had a franchise. There is no threatened, and serious, invasion of any of the plaintiff's rights in the future, if there has been an invasion in the past.

The court has authority to use the extraordinary power of injunction, when it is properly applied for, when justice urgently demands it, and when there is no legal remedy, or the remedy at law is inadequate. A cause of action that is capable of being determined at law, but is entertained in equity on jurisdiction grounds of equitable relief sought, if it appears from the evidence, or from lack of sufficient proof, that relief in equity cannot be granted, the court may be without jurisdiction and the bill in equity should be dismissed without prejudice. *Levesque* v. *Pelletier,* 144 Me. 245, 68 Atl. (2nd) 9; *Wolf* v. *W. S. Jordan Co.,* 146 Me. 374, 82 Atl. (2nd) 93.

Under the allegations in the bill in equity and the existing facts and circumstances that appear from this record, the court is of the opinion that the entry must be

Bill dismissed without prejudice.

*Mr. Chief Justice Murchie took part in consultation but died before the opinion was prepared by the court.

STATE OF MAINE
vs.
NORTON H. EUART

Franklin. Opinion, June 16, 1953.

Indictments. Hunting. Negligence. Pleading. Particulars.

An indictment charging negligent shooting in the language of the statute (i.e. "Whoever while on a hunting trip, or in pursuit of wild game or game birds, negligently or carelessly shoots and wounds x x x any human being shall be punished x x x") is sufficient.

R. S., 1944, Chap. 33, Sec. 125 quoted above fully sets out facts which constitute the offense.

A general allegation that the act, to wit, the shooting, was negligently and carelessly done without specific allegation as to what constituted the negligence is sufficient notwithstanding the rule in civil cases which makes such general allegations insufficient.

If a presiding justice feels that further particulars are necessary for a respondent to prepare his defense and that justice so demands he can order the state to more fully state its claims.

ON EXCEPTIONS.

This is an indictment for the negligent shooting of a human being. The case is before the Law Court on excep-

tions to the overruling of a demurrer to the indictment. Exceptions overruled.

Joseph F. Holman, for State.

Berman & Berman, for defendant.

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

FELLOWS, J. This is an indictment against Norton H. Euart for negligent shooting and wounding one William F. Kenney while on a hunting trip. The respondent demurred, which demurrer was overruled by the presiding justice. The case comes to the Law Court from Franklin County Superior Court on respondent's exceptions.

The indictment charges the commission of the alleged offense in the following language:

> "THE JURORS FOR SAID STATE, upon their oath present, that Norton H. Euart of Middle Valley in the State of New Jersey, on the thirty-first day of October in the year of our Lord one thousand nine hundred and fifty-two, at Wilton, in said County of Franklin and State of Maine, as aforesaid, while being then and there in the pursuit of wild game, feloniously, negligently and carelessly did shoot and wound one William F. Kenney, of said Wilton, against the peace of said State of Maine and contrary to the form of the statute of said State of Maine in such case made and provided.
>
> COUNT TWO
>
> And your Jurors aforesaid, upon their oath aforesaid, do further present that Norton H. Euart, of Middle Valley, in the State of New Jersey, on the thirty-first day of October in the year of our Lord one thousand nine hundred and fifty-two, at Wilton, in the County of Franklin and State of Maine

> aforesaid, while being then and there on a hunting trip, feloniously, negligently, and carelessly did shoot and wound one William F. Kenney, of said Wilton, against the peace of said State of Maine and contrary to the form of the Statute of said State of Maine in such case made and provided."

The statute (Inland Fish and Game Laws of the State of Maine 1951, Section 125; R. S., 1944, Chap. 33, Sec. 125) under which the indictment was brought reads as follows:

> "Whoever while on a hunting trip, or in pursuit of wild game or game birds, negligently or carelessly shoots and wounds, or kills any human being shall be punished * * *".

The respondent contends that his exceptions should be sustained because he says the indictment does not set forth the acts constituting the alleged crime, and that it is otherwise "vague, indefinite and uncertain."

It is, of course, well established law that in all criminal proceedings the accused has the right to know the nature of the accusation, which must be stated in the indictment with that certainty and precision requisite to enable him to meet the exact charge. The description of the offense must be certain, positive and complete. Constitution of Maine, Article I, Sec. 6; *State* v. *Morton,* 142 Me. 254, 257; *State* v. *Crouse,* 117 Me. 363; *State* v. *Bellmore,* 144 Me. 231; *Smith, Petr.* v. *State,* 145 Me. 313.

If every fact necessary to constitute the offense charged is found in the statute involved, it is only necessary that the indictment follow the language of the statute. *State* v. *Doran,* 99 Me. 329; *State* v. *Smith,* 140 Me. 255, 280; *State* v. *Munsey,* 114 Me. 408, 410. See also *Moody, Petr.* v. *Warden,* 145 Me. 328, 335; *State* v. *Maine State Fair Assn.* (148 Me. 486); *Smith, Petr.* v. *State,* 145 Me. 313, 327.

"It is an elementary rule of criminal pleading that every fact or circumstance which is a necessary ingredient in a

prima facie case of guilt must be set out in the complaint or indictment. It has been also frequently declared that in complaints or indictments charging violation of a statutory offense it is sufficient to charge the offense in the language of the statute without further description, providing the language of the statute fully sets out the facts which constitute the offense. Again it has been held that the complaint or indictment is sufficient if it should state all the elements necessary to constitute the offense either in the words of the statute or in language which is its substantial equivalent. It has also been held that the indictment or complaint is sufficient if it follows the statute so closely that the offense charged and the statute under which the indictment is found may be clearly identified. But even where a charge of a statutory offense is made the respondent still has the right to insist that the indictment, whether in the language of the statute or otherwise, shall state the facts, alleged to constitute the crime, with that reasonable degree of fullness, certainty and precision requisite to enable him to meet the exact charge against him, and to plead any judgment, which may be rendered upon it, in bar of a subsequent prosecution for the same offense." See *State* v. *Munsey,* 114 Me. 408, 410.

If the words of the statute are vague or indefinite, it will be necessary to set out the specific acts of the accused, in order that it may appear that the acts come within the statutory prohibitions. The indictment must be sufficiently specific to advise the respondent what he has to meet and to give him opportunity to prepare his defense. *State* v. *Doran,* 99 Me. 329; *State* v. *Lashus,* 79 Me. 541; *State* v. *Bushey,* 96 Me. 151, 154; *State* v. *Beattie,* 129 Me. 229, 232; *State* v. *Strout,* 132 Me. 134; *State* v. *Peterson,* 136 Me. 165.

In this case the indictment appears to us to be sufficient. The accused is fully informed of the charge he must meet. The date when and place where are given. The words of

the statute cover all the material facts of the alleged offense. It is not necessary to state in the indictment such allegations as: — that the accused carried a gun while on a hunting trip; that the gun he carried was loaded; that the gun was discharged; that the respondent stumbled and fell; that the trigger was unintentionally hit when respondent climbed a fence; that respondent thought he saw a deer, or similar allegations. It would be difficult, if not impossible, to allege and prove the mental process of a respondent, or describe his nervous reactions, or appearances of inattention or excitement, or even what he was doing at the time of shooting. He may have been hiding in deep woods and no eye have seen the respondent or the flash of the gun. The crime consists in shooting a human being, negligently or carelessly, while in pursuit of wild game or while on a hunting trip. Unless the surrounding circumstances are constituent parts of an offense, the means by which and the manner in which a crime has been committed are not part of the crime itself. See *State* v. *Verrill,* 54 Me. 408, 414.

The respondent claimed that this indictment, which contains only a general allegation that the act, to wit, the shooting, was negligently and carelessly done without specific allegation as to what constituted the negligence, is demurrable. In argument he attempted to justify this position by reliance upon an alleged rule in civil cases that a general allegation that an act was negligently done is insufficient in form and subject to special demurrer.

This supposed rule in civil cases, however, is not of universal application. There are many exceptions thereto. See *Couture* v. *Gauthier,* 123 Me. 132 citing Chitty on Pleading, Vol. II, 16th Ed. 574, and Oliver's Precedents, Pages 397 to 400. See also *Herbert* v. *Street Railroad,* 103 Me. 315, 323, 65 C. J. S. 890, 45 C. J. 1078, and 38 Am. Jur. 954, Sec. 262.

In this case the allegation that the defendant "negligently and carelessly did shoot and wound one William F. Kenney"

is an allegation of injury to Kenney which was the direct result of the defendant's act. It states that that act, to wit, the shooting, was carelessly and negligently performed. Exactly what the defendant did, if he did anything, was peculiarly within his own knowledge.

We hold that an allegation that the defendant did negligently and carelessly shoot another is a sufficient allegation that the shooting was negligently and carelessly done without further specification as to wherein the negligence or carelessness lay. It sufficiently informs the respondent of the nature of the crime with which he is charged. If the circumstances in the case are such that he requires a more specific statement of the facts claimed in order to prepare his defense, he has the right to make a proper motion to the presiding justice for particulars, and if the presiding justice feels that under the circumstances justice so demands, he can order the State to more fully state its claims and contentions. *State* v. *Hume,* 146 Me. 129, 78 Atl. (2nd) 496; *State* v. *Haapanen,* 129 Me. 28, 149 Atl. (2nd) 389.

The counts in this indictment are in accord with the precedents long used in this jurisdiction. We hold they are sufficient to charge violation of the statute in question.

Exceptions overruled.

STATE OF MAINE

vs.

HELENA C. ROGERS

Kennebec. Opinion, June 16, 1953.

Pleading. Demurrer. Exceptions. Waiver. Perjury.

Pleading to the merits and proceeding to trial results in a waiver of exceptions to the overruling of a demurrer to an indictment even though a respondent reserves the right to plead over if the demurrer is overruled.

Exceptions to the overruling of a demurrer go forward immediately to the Law Court for determination.

The falsity of an allegedly perjured statement must be established by the testimony of two independent witnesses or one witness and corroborating circumstances.

ON EXCEPTIONS.

This is an indictment for perjury. The respondent filed a general demurrer reserving by leave of court the right to plead anew, if the demurrer was overruled. The demurrer was overruled and leave to plead anew granted. The respondent excepted to the overruling of the demurrer. The respondent then pleaded not guilty and proceeded to trial. At the close of the state's case respondent moved for a directed verdict and filed exceptions to the overruling thereof. Exceptions sustained.

Alexander A. LaFleur, Atty. General,
William H. Niehoff, Asst. Atty. General, for State.

Frank M. Coffin, for defendant.

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

TIRRELL, J. The respondent was indicted for perjury alleged to have been committed by her in testimony given before the Grand Jury in Kennebec County.

The case is before this court on exceptions by the respondent and by appeal from the refusal of the presiding justice to grant a new trial.

The pertinent allegations of the indictment are, that the respondent

> "appeared as a witness in a proceeding before the Grand Jury in and for the County of Kennebec, then and there engaged in hearing testimony relative to the commission of crime in said County of Kennebec . . . . the said Helena Rogers then and there committed the crime of perjury by testifying as follows..that she never was acquainted with Joe Lindsay and had never met Joe Lindsay at any time; when in truth and in fact the said Helena Rogers had met the said Joe Lindsay and was acquainted with said Joe Lindsay; all of which the said Helena Rogers then and there well knew and which testimony was material to the issue and inquiry then and there pending. . . ."

To this indictment the respondent filed a general demurrer asking for the right to plead anew, if the demurrer was overruled. The right to plead anew was granted by the justice presiding, and the demurrer was overruled; the respondent excepted to this ruling. This is Exception 1.

A demurrer to an indictment admits all facts well pleaded. This rule needs no citation of authority. If the demurrer is overruled judgment is for the State unless the right to plead over was reserved by the respondent and leave therefor granted by the court. *State* v. *Cole,* 112 Me. 56, *State* v. *Munsey,* 114 Me. 408 at 411.

Upon the filing of a demurrer it is the duty of the court to render judgment thereon. The decision of the justice at

nisi prius is final and conclusive upon the demurrer unless exceptions are taken to his ruling. Exceptions to the overruling of a demurrer, under our practice, go forward immediately to the Law Court for determination. If the exceptions be overruled, judgment is final on the demurrer, and since a demurrer admits the truth of all facts well pleaded judgment is for the State. When, however, the right to plead over has been reserved and granted at *nisi prius,* as aforesaid, if exceptions to overruling of the demurrer are overruled, the judgment of the Law Court is, "Exceptions and demurrer overruled, respondent entitled to plead anew." *State* v. *Snow,* 132 Me. 321.

Exceptions, however, may be waived or abandoned by conduct inconsistent with their further prosecution. A plea to the merits and trial thereon is inconsistent with a demurrer and waives the same. *True* v. *Plumley,* 36 Me. 466. If exceptions are taken to the overruling of a demurrer, the demurrant by proceeding to trial upon the merits before bringing the exceptions forward to the Law Court waives the exceptions. *Gilbert* v. *Cushman,* 113 Me. 525.

These cases are well sustained by the authorities. See 8 Encyc. Pl. & Prac. 211; 49 C. J. 447, Sec. 554; 71 C. J. S. 540; *Webb, Receiver* v. *Smith,* 6 Colo. 365; *Freas et al.* v. *Engelbrecht et al.,* 3 Colo. 377; *Stanbury* v. *Kerr,* 6 Colo. 28; *Nye* v. *Wright,* 3 Ill. 222; *Grier* v. *Gibson,* 36 Ill. 521; *Hull* v. *Johnston,* 90 Ill. 604; *Ashton* v. *Detroit City Ry. Co.,* 44 N. W. (Mich.) 141; *West* v. *McMullen,* 20 S. W. (Mo.) 628; *Francisco* v. *Benepe,* 11 Pac. (Mont.) 637; *Pottinger* v. *Garrison,* 3 Nebr. 221.

Upon waiver or abandonment of exceptions to the overruling of a demurrer to an indictment, judgment on the demurrer becomes final and unless the right to plead over has been granted, judgment is entered for the State.

The fact that the respondent reserved and was granted the right to plead anew if the demurrer was overruled does

not change the procedure with respect to the carrying forward of exceptions to the Law Court. The exercise of that privilege prior to the carrying of the exceptions forward to the Law Court waives the exceptions.

In announcing the foregoing conclusion we are not unmindful of the case of *State* v. *Pike,* 65 Me. 111. In that case the defendant was indicted for manslaughter. He first pleaded in abatement and then after his plea in abatement had been adjudged bad on demurrer, he pleaded further that he was not guilty. The presiding justice declined to allow exceptions to the ruling upon the plea in abatement upon the ground that by pleading over the defendant had waived his right to except. In holding that he had not waived his right to except by pleading over this court called specific attention to the fact that when a plea in abatement is adjudged bad on demurrer the judgment is always *respondeat ouster;* that by pleading over the defendant did no more than obey the mandate of the court. We further stated that to hold that he had waived his right to except would be equivalent to holding that in such case a defendant can never except. This exception to the rule that by going to trial upon the merits exceptions to the overruling of a demurrer to a dilatory plea are not waived was also recognized in *Gilbert* v. *Cushman, supra.* In this connection, it is to be remembered that by R. S., Chap. 94, Sec. 19 it is provided:—"When a dilatory plea is overruled and exceptions taken, the court shall proceed and close the trial, and the action shall then be continued and marked 'law', subject to the provisions of section 14." This statute applies not only to civil but to criminal cases. *State* v. *Jellison,* 104 Me. 281. We hold that the respondent by going to trial on the merits of the case before bringing her exceptions to the overruling of the demurrer forward to this court waived the same.

Exceptions 2 and 3 relate to allegedly erroneous rulings of the presiding justice preventing counsel for respondent from cross examining a witness for the State.

The respondent in her written brief says "Although the points are not abandoned by respondent, they are not made the subject of citation of authorities, in view of the two exceptions 1 and 4."

After the State had "rested" the respondent, without offering any testimony in her behalf, addressed a motion to the court for a directed verdict. The motion was denied and the respondent excepted. This is exception No. 4.

The issue involved by this exception is "can a verdict of guilty in a perjury case rest upon the uncorroborated testimony of one witness as to the falsity of respondent's oath?"

A study of the transcript of testimony shows that the State called upon only two witnesses. The first was the foreman of the grand jury, whose testimony was limited to what the respondent testified to before the grand jury, and no more.

The *falsity* of respondent's statement was attempted to be proved by the testimony of only one witness, namely Hyman Kaplan.

The law relating to the requirements of proof in perjury cases is so well established and so substantially unanimous that it might seem unnecessary to quote authority. A variety of sources support this assertion.

A complete and comprehensive statement of the law is set forth in 41 Am. Jur., Perjury, Section 67 at Pages 37 and 38.

Corpus Juris Secundum volume 70; Perjury, Section 68, at Pages 535 to 537, reads in part:

> "As the rule now stands, the falsity of the allegedly perjured statement must be established by the testimony of two independent witnesses or one witness and corroborating circumstances, and a conviction for perjury may not be secured and sus-

> tained on the uncorroborated testimony of one witness to the falsity of the matter on which the perjury is assigned."

In *Newbit* v. *Statuck,* 35 Me. 315, at Page 318, this court said

> "If the plaintiff were on trial for perjury, and one witness only were produced to swear that his testimony was false, a jury would not be authorized to convict without additional evidence, because the case would be in equilibrium, being oath against oath, and both given under circumstances where the obligation to speak the truth was alike binding. Such is the rule universally recognized in this class of prosecutions."

See also *Ellis* v. *Buzzell,* 60 Me. 209; *State* v. *True,* 135 Me. 96; *Commonwealth* v. *Pollard,* 12 Met. 225; *U. S.* v. *Hiss,* 185 F. (2nd) 822; *U. S.* v. *Remington,* 191 F. (2nd) 246.

Many cases to the same effect may be found in the Decennial Digest System, under Key Number, Perjury 34.

This exception must be sustained. Questions raised by other exceptions and the appeal need not be decided.

Exceptions sustained.

STATE OF MAINE
vs.
F. H. VAHLSING, INC.

Aroostook. Opinion, June 26, 1953.

Taxation. Potato Tax.

THAXTER, J. This case is a suit to collect the tax amounting to $6,993.48 due the State of Maine for potatoes sold or shipped by the defendant for the period beginning July 1, 1950 and ending January 1, 1953 from Limestone and Easton in the County of Aroostook. It was brought in the Superior Court for the County of Aroostook. A plea of the general issue was filed together with a brief statement to the following effect:

> "And for Brief Statement the Defendant further says that Sections 206 to 217 inclusive of Chapter 14 of the Revised Statutes 1944 as amended of the State of Maine (Potato Tax Law) are unconstitutional and in violation of the 5th and 14th amendments to the Constitution of the United States and particularly so when construed in connection with P. L. 1945, Chapter 156, P. L. 1945, Chapter 153 as amended by P. L. 1947, Chapter 235, and P. L. 1949 Chapter 72; that the Potato Tax Law, so-called, is discriminatory, class legislation, a burden on interstate commerce and constitutes double taxation."

It was submitted to the court on such pleadings and in addition on the following agreed statement of facts:

> "The defendant corporation was on the first day of July, 1950, a grower and shipper of potatoes at Limestone and Easton in the County of Aroostook and so continues to be. The defendant corporation between July 1, 1950, and January 1, 1953, at said Limestone and Easton sold and shipped 699,348 barrels of potatoes. The destinations of said shipments, when consigned to carrier by the defendant

> corporation, were points outside the State of Maine: All said potatoes were raised in said County of Aroostook. If any tax is legally due thereon under and by virtue of the Potato Tax Law of the State of Maine it amounts to $6,993.48."

The presiding justice ruled that the plaintiff was entitled to judgment in the sum of $6,993.48. To this ruling the defendant excepted and the case is before us on such exceptions.

Exactly the same question was presented to this court in the case of *State* v. *Vahlsing,* 147 Me. 417. We there held that our so called potato tax law, R. S., 1944, Chap. 14, Secs. 206-217, as amended, was a valid enactment under both the state and federal constitutions.

This is but a suit to collect additional installments of the same tax which was sustained in the previous case and the decision must be the same.

Exceptions overruled.

Alexander A. LaFleur, Atty. General,
Boyd L. Bailey,
Miles P. Frye, Assts. Atty. Generals, for State.

Scott Brown, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ., MURRAY, A. R. J., NULTY, J., did not sit.

EDWARD W. BRIDGHAM
vs.
W. H. HINMAN, INC.

Sagadahoc. Opinion, June 8, 1953.

Thoughtless Inattention. Contributory Negligence.

PER CURIAM.

On motion. This case was tried in the Superior Court for Sagadahoc County at the June 1952 Term. A verdict was returned for the plaintiff. The case is before us on a motion for a new trial addressed to this court, as against the law and the charge of the justice; because it is against the evidence; and because it is manifestly against the weight of the evidence in the case.

The action was brought to recover for damage to the plaintiff's automobile which was in collision with a heavy truck alleged to have been negligently operated by a servant of the defendant. The collision took place on the public highway leading from Bath to Brunswick, designated as U. S. Highway No. 1, at an intersection between that highway and a private way leading across it from the Brunswick Airport to a cement mixing plant. Cement was being transported by truck from the plant to the airport by the defendant for construction purposes. The collision was between the plaintiff's passenger automobile and an empty cement truck returning from the airport to the cement plant.

Generally speaking, the highway extended westerly from Bath to Brunswick; and the private way extended northerly from the airport to and across the highway, entering the southerly side of the highway at an approximate right angle. At or in the corner of the intersection of the south line of the highway with the east line of the private way was what was described as a knoll or mound. This knoll obscured the

view of a truck approaching the intersection from the south, so that the driver of an automobile approaching the intersection from the east would not see the same until the truck emerged approximately into the highway limits. About six hundred feet east of the intersection at least one sign carried warning in large letters over the defendant's name in smaller ones "SLOW TRUCKS CROSSING."

The plaintiff was familiar with the location, knew that trucks were crossing and recrossing the main highway at the intersection, and had seen the sign many times. There is a conflict of evidence as to whether he saw it or whether he did not see it when passing it just prior to the accident. The plaintiff knew also that members of the Brunswick Police Force were stationed at the intersection when defendant's trucks were hauling material across the main highway at the intersection and presumably, since such was the fact, knew that they were paid for their work in that connection by the defendant.

An officer of the Brunswick Police Force was present directing traffic at the intersection when the accident occurred. There is some conflict in the testimony as to just where he was standing, although undisputable evidence discloses that he stopped two cars approaching the intersection from the west and signaled the driver of the defendant's truck to cross just prior to the impact. It is undisputed that for a distance of approximately six hundred feet the plaintiff had a clear view of the intersection and the conclusion is irresistible that he could have seen the officer who was directing traffic. This is true whether or not the officer was in the center or was nearer the south line of the highway.

The plaintiff testified that he did not see the officer who testified that he was in the center of the highway signaling the eastbound traffic to stop, and while there motioned the truck to enter the highway. If the plaintiff did not discover

the presence of the officer in the highway directing traffic and not only signaling the eastbound traffic to stop but stopping the same, when we consider the fact that the plaintiff had a long clear view of the location and was familiar with the crossing, the warning sign, the likelihood of trucks to enter the intersection either from the south or the north, and the fact that traffic officers were usually there directing traffic, his failure to see the officer can be attributed to but one thing, *thoughtless inattention upon his part.* Thoughtless inattention is the very essence of negligence. *Tasker* v. *Farmingdale,* 85 Me. 523. In this case it was a contributing if not the sole cause of the accident. The negligence of the plaintiff, being a contributing cause of the accident, precludes a right of recovery on his part.

Motion sustained.

Verdict set aside.

New trial granted.

Harold J. Rubin, for plaintiff.

Verrill, Dana, Walker, Philbrick & Whitehouse, for defendant.

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

*MURCHIE, C. J., having deceased, did not join in this opinion.

THE INHABITANTS OF THE TOWN OF HARTLAND

vs.

THE INHABITANTS OF THE TOWN OF ATHENS

Somerset. Opinion, July 1, 1953.

Paupers. Settlement. Military Service.

The settlement status of a former member of the Armed Services who entered the services as a minor remains unchanged under a statute providing it "shall remain as it was at the time of the beginning of such service," notwithstanding the loss of settlement status of serviceman's father and other statutory provisions providing "if he (father) has not, the (children) shall be deemed to have no settlement in the State."

ON REPORT.

This is an action to recover for pauper supplies. The case is before the Law Court on report upon agreed statement. Judgment for plaintiff in the amount of $124.58.

John B. Furbush, for plaintiff.

Clayton E. Eames, for defendant.

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

WILLIAMSON, J. On report upon an agreed statement. This is an action to recover for pauper supplies furnished in 1949-50 to Wallace Wentworth, his wife and minor children,

then living in the plaintiff town. If the settlement of Wallace Wentworth was in the defendant town of Athens judgment is to be entered for the plaintiff in the amount of $124.58; otherwise for the defendant.

The decision rests upon the meaning of the last sentence of R. S., Chap. 82, Sec. 3, which reads:

> "The settlement status of a person in the military or naval service of the United States or of a person who is an inmate of any asylum, penitentiary, jail, reformatory, or other state institution shall not change during such period of service, confinement, or imprisonment, but his settlement shall remain as it was at the time of the beginning of such service, confinement, or imprisonment."

Wallace Wentworth was a member of the armed services of the United States from January 1943 to January 1946. He became twenty-one years of age with capacity to acquire a settlement in June 1945. When he entered service the settlement of his father and of himself, an unemancipated minor, by derivation from his father was in Athens. Subsequently and before he became twenty-one his father lost his settlement in Athens without acquiring another settlement elsewhere in the state. The settlement of Wallace on his coming of age has remained unchanged. Apart from section 3, *supra,* he would have lost his settlement in Athens during his minority along with his father under R. S., Chap. 82, Sec. 1, Par. II, reading in part:

> "Legitimate children have the settlement of their father, if he has any in the state; if he has not, they shall be deemed to have no settlement in the state. Children shall not have the settlement of their father acquired after they become of age and have capacity to acquire one."

Where then was the settlement of Wallace on reaching twenty-one? Under section 3, was it "frozen" in Athens during his military or naval service? Under Section 1, Par.

II, did he lose his settlement in Athens along with his father? The words of section 3 are plain and clear "The settlement status—shall not change during such period of service—but his settlement shall remain as it was at the time of the beginning of such service--." Wherein is there room in these phrases to differentiate between change of settlement by an adult of capacity to acquire a new settlement for himself, and by a minor whose settlement is derivative, as here for example, from his father?

The defendant's argument is summed up in a question in its brief: "How could it (the last sentence of section 3) refer to the settlement of an unemancipated minor when he has none?" In other words, the defendant says that an unemancipated minor has no pauper settlement of his own and therefore section 3 is not applicable, and section 1, paragraph II, operates in full force.

The error of the reasoning lies in the failure to note that a child has a settlement within the state—or none as the case may be—as does an adult. The difference between the case of the child and the adult lies in the manner of acquisition or loss of settlement and not in the nature of a settlement itself. Compare paragraphs II and III of section 1 of R. S., Chap. 82, relating to children both legitimate and illegitimate, with paragraph VI relating to the length of residence necessary for acquisition of a settlement by a "person of age." We are here interested in the *where* and not in the *what* of settlement.

There can be no question of the power to control the settlement of a child. The Legislature in matters of pauper settlements is "limited in its power only by its own perception of what is proper and expedient." *Lewiston* v. *North Yarmouth,* 5 Me. 66; *Hallowell* v. *Portland,* 139 Me. 35, 26 A. (2nd) 652; *Mercer* v. *Anson,* 140 Me. 214, 36 A. (2nd) 255. See also 70 C. J. S. 57 et seq. and 72, "Paupers," Sec. 32 et seq. and Sec. 37; 41 Am. Jur. 700, "Poor and Poor Laws," Sec. 26.

There is nothing unusual in a provision against change of a minor's settlement by derivation. Prior to 1933 an illegitimate child took the settlement of his mother at birth and there it remained until the child acquired a new settlement in his own right, although his mother in the meantime acquired another. *Augusta* v. *Mexico,* 141 Me. 48, 38 A. (2nd) 822. Since 1933 the settlement of such a child has followed that of his mother. There is the example of the emancipated minor whose settlement no longer to be changed by derivation remains fixed until having capacity so to do he acquires another. *Lowell* v. *Newport,* 66 Me. 78.

The history of the last sentence of section 3 is brief and reveals nothing to alter the plain meaning of the language used. It was first enacted in the Laws of 1931, Chap. 124, as an addition to R. S., 1930, Chap. 33, Sec. 3. In the Laws of 1937, Chap. 113, it was amended to read as follows:

> "A person in the military or naval service of the United States shall be deemed to **have a settlement in** be a resident of the town in which he was a resident **had a settlement** at the time of his enlistment or induction."

The words emphasized replaced the words crossed out which were in the 1931 Act.

In 1939 the sentence in its present form was enacted for the purpose of making a uniform rule governing the settlements of certain classes of persons. *Laws of 1939, Chap. 45.* The statute which in 1931 controlled only those in military and naval service was now enlarged in scope to include inmates of institutions as well. The common problem was the effect of the absence of such persons from home upon their pauper settlements.

In enacting the 1931 and 1937 laws relating to the armed services the Legislature dealt with a class of which a large part would ordinarily at all times be minors. Had it wished to differentiate between the minor who acquired his settle-

ment by derivation and an adult with capacity to acquire a settlement for himself, it could readily have so stated in express terms.

No change was made in the more inclusive 1939 law. The Legislature then chose, and with a purpose we believe, to speak of "the settlement status of a person" in section 3, and not of persons of age, or of minors, or of children, as in several paragraphs of section 1 from which we have quoted in part above relating to the acquisition of settlements. In section 3 "person," in our view, includes both minor and adult, and the settlement of each is affected thereby.

It is of interest to note that the last sentence of section 3, *supra,* in its development since 1931 has substantially altered existing law; for example, our court had held that time spent in military service or in prison did not interrupt the five years continuous residence necessary for change of settlement. *Brewer* v. *Linnaeus,* 36 Me. 428 (1853) (military service); *Topsham* v. *Lewiston,* 74 Me. 236 (1882) (imprisonment in Maine); *Bangor* v. *Frankfort,* 85 Me. 126, 26 A. 1088 (1892) (imprisonment in Massachusetts). In the case of the inmate of an insane hospital see *Pittsfield* v. *Detroit,* 53 Me. 442 (1866), and particularly *Bangor* v. *Wiscasset,* 71 Me. 535 (1880).

The words of the statute, as we earlier stated, are in our view plain and clear. We can find no sound reason why the Legislature did not mean precisely what it said.

We conclude therefore that the loss of his father's settlement in Athens did not affect that of Wallace. His settlement was in Athens when he entered service and there it remained. The entry will be

Judgment for plaintiff in the amount of $124.58.

MARGARET T. HAMILTON

vs.

TRUMAN LITTLEFIELD

EDWARD T. HAMILTON

vs.

TRUMAN LITTLEFIELD

York. Opinion, July 7, 1953.

Negligence. Pedestrians. Nonsuit.

Whether a pedestrian is guilty of contributory negligence under R. S., 1944, Chap. 19, Sec. 118-A and P. L., 1949, Chap. 143 in walking during a snowstorm along the right hand side of the road involves questions of facts which, in the instant case, should have been submitted to a jury.

ON EXCEPTIONS.

This case is before the Law Court upon exceptions by the plaintiff to the direction of a nonsuit. Exceptions sustained.

Berman, Berman & Wernick,
Cecil Siddall, for plaintiff.
William B. Mahoney, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ. MURRAY, A. R. J.

MURRAY, A. R. J. These two cases are tort actions, one brought by the wife because she says, the defendant while driving his automobile ran into her as she was walking

along the road. The other by the husband for the expense to which he was put for her medical bills caused by her injuries.

Both cases were tried together, but we shall discuss them as if the wife's case only were being tried, because his case depends upon her case.

At the close of the plaintiff's case, upon motion, the court directed a nonsuit. Plaintiff excepted and the case is here on the exception. The plaintiff contends that the facts and legitimate inferences that could be drawn therefrom, are sufficient to justify a jury in returning a verdict for the plaintiff. The defendant, upon the other hand, says the plaintiff has not produced evidence sufficient to show negligence of the defendant, nor want of contributory negligence in the plaintiff.

The accident happened about 7 P.M. January 24, 1950. It was snowing and blowing, and had been all day. The plaintiff, a woman about fifty-eight years of age, with her sister, were going to the movies and were walking along the road single file, plaintiff immediately behind her sister. The snow had been pushed to each side of the road by the snowplow, not only the snow from this storm, but also previous snow storms. They were on their right-hand side of the road, that is, back to on-coming traffic.

As they were walking along near the right-hand snow bank, a car came from behind them, they saw its lights, stopped, and it went by. There was room on the road for three cars abreast. Almost an instant after this car passed, the defendant came from behind them and struck the plaintiff. She saw no lights, heard no horn, was aware of nothing out of the ordinary until struck from behind. He did not see her until too late to stop his car. There was a brake mark on the road running back from his car thirty-nine feet.

We feel that upon the question of the defendant's negligence, there was sufficient evidence for the case to have

gone to the jury. It would be well, at this time, to quote Chapter 143, Laws of Maine, 1949, which is additional to R. S., 1944, Chap. 19.

> **Sec. 118-A. Pedestrians on Ways:**
>
> "Where sidewalks are provided and their use is practicable, it shall be unlawful for any pedestrian to walk along an adjacent way.
>
> Where sidewalks are not provided, any pedestrian walking along and upon a highway, shall, when practicable, walk only on the left side of the way or its shoulder facing traffic which may approach from the opposite direction."

In considering the question of contributory negligence, it is necessary to revert to the facts. The evidence discloses that a sidewalk had been built on each side of the road, and there was further evidence that the plaintiff did not walk upon the sidewalk. "Well, there was no sidewalk there, there was snow where the sidewalk would have been * * *." This piece of evidence is not isolated, there are other parts of the evidence, which if believed, would tend to show that the snow had fallen, or drifted onto the sidewalks and had not been plowed out. There was evidence that the snow bank on the plaintiff's left-hand side of the road was high. One piece of evidence from a witness, "* * * I opened the door on my side of the car to get out, there was a snow bank and I couldn't get out, so I went out through on the driver's side." The plaintiff gave as a reason for walking on her right instead of her left side of the road that the snow was high on her left side of the street. There was from three to four feet of snow on her left side, and on her right it was much lower. The traffic on her left side was very heavy, and on her right very light.

The defendant contends this evidence shows a violation by the plaintiff of the quoted statute which is prima facie evidence of negligence. *Tibbetts* v. *Dunton,* 133 Me. 128,

131, 174 Atl. 453; *Danksky* v. *Kotimaki,* 125 Me. 72, 74, 130 Atl. 871.

This is the first time that this court has been called upon to construe this statute, but the rule for construction is the same in all like statutes. What was the legislative intent, the object it had in view, the mischief it intended to remedy? *Cushing* v. *Inh. of Bluehill, et al.,* 148 Me. 243, 92 Atl. (2nd) 330. In order to ascertain whether statute is applicable, facts must be found. That means when there is evidence upon which the jury can act, it, not the court, should act. In this case it is a fact whether sidewalks were provided, if not sidewalks, whether it was practicable to walk only on the left side or shoulder of the road, if sidewalks were provided, whether their use was practicable. To be found, of course, on proper instructions by the court. It should have gone to the jury as to whether there was a breach of the statute by the plaintiff.

If the jury found both of the aforesaid contentions in favor of the plaintiff, there would remain the question of the due care of the plaintiff. As to this, there are a number of things that should be considered, for instance, the lights of the defendant's car, the snow upon the ground, the clothing of the plaintiff, blowing of the horn, etc. We feel that upon this branch of the case there was sufficient evidence to go to the jury. In both cases

Exceptions sustained.

STATE OF MAINE

vs.

ALVA RANGER

Cumberland. Opinion, July 8, 1953.

Indecent Liberties. Witnesses. Children. Competency.

Res Gestae. Evidence.

It has long been recognized in Maine that a child of tender years, capable of distinguishing between good and evil, may in the discretion of the court be examined on oath.

The question of competency of a child to testify is addressed largely to the discretion of the presiding justice, but it is *judicial discretion.*

The doctrine of *res gestae* (things done) or "verbal act doctrine" is, that whenever evidence of the act is admissible, statements made at the time of the act, having a tendency to elucidate or give character to the act, are also admissible.

There is practical unanimity of opinion that the fact that a complaint was made is always admissible is part of the state's evidence in chief, if the prosecutrix takes the stand, in corroboration of her evidence but not the details of the complaint.

ON EXCEPTIONS.

This is an indictment for indecent liberties. The case is before the Law Court, following a verdict of guilty, upon exceptions. Exceptions sustained.

Frederick S. Sturgis, for State.

I. Edward Cohen, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ. MURRAY, A. R. J.

FELLOWS, J. This is an indictment brought in the Superior Court for Cumberland County against the respondent

Alva Ranger for taking indecent liberties with a minor under the age of sixteen years. The jury returned a guilty verdict. During the trial the respondent seasonably took exceptions to various rulings of the court on the ground that they were erroneous and prejudicial. Exceptions are sustained.

FIRST AND SECOND EXCEPTIONS

The first witness called by the State was Barbara Anne Reichert, age 10, and she was questioned by counsel on the matter of her qualifications. Some of the questions and her answers are as follows:

"Q. What is the difference between the truth and a lie, Barbara?

A. No answer.

Q. Do you know?

A. (Shakes head) No.

Q. Do you know what it is to take an oath?

A. (Shakes head) No.

Q. For the record, your answer is you don't know the difference between the truth and a lie; is that right?

A. (Nods) Yes.

Q. You have talked this case over with your mother?

A. (Nods) Yes.

Q. Did your mother tell you what to say?

A. (Nods) Yes.

Q. Did she tell you you would get a licking or something like that if you didn't tell? Did she tell you she would hit you with a strap or something?

A. Hit me with her hand.

Q. Did she tell you what to say when you went upstairs to the Grand Jury to tell your story, when you went upstairs to tell the story to

those people up there, you went with your mother?

A. Yes, I went with my mother.

Q. Sure; your mother was there. Didn't your mother tell you what to tell those people in there?

A. (Nods) Yes.

Q. Did you hear that question? Did the Sergeant (Officer Kearns), the man who stood up in the back tell you what to say?

A. (Nods) Yes.

Q. What is the difference between right and wrong, do you know?

A. (Shakes head) No.

Q. You don't know? May that go for the record?

A. (Shakes head) No.

Q. Did you tell your mother the night you came home that night what had happened?

A. (Nods) Yes.

Q. Did she tell you when you came home what you should say?

A. (Nods) Yes.

Q. Was it any different than what you told her that night.

A. (Nods) Yes."

Another witness for the State was Sharon Anne Rickett, age 8, and she was questioned on the second day as follows:

"Q. Did anyone explain the difference between truth and lies to you?

A. Yes.

Q. Who?

A. My mother.

Q. Did she tell you in case they asked you that question on the stand what to answer?

A. Yes.

Q. That is right. She told you if the attorney, me, the lawyer, asked you the question, you are supposed to answer that there is a difference?

A. (Nods) Yes.

Q. Is that right?

A. Yes.

Q. Up to yesterday you didn't know the difference, did you?

A. (Shakes head) No.

Q. Do you know what the truth means?

A. No.

Q. You don't know what an oath means, do you?

A. No."

The presiding justice permitted both children to testify.

It has long been recognized in Maine that a child of tender years, capable of distinguishing between good and evil, may in the discretion of the court be examined on oath. If permitted to testify, after preliminary examination as to qualification, the statements of such a witness are submitted to the consideration of the jury who should regard the age, the understanding, and the sense of accountability for moral conduct, in coming to their conclusion. *State* v. *Whittier*, 21 Me. 341; *State* v. *Dorathy*, 132 Me. 291. Greenleaf thus states the rule: " But in respect to children, there is no precise age within which they are absolutely excluded, on the presumption that they have not sufficient understanding. At the age of fourteen, every person is presumed to have common discretion and understanding, until the contrary appears; but under that age, it is not so presumed; and therefore inquiry is made as to the degree of understanding which the child, offered as a witness, may possess; and if he appears to have sufficient natural intelligence, and to have been so instructed as to comprehend the nature and effect of an oath, he is admitted to testify, whatever his age may be. This examination of the child, in order to ascertain

his capacity to be sworn, is made by the judge, at his discretion; and though, as has been just said, no age has been precisely fixed, within which a child shall be conclusively presumed incapable, yet, in one case, a learned judge promptly rejected the dying declarations of a child of tender years, observing, that it was quite impossible that she, however precocious her mind, could have had that idea of a future state, which is necessary to make such declarations admissible. On the other hand, it is not unusual to receive the testimony of children under nine, and sometimes even under seven years of age, if they appear to be of sufficient understanding; and it has been admitted even at the age of five years. If the child, being a principal witness, appears not yet sufficiently instructed in the nature of an oath, the court will, in its discretion, put off the trial, that this may be done." I Greenleaf on Evidence (6th Edition) 476, Sec. 367.

The question of the competency of a child to testify is addressed largely to the discretion of the presiding justice, but it is *judicial* discretion. It must not be an arbitrary decision. It must be based, not only on the appearance of the child, but it also must be based on what answers the child makes to show that he, or she, is qualified to testify. The proposed child witness should know the difference between truth and falsehood, and apparently must be able to receive accurate impressions of facts, and be able to relate truly the impressions received. The child witness should have sufficient capacity to understand, in some measure, the obligation of an oath; or to realize that it is wrong to falsify, and that if he does tell an untruth that he is likely to be punished. See 58 Am. Jur. "Witness," 97, Secs. 129-136 and cases cited.

In this case the respondent was fond of children. He had been a Scout Master, a 4-H Club leader, had been in charge of girls' summer camps, and the like, for thirty-five years. Because they asked him for a ride, he took at least three

girls, on this day in question, to an apartment where he adjusted or repaired an oil burner. Three children played "hide and seek" in the apartment and insisted that the respondent give them "piggy back rides." The alleged assault, which was to the effect that the respondent completely felt of her under her clothes, took place while one or more of the other children were there, and with all doors of the apartment open. The mother testified that she had forbidden her daughter to go to ride and when the daughter came home she "was happy when she came in." The mother says she "gave her a good whack" because she was late. The child testified she got "a licking." The child cried at the punishment and later when going to bed the child made the "complaint" to the mother, which is the subject of the third and fourth exception in this case.

Each of these two children was presented as an important witness in a serious case, and each makes statements in preliminary examination that show positively that they did not know the difference between truth and falsehood. The testimony of each is undoubtedly colored, if not prevaricated, through the coaching and instruction of a mother, as both preliminary examinations indicate.

Although many ancient proverbs indicate that some of our ancestors believed that only truth could come from childhood lips, we know through modern psychology that protective imagination is a common attribute of most children, and that a child will naturally attempt to blame someone else as the cause of disobedience. Add to this the suggestions of a mother who may be anxious or suspicious, and the child will in some instances adopt the suggestions in self protection. Great care must be exercised by the court, not only to discover the one who may be guilty, but also to make sure that no innocent person is unjustly convicted.

The testimony of these children should not have been received. It was an abuse of discretion and prejudicial error to permit either to testify.

THIRD AND FOURTH EXCEPTIONS

Mrs. Anne Reichert, mother of the prosecutrix, was permitted, subject to objection and exception, to testify to the details of an alleged complaint made to her by her daughter after the daughter came home, and after the mother had punished her. Barbara came home "happy," but was severely punished by her mother for her disobedience in staying late. The court stated that he admitted the claimed details of the alleged complaint as part of the *res gestae.*

The doctrine of *res gestae* (things done) or "verbal act doctrine" is, that whenever evidence of the act is admissible, statements made at the time of the act, having a tendency to elucidate or give character to the act, are also admissible. Declarations made at the time may become important as forming a part of the transaction itself. Such declarations are "verbal acts" and as competent as other testimony for the consideration of the jury; statements made by respondent when firing shot, *State* v. *Walker,* 77 Me. 488; recognition of murderer by dying victim, *State* v. *Wagner,* 61 Me. 178, 195; statements at time of writing a letter dictated by respondent, *State* v. *Bartley,* 105 Me. 505; declaration when changing residence or domicile, *Holyoke* v. *Estate of Holyoke,* 110 Me. 469.

The declarations must be so interwoven with the principal fact or event as to be regarded as part of the transaction itself, and also to negative any premeditation or purpose to manufacture testimony. *State* v. *Maddox,* 92 Me. 348, where declarations made a few minutes after an assault were held erroneously admitted; so was a statement three or four minutes after an accident not admissible because not "spontaneous exclamation accompanying an act." *Barnes* v. *Rumford,* 96 Me. 315. See 32 C. J. S. "Evidence," 19, Secs. 403-421 and 20 Am. Jur. "Evidence," 553, Secs. 661-685 where Maine cases are cited. See also Bouvier's Law Dictionary, Third Revision, *"Res Gestae"* citing *State* v. *Wagner,* 61 Me. 178.

The statements of the child to her mother, in which she related the details of the alleged act of the respondent, were not made under such circumstances nor were they made at such a time as to constitute a part of the *res gestae.* The fact that a complaint was made was admissible, but the details and particulars of the complaint were not. It was prejudicial error to admit testimony of the mother containing the recital thereof by the daughter to her. In *State* v. *King,* 123 Me. 256, 258, our court discussed the doctrine of *res gestae* and the admission of evidence relating to details of a complaint. The court say (in affirming the rule given in *State* v. *Maddox,* 92 Me. 348) : "There is practical unanimity of opinion, that the fact that such a complaint was made is always admissible as part of the State's evidence in chief, if the prosecutrix takes the stand, in corroboration of her evidence, but not the details of the complaint."

It is not necessary to discuss other exceptions taken by the respondent, nor is it necessary to consider the motion for new trial made to the presiding justice and the appeal. The entry must be

Exceptions sustained.

PAULINE JUDKINS

vs.

EDITH BUCKLAND

Penobscot. Opinion, July 8, 1953.

Slander. Pleading. Declarations. Nonsuit. General Issue.

A declaration for slander ordinarily contains (1) the inducement, or statement of the alleged matter out of which the charge arose (2) the colloquium, or averment that the words were used concerning

the plaintiff, (3) and the innuendo, or meaning placed by the plaintiff upon the language of the defendant.

A plea of the general issue in slander requires plaintiff to prove (1) the special character and the special extrinsic facts; (2) the speaking of the words (3) the truth of the colloquium, or the application of the words to himself, and (4) damages.

It does not follow that a prima facie case has been established because a presiding justice refuses a nonsuit at the close of plaintiff's case.

ON EXCEPTIONS.

This is an action of slander. The case is before the Law Court on exceptions to the granting of a directed verdict for defendant. Exceptions overruled.

B. M. Siciliano, for plaintiff.

Harry Stern, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ. MURRAY, A. R. J., did not sit.

FELLOWS, J. This was an action of slander brought by Pauline Judkins of Corinna, Maine against Edith Buckland of the same town, and comes from the Superior Court for Penobscot County. At the close of the testimony a motion for a directed verdict was made by the defendant. The motion was granted, and the case now comes to the Law Court on the plaintiff's exceptions. The exceptions are overruled.

Minnie Loud, who was the only witness who was called to testify to the alleged slander, testified in part as follows:

"Q. Do you claim to remember the exact words that took place there?

A. Very near.

Q. Will you repeat to the jury, please, right from the beginning?

A. Mrs. Buckland (defendant) and I were talking and I asked Mrs. Buckland who she thought cashed the check. Mrs. Buckland said: 'Don't you know who cashed the check?' And I said: 'No. Mrs. Staples told me it was a weaver in this mill, that she saw her when she did it.' Mrs. Buckland said: 'Mrs. Staples knows better than that. There isn't a weaver in this mill that would do that.' Then Mrs. Buckland said: 'Everyone knows who cashed the check,' she says, 'they know out in the office who cashed the check and they are watching all the stores thinking she will do something else and they will catch her.' Then Mrs. Buckland said it was a drawing-in girl that did it, that was getting very little work, that she cashed the check and paid twenty dollars on the bill. She said that Mrs. Holbrook was crying night and day over it. And I asked her what Mrs. Holbrook cared, and she said that Mrs. Holbrook didn't care about the girl but she was in the family and she didn't want the disgrace brought on the family; and she said when this girl got caught she would lose what reputation she had but she never had but little. Mrs. Buckland said in the conversation, when the girl got caught she would lose her job and get plenty. That was all."

The first count in the plaintiff's declaration declares in substance that the plaintiff had always been reputed of good character; that on July 8, 1951 the employer of the plaintiff issued to its employees checks for "vacation wages;" that one check was payable to Julia Nason and was "stolen from the premises" of the employer, by a person unknown; that the theft was well known to the employees; that the plaintiff was a spare drawing-in girl; that defendant was a weaver in the employer's mill; that the defendant delivered the check to an employee of P. E. Ward Co. who cashed it; that the defendant falsely and maliciously spoke the words (testified to by Minnie Loud) to the injury and

damage of the plaintiff. The second count, similar to the first count, alleged that the endorsement of the check was a forgery by a person unknown, and the alleged slanderous words accused the plaintiff of forgery. The third count declared that the alleged slanderous words accused the plaintiff of "uttering and publishing" a forged instrument with intent to defraud.

The plaintiff showed that the Eastland Woolen Mill, Inc., of Corinna issued vacation pay checks sometime in July 1951 to distribute among its employees in the same manner as the weekly pay checks. The plaintiff Pauline Judkins was one of the spare drawing-in girls, Eva Bell was a spare drawing-in girl, the defendant Edith Buckland was a weaver, and Julia Nason was a weaver, and all were employed by the corporation. The testimony indicates that Julia Nason went on vacation the day before the vacation pay checks were distributed. The evidence of the plaintiff's witnesses also indicates that a collector for P. E. Ward Co. received the check from the hand of the defendant and cashed the vacation check, payable to Julia Nason and endorsed by some person. Later the check was destroyed by the collector when he was obliged to make good the amount to his employer.

Minnie Loud was the only witness called by Pauline Judkins, the plaintiff, who testified to the alleged conversation with the defendant Mrs. Buckland. The plaintiff offered other witnesses to explain the existing facts and circumstances. There was evidence offered by the plaintiff to show that there were four "drawing-in" girls at the Eastland Woolen Mills, Inc. In answer to a question by the court, Minnie Loud testified that there were always four, "three steady ones and a spare one." At this time there were at least two spare girls. There is also uncontradicted testimony in the case that there were two women called "Mrs. Holbrook" in the town.

The words declared on by the plaintiff, and testified to by Minnie Loud, are claimed by the plaintiff to be slanderous because she says in her declaration, in her exceptions, and in her brief, that the check payable to Julia Nason could not have been cashed by any person, unless that person had the check in his possession illegally or without authorization, and had forged Julia Nason's name in endorseing it, and that it follows "as a matter of course" that the cashing of the check, falsely endorsed, would constitute a crime of stealing, forging, or uttering a forged instrument. The plaintiff further claims that the words were spoken of and concerning the plaintiff.

The plaintiff further contends in her bill of exceptions, (which contention does not appear in the argument, and may have been waived) that the presiding justice, having denied a motion for a nonsuit at the close of the plaintiff's testimony, could not properly grant the motion for a directed verdict because the justice had thus determined that there was a prima facie case.

"A declaration for slander ordinarily contains, as here, (1) the inducement, or statement of the alleged matter out of which the charge arose (2) the colloquium, or averment that the words were used concerning the plaintiff (3) and the innuendo, or meaning placed by the plaintiff upon the language of the defendant. 2 Greenleaf Ev. (4th Ed.) 'Libel and Slander,' 405; Starkie on Slander 'Averments,' 262; 37 C.J. 'Libel and Slander,' 22, Par. 328; Patterson v. Wilkinson, 55 Me. 42; Bradburg v. Segal, 121 Me. 146; Brown v. Rouillard, 117 Me. 55. The pleadings, under our practice, may in all cases be the general issue with a brief statement of special matter of defense. 'The plaintiff must join a general issue.' R. S., 1944, Chap. 100, Sec. 36.

A general denial is called the general issue because 'the issue that it tenders involves the whole declaration.' Stephen on Pleading (5th Ed.), 155; 2 Bouvier Law Dic-

tionary (3d Revision), 1347. 'The general issue is the plea which challenges the merits of the plaintiff's declaration.' Craven v. Turner, 82 Me. 383, 388." *McMullen* v. *Corkum and Trustees,* 142 Me. 393, 399.

The plea of the general issue in slander, as in this case, requires the plaintiff to prove (1) the special character and the essential extrinsic facts; (2) the speaking of the words; (3) the truth of the colloquium, or the application of the words to himself or herself, and (4) damages to the plaintiff. If the words are themselves actionable *per se,* the malice is presumed and no evidence of malice is necessary, although express malice may be shown in proof of damages. Words are to be construed in the sense which hearers of common and reasonable understanding would ascribe to them. See 2 Greenleaf on Evidence (16th Edition), Secs. 410-420; *McMullen* v. *Corkum,* 143 Me. 47; *McMullen* v. *Corkum and Trustees,* 142 Me. 393, 399. If the language is plain it is solely a question for the court whether it is actionable. The published article in libel, and the words in slander, must be construed, stripped of innuendo, insinuation, colloquium, and explanatory circumstances. Words must be taken in their ordinary and usual meaning because words may convey one idea to one person and another idea to another. "It is not the intent of the speaker or author, or even of the understanding of the plaintiff, but of the understanding of those to whom the words are addressed and of the natural and probable effect of the words upon them." *Chapman* v. *Gannett,* 132 Me. 389, 391; *Bradburg* v. *Segal,* 121 Me. 146; *Nichols* v. *Sonia,* 114 Me. 545.

It is true that it often may be a jury question whether defamatory matter applied to the plaintiff, but there must be evidence from which the jury can make that finding. *Sinclair* v. *Gannett,* 148 Me. 229. A jury is entitled to draw reasonable inferences from proved facts, but conjecture is not proof. *Glazier* v. *Tetrault,* 148 Me. 127 citing among other cases, *Ross* v. *Russell,* 142 Me. 101; *Elwell* v. *Hacker,*

86 Me. 416. See also *Stodder* v. *Coca-Cola, Inc.*, 142 Me. 139, 143.

In testing the propriety of a directed verdict for defendant, the evidence must be viewed favorably to the plaintiff. *Bolduc* v. *Therrien*, 147 Me. 39. A verdict should be directed when any other verdict would not be sustained. *Hultzen* v. *Witham*, 146 Me. 118; *Shackford* v. *N. E. Tel. & Tel. Co.*, 112 Me. 204.

Under the foregoing long established rules we are of the opinion that the alleged words spoken to Minnie Loud by Mrs. Buckland, the defendant, did not have the meaning claimed in the plaintiff's declaration. They were not slanderous even if they were spoken. To cash a check is not a crime. In this case, and under the circumstances testified to, the plaintiff was not accused of a crime. The record shows that the attorney for the plaintiff said "I haven't charged anybody with anything." To cash a check, however obtained, does not necessarily show fraud, forgery, or other offense.

If, by any stretch of imagination, the alleged words were slanderous, there is no evidence that the words were spoken of, or concerning, the plaintiff. There was another person that the evidence could apply to, and possibly several others. It would be mere conjecture or a guess. The plaintiff argues that relationship to Mrs. Holbrook identifies, but there is uncontradicted evidence that there were two by the name of Mrs. Holbrook. There is no allegation in the declaration that Mrs. Holbrook was in fact a relative of the plaintiff, nor which of the Mrs. Holbrooks is referred to. The fact that the plaintiff brought an action does not permit guesswork in her favor.

A jury is not warranted in selecting which of two conjectures to adopt on which to base a verdict. Reasonable inferences from true facts are proper. The exercise of judg-

ment is necessary. A verdict must not be an arbitrary decision. The choice of two possibilities is guesswork, unless there is evidence that will lead the reasoning mind to one conclusion rather than to the other. A proposition is proved when the evidence pertaining to the proposition is inconsistent with the negative. *Smith* v. *Lawrence,* 98 Me. 92; *McTaggart* v. *Railroad Co.,* 100 Me. 223. An inference of fact may be drawn by a jury only from other facts proved, and is a deduction or conclusion from facts known to be true. For an instance, where no evidence that a letter referred to a certain check, see *Seavey* v. *Laughlin,* 98 Me. 517.

The statement in the bill of exceptions to the effect that where the presiding justice failed to grant a nonsuit, it showed that he had decided that there was a prima facie case. This conclusion does not follow. The justice for various reasons may desire to hear all the evidence. The granting of a nonsuit is discretionary. The plaintiff has the right of exceptions if a nonsuit is ordered, but the refusal to direct a nonsuit is not subject to the defendant's exceptions. There is no right of exceptions to the refusal to grant a nonsuit. *Bragdon* v. *Appleton Insurance Co.,* 42 Me. 259; *Cooper* v. *Waldron,* 50 Me. 80; *White v. Bradley,* 66 Me. 254; *Washburn* v. *Allen,* 77 Me. 344; *Hunter* v. *Mountfort,* 117 Me. 568. A voluntary nonsuit before opening his case is a matter of plaintiff's right. After the case is opened, and before verdict, a voluntary nonsuit is discretionary. See *Washburn* v. *Allen,* 77 Me. 344, giving the history of the rule under common law and in Maine.

At the close of a case, if the party having the burden of proof introduces insufficient evidence to authorize a favorable finding, a verdict should be directed against him. He has right of exception. *Heath* v. *Jaquith,* 68 Me. 433; *Berry* v. *Atlantic Railway,* 109 Me. 330; *Johnson* v. *Railroad Co.,* 111 Me. 263; *Cate* v. *Merrill,* 109 Me. 424, 427; *Hultzen* v. *Witham,* 146 Me. 118.

In this case the direction of a verdict was proper. There is too much for conjecture. No other verdict, than that ordered, would have been sustained.

Exceptions overruled.

RITA HUARD, ET AL.

vs.

EVA E. PION

Kennebec. Opinion, July 10, 1953.

Real Action. Res Judicata. Estoppel. Life Estate. Remainder. Merger.

Judgment in a real action against a plaintiff life tenant is no bar to a subsequent action by a remainder man who was neither a party nor in privity with a party to the original action.

There is no privity between a life tenant and his remainderman.

"Privity" denotes mutual or successive relationship to the *same right* of property.

Generally, if a life estate and a remainder, reversion, or the like become united in the same person, the life estate is merged.

ON REPORT.

This is a real action. The case is before the Law Court upon the pleadings and a stipulation. Case remanded to the Superior Court for trial on the merits.

Dubord & Dubord, for plaintiff.

Roland J. Poulin, for defendant.

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

TIRRELL, J. This case is before the Law Court on report.

The case is a real action brought by the plaintiffs as remaindermen under the will of Pierre T. Mercier, also known as Peter Marshall. Title to a portion of land devised for life by Pierre T. Mercier to his daughter, Emma Landry, and at her death to the plaintiffs, is in issue.

Plaintiffs' writ is dated May 20, 1952, and it describes the land in question.

Defendant filed a plea of the general issue with a brief statement setting forth in substance that Emma Landry, life tenant, brought a real action asserting title to the same land against the defendant, that judgment was entered in favor of the defendant, and that the present plaintiffs are estopped from recovering judgment in the present action.

Plaintiffs filed a counter-brief statement in which they set forth that they are not bound by the judgment.

The case was reported to the Law Court with a stipulation that if the Law Court determines that the plaintiffs are bound by the judgment, the case is to be remanded to the Superior Court for entry of final judgment for the defendant, and that if the issue is determined in favor of the plaintiffs, then the cause is to be remanded to the Superior Court for trial on the merits.

Plaintiffs were not parties to the action brought by Emma Landry against the present defendant. Subsequent to the decision rendered in the suit brought by Emma Landry against the present defendant, Emma Landry quitclaimed the premises in question to the remaindermen for the purpose of giving the remaindermen immediate right of possession, which is of course an essential element in a real action.

The issue for determination is whether or not remaindermen are bound by a judgment rendered in an action brought

by the life tenant, said remaindermen not having been made parties to the prior action.

The general rule is that an estoppel resulting from a judgment is available to either party in a subsequent action. It is well settled that the doctrine of *res judicata* does not operate to affect strangers to a judgment, that is, to affect the rights of those who are neither parties nor in privity with a party therein. Am. Jur. Judgments, Vol. 30, Sec. 220; *Hill* v. *Stevenson,* 63 Me. 364-368.

In *Elmer E. Morrison* v. *George E. Clark,* 89 Me. 103, this court, in an opinion by Mr. Justice Whitehouse, said:

> "The two leading and essential elements of the doctrine of res judicata are the identity of the parties to the suit and the identity of the issue necessarily involved. Bigelow on Estop. 27-46. Hence to ascertain whether a judgment is a bar in a given case, it is necessary to inquire whether the subject matter in controversy was brought directly in question by the issue in the proceedings which terminated in the former judgment; and whether the former suit was between the same parties in the same right or capacity, or their privies claiming under them. *Lander* v. *Arno,* 65 Me. 26; *Bigelow* v. *Winsor,* 1 Gray, 299."

and in *Albion L. Savage* v. *North Anson Manufacturing Company,* 124 Me. 1, 4, the court stated:

> "It is a general and fundamental rule that judgments to be binding must be for the same cause of action and between the same parties or their privies. Under the term, parties, the law includes all persons who, though not nominally parties, but being directly interested in the subject matter, have a right to make a defense, or to control the proceedings, and to appeal from the judgment of the court, which right also includes the right to adduce testimony and cross-examine witnesses offered by the other side. Persons not having these rights are regarded as strangers to the cause and, of course, are not bound. Greenleaf on

> Ev., Vol. 1, Sec. 523; *Cecil* v. *Cecil,* 19 Md. 72, 80; *Lovejoy* v. *Murray,* 3 Wall. 1, 19. Privies with respect to judgments are those who have some mutual or successive relationship derived from one of the parties and accruing subsequent to the commencement of the action. 23 Cyc. 1253, 5, b; Bigelow on Estoppel, Page 142; *Seymour* v. *Wallace,* 121 Mich., 402; *Orthwein* v. *Thomas,* 127 Ill. 554. To give full effect to this rule, however, all persons represented by the parties, and who claim under them, are equally concluded."

See also *Van Buren Light & Power Co.* v. *Inhabitants of Van Buren,* 118 Me. 458, 461.

These plaintiffs had no right, in the original case, to participate in the trial thereof or to appeal from the judgment, neither did they have the right to adduce testimony or cross-examine witnesses. They were not parties to the original action.

This court, in *J. Frederic Burns* v. *Baldwin-Doherty Company,* 132 Me. 331, 333-335, said:

> "It is a principle of the common law that when a fact is once finally adjudicated, without fraud or collusion, by a tribunal of competent jurisdiction, the judgment binds the parties and their privies. *Lander* v. *Arno,* 65 Me. 26; *Van Buren Light & Power Company* v. *Inhabitants of Van Buren,* 118 Me., 458, 109A., 3; *Old Dominion Copper Min. etc., Co.* v. *Bigelow,* 203 Mass., 159, 214, 89 N.E., 193.
>
> "Parties, in the larger legal sense, are all persons having a right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision, if any appeal lies. Greenleaf Evid., Sec. 523, 535; *Duchess of Kingston's Case,* 3 Smith's Lead. Cas., 1998 (9th Am. ed.); *Litchfield* v. *Goodnow,* 123 U.S., 549, 31 Law Ed. 199. The same thing may also be said of those who assume to have the right to do these things. *Winchester* v. *Heiskell,* 119 U.S., 450, 30 Law ed., 462.

"Privity is a 'mutual or successive relationship to the *same rights* of property.' (Bouv. Law Dict., Greenleaf Evid., Sec. 189.) (Italics ours).

"The plaintiff, in invoking estoppel, must establish that all the essential characteristics of parties were really present in the" "defendant as a party to the former suit. Estoppels, to be good, must be mutual and reciprocal. *Litchfield* v. *Goodnow, supra,.....*"

"All remaindermen claiming under the same deed or will are in privity with each other, and mutually bound by a judgment for or against one of their number. On the other hand, a remainderman or reversioner is not thus in privity with the tenant for life, or with a tenant in dower, or a tenant by the curtesy. Indeed, it has sometimes been held generally that the rights of the remaindermen are not affected by a judgment for or against the life tenant in a suit to which they are not parties; and this is *undoubtedly true where the remaindermen are not represented in the suit.*" (Italics ours). (50 C.J.S., Judgments, p. 357, Sec. 810, Sec. b).

The term "privity" denotes mutual or successive relationship to the *same right* of property. Emma Landry, the plaintiff in the original suit, owned a life tenancy. The present plaintiffs, at the date of their writ, were owners in fee simple. Under this well established rule there was no privity between the parties. See *Lang* v. *Metsger,* 101 Ill. App. 380; *Strayer* v. *Johnson,* 1 A. 222, 110 Pa. 21; *Harang* v. *Golden Ranch Land & Drainage Co.,* 79 So. 768, 143 La. 982; *Burns* v. *Baldwin-Doherty Co.,* 132 Me. 331, Words and Phrases Per. Ed., Vol. 33, pages 819-820.

If the life tenant had conveyed to a stranger, there being privity of title between such stranger and the life tenant, the stranger would be estopped by the judgment against the grantor.

There being no privity between a life tenant and his remainderman, the remainderman would not ordinarily be

estopped by a judgment against the life tenant. In the present case, however, the remainderman did not succeed to the life tenant's estate by death but came into immediate possession by virtue of having received a quit-claim deed from the life tenant. At the time these plaintiffs received the quit-claim deed from their mother they were already seized in fee of the estate subject, of course, to the life estate held by her. The quit-claim deed from Emma Landry to her children, the plaintiffs in this action, did not convey her life estate to her children as remaindermen, but amounted to a release thereof and the remaindermen were holding the property described in the writ under their original title as vested remaindermen under the will of their grandfather, Pierre T. Mercier; and are therefore not in privity with the life tenant by reason of the deed of release.

> "Generally, if a life estate and a remainder, reversion, or the like, become united in the same person, the life estate is merged. Thus, if a life estate is the only estate preceding an estate in reversion or remainder and the remainderman acquires the life estate or, under an agreement, rents the estate for life, for and during the life of the person entitled to it, the life estate is merged in the remainder." (19 Am. Jur., page 592, Sec. 139).

The plaintiffs are not bound by the judgment set forth in the pleadings of the plaintiffs, to wit: the prior judgment against the life tenant in favor of the defendant. In accordance with the stipulation the entry is,

Case remanded to Superior Court for trial on the merits.

LEOTA W. (MICHAEL) LOVELETT

vs.

SAMUEL MICHAEL

Androscoggin. Opinion, July 11, 1953.

Children. Divorce. Custody.

A presiding justice who sees the parties and is acquainted with the facts concerning the custody of a child and what is for its welfare can be overruled only if he abuses his discretion.

ON EXCEPTIONS.

This is a petition under R. S., 1944, Chap. 153, Sec. 69 to obtain modification of a divorce decree. The case is before the Law Court upon exceptions to a decree modifying the decree. Exceptions overruled.

Berman & Berman,
Frank W. Linnell, for plaintiff.
Benjamin L. Arena, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ. MURRAY, A. R. J. TIRRELL, J. did not sit.

THAXTER, J. This is a petition brought under R. S., 1944, Chap. 153, Sec. 69, to obtain modification of a divorce decree as subsequently amended granted to the respondent in September, 1945, by the Superior Court for Androscoggin County insofar as it concerns the custody, control and support of the daughter of the parties, Sandra Michael, who at the time of the divorce was two years of age.

The parties were married in August, 1937, and on a libel of the respondent were divorced in May, 1945, on the ground of cruel and abusive treatment. They have two children, Bruce Michael an adopted child who is now eighteen

years old, and Sandra Michael now nine years old. In the original decree of divorce nothing was said about the custody of the children, but by agreement they apparently lived with the mother for about two years. According to statements in the bill of exceptions herein, which we must take as correct, the mother, the petitioner herein who had remarried, in October, 1947, filed a petition to amend the original decree of divorce so that she would be awarded custody of said children. On November 17, 1947, the following decree was filed:

> "That the said libelant be awarded the care and custody of the minor child, Sandra Michael, with the right of reasonable visitation to the libelee; it is further ORDERED and DECREED that the care and custody of the said minor child, Bruce Michael, be awarded to the libelee with the right of reasonable visitation to the libelant; and it is further ORDERED that the said libelant contribute the sum of sixty ($60.00) dollars per month to the said libelee for the support and maintenance of said minor child Bruce Michael. Execution to issue upon default of any payment. Original decree remains unaltered and unchanged in all other respects."

In July, 1948, the mother brought another petition seeking partial custody and control of the girl, Sandra. On this petition by agreement of counsel a further amended decree was made making provision for the mother to visit with the daughter. In January, 1950, the mother brought a further petition but a decree does not seem to have been entered until January, 1951, when further provision seems to have been made with respect to visitation. In July of 1951 the mother brought a further petition for amendment of the original decree as amended, and a decree was entered on such petition in July, 1952, by which the mother was awarded custody of Sandra with rights of visitation by the father and limited control by the father. It is to this decree that exceptions taken by the father are now before us.

Surely this recital of events in and of itself tells us that this little girl has learned through hard experience that she is indeed a ward of the court.

The presiding justice who saw the parties and was much more acquainted than we are with the facts concerning the custody of the child and what is for her welfare can only be overruled if he abuses his discretion. He surely did not do that. The court at all times approached this confusing and intricate problem with great care and through repeated hearings was doing what it thought was best for the child. The record shows us, not only that the court did not act without giving due consideration for the child's welfare but that on the other hand it did exactly right. That is the proper test, — that it acted for the welfare of the child. *Harvey* v. *Lane,* 66 Me. 536; *Stetson* v. *Stetson,* 80 Me. 483, 485; *Luques* v. *Luques,* 127 Me. 356, 361; *Merchant* v. *Bussell,* 139 Me. 118. The consideration which it gave to this case and the effort which it made to soften the asperities for this child of all the legal actions to which she had been subjected is nowhere better shown than in the following recital accompanying the decree of July 23, 1952:

> "The matter of the petition for change of custody of Sandra Michael having come on to be heard before me this day, thereupon after hearing, I find that the petitioner has demonstrated the financial ability to properly care for and educate her child, Sandra Michael; that she has a suitable home and the proper social environment in which to rear said child; that she bears an intense maternal love for her child which is best demonstrated by her repeated attempts to regain the full custody of the child; that she has demonstrated her ability to guide and rear her children by the manner in which she has conducted the bringing up of her son, Bruce Michael, who is without question, a boy of fine character and who, because of sacrifices made by his mother, the petitioner, is obtaining a college education. No evidence was produced by the respondent, but there is sufficient evidence to

satisfy the court that the respondent has not shown an ability or willingness to make sacrifices for the education and improvement of his child by his repeated failure to comply with the decree of this Court for the support of his son, Bruce Michael. The Court believes that in the formative years when this female child is developing into womanhood, that the guidance and love of a good mother has no substitute, and that it is for the best interests of the child that she be placed in the custody of her mother, the petitioner."

Exceptions overruled.

WILLIAM F. MAHANEY

vs.

ALICE L. CROCKER

York. Opinion, July 14, 1953

Divorce. Custody. Support. Necessaries.

When the custody of a minor child is granted to the mother on divorce from the father, and the father is ordered to contribute to the mother for support of the child, his common law obligation to support the child ceases and the obligation under the decree is substituted therefor.

The effect upon the common law duty of support is the same whether the decree be one awarding temporary custody or whether it be a decree in an action for divorce.

ON MOTION FOR A NEW TRIAL.

This is an action upon an account annexed for medical services furnished a minor child. The jury returned a verdict for defendant. The case is before the Law Court upon

plaintiff's motion for a new trial. Motion sustained. Verdict set aside. New trial granted.

Hilary F. Mahaney, for plaintiff.

Joseph E. Harvey, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ. MURRAY, A. R. J.

MERRILL, C. J. On motion. The plaintiff, a duly licensed physican and surgeon, brought an action against the defendant on an account annexed. The defendant's minor daughter was suffering from a ruptured appendix. The services for which the plaintiff seeks recovery were rendered in performing an emergency operation upon her therefor, and in performing a second operation to relieve infection that had set in. The case was tried at the January 1953 Term of the Superior Court for the County of York. The jury rendered a verdict for the defendant. The case is before us upon the plaintiff's motion to set aside the verdict and grant a new trial as against the law and the charge of the Justice, against evidence; and as manifestly against the weight of evidence in the case.

The necessity for and success of the operations are admitted and no question is raised as to the reasonableness of plaintiff's charges therefor.

Prior to the original operation and pending her divorce libel against the child's father, the defendant had been granted the temporary care and custody of the minor child. The husband had been ordered to pay to the defendant $15.00 per week for the support of this child and another of whom she was also given temporary custody. Subsequent to the first operation and prior to the second operation the defendant was granted a divorce upon her said libel. In the decree she was granted the care and custody of both children, including the little girl who was operated upon, and

the order on the husband for their support was continued. In both decrees the husband was given the right to visit with the children at all proper times and have the children visit him during week ends.

When the custody of a minor child is granted to the mother on divorce from the father, and the father is ordered to contribute to the mother for the support of the child, his common law obligation to support the child ceases and the obligation under the decree is substituted therefor. Until modified by the court, as it may be, the amount which the father is ordered to pay in such decree measures his duty to support the child. *Hall* v. *Green,* 87 Me. 122; *Harvey* v. *Lane,* 66 Me. 536; *Gilley* v. *Gilley,* 79 Me. 292; *Brow* v. *Brightman,* 136 Mass. 187. Our court has also held that the same exoneration from common law liabilities and remedies follows when the court awards the custody of the child to the mother, but is silent in its decree on the question of allowances for the support of the children or for herself. *Hall* v. *Green, supra.*

The exoneration from the common law obligation to support the child when custody is decreed to the mother is based upon the fact that the decree of custody to the mother deprives the father of his title to the services and earnings of the child. *Hall* v. *Green, supra.*

A decree of temporary custody is made to continue until further order of court. A decree in an action for divorce awarding custody of a minor child to the mother is subject to subsequent modification by the court. The effect of either of such decrees upon the rights of the father to the services and earnings of the child during their continuance is the same. They likewise have the same effect upon his duty to support the child.

In the instant case at the time the several operations were performed the law imposed no duty upon the father of the child to furnish or pay for them. The decree fixing the

amount to be paid by the father to the mother for the support of the child was subject to modification by the court. In the case of an emergency operation, performed upon the credit of the mother and under a contract either express or implied, the court which entered the original decree acting in its sound discretion would be authorized to order the father to reimburse the mother therefor either in whole or in part.

The obligation of a father to pay for necessary surgical attention furnished a minor child, whose custody has been awarded to the mother, is determined by the same rules of law as is that of the mother in cases where the father is under the primary duty to support the child. The father, therefore, in the absence of contractual assumption thereof would not be liable to pay for the plaintiff's services.

On the other hand, the legal custody of the child having been given to the mother, the law imposed upon her the primary obligation to furnish the child with such medical and surgical attention as thereafterwards became reasonably necessary. There is no evidence in this case of an express promise on her part to pay for the plaintiff's services. However, such surgical attention having been furnished the child by the plaintiff with the knowledge and consent of the mother or at least without protest on her part, the law, in the absence of a contractual assumption of liability therefor by the father, would imply a promise on the part of the mother to pay for the same.

There is no evidence in this case which would justify a jury in finding that the father assumed any legal obligation to pay the plaintiff for his services rendered the child. The fact that he made all araangements for the operation after being notified of the child's condition by the mother; the further fact that he and the mother, from whom he was estranged, took the child to the hospital for the operation, even though the mother made no express agreement with

respect to assuming liability for the operation, are not sufficient grounds to justify a jury in finding that the father had assumed the legal obligation to pay for the child's operations. This is especially true in view of the fact that the doctor testified that neither the father nor the mother made any agreement with him respecting his services.

Had the legal custody of the child been in the father, and had the mother acted in all respects as the father did in this case, there would not be the slightest question but what the father would have been liable to pay the plaintiff for the operations on the child and the mother would have incurred no liability therefor.

The jury evidently felt in this case that the father, not the mother, *should* pay for the operations performed upon the child, and for that reason found a verdict for the defendant. There being no evidence in the record which would justify this finding, the entry will be

Motion sustained.
Verdict set aside.
New trial granted.

STATE OF MAINE

vs.

CARL R. CHASE

Androscoggin. Opinion, July 15, 1953.

Murder. Demurrer. Arrest of Judgment. "Unlawfully." Assault. "Feloniously." Sentence.

There is an important distinction between an attack upon an indictment by demurrer and attack by arrest of judgment. Formal defects in indictments are subjects of general demurrer but only

such grounds as are assigned can be considered under exceptions to a denial of a motion in arrest of judgment.

A murder indictment which fails to set forth that an alleged assault was made *on* or *upon* someone is not in and of itself defective since an indictment without an allegation of assault is sufficient.

An indictment which sufficiently alleges that "Carl R. Chase * * * him, the said Alex Yoksus, alias Alex York, wilfully and of his malice aforethought did kill and murder" is sufficient.

The failure of an indictment for murder to employ the word "unlawfully" does not render the indictment defective notwithstanding that murder is defined by this State: "Whoever unlawfully kills a human being with malice aforethought, either express or implied is guilty of murder."

The allegation "against the peace of said state, and contrary to the form of the Statute in such case made and provided" is equivalent to an allegation of "unlawful" killing.

The omission of the word "feloniously" does not render the indictment defective even though the word "felonious" appears in the statutes, R. S., 1944, Chap. 132, Sec. 11. See also R. S., 1944, Chap. 132, Sec. 15.

"Feloniously" describes the grade of the act rather than the act which constitutes the offense. It is not a distinct element of the crime.

It is only in cases of conviction of crimes not punishable by imprisonment for life that the court has authority to impose sentence before the determination of exceptions by the Law Court. R. S., 1944 Chap. 135, Sec. 29.

ON EXCEPTIONS.

This is an indictment for murder. After a verdict of guilty the respondent moved in arrest of judgment. The case is before the Law Court upon exceptions to the denial thereof. Exceptions overruled. Judgment for the State. Case remanded for sentence.

Alexander A. LaFleur, Attorney General,
Neal A. Donahue, Asst. Attorney General,
Edward J. Beauchamp, for State.

A. Alan Grossman,
Louis Scolnik, for Defendant.

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

MERRILL, C. J. On exceptions. At the November 1952 Term of the Superior Court in Androscoggin County the respondent, Carl R. Chase, was arraigned, entered a plea of not guilty, was tried and found guilty of murder upon the following indictment:

"STATE OF MAINE

ANDROSCOGGIN, ss.

AT THE SUPERIOR COURT, begun and holden at Auburn, within and for the County of Androscoggin, on the first Tuesday of September in the year of our Lord one thousand nine hundred and fifty-two.

THE JURORS FOR SAID STATE upon their oath present that CARL R. CHASE, of Boston, Massachusetts, on the 27th day of August, 1952, at Auburn in the County of Androscoggin, one Alex Yoksus, alias Alex York, feloniously, wilfully and of his malice aforethought, did make an assault and him, the said Alex Yoksus, alias Alex York, wilfully and of his malice aforethought did kill and murder, against the peace of said State, and contrary to the form of the statute in such case made and provided.

A TRUE BILL

E. BEAUCHAMP ATTORNEY.

FOR THE STATE FOR SAID COUNTY.

G. L. WINSLOW FOREMAN."

After trial and before judgment Chase filed a written motion in arrest of judgment wherein he stated:—

"that the said indictment and matters therein alledged, in the manner and form in which they are therein stated, are not sufficient in law for any judgment to be rendered thereon, and the said in-

dictment is bad for it does not state that the said Carl R. Chase committed any crime or criminal act, in the following particulars, to wit:—

1. That it fails to set forth or state that a human being has been killed by any acts of the said respondent.
2. That is fails and does not state who killed or murdered;
3. That it does not state upon whom the assault was committed;
4. That it does not say or state that the assault was committed upon Alex Yorksus, alias Alex York;
5. That it does not say or state that Carl R. Chase, the respondent, did make an assault or kill or commit any murder upon Alex Yorksus, alias Alex York;
6. That it does not say or state that an assault was made upon any person;
7. That it does not say or state that anyone was killed and murdered;
8. That it does not set forth the crime of murder in the language of the Statutes of Maine as therein made and provided;"

The case is now before us on exceptions to the denial of said motion by the presiding justice.

Before entering upon a discussion of the present indictment the following general principles are to be borne in mind. In the early case of *State* v. *Carver*, 49 Me. 588 at 593, we stated:—

"A motion in arrest presents only the sufficiency of the indictment. *State* v. *Nixon*, 8 Verm., 70. It is equivalent to a demurrer, and can be sustained only when all that is alleged in the indictment may be true, and yet the person convicted not have committed any offence. *State* v. *Hobbs*, 39 Me. 212, and cases cited. And, even for defects which would be fatal to an indictment upon demurrer, if they

are such as are aided by a verdict, judgment will not be arrested after conviction. *Commonwealth* v. *Tuck,* 20 Pick., 356.

Nor will judgment be arrested for anything that could have been pleaded in abatement.

By pleading generally to the indictment the defendant admits its genuineness, and waives all matters that should have been pleaded in abatement. The decisions to this point, both in England and in this country, are numerous."

In *State* v. *Mockus,* 120 Me. 84 at 98, we said:—

"The ninth, tenth and eleventh requests relate to matters of pleading, and are based upon the omission of words which charge that the acts complained of were done wilfully, or maliciously, or feloniously. No attempt was made to take advantage of any matter of form by demurrer. It is too late to attempt such advantage by requested instructions after plea of not guilty and full trial upon the issues of fact. Having appeared generally and pleaded not guilty he thereby waived all objections to matters of form in the indictment except as they may be raised by motion in arrest of judgment. *State* v. *Regan,* 67 Maine, 380; *Commonwealth* v. *Henry,* 7 Cush., 512; *Commonwealth* v. *Gregory,* 7 Gray, 498."

Although one can find expressions in the opinions of this court that a motion in arrest of judgment is equivalent to a demurrer, there is an important distinction between the two forms of attack upon indictments which must be borne in mind and which are applicable to the issues of this case. Due to the fact that the statute of jeofails has no application to criminal pleadings, formal defects in indictments remain proper subjects of general demurrer, as at common law. *State* v. *Dunn,* 136 Me. 299, *State* v. *Mahoney,* 115 Me. 251. In the latter case we stated:—

" 'In criminal pleading there is no distinction between a general and special demurrer. Sts. 27 Eliz. 5, sec. 1 and 4 and 5 Anne, ch. 16, relate to

> pleading in civil actions only. Formal defects in indictments and other criminal prosecutions remain proper subjects of general demurrer, as at common law. . . .' "

To multiply authorities to this effect would serve no useful purpose. With respect, however, to motions in arrest of judgment, the rule is different. We said in *State* v. *Harvey,* 124 Me. 226 at 227:—

> "Only such grounds as are assigned in the motion in arrest of judgment can be considered under the exception to its denial. A motion in arrest of judgment should specify the causes for which judgment should be arrested, and our review of the ruling below is controlled by the reasons stated in the motion. *State* v. *Donaluzzi,* 94 Vt., 142; *State* v. *Wing,* 32 Maine, 581; 2 Encyc. Pl. and Pr. 816; 16 C. J., 1264, and cases cited."

As said in *State* v. *Wing,* 32 Me. 581, *supra,* with respect to a motion in arrest of judgment which did not particularize the grounds upon which it was based, "The motion was a call upon the Judge to exercise his legal ingenuity and intellectual acumen to ferret out some possible ground for granting the motion. But he was under no such obligation."

In the instant case, the respondent pleaded not guilty, went to trial and was convicted. He did this without interposing either a motion to quash or a demurrer. His exceptions to the overruling of his motion in arrest of judgment must stand or fall upon the reasons therefor specified in said motion.

One group of objections to the indictment here involved are based upon the fact that the word *on* or *upon* was omitted before the words "one Alex Yoksus" and that consequently the indictment failed to set forth that the respondent Chase made an assault upon anyone and especially that it failed to allege that he made an assault upon Yoksus. The 3rd, 4th and 6th specifications, and so much of the 5th

specification in the motion for arrest of judgment as relates to assault, are based upon this omission and all relate to the defective allegation of making an assault.

It is further objected that the omission of the word *on* or *upon* with respect to the assault and the failure to allege the making of the assault upon Yoksus renders the rest of the indictment so unintelligible that it fails to set forth that anyone was killed or murdered or that Chase killed or murdered Yoksus. Specifications numbered 1, 2, 7 and so much of 5 as relates to the killing or murder of Yoksus are relied upon as raising this objection.

It is further objected that the indictment does not set forth the crime of murder in the language of the statutes of Maine as therein made and provided. This is specification No. 8.

Granting for the sake of argument that because the word *on* or *upon* is not inserted before the words "one Alex Yoksus," the allegation of an assault is fatally defective, it by no means follows that the indictment itself as an indictment for murder is likewise defective.

It is unnecessary in a murder indictment to allege the making of an assault by the accused upon the deceased. An indictment without an allegation of an assault is sufficient. An allegation of the assault is at most but a statement of the means by which the murder was accomplished, which need not be alleged in an indictment. R. S. (1944), Chap. 132, Sec. 11; *State* v. *Morrissey,* 70 Me. 401; *State* v. *Verrill,* 54 Me. 408. See also *State* v. *Smith,* 65 Me. 257 and *Thompson, Petitioner,* 141 Me. 250. It is true that these last two cases related to indictments for manslaughter, not murder. However, they both sustained the validity of the foregoing statute as declaratory of the common law and as non-violative of Section 6 of Article 1 of the Constitution of Maine.

In *State* v. *Morrissey, supra,* it was contended that an indictment for murder which contained an allegation of an assault upon the deceased by the accused was defective because it did not set out the means by which the assault was perpetrated. The court stated with respect to this contention, "If the indictment be good without such unnecessary allegation it must be as good with it. * * * But it does not follow because he has alleged more than is needful, that he is in a dilemma of not having alleged enough. He is not required to spread out his general averment of assault into particulars."

By the same token, if there be *no necessity for any allegation* of an assault in an indictment for murder, *a defective allegation* thereof does not vitiate the indictment. "A defective charge is no charge and may be rejected as surplusage." *State* v. *Leavitt,* 87 Me. 72 at 80.

The respondent in argument, however, urges that the rejection of the defective charge of an assault as surplusage might be prejudicial to him for, as he says, *State* v. *Morrissey,* 70 Me. 401 stands for the principle that if an assault be unnecessarily alleged in an indictment for murder, the State is required to prove the murder to have been committed by force. He further argues that if this defective averment be rejected as surplusage that he might have been taken by surprise in the event that the State had attempted to prove a murder not committed by force. The respondent in this case cannot blow both hot and cold with respect to this averment. He cannot on the one hand allege its invalidity as the basis for rendering the indictment void, and on the other assert its validity to show that he might be taken by surprise by its rejection as surplusage.

The indictment does not sustain the 3rd, 4th and 6th specifications, or either of them, nor does it sustain so much of the 5th specification as relates to the assault. Therefore, they do not afford sufficient ground for arresting the judgment.

This brings us to a consideration of the second group of objections to the indictment which are based upon the claim that the defective allegation as to an assault renders the rest of the indictment so unintelligible that it fails to set forth that anyone was killed or murdered or that Chase killed or murdered Yoksus. There is no merit in these objections. Rejecting the defective charge of an assault the indictment alleges that "Carl R. Chase * * * him, the said Alex Yoksus, alias Alex York, wilfully and of his malice aforethought did kill and murder." This is an allegation that Carl Chase killed and murdered Alex Yoksus.

The indictment does not sustain the 1st, 2nd and 7th specifications, or either of them, nor does it sustain so much of the 5th specification as relates to the killing or murder of Yoksus. Therefore, they do not afford sufficient ground for arresting the judgment.

Bearing in mind that a motion for arrest of judgment can be sustained only upon the grounds specified therein, this leaves but one specification for consideration, to wit, No. 8. This specification is that it (the indictment) does not set forth the crime of murder in the language of the statutes of Maine as therein made and provided. Murder is defined by the statutes of this State as follows:— "Whoever unlawfully kills a human being with malice aforethought, either express or implied is guilty of murder,". It is true that in this case the indictment does not use the word unlawfully with respect to the killing. This, however, unaided by the statute hereinafter referred to (R. S. (1944), Chap. 132, Sec. 15), is unnecessary.

The allegations in this indictment that the respondent killed and murdered Yoksus "against the peace of said State, and contrary to the form of the statute in such case made and provided" are equivalent to an allegation that the killing was unlawfully done. *State* v. *Tibbetts* and *State* v. *Haley,* 86 Me. 189, 191. See also *State* v. *Merrill,* 132 Me. 103, and *State* v. *Skolfield,* 86 Me. 149.

It is to be noted, however, that although this indictment uses the phrase "*feloniously*, wilfully and of his malice aforethought" with respect to the assault, it omitted to repeat the word *feloniously* in the phrase setting forth the killing and murder. With respect thereto it alleges that he "wilfully and of his malice aforethought did kill and murder." The respondent takes the position that the word feloniously as first used does not carry through and apply to the killing. This omission to repeat the word feloniously is urged as a fatal defect in this indictment. Granting for the sake of argument that the respondent's position is correct to the extent that the word feloniously as used in the indictment is not descriptive of the killing, it by no means follows that this indictment is defective.

The statutes of this State do not prescribe a form of indictment for murder. However, R. S. (1944), Chap. 132, Sec. 11 provides that,

> "It is sufficient in every indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased; and for manslaughter, to charge that the defendant did feloniously kill and slay the deceased without, in either case, setting forth the manner or means of death."

The respondent urges that this statute is in effect a statute prescribing a form of indictment for murder and says that because the present indictment omits the word *feloniously* in the portion thereof descriptive of the killing and murder it is fatally defective. This position on the part of the respondent is untenable. There is another section in the same chapter which conclusively answers this claim. R. S. (1944), Chap. 132, Sec. 15 in part reads:— "No indictment or complaint shall be quashed, or adjudged bad, nor shall the proceedings or judgment thereon be arrested, reversed, or affected by reason of the omission * * * of the words '*feloniously*' * * * if such omission * * * does not tend to his prejudice;". (Emphasis ours.)

At common law there were certain differences in the trial of felonies and misdemeanors and many of the old common law cases which hold that the omission of the word "feloniously" in indictments is fatal were founded upon this difference in practice. Especially was this true where conviction resulted in the imposition of the death penalty. These differences in the trial of felonies and misdemeanors have disappeared from our practice. The reason for the rule requiring the use of the word "feloniously" in indictments where the same is not included in the definition of the offense in the statute defining the same, has now disappeared. Even if required, the use of the word "feloniously" except where the same forms a part of the statutory definition of the offense is but a matter of form.

Apart from statute, when the use of the word "feloniously" in indictments is required as a matter of form, an indictment which fails to use it is subject to demurrer. However, being a matter of form and not of substance, even if its absence could be attacked by motion in arrest of judgment, it could only be so taken advantage of if specified as one of the reasons for arresting judgment. The omission of the word "feloniously" in this indictment is not specified as one of the reasons why the indictment should be arrested. Although better practice would dictate its use, and even if failure to use the word "feloniously" in describing the killing would have been open to attack by demurrer, it cannot be reached by *this* motion in arrest of judgment.

This indictment charges a substantive felony. It is murder both at common law and under our statute to unlawfully kill a human being with malice aforethought. This indictment charges that the respondent wilfully, and of his malice aforethought did kill and murder Yoksus. As already shown, the allegation that he did so contrary to the form of the statute is equivalent to an allegation that he did so unlawfully. The unlawful, wilful killing with malice aforethought is murder, and murder is a felony. Where

the acts charged in the indictment amount to a felony, it is unnecessary to allege that they were feloniously done. "Feloniously" describes the grade of the act rather than the act which constitutes the offense. It is not a distinct element of the crime. See *State* v. *Navarro,* 131 Me. 345, 349. See also *State* v. *Hyman,* 116 Me. 419. Inasmuch as this indictment contains allegations sufficient to characterize the offense as a felony, the failure to charge that the felony was feloniously committed can work no prejudice to the respondent. *State* v. *Leavitt,* 87 Me. 72. It would therefore have availed the respondent nothing had his motion in arrest specified the failure to repeat the word "feloniously" as a ground therefor.

The 8th specification is not sustained by the indictment and therefore it does not afford a sufficient ground for arresting the judgment.

As the motion in arrest of judgment could not be sustained on any of the grounds specified therein, there was no error on the part of the presiding justice denying the same and the exceptions thereto must be overruled.

That we have sustained the action of the presiding justice in denying this motion in arrest of judgment must not be taken as tacit approval by this court of the future use of this indictment as a precedent. Nor do we even intimate that the same was not demurrable on grounds which were either waived by going to trial on the merits, or which have not been specified as grounds for arresting judgment in the present motion.

Indictments for murder in this State are of the greatest simplicity, and should present no difficulties in draftsmanship. A form of indictment therefor sustained by this court appears in *State* v. *Verrill,* 54 Me. 408, and it was again sustained in *State* v. *Morrissey,* 70 Me. 401. The same form, together with one omitting the allegation of the assault, may be found in "Whitehouse and Hill Forms for Criminal Procedure," Page 160, a book of forms adapted to and writ-

ten for use under the practice in vogue in this State. These forms of indictments contain but a few lines and it should be a simple matter to check drafts of indictments with the forms. Errors will creep into legal documents despite care, but we cannot allow the carelessness exhibited in the drafting of this indictment for the most serious crime, save treason, known to the law, to pass unnoticed. We feel the more strongly impelled to voice this criticism because we now have before us another case which charges a *particeps criminis* with this respondent with this same murder in a separate indictment, which indictment is couched in exactly the same language as that in which this one is couched.

The record discloses that after the denial of the motion in arrest of judgment and the noting of exceptions thereto, the presiding justice imposed sentence upon the respondent. It is only in cases of conviction of crimes not punishable by imprisonment for life that the court has authority to impose sentence before the determination of exceptions or appeals by the Law Court. R. S. (1944), Chap. 135, Sec. 29. Sentence must be imposed anew. The mandate is

Exceptions overruled.
Judgment for the State.
Case remanded for sentence.

STATE OF MAINE
vs.
SAMUEL RAINEY

Androscoggin. Opinion, July 15, 1953.

Murder. Evidence. Photographs. Exceptions. Waiver. New Trial. Principals.

See *State* v. *Chase, supra.*

Photographs of a dead body, although gruesome, if accurate are admissible in the discretion of the trial court, and unless there is an abuse of judicial discretion, no exception lies thereto.

Exceptions to the refusal to direct a verdict at close of the state's case are waived by proceeding with the introduction of defense evidence.

Motions for a new trial filed after premature imposition of sentence and appeal from its denial may be considered by the Law Court.

All persons who are present, aiding, abetting, and assisting a person to commit a felony are principals and may be indicted as such.

ON MOTION, APPEAL, EXCEPTIONS.

This is an indictment for murder. Following a verdict of guilty, the case is before the Law Court upon exceptions, appeal and motion for new trial. Exceptions I, II, and III overruled. Exception IV dismissed, Appeal dismissed. Motion for new trial denied. Judgment for State. Case remanded for sentence.

Alexander A. LaFleur, Attorney General,
Neal A. Donahue, Asst. Attorney General,
Edward J. Beauchamp, for State.

Benjamin J. Arena,
Frederick Keany, for Defendant.

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

MERRILL, C. J. On exceptions and appeal. At the September 1952 Term of the Superior Court in Androscoggin County the respondent, Samuel Rainey, was arraigned, entered a plea of not guilty, was tried and found guilty of murder upon an indictment charging him with the murder of one Alex Yoksus, alias Alex York. The indictment in this case, except for the fact that it charged the respondent Rainey instead of one Carl R. Chase with the murder, is identical with the indictment against said Chase for the murder of said Yoksus, which indictment is set forth in full in our opinion filed this day in the case of *State of Maine* v. *Carl R. Chase.* To set forth the indictment herein would serve no useful purpose.

During said term of court, after verdict and before sentence, the respondent filed a motion in arrest of judgment which was denied by the presiding justice.

The respondent's Exception I is to the denial of his motion in arrest of judgment. The motion in arrest of judgment alleged two grounds therefor: (a) The indictment and the matters therein alleged, in the manner and form therein stated are not sufficient in law for any judgment to be rendered thereon. (b) The indictment is bad in that it does not allege a homicide was committed in the perpetration of the crime of robbery or the attempted perpetration of the crime of robbery by an accomplice. As to the latter ground, the respondent in his brief makes the following statement: "Respondent will not press this part of his exception because there is no merit in it." In this he arrived at a sound conclusion. The exception to the denial of the motion in arrest of judgment on ground (a) is fully disposed of by our opinion filed this day in the case of *State* v. *Chase.* There is no merit in it. Exception I is therefore overruled.

Exception II was to the admission of certain photographs of the body of the deceased. Photographs of a dead body, although gruesome, if accurate are admissible in the discretion of the trial court, and unless there is an abuse of judicial discretion no exception lies thereto. *State* v. *Stuart,* 132 Me. 107. See also *State* v. *Turmel,* 148 Me. 1. These photographs met the test. There is not the slightest evidence in the case even tending to indicate that there was abuse of discretion on the part of the presiding justice in the admission of these photographs. Exception II is overruled.

Exception III is as follows:

> "Testimony given by Captain Francis G. Wilson of the Homicide Unit, Boston Police Department, as a result of an alleged conversation with the respond-

> ent of alleged acts not connected with the crime of which he was charged was improperly admitted, over objection. See pages 166 to 168 of the transcript of the Evidence."

By a footnote in the record pages 166 to 168 of the transcript are identified as pages 269-272 of the record.

The bill of exceptions standing alone without reading the pages of the record is unintelligible. The testimony objected to was the relation by Captain Wilson of statements made by the respondent relative to the purpose of coming to Maine with Chase with whom he was associated in the robbery and murder of Yoksus. A recital of the four pages of testimony and the running fire of comment by counsel therein with respect thereto would serve no useful purpose. Suffice it to say that we have read the same carefully and there was no error on the part of the court in either receiving the testimony or refusing to strike the same from the record. Exception III is overruled.

Exception IV was to the denial by the presiding justice of respondent's motion to direct a verdict of not guilty. This motion was made at the close of the State's case. After the denial of the motion, and exception thereto, the respondent did not rest his case but offered himself as a witness, took the stand, and testified in his own behalf. Although counsel for the respondent now states in his brief that he does not press this exception, the failure to rest the case and the introduction of evidence in defense waived the exception. *State* v. *Johnson,* 145 Me. 30; *State* v. *Shortwell,* 126 Me. 484, 487. Exception IV is dismissed.

After denial of the motion in arrest of judgment and exceptions thereto, the respondent was sentenced to life imprisonment. Thereafterwards, the respondent filed a motion that the verdict be set aside and a new trial granted, alleging therein that the verdict was against the law and the charge of the justice; that it was against evidence; that it was manifestly against the weight of evidence in the

case; and that there was a variance between offense charged in the indictment and evidence adduced at the trial. This motion was denied and the respondent appealed from the denial thereof to this court.

As will be hereinafter shown, the justice presiding was without authority to impose sentence pending exceptions to this court. R. S. (1944), Chap. 135, Sec. 29. The sentence having been imposed without authority we need not meet the question as to whether or not a motion for a new trial must be filed before sentence. The justice could not deprive the respondent of his right to file the motion by the unauthorized imposition of sentence.

By considering the motion for a new trial in this case and the appeal therefrom, we do not intimate any opinion as to whether or not in cases not punishable by imprisonment for life, motions for a new trial on the grounds contained in the instant motion must be filed before sentence. That question we reserve for decision if and when a case involving the same be presented to us.

The respondent's appeal from the denial of his motion for a new trial must be dismissed and the motion for the new trial denied.

The indictment in this case charges that the respondent Rainey murdered Alex Yoksus. The evidence discloses that Yoksus was shot and killed by one Carl R. Chase during the progress of an armed robbery. The respondent was indicted, tried, and convicted as one who, although he did not fire the shots which killed Yoksus, was present, aiding, abetting, and assisting Chase in the commission of the robbery, a felony, and who because thereof was a principal in the murder committed by Chase during the commission of the robbery. As we said in *State* v. *Priest,* 117 Me. 223, 231, 232:

> "No principle of criminal law is more firmly established than this, that when two persons combine

> and conspire together for the common object of robbery and in pursuance of that object one of them does an act which causes the death of another both are regarded as principals and both may be convicted of murder. The State need neither allege nor prove that the respondent used the weapon with which the killing was done. 13 R.C.L., 729; *People* v. *Friedman,* 205 N.Y., 55, 45 L.R.A.N.S., 45, and note; *People* v. *Lawrence,* 143 Cal., 148, 68 L.R.A., 193, and note; *State* v. *Smith,* 32 Maine, 369; *State* v. *Smith,* 33 Maine, 48."

It is a well settled rule of law in this State that all persons who are present, aiding, abetting, and assisting a person to commit a felony are principals and may be indicted as such. *State* v. *Flaherty,* 128 Me. 141; *State* v. *Saba and Korbett,* 139 Me. 153. In this latter case we said:

> "The proper rule of law is that to constitute one as a principal in the commission of a felony, he must be proved to be present either actually or constructively at the time and place it was committed. The issue of actual presence is necessarily simple. The limits of constructive presence are more or less uncertain. In *Commonwealth* v. *Knapp,* 9 Pick., 496, 20 Am. Dec., as in 16 C.J. 126, Par. 114-b, and 22 C.J.S. 154, Par. 86-b, illustrations are given which indicate that one who is watching at a proper distance and station 'to prevent a surprise' or 'to favor, if need be, the escape of those . . . immediately engaged' may properly be considered as constructively *'present, aiding and abetting.'* "

An examination of the record of this case establishes that the jury were justified by evidence of sufficient weight to convince them beyond a reasonable doubt that the respondent not only conspired with Chase to commit the robbery, during the perpetration of which Yoksus was killed by Chase, but that he was present, aiding, abetting and assisting Chase in the perpetration of the robbery and was taking an active part therein.

The murder took place in the small hours of the morning in the kitchen of a restaurant operated by Yoksus. The re-

spondent, together with Carl R. Chase and two other companions, one a woman with whom he had come to Lewiston from Boston, went to the restaurant after the bar closed at the Paramount Hotel where they were staying. The four of them entered the restaurant. Chase and the respondent sat at the counter and the other two sat at tables. After they had had a drink, and after the female companion had danced, they went outside and to the automobile in which they had come to the restaurant. Chase moved the automobile from where it was to a location a short distance beyond the restaurant. He left the engine running and put out the lights of the car. He called for a gun that was on the heater in the car and passed it to the respondent. Chase made known to the respondent his purpose to hold up the restaurant. They entered the restaurant together. After entering the restaurant, making an excuse about wanting to see that the fat was trimmed off a sandwich which he had ordered, Chase started from the dining room into the kitchen, telling the respondent to take out his gun and stand by the door. A few moments later there were two shots in the kitchen followed by two more. Upon hearing the first shots the respondent drew his gun and told people in the dining room not to move and they wouldn't get hurt. The first shots in the kitchen were fired by Chase at a dog which was set upon him by the proprietor after Chase had made a demand for money. The second shots were fired at the proprietor of the restaurant, Yoksus, and were the ones which killed him. The killing of Yoksus was murder beyond any doubt. On this evidence the jury were well warranted in finding that the respondent and Chase were participating in a common design to rob the restaurant. Both of the men were armed, although the respondent claims that his revolver was not loaded. The respondent shared in the proceeds of the robbery. The jury were not naive enough to believe the contention of the respondent Rainey that he was not a participant performing his part in the robbery during which and as a

part whereof Yoksus was killed. Neither is this court. A person who *participates* in armed robbery must be prepared to take the consequences of his action as a joint principal in any murder which is committed by his companion during the progress of the robbery. The verdict of guilty in this case was a just one, well warranted by the evidence. Any other verdict would have been a travesty of justice. The appeal must be dismissed and the motion for new trial denied.

In this case as in the case of *State* v. *Chase,* the court imposed sentence upon the respondent notwithstanding the pendency of his exceptions and appeal. This, for the reasons stated in *State* v. *Chase,* was beyond his authority. R. S. (1944), Chap. 135, Sec. 29. Sentence must be imposed anew. The mandate is

Exceptions I, II and III overruled.
Exception IV dismissed.
Appeal dismissed.
Motion for new trial denied.
Judgment for the State.
Case remanded for sentence.

STATE OF MAINE
vs.
ARNOLD VOGL, EDITH VOGL AND ERNA FISHER,
CO-PARTNERS IN TRADE UNDER NAME OF
RIVIERA PACKING COMPANY

Kennebec. Opinion, July 16, 1953.

Taxation. Statutes. Avoidance. Fish Packing.

The Sardine Tax Law, requiring the assessment of a tax upon processed cases of "15-ounce oval cans," (P. L., 1951, Chap. 2) cannot

be avoided by putting an extra ounce into the contents of each can, since it was intended by the Legislature to place the tax upon "cans built for, and capable of containing approximately one pound."

The labels placed upon the cans are not controlling; the legislative will cannot be thwarted by legerdemain.

In construing a statute, technical or trade expressions should be given a meaning understood by the trade or profession.

ON REPORT.

This is an action of debt to recover a tax levied under R. S., 1944, Chap. 14, Sec. 244-254. (P. L., 1951, Chap. 2.) The case is before the Law Court upon agreed statement and a stipulation. Judgment for the State for $9,867.25 with interest and costs.

Alexander A. LaFleur, Attorney General,

Boyd L. Bailey,

Myles P. Frye,

Asst. Attys. General, for plaintiff.

Woodman, Skelton,

Thompson & Chapman, for Defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ. MURRAY, A. R. J.

FELLOWS, J. This is an action of debt brought by the State of Maine in the Superior Court for Kennebec County against the defendants, co-partners doing business under the firm name of Riviera Packing Company, to recover a tax on cases of sardines. The defendants filed a brief statement with the plea of general issue stating that no can used is designated a "15-ounce oval" and that the net contents of all oval cans packed by the defendants weighed one pound or more. The case comes to the Law Court on report. The court is to determine the legal rights and to render final judgment.

The issue is agreed to be this: Are the one pound cans packed by the defendants in 39,469 cases "15-ounce oval cans" within the meaning of Subsection III of Section 245 of Chapter 2 of the Public Laws of Maine 1951? If it be determined by the court that the cans packed by the defendants are "15-ounce oval cans" within such meaning, the defendants are subject to tax, and judgment shall be for the State in the sum of $9,867.25 with interest and costs. If it is determined that the cans are not "15-ounce oval cans" within such meaning, judgment shall be for the defendants with costs.

The principal facts agreed upon are that the defendants, Arnold Vogl, Edith Vogl, and Erna Fisher, are residents of Eastport, in the County of Washington, and are engaged in business as packers of sardines for sale as copartners under the firm name of Riviera Packing Company, and were engaged in such business during the period February 8, 1951 through October 4, 1952, both dates inclusive.

Ernest H. Johnson was and now is, the State Tax Assessor, and charged with the duty of administering the provisions of Sections 244-254 of Chapter 14, R. S., as enacted by Chapter 2 of the Public Laws of 1951, entitled "An Act to Provide for a Self-Imposed Tax on Sardines for An Industry Development Fund."

During the period February 8, 1951 through October 4, 1952, the defendants packed for sale 39,469 cases of sardines of 48 cans per case, in oval cans. The oval cans are flat cans, so-called, oval in shape, of approximately the following dimensions: 6½ inches long at their longest part, 4½ inches wide at their widest part and 1½ inches deep. The oval cans are manufactured by the American Can Company which produces only one size can of these dimensions, which were billed by American Can Company as "1# ovals." the symbol # means, according to Webster's New International Dictionary, Second Edition, "Pound," and the

cans are sold by the American Can Company as one pound cans. The same size, shape and kind of can is used for a 14-ounce, 15-ounce or 16-ounce or more, pack.

Within the sardine trade, at the time of enactment of Chapter 2, P. L., 1951 and thereafter, these cans have been termed "large ovals," "1-pound ovals," or "No. 1 ovals." There has been no oval can of a larger size used to pack sardines. The next smaller size oval can used for packing sardines was 6 inches by 3⅝ inches by 1¼ inches, and had a capacity of approximately one-half the oval cans in question here. These smaller cans are exempt from the tax. The defendants purchased the oval cans in issue from the American Can Company. The net weight of a single oval can when filled with sardines and packing media, will vary with the size of the fish packed, and the method of processing the fish before going into the cans. For example, the same can with light weight herring may yield only a net weight of 14 ounces, while a can filled with medium sized herring will produce a net weight of 16 ounces or over. The weight of the contents of a can will not be less than shown by the labels placed upon cans. For example, a light can may be labeled 14 ounces with contents of actual weight of 14.2 ounces, a heavier can 15 ounces or 16 ounces with contents of actual weight of 15.1 ounces and 16.3 ounces respectively. Or, as is true of part of the defendants' pack, a can may be labeled 15 ounces and actually contain over 16 ounces.

There are many types of containers used in the packing of sardines, such as: ¼ size, ½ pound ovals, ¾ size, 1 pound, 5 ounce or baby talls, and No. 1 or large talls. The method of processing and the ingredients used in the packing vary greatly. Thus, the contents of a ¼ size can may be labeled 3¼ ounces rather than 4 ounces; that of a ¾ size may be labeled 10 ounces rather than 12; or there may be different weights. And a 1# oval may be labeled 14 ounces, 15 ounces or 16 ounces, depending upon its contents.

The net weight of the above-mentioned oval cans packed by the defendants was 16 ounces each or over. However, part of the total number of cases of oval cans noted above, were labeled 15 ounces by the defendants. This was done for reasons of economy, as the defendants were using up labels which they had in stock from previous years and private labels for export firm customers for use in the export trade. When old labels were used up, new labels were adopted designating the quantity of the contents as "Net Contents 1 Lb."

The defendants paid no tax on the 39,469 cases of oval cans under the provisions of Chapter 2 of the Public Laws of 1951.

On October 15, 1952, Ernest H. Johnson, State Tax Assessor, assessed a tax in the sum of $9,867.25 upon the 39,469 cases of oval cans, packed for sale by the defendants, for the period of February 8, 1951, through October 4, 1952, inclusive. This assessment was made by the State Tax Assessor acting under the provisions of Chapter 2, P. L., 1951, and on the basis that the cases of oval cans consisted of "48 cans of 15 ounce oval cans" as specified in Subsection III of Section 245, Chapter 2, P. L., 1951. The assessment was certified to the defendants on October 17, 1952, and demand made for payment.

The defendants have maintained that the pack of oval cans were not subject to tax under the statute because they claim they were 1-pound ovals and not 15-ounce oval cans, and therefore have not paid assessment or any part thereof.

The Sardine Tax Law, Sections 244-254, inclusive, Chapter 14, R. S., added by Chapter 2, P. L., 1951, requires the State Tax Assessor to assess a tax of $.25 a case upon the privilege of packing sardines. The statute defines "case" of sardines so that only three described kinds are taxable: Cases of "one-quarter size cans," cases of "three-quarter size cans," and cases of "15-ounce oval cans."

The sole issue is whether the cans used were "15-ounce oval cans" within the meaning of Section 245, Chapter 14, R. S., 1944, enacted as Chapter 2, Public Laws, 1951. There is only one size of oval cans in which it is possible to pack 15 ounces of contents and that is the size the defendants used. But the defendants claim they have avoided tax liability by putting into these cans an extra ounce of fish.

The pertinent statutory sections, all added to Chapter 14, R. S., 1944, by Chapter 2, P. L., 1951 are:

> **Sec. 246.** ". . . An excise tax of 25c per case is hereby levied and imposed upon the privilege of packing sardines . . . ."
>
> **Sec. 245.** ". . . A 'case' of sardines shall mean:
>
> **I.** 100 *one-quarter size cans* of sardines packed in oil, mustard or tomato sauce, or any other packing medium;
>
> **II.** 48 *three-quarter size cans* packed in tomato or mustard sauce;
>
> **III.** 48 cans of 15-ounce oval cans packed in mustard or tomato sauce, or any other packing medium." (Underlining supplied.)

To the agreed statement of facts, signed by counsel for the parties, are annexed the invoices, or contracts, with, and letters from, the American Can Company, manufacturers of practically all the cans used by the Maine sardine industry, and a statement from the U. S. Department of Interior, which exhibits show that the defendant purchased of American Can Company "#1 Oval Open Top — seamless; 607 x 406 x 108 — for Sea Herring, mustard or tomato pack." The American Can Company manufactures only one size oval can approximately 6½ x 4½ x 1½ inches. The American Can Company's letter, which was also made a part of the agreed statement, indicates that within the sardine industry, "large ovals," "1-pound ovals" and "15-ounce ovals" are used interchangeably.

The letter from the Department of the Interior, made a part of the agreed statement, says: "The oval can which is used in the sardine industry in both Maine and California has a calculated capacity of approximately 15 ounces, and is generally known in the trade as the 'No. 1-oval' or the 'One-pound oval.' The phrase '15-ounces net' is used in our statistical data to indicate the approximate net weight of the contents of a can rather than to designate the can size. Since the statute referred to in your letter uses the terms '100 one-quarter size cans' and '48 three-quarter size cans' in defining 'case,' it would appear that the term '48 one-pound oval cans' should also have been used as a matter of consistency instead of '48 cans of 15-ounce oval cans.' Items I and II define 'case' in terms of can size whereas Item III defines 'case' in terms of can and its contents."

According to a list published by the National Canners Association in its booklet, "Modern Labels for Canned Foods (October, 1951)" made a part of agreed statement, the "No. 1-oval can" has a capacity of approximately 15 ounces for sardine products. However, it is not required that exactly this weight of contents be used. This is indicated from the following excerpt which is taken from the above-named booklet.

> "Federal and various State laws require that a statement of net contents be given on the label. None of these laws specify what the weights shall be. There is a general requirement that the can be as full as practicable, but for any given product there may be small differences in fill which will affect the net weight or volume. Therefore, it is not possible to recommend or require a fixed weight that will cover all degrees of legal fill."

It is to be noted from the above statute that the excise tax of twenty-five cents is per case. It was not a tax on all sardines or all cases of sardines, but only on sardines that were packed in certain types of containers. See *Subsections I, II and III of Chapter 14, Revised Statutes 1944, Section*

245, as enacted by Chapter 2 of the Public Laws of 1951. Subsection I places a tax on a case of 100 one-quarter size cans, Subsection II places a tax on 48 three-quarter size cans, and Subsection III provides for a tax on 48 cans of *15-ounce oval cans.* As set forth in the agreed statement, there are several other types of sizes of containers, and the types vary greatly, but the Legislature saw fit to tax only those cases of sardines packed in the containers described in Subsection I, II, and III as above stated.

In this case the State claims that the cases of defendants' pack are taxable under Subsection III as "15-ounce oval cans." The defendants claim that they are not. The defendants state in their brief: that the defendants are not only presumed to know the law, but that the defendants did know the law, having been active in the industry for many years. The defendants further say in their brief that, if they packed 15-ounce ovals, they knew they had to pay a tax of $.25 per case; if they packed something that was not included in Subsections I, II, and III, they knew there was no tax. They therefore packed 16 ounces instead of 15 ounces in each can. The defendants say that twenty-five cents per case represents a substantial additional cost to the packer per case, and the defendants ask "is it reasonable to believe that they would voluntarily place this additional cost on their packs?" In other words, the defendants say that they would not do anything to impose a tax on themselves, when they believed that there was no tax on a case of one-pound oval cans, and a tax of 25 cents on a case of 15-ounce oval cans. They say that every can they packed, that is involved in this litigation, was especially processed so that the contents of every can contained at least 16 ounces, net weight. They intended to pack, and did pack "one-pound ovals," and sold them as such. They say they did not pack "15-ounce oval cans" that the statute specifies.

This statute, now in question, enacted as Chapter 2 of the Public Laws of 1951, was passed by the Legislature at

the request of many in the sardine industry for the purpose of raising money from sardine packers to be spent for advertising Maine sardines. The question of the constitutionality of the act is not raised by the defendants. On the contrary, counsel for defendants stated in argument that not only is the question not raised, but he also urged that the constitutionality be in no manner considered. The court therefore in this case passes only upon the construction of the statute and does not consider any constitutional question or questions that perhaps might be raised.

The foregoing portion of this opinion contains the principal facts in the extensive "agreed statement of facts," as well as the claims and contentions of the parties relative to the construction of the statute in question.

The court must determine the intent of the Legislature when it enacted Chapter 2 of the Public Laws of Maine 1951. *Acheson et al.* v. *Johnson,* 147 Me. 275, 280.

What did the Legislature intend to accomplish? It is plain that it did not intend to tax the cases of sardines made up of sizes other than mentioned in Subsections I, II and III, whatever may have been its reason for omission to tax them. In the legislative mind, was "15-ounce oval can" and "one-pound oval can" synonymous? In arriving at legislative intent, did the two terms mean the same, and were they so recognized in the sardine trade? It is not a question as to whether the defendants did, or did not, seek to evade the law. It is a question of the legislative intent, and whether the 39,469 cases of sardines, admittedly packed by the defendants, were taxable under the terms of Subsection III of this statute as being cases of "48 cans of 15-ounce oval cans."

It is the opinion of the court that there can be no valid reason to doubt what was the intention of the Legislature. The statute is not ambiguous. The Legislature clearly intended to tax cases of sardines in three instances only, based

upon the number and size of the cans in the case. The cans were to be cans built for, and capable of containing, approximately one pound (Subsection III), or approximately twelve ounces (Subsection II), and approximately four ounces (Subsection I) whatever they may have been labelled and whatever (more or less) net amounts of fish were actually contained in the respective cans. It was in fact agreed by the parties that "a 1# oval may be labelled 14 ounces, 15 ounces or 16 ounces."

The defendants claim that the Legislature did not say "one-pound cans." The defendants packed one-pound cans. The defendants claim that the phrase "15-ounce oval cans" is not the same as "one-pound cans." They claim that they are therefore not taxable.

While statutes should be construed according to their plain import without regard to other legislative acts, *Ingalls* v. *Cole,* 47 Me. 530, it is interesting to note (and it might have been an aid to construction of this statute had it been ambiguous) that the Legislature of 1949 in Chapter 248, Public Laws of Maine 1949, in "An Act Relating to the Packing of Sardines," used the words "15-ounce oval cans" in the emergency preamble, "1-pound oval cans" in Section 1, and "15-ounce oval can" in Section 3. The Legislature in 1949 evidently recognized, and used, the two phrases as meaning the same. The court notices also, that the Legislature of 1953 in an emergency measure now in effect (Section 7, Chapter 171, Public Laws 1953), speaks of #1 oval can, "commonly known as a 1-pound or 15-ounce oval can." See generally, 36 Cyc. "Statutes," 1142, Sec. A, 6, IV, 59 Corpus Juris "Statutes," 1050, Sec. 620. See also 50 Am. Jur. "Statutes," 255, Sec. 265, and cases cited.

Were the contentions of the defendants valid, it would absurdly follow that if the defendants had packed and labelled these #1 ovals or 15-ounce oval cans "15¼ ounces," they would not be taxable. The court sees no magic in any

such deviations, and the legislative will cannot be thwarted by legerdemain.

According to the agreed facts, and the exhibits made a part of the evidence, persons in the sardine trade and manufacturers of sardine cans, would clearly understand what was meant if they were asked for a "15-ounce can" or if asked for a "1-pound oval." In either event, the purchaser would receive the same kind and size of can. He would receive the same can. The American Can Company makes only one kind of this approximate size. The defendants themselves, if they were asked to sell a "1-pound oval" or a "15-ounce oval" would certainly give the purchaser the same can. They admittedly labelled some of these cans 15 ounces and some 16 ounces.

In construing a statute, technical or trade expressions should be given a meaning understood by the trade or profession. *Portland Terminal Co.* v. *Railroad,* 127 Me. 428, 144 A. 390; 50 Am. Jur. "Statutes," 265, Section 277; *Conductors* v. *Swan,* 329 U. S. 520, 91 L. Ed. 471, 67 Sup. Ct. 405; *Sweeney* v. *Dahl,* 140 Me. 133; 59 Corpus Juris "Statutes," 979, Secs. 577, 578.

It is the considered opinion of the court that the cans packed by the defendants and sold as 1-pound cans, in the 39,469 cases, were "15-ounce oval cans" within the meaning of Subsection III of Section 245, Chapter 14, Revised Statutes 1944, enacted by Chapter 2, Public Laws of 1951. In accordance with stipulation of the parties, judgment must be for the State in the agreed amount, with interest and costs. The entry will, therefore, be

Judgment for the State for $9,867.25 with interest and costs.

MARGARET HUGHES

vs.

SINGER SEWING MACHINE CO.

Cumberland. Opinion, July 30, 1953.

Pleading. Demurrer. Damages.

A special demurrer must be technically sufficient. The specific defect relied upon must be pointed out in the special demurrer.

A general demurrer is bad if any part of the declaration sets forth a good cause of action.

The addition of an improper element of damage will not destroy a declaration otherwise sufficient.

ON EXCEPTIONS.

This case is before the Law Court upon exceptions to the sustaining of a special demurrer. Exceptions sustained. Demurrer overruled.

Udell Bramson, for plaintiff.

Berman, Berman and Wernick, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ. MURRAY, A. R. J.

WILLIAMSON, J. Exceptions by the plaintiff to the sustaining of defendant's special demurrer must be sustained. The ruling by the presiding Justice in the Superior Court was based upon the third ground of the demurrer which reads:

> "(3) That the Plaintiff's declaration sets forth damages which are not recoverable under any of the allegations contained therein."

The declaration follows:

> "In a plea of the case for that the said defendant corporation, by and through its agents and ser-

> vants, at Portland, on the thirtieth day of August, 1951, wilfully, maliciously and wantonly took and carried away the goods and chattels of the plaintiff, to wit: one sewing machine, of the value of one hundred (100) dollars, and also maliciously, wilfully and wantonly caused the plaintiff to suffer mentally and physically by the fright occasioned by the defendant corporation by and through its agents and servants while committing the trespass. And the plaintiff further avers that her reputation for honesty in paying her bills, her credit standing in the community, and the plaintiff's general reputation in the community was damaged. The plaintiff further avers that, as a result, she suffered humiliation, indignity and insult. The plaintiff further avers that, in addition to compensatory damages, she is entitled to punitive and exemplary damages because of the trespasses complained of, as above set forth were malicious, wilfull and wanton, to the damage to the plaintiff as she says, $3,000.00"

The third ground of the demurrer, which is the only ground we need consider, does not, it is to be noted, point out in detail what damages set forth in the declaration are not recoverable. *Jellerson* v. *Police of Biddeford,* 134 Me. 443, 447, 187 A. 713. The defendant has done no more than say that of four types of damage, one or more are not recoverable.

In argument the defendant does not object to damages for the value of the sewing machine or punitive damages. The error urged is that the plaintiff seeks to recover for damage from fright and to her reputation. From the demurrer, however, it is impossible to tell which one or more of the claims for damage the third ground of the special demurrer is intended to reach.

A special demurrer must be technically sufficient. The specific defect relied upon must be pointed out, not in argument as here, but in the special demurrer. It is too late to present the objections for the first time in argument either

in Superior Court or the Law Court. In *Ryan* v. *Watson, Sheriff, &c,* 2 Me. 382, at page 385, the court said: "The special demurrer is also fatally defective in not *pointing out minutely wherein the pleas are double and argumentative,* if they are so." *Neal* v. *Hanson,* 60 Me. 84; *Glidden* v. *Bath Iron Works,* 143 Me. 24, 54 A. (2nd) 528; *Reynolds et al.* v. *Hinman Co.,* 145 Me. 343, and cases cited on page 345, 75 A. (2nd) 802; 41 Am. Jur. 451, Pleading, Sec. 226; 71 C. J. S. 421, Pleading, Sec. 212.

The defendant gains nothing from the principle that a special demurrer includes a general demurrer. *Glidden* v. *Bath Iron Works, supra; Scott* v. *Whipple,* 6 Me. 425; *State of Maine* v. *Peck,* 60 Me. 498; 71 C. J. S. 421, Pleading, Sec. 212.

A general demurrer is bad if any part of the declaration sets forth a good cause of action. *Blanchard* v. *Hoxie,* 34 Me. 376; *Martin's Notes on Pleading,* 6 Me. Law Review, 107, 173 (1913). The addition of an improper element of damage will not destroy a declaration otherwise sufficient. 15 Am. Jur. 752, Damages, Sec. 310; 41 Am. Jur. 446, Pleading, Sec. 219; 25 C. J. S. 750, Damages, Sec. 130; 71 C. J. S. 463, Pleading, Sec. 235. See also *Herrick* v. *Publishing Co.,* 120 Me. 138, 113 A. 16, 23 A. L. R. 358, in which a general demurrer was sustained to a declaration under which the only type of damage sought could not be recovered and hence no cause of action was thereby stated. Thus, whether the demurrer here is to be treated as a special demurrer reaching only specific defects or as a general demurrer found within a special demurrer, the issues sought to be raised by the pleadings neither were properly before the presiding justice nor are they before us on exceptions.

The objections of the defendant should be ruled upon in the course of trial. By the lack of particularity in the demurrer, the defendant has lost only its right to the judgment of the Law Court before trial. It retains the oppor-

tunity to raise the issues after trial by exceptions to rulings below in the event of an adverse result; for examples, see *Goddard* v. *Grand Trunk Railway,* 57 Me. 202, 2 Am. Rep. 39, and *Wyman* v. *Leavitt,* 71 Me. 227, 36 Am. Rep. 303.

Exceptions sustained.

Demurrer overruled.

LORRAINE PALOW (KITCHIN)
vs.
HAROLD KITCHIN

Kennebec. Opinion, August 1, 1953

Divorce. Support. Children. Military Service. Class Q Allotment. Counsel Fees.

Where a father is ordered by divorce decree to contribute to the mother for support of the child, the decree is a substitute for his common law obligation.

The provisions of the Federal Statutes relative to allotments to dependents of persons in the Armed Services are not a substitute for the common law liability of the father to support his dependents nor do they terminate his liability so to do when the same is fixed and measured by a decree of a court of competent jurisdiction. (37 U. S. C. A., Chap. 4, Secs. 231-232; 37 U. S. C. A., Chap. 2, Secs. 201-221.)

Counsel fee orders are provided for by R. S., 1944, Chap. 153, Sec. 63, as amended by P. L., 1947, Chap. 321.

ON EXCEPTIONS.

This case is before the Law Court on exceptions to a decree ordering execution to issue for unpaid installment of support and counsel fees. Exceptions overruled.

Cratty & Cratty, for plaintiff.

Jerome G. Daviau, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ. MURRAY, A. R. J.

TIRRELL, J. On Exceptions by respondent.

This is a petition addressed to a Justice of the Superior Court for execution to issue against the respondent in the amount of $90.00 alleged to be overdue the complainant under a support order incident to a divorce decree.

The facts are as follows:

The Superior Court for Kennebec County at its October Term 1950 and on October 3, 1950 granted Harold Kitchin, here respondent, a divorce from Lorraine Kitchin, now Lorraine Palow, here complainant; granted custody of two minor children to Lorraine Kitchin aforesaid, and Harold Kitchin aforesaid was ordered to pay Lorraine Kitchin the sum of $15.00 per week for the support of the minor children. This decree was in effect on the date of the petition and at the time of hearing before the Justice of the Superior Court.

The support order was complied with by respondent until he entered military service on January 31, 1951, at which time, as part of the administrative procedure incidental to his induction, he was informed of his right to authorize an "allotment of pay" for the benefit of his dependents (two minor children) and did so authorize an allotment which, under then current United States statutes and regulations of the Department of the Army was known as a Class "Q" allotment and which amounted to $107.50 per month.

This amount was composed of $40.00 deducted from the soldier's pay and $67.50 from the Government as an allowance for "quarters" for the dependents.

The soldier's pay was $78.00 per month for the first four months of service, then $83.20 until he should have completed two years. This is known as "base" pay and is applicable to the soldier in grade of "private."

Complainant received the amount of $107.50 monthly from "the time Harold went into service" until about June 1, 1952.

About June 1, 1952 (as of May 19, 1952 effective May 1, 1952) the government's portion of this Class "Q" allotment was increased to $77.10 monthly, making a total allotment of $117.50 monthly.

> See Act popularly known as "Career Compensation Act of 1949" effective October 1, 1949 and under Title 37 United States Code Annotated, Chapter 4, Secs. 231-322, which superseded act popularly known as "Servicemen's Dependents Allowance Act of 1942" providing for wartime allowances to servicemen's dependents, repealed October 12, 1949, effective October 1, 1949, and which appeared under Title 37 U.S.C.A., Chapter 3, Secs. 201-221.

Complainant received the amount of $117.10 monthly from about June 1, 1952 to February 7, 1953 when she received the allotment check for January 1953.

Respondent was promoted to the grade of Corporal in November 1951. This would bring an increase in his base pay.

Respondent was released from military service on January 24, 1953. Complainant has received no money from respondent since the February 7, 1953 above recited.

Complainant contends that respondent is in default of his obligation under the subsisting decree from February 1, 1953 to the date of her petition (March 17, 1953), a period of six weeks at $15.00 per week, a total of $90.00, and asks execution therefor.

The basic dispute between the parties is over the application of $972.80. This is the sum by which the total amount received as an allotment ($2,877.80) exceeded the total amount of payments accrued under the support decree ($1,905.00) to the date of the petition.

Respondent contends that the total amount received as an allotment should be credited against the amounts due and to become due under the decree, and that on this basis he has satisfied his obligation under the decree many weeks in advance.

On the other hand, the complainant contends that, although she should and did allow all sums received as an allotment, both those deducted from respondent's pay and those allowed by the government, against the payments due under the decree during the time when the respondent was in service and as they accrued, the surplus received by her was received for the benefit of the children, and did not constitute prepayment of amounts to accrue under the decree after the respondent's service ended.

The justice hearing the petition sustained this contention of the complainant. He ordered execution to issue against the respondent as in an action of tort for the sum of $90.00. This was the amount of six payments which had accrued under the decree subsequent to the termination of the respondent's service and the termination of the period for which allotment was paid by the government. In addition thereto, the justice ordered the respondent to pay to the attorney for Lorraine Palow, the complainant, the sum of $35.00 as counsel fees for the prosecution of her petition, same to be paid not later than April 20, 1953, and that in default of payment that execution therefor as in an action of tort issue against the said respondent.

The respondent seasonably filed exceptions to these rulings as erroneous in law.

When the custody of a minor child is granted to the mother on divorce from the father, and the father is ordered to contribute to the mother for the support of the child, his common law obligation to support the child ceases and the obligation under the decree is substituted therefor. Until modified by the court, as it may be, the amount which the father is ordered to pay in such decree measures his duty to support the child. *Hall* v. *Green,* 87 Me. 122; *Harvey* v. *Lane,* 66 Me. 536; *Gilley* v. *Gilley,* 79 Me. 292; *Brow* v. *Brightman,* 136 Mass. 187; *Mahaney* v. *Crocker,* 149 Me. 76 (not yet reported).

The provisions of the Federal Statutes relative to allotments to the dependents of persons in the armed services (37 U. S. C. A. Chap. 4, Secs. 231-252; 37 U. S. C. A. Chap. 2, Secs. 201-221) are not a substitute for the common law liability of the father to support his dependents, nor do they terminate his liability so to do when the same is fixed and measured by a decree of a court of competent jurisdiction. As said in *Keen* v. *Goodwin,* 182 Pac. (2nd) (Wash.) 697, 699:

> "The most compelling reason for holding that the Federal statute did not supersede the court's decree, is that no law passed by state or Federal law-making bodies, can set aside, nullify, or modify a court's judgment. Appellant had a vested right in the decree allowing her two hundred dollars support money, and no power could take it from her, except the reserved right of the court to modify, as provided by state law in force at the time the decree was entered."

Although the Federal act relative to allotments was not a substitute for and did not in and of itself discharge the liability of the respondent under the decree of the Superior Court, it does not follow that the payments thereof when actually made, they being in sufficient amount therefor, did not discharge the liability which had already accrued under

the decree. In *Kipping* v. *Kipping,* 209 S. W. (2nd) (Tenn.) 27 at 29, it was held that the total amount of allotment, including both the amount deducted from the soldier's pay and that allowed by the government should, so far as necessary to discharge the same, be credited against the accruing liability under a court decree for support of the dependent.

In the case of *Hinton* v. *Hinton,* 199 S. W. (2nd) 591, it was held that the government allotments were not intended to increase the pay of enlisted men but to make provision for the support of their dependents while the men were in the armed services. In that case there was a court order requiring the enlisted man to pay $20.00 per month to his divorced wife for the support of his child. The government allotment was $42.00 per month, of which $22.00 was deducted from the pay which otherwise should have been paid to the soldier himself. As here the respondent claimed he had by means of the excess of the allotment above the court order overpaid the complainant. The court in that case said:

> "The allotment payments totaling $42 per month were not made under the divorce decree, but they were made nevertheless, and appellant should have credit therefor. They were made during the entire period of appellant's service in the army, and were in an amount sufficient to discharge his obligation to pay up to the time of his discharge from the army, so that he owed nothing when he was discharged from the army. But the obligation to pay $20 per month for the support of his child did not cease upon his discharge from the army. That obligation continued and now exists, and he should be charged with that amount since the date of his discharge. No allotment payments were made after November, 1945, and appellant should be charged with his child's support as provided in the decree, from that date."

In the instant case the Justice of the Superior Court was correct in ruling that the excess of the amount received

from allotments, over and above the payments due under the decree accruing for the same period as that for which the allotments were made, did not constitute a prepayment of amounts to accrue under the decree after the termination of the period for which the allotments were paid. The respondent's first exception avails him nothing.

The respondent in oral argument abandoned his exception to the allowance of counsel fees.

However, the ruling of the justice after hearing on the petition ordering payment of counsel fees to the attorney for the complainant is provided for by the statutes. R. S. (1944), Chap. 153, Sec. 63, as amended by P. L., 1947, Chap. 321. The exception to this ruling was without merit.

Exceptions overruled.

JOSEPH F. FEELY
vs.
EDWARD NORTON

Androscoggin. Opinion, August 4, 1953.

Negligence. Due Care. Speed. Proximate Cause.

The burden of establishing his own freedom from contributory negligence is upon the plaintiff. This burden is an affirmative one. Unless the plaintiff affirmatively shows that his conduct was such that no lack of due care on his part was one of the proximate causes of the accident he cannot recover.

Whether a certain speed under the surrounding circumstances is one which is negligent, and if so, in the event of the occurrence of an accident is the proximate cause of the same is ordinarily a question of fact for the jury.

Compare *Esponette* v. *Wiseman*, 130 Me. 297.

ON EXCEPTIONS.

This is a negligence action before the Law Court on exceptions to the direction of a verdict for defendant. Exceptions sustained.

John A. Platz, for plaintiff.

Robinson, Richardson & Leddy, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ. MURRAY, A. R. J.

MERRILL, C. J. On exceptions. This was an action to recover for injuries to the person and property of the plaintiff suffered in a collision of automobiles caused by the alleged negligent operation of his car by the defendant. At the close of the evidence the defendant moved for a directed verdict. This motion was granted. The case is now before this court upon plaintiff's exceptions to the direction of the verdict by the presiding justice.

Taking the evidence in its most favorable light for the plaintiff, as we must in cases of this kind, the jury could have found the following facts. The plaintiff and the defendant were each operating their respective automobiles. The collision took place upon a straight stretch of highway on the outskirts but not within the built-up section so-called of the town of Lisbon. The highway was new, smooth, and level with a macadam surface thirteen paces wide, divided in the center by a white line. Signs limiting the speed to thirty-five miles an hour had been erected under the direction of the Highway Commission at points several hundred feet east and west of the point of collision. The plaintiff was driving his automobile from Lewiston toward Lisbon. The defendant was driving his automobile from Lisbon toward Lewiston. At approximately the center of this straight stretch of highway and on the plaintiff's right hand

side thereof was the defendant's home. The defendant was on his way home from work in Lisbon. To drive into his driveway it was necessary for him to turn across the highway from the right hand lane thereof, in which he was travelling, to his left side of the highway. To do this it was necessary for him to cross the highway lane used by traffic coming from Lewiston toward Lisbon. Both parties were, until the defendant made his turn across the highway to enter his driveway, travelling in their respective right hand lanes of the highway. Both parties, so far as highway conditions were concerned on the day of the accident, had a clear view of oncoming traffic for a distance of at least one-quarter of a mile, with the defendant's driveway at approximately the middle thereof. The defendant travelling toward his home from Lisbon, without giving any signal of his intention so to do, turned directly across the highway in front of the oncoming automobile driven by the plaintiff. There is a conflict of testimony between the plaintiff and the defendant as to whether or not at the time the defendant turned across the highway his view of oncoming traffic was obscured by smoke from grass being burned beside the highway. For our purposes, however, we must accept the testimony of the plaintiff that there was no smoke which did or could have obscured the vision of either of the parties. There is also evidence from which the jury could have found that the defendant's attention was diverted by a dog or dogs outside the highway.

The plaintiff testified and we must, for the purposes of this case, accept his testimony as true, that just before he came to the town of Lisbon he saw the defendant's car on his, the defendant's, side of the road coming toward him; that the road was perfectly straight for more than a quarter of a mile; that between the defendant's car and the plaintiff's car there were no crossroads and no intersections whatever; that the plaintiff watched the defendant and concluded and was justified in so doing that the defendant was

going to proceed onward by the plaintiff; that as they came closer together the defendant suddenly turned to his left directly in front of the plaintiff, giving no hand signal or warning of any kind. Without estimating the distance between the two cars when the defendant turned, the plaintiff stated that he was very close to him; that he, the plaintiff, had nothing else to do but put on his brakes, which were four-wheel brakes in good working order, and pull his car to the right as far as he could and still stay in the road; this he did; the defendant kept on coming and his car hit the left rear end of the plaintiff's car which almost passed him; the plaintiff's car then went out of control, out of the road and rolled over, coming to a stop forty-six feet from the point of collision. This latter distance is based upon undisputed testimony of a State Police officer who measured the same.

From the point of collision leading back toward Lewiston there were tire burns on the surface of the road extending toward Lewiston a distance of slightly over one hundred feet. Although the plaintiff urges that whether these tire marks were made by his car is a question of fact for the jury, from the testimony in the case the conclusion is inescapable that the tire burns on the road were made by the plaintiff in braking his car prior to the collision. The plaintiff's car must have been at least a little more than one hundred feet distant from the point of collision when he applied his brakes upon seeing the defendant turn across the road.

To maintain his action the plaintiff must establish by a fair preponderance of the evidence that the accident was proximately caused by the negligence of the defendant and that no negligence on his part was to the slightest degree a proximate cause thereof. In other words, the plaintiff must prove the defendant's negligence and his own freedom from contributory negligence.

There was sufficient evidence in the case to make the defendant's negligence an issue of fact for the jury. This alone, however, did not require the submission of the case to the jury. Unless there was also sufficient evidence in the case to justify a jury in finding that no negligence on the part of the plaintiff was a proximate cause of the collision it was not error to direct the verdict for the defendant.

The burden of establishing his own freedom from contributory negligence is upon the plaintiff. This burden is an affirmative one. Unless the plaintiff affirmatively shows that his conduct was such that no lack of due care on his part was one of the proximate causes of the collision he cannot recover. Unless there was sufficient evidence in the case to justify the jury in making an affirmative finding that the plaintiff's conduct was free from negligence that contributed as a proximate cause of the collision, the action of the presiding justice must be sustained and the exceptions overruled.

The foregoing principles of law are so elementary that we need cite no authorities to support the same.

The plaintiff testified that he approached the scene of the accident driving thirty to thirty-five miles per hour. The defendant urges that the mute evidence of the tire burns and the distance which the plaintiff's car travelled after the collision absolutely refutes this estimate of speed given by the plaintiff. This contention of the defendant must be sustained. There is no evidence in the record from which it could be found that the plaintiff was driving his car at a speed not in excess of thirty-five miles per hour. On the other hand, this is not decisive of the propriety of the direction of the verdict for the defendant.

While the evidence of the tire burns on the surface of the highway and the distance which plaintiff's car rolled after being struck by the defendant's car is sufficient to establish

that the plaintiff was travelling in excess of thirty-five miles an hour, the rate which he was travelling was a question of fact for the jury. When determined by them it would be a further question of fact for them whether that rate of speed was excessive under the circumstances, and if excessive, whether or not it was a proximate cause of the injury. Whether or not the speed at which the car was being driven by the plaintiff was a proximate cause of the injury, or whether it was only a condition under which the negligence of the defendant became operative and effective as a proximate cause thereof was a question of fact for the jury.

In this case we are asked to rule as a matter of law, that because the plaintiff was driving his car at such a rate of speed that he could not stop the same within a distance of a little more than one hundred feet when attempting to do so by brakes in good condition, and because of the fact that after being struck on his left side his car rolled over and went forty-six feet, he has failed to offer any evidence from which the jury could find that he was in the exercise of due care on his part or that his own negligence did not in any way constitute one of the proximate causes of the accident. We cannot agree to this proposition. Whether or not he was driving at an unreasonable rate of speed, so that it constituted negligence on his part was a question of fact for the jury. Counsel for the defendant cites the case of *Esponette* v. *Wiseman,* 130 Me. 297 as conclusive upon this question.

The care required of plaintiffs and defendants alike is due care. Due care is that degree of care which the reasonably prudent man, that is, the man of reasonable prudence, *would* exercise under like circumstances. Whether or not the parties were in the exercise of due care is to be determined by foresight not by hindsight, although what they actually did may be determined from the evidence of circumstances existing after the accident.

Esponette v. *Wiseman* is an opinion written twenty-two years ago, since which time it is common knowledge that there have been great advances in the construction of motor cars and that speeds which were then unsafe and which would not be attempted by the ordinarily prudent man are now not only commonplace, but reasonably safe. By this we do not mean to palliate in any way or to any degree reckless or careless driving. Whether or not a certain speed under the surrounding circumstances is one which is negligent, and if so, in the event of the occurrence of an accident is a proximate cause of the same is ordinarily a question of fact for the jury.

The plaintiff in this case was driving upon a straight, open, level, wide stretch of new highway. He was not in a so-called built-up section. He saw the defendant when about a quarter of a mile distant proceeding toward him on his, the defendant's, own side of the highway. He continued to watch him as he approached. He saw no indication that the defendant intended to do other than proceed along the highway on his own side of the road. The jury could find that the plaintiff had a right to assume that the defendant likewise saw him approaching and that he would not attempt to turn across in front of him without seasonably signalling his intent so to do. The jury could find that this would be at such a distance prior to turning across the highway that the plaintiff would have had ample time to stop his car had such signal been given. If this were true, unless the jury found that the plaintiff was driving at such an unreasonable rate of speed that he could not have stopped his car had a proper signal been given by the defendant at a proper distance before making his turn, they would be justified in finding that the plaintiff's speed was not in any way a proximate cause of the accident. These were questions of fact for the jury and if found in the plaintiff's favor would have justified a verdict for the plaintiff.

The principles of law underlying automobile cases are simple. They are the ordinary rules of law governing negligence, contributory negligence, and proximate cause. Decisions in other cases are not particularly helpful because it is almost impossible to duplicate facts and surrounding circumstances.

The question of the plaintiff's speed as a proximate cause of collision has heretofore received little attention in the opinions of this court. In the case of *Esponette* v. *Wiseman* the court without discussion assumed that if the plaintiff was driving at an unreasonable speed it would amount to contributory negligence on his part. This is not necessarily so unless it is a proximate cause of the accident.

A very interesting case on excessive speed as proximate cause of the collision is *Butner* v. *Spease,* 6 S. E. (2nd) 808. In that case a passenger in one automobile sued the driver of that automobile and the driver of another automobile who, without warning, as did the defendant in this case, turned across the highway in front of the driver of the car in which the plaintiff was riding. In that case in holding that the driver of the car in which the plaintiff was riding was not liable although he was driving at a rate in excess of 45 miles an hour which was prima facie unlawful in that state, the court said:

> "Nevertheless, conceding the speed of the Butner car to be in excess of 45 miles an hour, and therefore prima facie unlawful, it is manifest that its speed would have resulted in no injury but for the 'extraordinarily negligent' act of the defendant Spease—in the language of Restatement of Torts, Sec. 447. Powers v. Sternberg, supra. Hence, the proximate cause of the collision must be attributed to the gross and palpable negligence of the driver of the north-bound vehicle."

It is a well known common law principle that a passenger in an automobile involved in a collision can recover from

the drivers of both of the cars if their negligence to the slightest degree contributes proximately to cause the accident. The driver in the Butner case was exonerated from liability even though his driving of the car was prima facie at an unreasonable speed because it was not a proximate cause of the collision. The same principle of law would allow the plaintiff in this case to recover even though he were driving at an unreasonable rate of speed, unless that unreasonable rate of speed was a proximate cause of the accident. Whether or not he was driving at an unreasonable rate of speed, and if so, whether or not it was a contributing cause to the collision were questions of fact for the jury and should have been submitted to them for their decision. The direction of a verdict for the defendant was error in law. The entry must be

Exceptions sustained.

WILLIAM STEARNS
vs.
WILLIAM W. SMITH

Knox. Opinion, August 4, 1953.

Negligence. Sidewalks. Pedestrians. Proximate Cause. Exceptions.

R. S., 1944, Chap. 19, Sec. 118-A presents questions of fact.

The question whether "sidewalks are provided and their use practicable" is a question of fact to be decided by a jury under R. S., 1944, Chap. 19, Sec. 118-A.

One violating R. S., 1944, Chap. 19, Sec. 118-A is not necessarily guilty of contributory negligence as a matter of law. There still remains the question whether the violation was the proximate cause of the accident.

The party who brings a case forward to the Law Court has the burden of submitting a sufficient and complete record. If a decision of the trial court rests upon evidence of "heres" and "theres" (drawn upon a blackboard not before the Law Court) exceptions would necessarily be overruled.

ON EXCEPTIONS.

This is an action of negligence. The case is before the Law Court on exceptions to the direction of a verdict for defendant. Exceptions sustained.

Domenic P. Cuccinello, for plaintiff.

Harry E. Wilbur, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ. MURRAY, A. R. J.

WILLIAMSON, J. This automobile accident case is before us on exceptions to the direction of a verdict for the defendant. In our view the case presents issues for the jury.

In brief, the record shows substantially the following situation:

The plaintiff, a pedestrian, was struck by a car driven by the defendant, on Route No. 1 in Rockland, a street or highway twenty feet in width and running generally east and west, with a sidewalk only on the north side. The plaintiff's home adjoins the street on the south. The accident took place after dark on a summer evening. There was no obstruction to the view of either the plaintiff or defendant, and no other traffic in the vicinity.

The plaintiff says that on observing the lights of defendant's car approaching at some distance from the east, he crossed from the sidewalk to the south side of the street, and after walking about fifteen feet "against traffic" westerly in the direction of his home and about two feet from the curb, was struck by the defendant's car. The defendant

and his wife, on the contrary, say that the car was at all times proceeding westerly in the westbound traffic lane, or north half of the street, at a low rate of speed and that the plaintiff suddenly "dashed out" from the sidewalk in front of the car.

The point of impact is placed by the plaintiff in the eastbound traffic lane, or south half of the street, within sixty feet of his home, and by the defendant and his wife in the westbound traffic lane almost directly across the street from the plaintiff's home.

We find nothing inherently improbable in the evidence for the plaintiff or for the defendant. Where the truth lies was for the jury to determine, unless the statute mentioned below compels a decision otherwise.

The defendant argues that the verdict was directed on the ground that the plaintiff was walking on the highway "where sidewalks are provided and their use is practicable" in violation of R. S., Chap. 19, Sec. 118-A.

In the recently decided case of *Hamilton* v. *Littlefield,* 149 Me. 48, this statute was for the first time before the court. We there pointed out that it presents questions of fact. Here there are two such questions.

(1) Was the use of the sidewalk by the plaintiff "practicable"? The jury must consider the time, the place, and the surrounding circumstances in reaching their conclusion.

(2) Assuming a violation of the statute, was the violation a proximate cause of the accident? One who breaks the statute in question is not necessarily guilty of contributory negligence as a matter of law. He does not thereby become an outlaw to whom no duty is owed by, and with no redress against, the motorist who injures him. The usual rules of causation remain applicable.

Much of the evidence centered about a diagram or "chalk" drawn on a blackboard by a police officer. There is testi-

mony so often found of a "street here," and "skid marks there." The diagram was not introduced in evidence. The record of a trial with its transcript of testimony, exhibits and photographs, cannot include the "chalk," not introduced in evidence, which ends with the use of an eraser. No more can the "chalk" be restored by an appellate court on study of the record, assuming, which is not the case, a duty to attempt such a difficult and unnecessary task.

The party who brings his case forward has the burden of submitting a sufficient and complete record. In the instant case, if the decision rested upon consideration of the "chalk" and the evidence of "here," and "there," the exceptions would necessarily be overruled. A simple plan, introduced as an exhibit, to which the evidence of places, often vital in a trial, may be related, has a value for the record far greater than a "chalk."

Exceptions sustained.

ROY C. KNAPP, APLT. FROM DECREE OF JUDGE OF PROBATE
LEWISTON AND AUBURN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, APLT. FROM DECREE OF JUDGE OF PROBATE
IN RE: ESTATE OF FRED E. KNAPP

Androscoggin. Opinion, August 11, 1953

Probate Court. Decrees. Distribution Accounts. Identity of Beneficiaries. Cy Pres. Equity. Exceptions. Fraud.

Erroneous decrees of the Probate Court upon matters within its jurisdiction, when not appealed from, may be conclusive; such decrees are in the nature of judgments and cannot be impeached collaterally.

The Probate Court has the power, upon subsequent petition, to vacate or annul a prior decree, clearly shown to be without legal foundation and in derogation of legal right, such as for fraud, perjury, forgery, discovery of a later will, etc.

Under R. S., 1944, Chap. 143, Sec. 21 the Probate Court determines who the individuals are to whom the testator gave the remainder of his property. The matter of identity of persons named under the statute is not a question of *cy pres*. There may be misnomer. (R. S., 1944, Chap. 140, Sec. 9.)

There are by virtue of two statutes two different courts, one a Probate Court, the other an equity court of special and limited authority (R. S., 1944, Chap. 140, Sec. 2; R. S., 1944, Chap. 143, Sec. 21).

The intention of the testator must be gathered from the language of the will.

When an executor or administrator has paid as required by decree, he may file an account, which may be a final discharge. There is no statutory obligation to file a distribution account.

There is no appeal from the Supreme Court of Probate. The case must go to the Law Court on exceptions.

A bill of exceptions must state the grounds of exception and cannot be construed like a coastal dragnet to be pulled over and through the record in the vain hope that the court may find some error caught therein.

Fraud must be shown by clear and convincing proof in order to justify the reopening of probate decrees.

ON EXCEPTIONS.

This is a petition to the Probate Court to annul and set aside a probate decree. After denial of the petition the matter was appealed to the Supreme Court of Probate where the decree was affirmed. The case is before the Law Court on exceptions to the decree of the Supreme Court of Probate. Exceptions overruled, in both cases.

Seth May,
Frank Powers,
John G. Marshall, for Roy C. Knapp.
Berman and Berman, for Lewiston and Auburn S.P.C.A.
Carl F. Getchell,
for Maine State Society for Protection of Animals
Charles F. Adams,
Israel Alpren, for Estate, Fred E. Knapp.
Ralph C. Masterman, for S.P.C.A., Hancock County.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ. MURRAY, A. R. J.

FELLOWS, J. These cases come to the Law Court on exceptions to the decision of a Justice of the Superior Court, sitting as the Supreme Court of Probate for Androscoggin County.

It appears that Fred E. Knapp died testate in 1944, leaving in the first clause of his will all his property to his wife, Lida A. Knapp, for her life, with power of disposal for her comfortable support and maintenance. Then follows the portions of his will that are the subject of this litigation:

> "Second, Subject to the first clause of my will, I give, bequeath and devise ten per cent (10%) of the residue remaining at my wife's decease, to the Stanton Bird Club, a corporation existing in Lewiston, Androscoggin County, Maine.
>
> Third, Subject to the foregoing provisions of this will whatever may be remaining of the residue of my estate after Clauses 1 and 2 of this will are satisfied, I give, bequeath and devise the same, in equal shares, to the Salvation Army, Inc. and to the Society for the Prevention of Cruelty to Animals. The gifts to each of them are upon the express condition that each of the said beneficiaries shall use all of said fund which they may receive under this will wholly in Androscoggin County, Maine, each respectively for the support of their general work in said County."

The will was admitted to Probate and administered upon, and on the filing of the final account by Oral E. Holmes, Admr. d. b. n. c. t. a., there remained an undistributed balance of $49,002.42. The Admr. d. b. n. c. t. a. then filed in the Probate Court his petition for authority to distribute this residue, under the third clause in the will. On November 28, 1947, the Judge of Probate made a decree ordering

this balance (less a sum of $3.00 for future expenses) paid as follows: $24,499.71 to "Society for the Prevention of Cruelty to Animals" and $24,499.71 to "Salvation Army, Inc." The Admr. d. b. n. c. t. a. later filed a distribution account that showed that he had paid to "The Salvation Army, $24,499.71" and "Society for the Prevention of Cruelty to Animals, $24,499.71" as ordered. This distribution account was allowed in 1948, although the voucher for the payment to the "Society for the Prevention of Cruelty to Animals" read "Society for the Prevention of Cruelty to Animals, by William M. Ingraham, Pres. Me. State Society for the Protection of Animals."

The will gave nothing to the testator's brother Roy C. Knapp, who is the appellant and exceptant in these proceedings. The will gave nothing to any blood relative. No question is raised as to the bequests and payments to the Stanton Bird Club or to the Salvation Army, but the payment of $24,499.71 by the administrator to the Maine State Society for the Protection of Animals, where the will left one-half of the residue to the Society for the Prevention of Cruelty to Animals, is strenuously objected to as a fraud upon the court, and is the subject of this controversy.

The widow was named executrix of the will but she died about four months after the testator, and was succeeded by her sister's husband Oral E. Holmes, as administrator of goods not administered upon with the will annexed.

The administrator was uncertain as to the identity of the "Society for the Prevention of Cruelty to Animals." The only society having nearly such a name was "The Society for the Prevention of Cruelty to Animals of Hancock County, Maine" at Bar Harbor, and a check for one-half the residue was offered to it, but was declined, probably because its charter authorized work in Hancock County, and the will in

this pending case provides that testator's money is to be used in Androscoggin County.

Counsel for the administrator then corresponded with the Maine State Society for the Protection of Animals at Portland, and concluded that this Society for the Protection of Animals was the society *intended* by the testator. The money was then paid to the Maine State Society for the Protection of Animals. Payment was made to its president William M. Ingraham who signed the voucher in the name of "Society for Prevention of Cruelty to Animals," as president of the "Maine State Society for the Protection of Animals."

The distribution account was filed in January, 1948, and allowed, and showed payment according to the terms of the order of distribution and according to the terms of the will.

In 1949, more than a year after the distribution account was allowed, the testator's brother Roy C. Knapp filed in the Probate Court his petition to revoke the original decree allowing the will, on the ground that the will had not been proved. This petition was denied by the Probate Court and denied on appeal. Exceptions were overruled by the Law Court in *Knapp, Appellant,* 145 Me. 189.

Later, in January 1951, Roy C. Knapp filed this petition, which commenced the pending litigation, alleging that the bequest to the "Society for the Prevention of Cruelty to Animals" in paragraph third of the will contains a description of the Society at Bar Harbor; that it is the only society within the terms of the will; that this society having declined the gift, the money descends as intestate property and should be ordered paid to the petitioner as next of kin; that payment to the Maine State Society for the Protection of Animals was erroneous, and that the statement in the distribution account to the effect that the money was paid to

the Society for the Prevention of Cruelty to Animals when actually paid to the Maine State Society for Protection of Animals was "false and untrue" and "a fraud" on the Probate Court. The petitioner, Roy C. Knapp, therefore, asked the Probate Court to reopen "said order of distribution and said distribution account," and to order and require the administrator to pay the petitioner $24,499.71 and to issue a new order of distribution in favor of himself in the sum of $24,499.71.

The Lewiston and Auburn Society for the Prevention of Cruelty to Animals was a local body which about 1903 passed out of useful existence by the death of all its members. It had disintegrated but was apparently continued, or reorganized, as an organization known as "Androscoggin County Humane Society." The Lewiston and Auburn Society for the Prevention of Cruelty to Animals, however, was lately revived and petitioned for leave to intervene, and claimed to be the legatee intended by the testator.

After hearing on this petition to reopen, in the Probate Court, the Judge of Probate presumptively found no fraud had been practiced; that the payment to the Maine State Society for the Protection of Animals was a correct payment, and that this Society was the intended legatee. The decree of the Probate Court denied the Knapp petition. On appeal, with the Superior Court Justice sitting as the Supreme Court of Probate, the decree of the Probate Court was affirmed. The pending exceptions were taken by Roy C. Knapp and the Lewiston and Auburn Society for the Protection of Animals.

The presiding Justice in the Supreme Court of Probate found that the words in the will, "Society for the Prevenfound no fraud or imposition on the Probate Court, and tion of Cruelty to Animals," did not convey a plain meaning; that extrinsic evidence was admissible without pre-

liminary resort to equity; that the will and the evidence eliminated the Bar Harbor Society; and that the evidence failed to place the Lewiston and Auburn and other Androscoggin County bodies "in the ken or in the consciousness of the testator;" that the testator contemplated not a local body but one with a broader area and base which should use the legacy wholly in Androscoggin County; that there was sufficient evidence to support the contention that testator knew of the existence of the Maine State Society and of its purposes and activities and that he sympathized with its objects; that the latter has a statewide range including Androscoggin County, and that it operated in 1935 and in 1944 and is still active, and is the only society conforming to the elements of description in paragraph third of the will, and is therefore entitled to the legacy. The presiding justice ruled that extrinsic evidence was admissible under the circumstances to identify a devisee or legatee, and "beneficient bequests are not to be defeated by misnomers." The justice also ruled that the testimony of witnesses is admissible concerning declarations of the testator because of doubt or latent ambiguity.

The bills of exceptions of Roy C. Knapp and Lewiston and Auburn Society for the Prevention of Cruelty to Animals are more or less similar, and with petitions, decrees, and evidence made a part, (differing according to their particular contentions) contain exceptions to the effect that (1) there was a fraud perpetrated upon the court because of voucher showing payment to Society for Prevention of Cruelty to Animals, and there is no sufficient legal evidence to sustain the finding and ruling that the Maine State Society for the Protection of Animals was the society intended by Fred E. Knapp testator; (2) that the court erred in admitting in evidence the deposition of one Ernest H. Dyer; (3) that the court erred in treating these proceedings as if

the proceedings were a case in equity for construction of the will; (4) that if the Hancock County Society was not the intended beneficiary, there was no society answering to the name and description given in the will; (5) that the evidence shows that the Lewiston and Auburn Society for the Prevention of Cruelty to Animals was the intended beneficiary; (6) that there was no evidence establishing with reasonable certainty that the Maine State Society for the Protection of Animals was intended; (7) that the court erred in admitting extrinsic evidence to show that the Maine State Society for the Protection of Animals, or other claimants, was the intended beneficiary; (8) that the Probate Court has no power to determine that an organization is entitled to a charitable gift, and that only a Court of Equity in the case of a charitable trust has the power under the *cy pres* doctrine; (9) that the court erred in not finding that the bequest lapsed.

The problem presented to the Probate Court and to the Supreme Court of Probate (now before us on exceptions) is the intent of the testator as expressed in his will. It "takes precedence over all else." *Trust Co.* v. *Perkins et al.*, 142 Me. 363. It is clear beyond all reasonable doubt that this testator intended to recognize none of his blood relatives, and that he did not intend that there be any partial intestacy. He named in his will the "Society for the Prevention of Cruelty to Animals" to receive, outright, one-half of the residuum, with instructions that the money be spent in its work in Androscoggin County, Maine. The testator did not precisely and correctly name, and he did not intend, the "Society for the Prevention of Cruelty to Animals of Hancock County," at Bar Harbor, Maine, and both exceptions seem to recognize this, although petitioner Knapp's brief says "we do not pretend that the Hancock Society was actually intended * * * the Hancock Society does answer to the designation in the will."

The prior proceeding in 1949 attacking the allowance of this will, brought by Roy C. Knapp, this petitioner, and decided against him, is not *res judicata* as to matter at bar. The issue here was not determined in the prior case. See *Knapp, Appellant,* 145 Me. 189; *Light & Power Co.* v. *Van Buren,* 118 Me. 458, 463, 109 A. 3; *Bray* v. *Spencer,* 146 Me. 416, 82 Atl. (2nd) 794.

Erroneous decrees of the Probate Court upon matters within its jurisdiction, when not appealed from, may be conclusive. Such decrees are in the nature of judgments and cannot be impeached collaterally. The right of appeal is given for the purpose of correcting errors, such as, errors of judgment, or mixed errors of fact and law. *Mudgett's Appeal,* 103 Me. 367, where order of distribution erroneously was per stirpes instead of per capita, it was nevertheless conclusive.

The Probate Court has the power, upon subsequent petition, to vacate or to annul a prior decree, clearly shown to be without legal foundation and in derogation of legal right, such as for fraud, perjury, forgery, discovery of later will, etc. *Merrill Trust Co., Appellant,* 104 Me. 566; *Cousins* v. *Advent Church,* 93 Me. 292; *Waters* v. *Stickney,* 12 Allen (Mass.) 1, cited with approval in Merrill Trust Co., Appellant; *Auburn Trust Co., Appellant,* 135 Me. 277. See *Roy Knapp, Appellant,* 145 Me. 189, 192.

Where there is in the Probate Court an existing decree, no new decree can be made. Thus, where it did not appear that the petitioner filed a petition in the Probate Court to have the decree set aside, but it was a petition to have a codicil declared null and void, our court held that such a decree could not be made in the face of an existing decree. The only way the earlier decree could be disposed of was by reopening, or else by annulment, before a new decree could be

made. The ruling of the presiding justice in dismissing appeal was correct. *McKellar, Appellant,* 118 Me. 64, 66.

The statute relating to distribution of residual property provides that "when on the settlement of any account of an administrator, executor, guardian, or trustee there appears to remain in his hands property not necessary for the payment of debts and expenses of administration, or for the payment of pecuniary legacies of fixed amount, nor specifically bequeathed, the judge, upon petition of any party interested, after public notice and such other notice as he may order, shall determine who are entitled to the estate and their respective shares therein under the will or according to law, and order the same to be distributed accordingly; and alienage shall be no bar to any person, who, in other respects, is entitled to receive any part of such property." R. S., 1944, Chap. 143, Sec. 21. See also R. S., 1944, Chap. 140, Sec. 9.

The statute says that the Probate Court "shall determine who are entitled to the estate and their respective shares therein under the will." See *Stilphen, Appellant,* 100 Me. 146, 149. The Probate Court determines who the individuals are to whom the testator gave the remainder of his property and the amounts to which they are entitled. It is not a question of *cy pres* under this statute. It is a question of the *identity* of the person *named* or *intended.* There may be a misnomer of some person to whom he intended to give. *Cy pres* is not applicable when this statute is invoked. See *Universalist Society of Bath* v. *Swett,* 148 Me. 142, 90 Atl. (2nd) 812; *Guilford Trust et al.* v. *Inh. of Guilford et al.,* 148 Me. 162, 91 Atl. (2nd) 17; *Lynch, Trustee* v. *Congregational Parish,* 109 Me. 32. The Judge of Probate, however, has authority to act in equity proceedings, where the *cy pres* doctrine might be adopted, but the jurisdiction to act in equity is contained in another statute. There are, by virtue of these two statutes, two different courts, one a Probate

Court, and the other an Equity Court of special and limited authority. The two courts have but a single judge. See R. S., 1944, Chap. 140, Sec. 2; R. S., 1944, Chap. 143, Sec. 21. *Havana Electric Company In re Estate of Neely,* 136 Me. 79.

The Probate Court under the statute apparently has power to determine on a petition for distribution or on allowance of an account, who is entitled to the balance remaining in the hands of an administrator, or executor, subject always to right of appeal. *Mattocks* v. *Moulton,* 84 Me. 545; *Stilphen, Appellant,* 100 Me. 146, 149; *Small* v. *Thompson,* 92 Me. 539, holding that on allowance, court has power to interpret will so far as necessary for that purpose. See also *Strout* v. *Chesley,* 125 Me. 171, 178, holding that Judge of Probate may determine who is entitled to take and respective shares, but does not take away right of equity to construe a will.

The intention of the testator must be gathered from the language that he used in the will. It may be sought within the "four corners of the will." If the language in a will is doubtful, or ambiguous, conditions existing when the will was made may be considered, if they were known to the testator and "may be supposed to have been in the mind of the testator." *Palmer* v. *Estate of Palmer,* 106 Me. 25, 28.

"It is a familiar rule of interpretation that when the name or designation in the will does not designate with precision any person or corporation, but so many of the circumstances concur to indicate that a particular person or corporation was intended, and no similar conclusive circumstances appear to distinguish any other beneficiary, the person or corporation thus shown to be intended will take. *Preachers' Aid Society* v. *Rich,* 45 Me. 552; *Howard* v. *American Peace Society,* 49 Me. 288; *Tucker* v. *Seaman's Aid Society et al.,* 7 Met. (Mass.) 188. Extrinsic evidence

is always admissible to identify a devisee or legatee, and beneficient bequests are not to be defeated by mere misnomers. This rule applies to a devise or a bequest to a corporation." The above is quoted from *Trust Co.* v. *Pierce,* 126 Me. 67, 69, where the will of testator directed trustee to pay income to Maine State Society for the Prevention of Cruelty to Animals and the court ordered payment to Maine State Society for the Protection of Animals.

There is no obligation to file a distribution account. When an executor or administrator has paid as required by decree, he may file an account, which may be a final discharge. The statute creates a privilege but imposes no obligation. See *Mudgett's Appeal,* 105 Me. 387, construing a portion of R. S., 1944, Chap. 143, Sec. 21.

There is no appeal from the decision of the Supreme Court of Probate. The case must go to the Law Court on exceptions. Findings of fact are conclusive if there is credible evidence to support them, and if the findings are not "clearly wrong." "If he finds facts without evidence, or if he exercises discretion without authority, his doings may be challenged by exceptions." *Cotting* v. *Tilson,* 118 Me. 91; *Cote et al., Appellants,* 144 Me. 297. Findings must be "supported by evidence of real worth and probative value." *Mitchell* v. *Mitchell,* 136 Me. 406, 417.

"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* v. *Rolfe,* 37 Me. 400; *Pettengill* v. *Shoenbar,* 84 Me. 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* v. *Hervey,* 74 Me.

192. 'Factual decisions made by triers of fact will not be disturbed in appellate proceedings, if supported by credible evidence.' Murray, J., in *Brown* v. *McCaffrey, et al.*, 143 Me. 221, 226." Quoted from *Jolovitz* v. *Redington & Co., Inc.*, 148 Me. 23, 30.

A reference in the bill of exceptions to the body of evidence, or the incorporation of evidence as a part of the bill, does not take the place of a succinct and summary statement of the specific grounds of exceptions in the bill itself. A statement in the bill of exceptions, that pleadings and all the evidence are made a part of the bill, is usually necessary, but there must also be a summary of the specific grounds. *Dennis* v. *Packing Co.*, 113 Me. 159, 161. A bill of exceptions, to keep within the rules, cannot be constructed like a coastal dragnet to be pulled over and through the record in the vain hope that the court may find some error caught therein. It is not the work of the court to seek for errors. It is the duty of counsel to point out the claimed fault and to state wherein there is prejudicial error. See *Bradford* v. *Davis*, 143 Me. 124, and cases therein cited.

An examination of the extensive record in this case, in the light of the foregoing well established rules of law, gives to the Law Court this picture: There was a decree of distribution which had been made in October 1947 by the Judge of Probate. The distribution decree followed the words in the testator's will. It ordered payment of the balance remaining to the "Society for the Prevention of Cruelty to Animals" and to the "Salvation Army, Inc.," as the will required. The administrator d. b. n. c. t. a. in January 1948 filed a distribution account that showed that he had paid the parties as ordered in the distribution decree. One payment voucher, however, read "Society for the Prevention of Cruelty to Animals by William M. Ingraham Pres. Me. State Society for the Protection of Animals." There was no fraud or mistake in the order for distribution. The order for distribu-

tion followed the provisions in the will. The Probate Court found no error in the distribution account, and presumptively considered and passed upon the voucher. The Probate Court allowed the account in January 1948, as an account showing payment to the parties intended by the testator. No appeal to the Supreme Court of Probate was taken from these two decrees in 1948. The action by the Probate Court in the absence of fraud was final. *Mudgett's Appeal,* 103 Me. 367.

In January 1951 the petitioner Knapp commenced the proceedings at bar, alleging that there was fraud and improper action in the Probate Court, and asked for reopening of the distribution decree and the decree allowing the distribution account, because of the fact that the oath to the distribution account was false and untrue which was a "fraud and imposition on the Court." The Judge of Probate denied this petition to reopen. See rule in *Merrill Trust, Appellant,* 104 Me. 566 and *Trust Co., Appellant,* 135 Me. 277.

After the hearing in the Probate Court in 1951, and the denial by the Probate Court of Knapp's pending petition to reopen, Knapp and the Lewiston and Auburn Society took appeals to the Supreme Court of Probate. On appeal, the justice presiding affirmed the decree of the Probate Court which denied the pending Knapp petition to reopen.

The only question now before the Law Court, under the bills of exceptions presented by the petitioner Roy C. Knapp and the intervening Lewiston and Auburn Society for the Prevention of Cruelty to Animals, is whether the Supreme Court of Probate was legally authorized upon the record to affirm the decree of the Probate Court denying the pending petition. It is not a question of how any other judge might have decided in the first instance. There is no question of fact open to the Law Court. Was there credible evidence before the Supreme Court of Probate on which the justice presiding could render his decision? We think there was.

At the beginning of these proceedings, in the first instance, the Probate Court heard evidence on the petition to reopen the two prior decrees. The Probate Court found there was no fraud previously practiced upon the court in the allowance of the distribution account, and that the payment to the Maine State Society for the Protection of Animals was a payment to the corporation intended by the testator. The Probate Court, therefore, denied the pending petition to reopen.

The Supreme Court of Probate on appeal found no fraud, and could have, and perhaps should have dismissed the appeal and affirmed the decision below under the rule in *Mudgett's Appeal,* 103 Me. 367, because the Probate Court had jurisdiction to determine, and did determine, the identity of the person intended by the testator, which was not appealed from in 1948.

The Supreme Court of Probate, however, went into the question of identity. There was sufficient credible evidence on which the justice presiding could find, as he did find, that the payment to the Maine State Society for the Protection of Animals was proper, and in accordance with the intention of the testator as expressed in his will.

The exceptions taken to the refusal of the court to annul, or reopen, the decrees of distribution and allowance of distribution account, were based on the contentions that there was a fraud practiced on the court; that there was insufficient admissible evidence, and that no extrinsic evidence was admissible to ascertain the intention of the testator. Under the view that we take of the record and the findings, all the exceptions must be overruled. There was no "clear and convincing proof of fraud." *Auburn Trust Co., Appellant,* 135 Me. 277, 281, 282. Proof of fraud was necessary to permit reopening. Extrinsic evidence was admissible to establish identity under the circumstances. There was suf-

ficient evidence that was admissible and credible, on which the presiding justice could base a decision that the terms of the will had been carried out.

Under our system the validity of decrees of the Probate Court are an economic necessity. Rights in and titles to property often depend upon them. Each generation sees the Probate Court pass in some manner on the succession rights to nearly all property. If there are errors made by the Judge of Probate in a decree, the right of appeal is given to enable parties to correct them. When, however, no appeal is taken, and the parties have acted in reliance upon decrees, such decrees must not be reopened, or set aside, without clear and convincing proof of fraud, or other compelling legal cause. In this case the Supreme Court of Probate has decided that the previous Probate decrees of distribution and the allowance of account should not be disturbed. The record warrants the decision.

Exceptions overruled, in both cases.

EVERETT J. BRAGDON
vs.
CHARLES A. CHASE
d/b/a CHASE & KIMBALL

Penobscot. Opinion, August 14, 1953.

Sales. Deceit. Damages.

A nonsuit, or a directed verdict for the defendant, should be ordered on proper motion whenever all the evidence viewed most favorably to the plaintiff would not support a verdict in his favor.

In an action for deceit by a purchaser defrauded in a sale the measure of damages is the difference between the actual value of the property at the time of purchase and its value if it had been as represented.

ON EXCEPTIONS.

This is an action of deceit. The case is before the Law Court on exception to the direction of a verdict for defendant. Exceptions overruled.

B. M. Siciliano, for plaintiff.

C. W. & H. M. Hayes, for defendant.

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

NULTY, J. This is an action of tort for deceit brought to recover damages for an alleged misrepresentation of the model year of a new and unused two-ton Ford truck sold by the defendant to the plaintiff on December 7, 1949.

The defendant filed a plea of general issue and the case comes before us on exceptions by the plaintiff to the granting of a motion for a directed verdict for the defendant at the September 1952 Term of the Penobscot County Superior

Court. The bill of exceptions presents the single issue of law arising out of the allegation in the bill that plaintiff is aggrieved by the directed verdict ordered by the trial court. The facts are as follows:

The defendant in December, 1949, was engaged in the automobile sales business and was selling Ford trucks. The plaintiff, who was a pulp buyer and contractor, approached him relative to the purchase of a new two-ton Ford truck, stating that if he could get a new two-ton 1950 Ford truck he would at once trade. According to the plaintiff the defendant said he had a new two-ton 1950 Ford truck that would meet the specifications of the plaintiff, whereupon the defendant examined, or caused to be examined, plaintiff's truck and while the plaintiff did not see the new truck which he bought from the defendant, from the evidence and the conditional sale agreement admitted in evidence, it is apparent that the parties, on December 7, 1949, traded trucks. According to the record, the defendant received plaintiff's truck in part payment for the new and unused two-ton Ford truck. Plaintiff then testified that about five months later he discovered that the truck was not a 1950 truck—but a 1949 truck—which information he received from a sales agent of the Ford Motor Company. It appears from the record that there was no change in model between Ford trucks manufactured in 1949 and 1950 by the Ford Motor Company. They were in all respects physically identical and an examination of the serial numbers would not indicate the year of manufacture. It also appears that for registration identification purposes the Ford Motor Company suggested to its dealers that sales of new and unused trucks purchased during 1949 from its dealers and completed prior to January 1, 1950, should be billed as 1949 models and that if sold thereafter the trucks should be billed as 1950 models. The evidence clearly shows that the plaintiff, after receiving information that the truck which he had purchased from the

defendant was a 1949 model, kept and used it until November 1951 when he traded it and received an allowance based on the fact that the truck was a 1949 model and that the allowance so received was approximately $200.00 less than the plaintiff would have received had the truck been a 1950 model. The plaintiff alleges in his declaration that the loss of approximately $200.00 was occasioned by the misrepresentation of the defendant that the truck sold by the defendant to the plaintiff was a 1950 model and that is the basis of his action for deceit. Plaintiff was asked in cross examination what difference there was between a 1949 truck and a 1950 truck at the time he learned that the truck was a 1949 truck instead of a 1950 truck and his answer was "discontinuation day." He was further asked if he learned of any other difference between the 1949 and the 1950 truck and his answer was "I don't think there was any." Questioned further, he testified that there was no difference except the year and the retail value. It also appears that plaintiff made no attempt at the time of the purchase of the new truck by questioning or otherwise to determine whether the new truck so purchased by him which he had not seen was anything other than a 1950 truck although at the date of purchase, to wit, December 7, 1949, it is very apparent that the new truck could not have been manufactured in 1950. The plaintiff also produced a witness who qualified as having been connected with the automobile business for many years and who assisted in appraising the truck which plaintiff traded towards the purchase of the new truck from the defendant. The witness testified that the only way he knew that this truck was a 1949 truck was because it was bought in December of 1949 and he also testified under further questioning that if there were on the floor of the sales room on January 1, 1950, a 1949 and a 1950 model there would be no difference in the price and there would be no difference in their fair market value.

On this testimony the court directed a verdict for the defendant and this court is now asked to sustain the plaintiff's exceptions.

We have many times within recent years set forth the rules with respect to the propriety of granting a nonsuit or a directed verdict and without quoting at length from our former opinions we again state the rule set out in *Williams* v. *Bisson et al.*, 142 Me. 83, 85, 46 A. (2nd) 708:

> "A non-suit, or a directed verdict for the defendant, should be ordered on proper motion whenever all the evidence viewed most favorably to the plaintiff would not support a verdict in his favor, *Lander* v. *Sears, Roebuck & Co.*, 141 Me., 422, 44 A., 2d, 886 and cases cited therein, — — — — —."

See also *Kimball* v. *Cummings*, 144 Me. 331, 68 A. (2nd) 625, 627, quoting from *Barrett* v. *Greenall*, 139 Me. 75, 80, 27 A. (2nd) 599, 601. We said in *Shine* v. *Dodge*, 130 Me. 440, 442, 157 A. 318:

> "A purchaser, defrauded in a contract of sale, may elect one of two remedies. He may rescind the sale, and, in an action of assumpsit for money had and received, recover back the purchase price; or he may without rescission sue in tort for deceit. *Carey* v. *Penney*, 129 Me., 320. In such case the measure of his damages is the difference between the actual value of the property at the time of the purchase and its value if it had been as represented. *Wright* v. *Roach*, 57 Me., 600; *Mullen* v. *Eastern Trust & Banking Co.*, 108 Me., 498; *Morse* v. *Hutchins*, 102 Mass., 439. -.
>
> "The essential elements of an action for deceit have been so often and so recently stated by this court that it is unnecessary to reiterate them. *Allan* v. *Wescott*, 115 Me., 180; *Prince* v. *Brackett, Shaw & Lunt Co.*, 125 Me., 31; *Gilbert* v. *Dodge*, 130 Me., 417."

In *American Jurisprudence,* Sec. 206, under the heading Fraud and Deceit, B. Defenses, we find the following:

> "§ 206. Generally. — There are many defenses available to an action for damages for fraud, some of which may be based upon the absence in the case of one or more of the elements essential to the predication of such an action. Thus, the right of action may be negatived on the ground - - - - - or that the complainant sustained no damage by reason of his reliance upon the alleged misrepresentation."

We said in *Mitchell* v. *Mitchell,* 136 Me. 406, 415, 11 A. (2nd) 898,

> "To recover in an action for deceit, something more than the falsity of the statement relied on must be shown. Each and every other element required to constitute deceit must be proved, and when it is apparent that any one of them has failed of proof, the plaintiff is not entitled to relief. It then becomes entirely unnecessary to decide whether or not the other required elements have been established by the evidence."

In the recent case of *Coffin* v. *Dodge,* 146 Me. 3, 6, 76 A. (2nd) 541, we said in respect to proof of the necessary elements in deceit:

> "Every one of these elements must be proved affirmatively to sustain an action of deceit."

The plaintiff in the instant case alleges that the representation was material which, by the way, is a question of law. See *Caswell* v. *Hunton,* 87 Me. 277, 32 A. 899. Whether the representation in the instant case was material and whether it was false, questions not entirely free from doubt, in the view we take of the case it is unnecessary to decide because the plaintiff's testimony and that of his witness clearly proves, when considered in a light most favorable to the plaintiff, that the plaintiff suffered no damage as a result of the representation made assuming that it was a false representation and was material. As a general rule, damages

in deceit are determined as of the date of the sale and not at a subsequent date. See *Coffin* v. *Dodge, supra; Stewart* v. *Winter,* 133 Me. 136, 139, 174 A. 456; *Williams* v. *Bisson, supra, Shine* v. *Dodge, supra, Am. Law Institute, Restatement of the Law, Torts, Deceit,* Sec. 549. We said in *Williams* v. *Bisson et al., supra:*

> "There can be no point in discussing the evidence relative to damages in a case where liability has not been established - - - - -."

We also said in *Stewart* v. *Winter, supra:*

> "Still, unless damage results from the representation, while there may be such fraud as to justify a rescission or an avoidance of the contract, yet there must proximately result actual damage in order to maintain an action of deceit. Without damage it is not actionable fraud."

Restatement of the Law, Tort, Deceit, under Comment on Clause (a), Sec. 549, *supra,* contains these significant words:

> "If notwithstanding the falsity of the representation the thing which a vendee acquires is of equal or greater value than the price paid and he has suffered no harm through using it in reliance upon its being as represented, he has suffered no loss and can recover nothing."

According to our decisions, every one of the elements of deceit must be proved by full, clear and convincing evidence. We said in *Crossman* v. *Bacon & Robinson Company, et al.,* 119 Me. 105, 109 A. 487, and we again cited that case in *Coffin* v. *Dodge, supra,* the following with respect to an action of deceit:

> "For the action of deceit was not intended to be made easy to prove. Its purpose was to restrain law suits in commercial and trading transactions so that every time a party, through reliance upon opinion, or trade talk, or without taking pains to

> inquire for himself, got the bad end of a bargain he should not be permitted to fly to the courts for redress."

The evidence, as we have heretofore indicated, clearly shows that as of the date of the original sale, December 7, 1949, or even January 1, 1950, there was no difference whatsoever in value between the 1949 Ford truck and a 1950 Ford truck new and unused. Accordingly, whether the representation was material or whether it was false, the plaintiff's evidence, when viewed most favorably fails to show that he suffered any damage at the time of the purchase of the truck and under the applicable rules of law hereinbefore laid down he cannot recover in the present form of action. The action of the trial court in directing a verdict for the defendant was correct, and the mandate will be

Exceptions overruled.

NANCY IRISH

vs.

NORMAN CLARK ET AL.

* * *

MARION P. DUNN

vs.

NORMAN CLARK ET AL.

(Two cases)

Kennebec. Opinion, August 22, 1953.

Negligence. Due Care. Warning. Passengers. Interference. Direction and Control. Directed Verdict.

The plaintiff in a negligence action has the burden of affirmatively proving due care.

Where the proofs are silent as to the conduct of a plaintiff passenger in the rear seat of an automobile, it is error to direct a verdict

against the plaintiff when the jury may fairly conclude that all other facts and circumstances are inconsistent with possible contributory negligence of the plaintiff.

When a jury could fairly find that no warning by a plaintiff passenger could have averted an automobile accident, a plaintiff need not establish affirmatively that there was no lack of due care in failing to give an effective warning.

Where there is no suggestion by defendants that plaintiff passenger interfered with defendant driver, a plaintiff need not establish affirmatively his non-interference.

The suggested direction of route by a passenger taken alone does not amount to the control of or an attempt to control the immediate operation of a car.

Where a finding of due care on the plaintiff's part could be made upon the facts adduced and would not be product of unreasonable minds it is error to direct a verdict for failure to prove due care.

ON EXCEPTIONS.

This is a negligence action before the Law Court on exceptions by the plaintiff to the direction of a verdict for defendants by the trial court. Exceptions sustained.

John G. Marshall, for plaintiff.

William B. Mahoney,
James R. Desmond,
Francis C. Rocheleau,
Saul H. Sheriff, for defendant Clark.
Locke, Campbell, Reid and Hebert,
for defendant Milton.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ. MURRAY, A. R. J.

WILLIAMSON, J. These two actions, before us on exceptions to the direction of verdicts for both defendants, arise from a collision between an automobile driven by the defendant Clark in which the plaintiff Nancy Irish was a passenger and an automobile driven by the defendant Milton. The defendants are charged with liability as "joint tort feasors," within the common use of the term, for concurring

acts of negligence. Nancy Irish, a minor, seeks to recover damages for personal injuries, and Marion P. Dunn, who has custody of Nancy, for medical and other expenses not included in the latter's suit.

The sole issue—identical in both cases—is whether there was evidence of due care on the part of Nancy Irish which would warrant submitting the cases to the jury. The evidence was clearly sufficient to go to the jury on the other issues; namely, negligence of both defendants, damages, and due care of plaintiff Marion P. Dunn. Indeed there is no dispute on this score, except with reference to defendant Milton's negligence. For convenience we will discuss only the case in which Nancy Irish is the plaintiff.

The facts which a jury could reasonably find may be briefly summarized. The cars collided at the intersection of the Blue Road, or Curtis Corner Road, so-called, and Route No. 202, the main or through highway from Winthrop to Lewiston, about 10:15 o'clock on the evening of March 16, 1952. The Milton car was proceeding westerly on the main highway at a speed of forty-five miles per hour and the Clark car was travelling southerly on the Blue Road, on which there was a "stop sign." Neither driver saw the other until it was too late to avoid the collision. To use the words of defendant Milton: "As I approached this intersection a car (the Clark car) shot out from behind the snow bank, and there was not time to do anything. It was about a car or two cars' length in front of me, and I just hit it."

There were four young people in the Clark car. In the front seat were defendant Clark and Carol Barber, and in the rear seat the plaintiff Nancy Irish, aged 16, and Lawrence Lord. Carol testified that at some point on the way home from Lewiston to North Monmouth Nancy and Lawrence changed from the front to the rear seat. She remembered nothing of the details of the accident. Neither Nancy, nor Lawrence Lord, nor the defendant Clark took the stand.

There is no dispute about the controlling legal principles. The plaintiff has the burden of affirmatively proving her due care or freedom from contributory negligence. The issue is to be decided by the jury if, but only if, the evidence with the inferences reasonably drawn therefrom taken in the light most favorable to the plaintiff warrant such a finding. The jury must base its conclusions upon facts found, not upon guess, conjecture or surmise. *Feely* v. *Morton,* 149 Me. 119; *Spang* v. *Cote, et al.,* 144 Me. 338, 68 A. (2nd) 823.

The argument of the defendants is this: that there is no evidence of what Nancy was doing from the time she sat on the rear seat until the collision; that it would be a guess, and no more, to find either negligence or due care on her part; and that therefore she has not sustained the burden of proving the essential fact, and so the verdicts were properly directed.

Three types of possible negligent conduct on Nancy's part are suggested: (1) failure to warn of impending danger; (2) physical interference with the driver; and (3) directions to the driver as to his speed or course.

The record contains evidence from which a jury could find that no warning by Nancy could have averted the accident. Reasonable persons could conclude under all of the circumstances that there was no lack of due care on Nancy's part in failing to see the Milton car in time to give an effective warning. Nancy was not the driver. It was not her duty as a passenger to undertake the direction of the car. A jury could well find that she failed in no duty to act affirmatively. *Nadeau* v. *Perkins,* 135 Me. 215, 193 A. 877; *Keller* v. *Banks,* 130 Me. 397, 156 A. 817; *Peasley* v. *White,* 129 Me. 450, 152 A. 530.

We come to the second and third types of suggested negligent conduct. They are, it will be noted, acts from which

a passenger or guest must refrain. It was stated in argument that had there been evidence that Nancy was asleep on the back seat, for example, the cases should have gone to the jury. It is the failure to account for Nancy's non-interference which the defendants say is fatal to her case at this stage.

On this point we need consider certain evidence applicable against Clark, but not against Milton. Both Clark and Milton talked with Officer Robinson of the State Police who investigated the accident shortly after it happened. The Officer said:

"A. He (Clark) said he came out onto the road, saw the stop sign and the other car at about the same time, that he increased his speed, trying to clear the other car.

Q. Do you recall the expression that he made?

A. He said he gunned it."

The statement of Clark, who did not take the stand, is evidence in the case against him. It has no bearing upon the case against Milton. Although Clark and Milton may be called "joint tort feasors," this characterization in the situation here existing carries no implication of a joint undertaking. The principles are well set forth by Chief Justice Dunn in *Arnst* v. *Estes and Harper,* 136 Me. 272, 8 A. (2nd) 201. The important feature of Clark's statement to the officer is that he does not indicate the slightest interference on the part of Nancy. His statement is valuable evidence no less for what he did not say than for what he did say. A jury could well have considered that a young man giving a statement of how a serious accident happened shortly after its occurrence, would mention interference with the operation of the car if such was the fact.

The defendant Clark cannot well complain that Nancy's counsel did not place him on the stand. His story was before the jury through the statement of the officer.

In the case against defendant Milton the statement of Clark to the officer is not available as evidence for Nancy or for Milton. The second and third types of possible interference and possible negligent conduct on Nancy's part are, therefore, to be considered without the benefit of Clark's statement.

We must look at life as it exists. Certainty is rarely found. Our pace would be slow indeed if we did not, in weighing probabilities, act before certainty was assured. In the administration of criminal law we guard the respondent with proof of guilt beyond a reasonable doubt. In civil actions the rule is less exacting. A fact is established by the preponderance of the evidence, by the tilt of the scales, to use the illustration presented to juries day after day by trial judges.

Here we have four young people driving home from Lewiston to North Monmouth. We find, as we would expect, a boy and girl in front, and a boy and girl in the rear. What possible reason would the girl on the rear seat have to interfere with the driver by direct physical action? Of course there are a thousand and one acts which a passenger in the rear seat of an automobile may do to interfere with the control of the car. There are countless possibilities of action which, if proven, would show that there was no negligence on the part of the driver. But human experience is such that we may safely act in the belief that a person in the rear seat of an automobile will stay there a reasonable length of time and will not physically interfere with the driving of the car. Circumstances will govern the finding by a jury. For example, young children in the rear of a car may present a different problem and a different set of probabilities with reference to the conduct of the driver.

It is also argued that Nancy may have been negligent in directing the driver as to his speed or course. We are not discussing warning of impending danger of collision, but

improper direction prior to the moment the Clark car emerged from the cross road into the highway. In Clark's statement to the officer there is an indication that he was not familiar with the road and that his course was directed by one of the girls.

The defendant Milton, in our view, insists unduly upon the denial of possibilities. There is nothing in the evidence to indicate that either the side road or the main highway presented peculiar problems to a driver. He could observe the road, could see the stop sign on the Blue Road, and use his own judgment upon speed and manner of driving. Let us suppose Nancy told Clark the way home was by the Blue Road and Route No. 202. Such a direction of route by a passenger, taken alone, surely does not amount to the control of or an attempt to control the immediate operation of the car. In the absence of other evidence we are of the view that the jury could find that Nancy in no way interfered with Clark's control of the car.

The record is not so complete as one would wish. Counsel argued that Nancy could not testify due to her condition. The record, while filled with evidence of her serious personal injuries, does not include evidence that she was unable to take the stand. The defendants also urge that the plaintiff should have called Lawrence Lord and Norman Clark as witnesses to tell more of what happened in the car.

Our problem, however, does not reach beyond the necessity of determining whether the evidence was sufficient to warrant submission to a jury and thus a favorable finding. Our concern is not whether a jury must find for the plaintiff on the issue of due care, or whether they ought so to find, but whether they could as reasonable men and women so find.

The record, from our examination, discloses a situation from which such men and women could infer and find that

Nancy was in the exercise of due care. Stated differently, a finding to this effect would not be the product of unreasonable minds. In reaching such a conclusion jurors will waste little time in eliminating fanciful possibilities. They will consider probabilities, and they will not insist that proof be required beyond the proof which they themselves demand in determining the facts in important matters affecting their own lives.

The jury is insulated by rules of evidence from hearsay and certain other types of evidence. No successful attempt has been made, however, to insulate the jury from the sound judgment, experience, and good common sense which they bring to the administration of justice.

We do not say that a jury would have found for the plaintiff in each case. We do say, however, that on this record a jury verdict for the plaintiff in each case against both defendants would have been justified. The plaintiffs were entitled to go to the jury. The entry will be in each case

Exceptions sustained.

CITY OF BANGOR, IN EQ.
vs.
MERRILL TRUST COMPANY
MARY F. BASS
ELAINE BASS PIERCE
HAROLD M. PIERCE ET AL.

Penobscot. Opinion, August 24, 1953.

Wills. Determinable Estates. Possibility of Reverter. Trusts. Recreation Districts. Horse Races. Lease. Gifts.

A conveyance to a city "so long as" it shall be devoted to a particular purpose is a determinable fee with a possibility of reverter in the heirs of the grantor.

It is the donor and not the donee who measures the extent of a gift.

The conveyance of land to be devoted to semi-public purposes of circuses and fairs fairly includes the use of such land for horse races.

A city holding land by a base or determinable fee to be devoted to public park purposes may fairly lease a portion thereof to a Recreation District covering the inhabitants of said city for the construction of a recreation building provided uses under the lease are not inconsistent with the purposes for which the lessor holds the land. The term of such lease may properly cover the life of the building.

ON REPORT.

This is a bill in equity for construction of a will and equitable relief. The case is before the Law Court on report. Ordered that decree be entered below in accordance herewith.

Abraham J. Stern, for plaintiff.

Keith & Keith,
James M. Gillin,
Michael Pilot,
Benjamin W. Blanchard, for defendants.
David B. Soule, for State.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ. MURRAY, A. R. J.

WILLIAMSON, J. This is a bill in equity brought by the City of Bangor for the construction of the will and codicils of Joseph P. Bass and for equitable relief dependent upon such construction. The case was heard on bill, answers, replications and proof, and is before us on report to the Law Court, "which Court shall, upon Bill, Answers, Replication and so much of the evidence as is legally admissible, render such final decision as law and equity require."

The plaintiff seeks:

(1) That we determine whether or not the purposes of the Bangor Recreation Center set forth in P. & S. L., 1951, Chap. 90, Sec. 1, fall within the meaning of the phrase "Public Park purposes including, if the City sees fit, semi-public purposes such as circuses, fairs, the City charging rental for such uses at its option," found in Article 12 of the will;

(2) That if we answer (1) in the affirmative, we give instructions in the manner and extent to which the City of Bangor may go in renting, leasing or conveying to the Bangor Recreation Center such of the land area of Bass Park as may be reasonably required for its purposes; and

(3) That a successor trustee be appointed under the will to execute and deliver to the City of Bangor the deed called for under Article 12 of the will.

Joseph P. Bass, late of Bangor, died in March 1919, and his will with two codicils was approved and allowed in the following month. The provisions of the will which require construction are stated below.

In Article 11 the testator places certain property in trust, and in the final paragraph states:

> "All of said income not needed to meet the payments called for in the preceding paragraphs of this Article of my will, said Trustee shall allow to accumulate until January 1, 1933, and if the City of Bangor shall accept a conveyance of the premises known as Maplewood Park and upon the conditions hereinafter specified in this will, then in that event, my said Trustee shall pay all of my said accumulated income to said City and thereafter shall, each year, pay to said City all said income not needed to make the other payments called for by the preceding paragraphs of this Article of my will, said income so to be paid to said City to be by it applied as hereinafter specified in this will."

The testator in Article 12 leaves all of the remainder of his property in trust for certain individual beneficiaries with the exception of Maplewood Park, so-called, and states in the last paragraph the following:

> "Provided the City of Bangor shall on or before six months from January 1, 1933, vote to accept a deed of said Park and shall vote that said Park shall be forever used only for and devoted to Public Park purposes including, if the City shall see fit, semi-public purposes such as circuses, fairs, the City charging rental for such uses at its option; and the City shall vote that said Park shall be forever known as "Bass Park"; and the City shall vote to apply all the money which it may receive under the provisions of the trust created under Article 11 of this will only for improving, beautifying and adding to said "Bass Park" from time to time and at any time; thereupon said Trustee shall convey to said City said Park, if not already conveyed, to have and to hold to said City so long as said Park shall be used for and devoted to one or some or all of said purposes and those purposes only, and so long as said park shall be called Bass Park, and so long as said moneys to be received by said City as aforesaid shall be applied only for the aforesaid purposes or some or one of them and no longer."

The only other provision directly relating to the City of Bangor is set forth in Article 20 of the second codicil to the will, reading:

> "In regard to the provision for the City of Bangor, I further provide that my trustee shall deliver to said City of Bangor to be held in trust forever, unless forfeited, a deed of the real estate which I may own at the time of my decease, situated between Buck and Dutton Streets, and the Park and Main Street, said property to be held by said City of Bangor for the benefit of the Eastern Maine Musical Association subject to the control of said association so long as said association shall exist for the purpose of conducting a musical festival or other purposes incidental to promoting the musical or other public interests of said city except that a right of way over said property shall always be available to the park property situated westerly thereof. If said Eastern Maine Musical Association shall cease to exist or shall fail to use said property for the purposes hereinbefore mentioned said property shall revert back to the City of Bangor to be added to the Bass Park so-called created in my will and subject to the conditions and provisions in regard thereto contained in *in* said will."

The City of Bangor on three separate occasions has voted to accept the provisions of the will and codicils. Albert E. Bass, the Trustee named to convey property to the city died in 1930, and no successor trustee has been named.

The city has never received a deed to Maplewood Park, so-called, or a deed to the adjoining property described in Article 20 of the second codicil. The Eastern Maine Musical Association ceased to exist in 1943 and the property known as the Bangor Auditorium has been added to and used in connection with Bass Park.

The Bangor Recreation Center was created by P. & S. L., 1951, Chap. 90, which became effective upon acceptance by the voters of Bangor in December 1951. Section 1 reads:

> "**Sec. 1. 'Bangor Recreation Center' created.** The inhabitants of and the territory within the city of Bangor, in the county of Penobscot shall be and hereby are constituted a body politic and corporate under the name of 'Bangor Recreation Center' for the purpose of acquiring property within said city of Bangor for recreational and municipal purposes, erecting, enlarging, repairing, equipping and maintaining on said property a building and related athletic, recreational and municipal facilities. Said district is hereby authorized to acquire land or buildings for said purposes by purchase, gift or lease and construct thereon, building or buildings for said purposes on land acquired as above. Property of said district shall be tax exempt."

The Trustees of the Bangor Recreation Center have indicated to the City of Bangor that Bass Park is their first choice for the location and erection of a recreation building, if a site in that location can legally be made available. Bass Park, including the five acres formerly occupied by the Eastern Maine Musical Association, is approximately forty-one acres in extent. The proposed building of the Recreation Center, with adequate parking facilities, would occupy about fifteen acres within what was formerly known as Maplewood Park.

At the present time there are outstanding leases of the Bass Park Fairgrounds, so-called, from the Trustees of Bass Park, who are officers of the city, to Thomas D. Mourkas, in which it appears that for a period ending in 1961 Mourkas has a lease of Bass Park, so-called, "for a period of three weeks, in each year, the first week for preparation, the second week for the Fair proper, and the third week for cleaning up," and also under amendments to the original lease of May 31, 1951, the right to conduct night racing for a stated rental per night. Under the amendments for night racing the city agrees "that the fairgrounds will not be rented to any other person for the conduct of night racing

during the period of this lease," with a provision that "if the lessee fails to conduct two weeks of night racing in any year, the city will have the right to rent the fairgrounds for this purpose to any other person in that year." There are provisions in the lease and amendments calling for improvements by the city to the premises, in particular for the erection of stables to accommodate 250 horses, and for installation of a lighting system on the race track by the lessee.

In 1950 the city leased Bass Park to Maine State Raceways for three weeks in each year through 1963 for purposes of a fair. There is now pending an action in equity between the Don-Al Corporation, as assignee of this lease, plaintiff, and Mourkas, the Bangor Fair, the Trustees of Bass Park and the City of Bangor, defendants, relating to the several leases for fair and racing purposes. We are not here interested in the merits of the litigation.

It is urged by certain of the defendants that the leases to Maine State Raceways and Mourkas are, and the use of the park for night racing would be, in violation of the conditions expressed by the testator in his will, and that therefore no trustee should be appointed, as prayed for, to convey the property to the city. We must determine then at the outset: (1) what estate the city acquired or had a right to acquire under the will; and (2) whether or not such estate has been forfeited or lost. Unless the city has an interest in the property and is entitled to a deed, it obviously would be meaningless to consider the problems relating to the Recreation Center.

The record shows that many years ago the city, having accepted the provisions of the will, was entitled to deeds of both Maplewood Park and of the Musical Association property.

For the moment we turn our attention to Maplewood Park. The terms of the proposed deed are stated in Article

12 of the will. The conveyance to the city is "to have and to hold to said City *so long as*" the property shall be devoted to the particular purposes, and *"so long as* said Park shall be called Bass Park," and *"so long as"* the trust income received under Article 11 "shall be applied only" for the designated purposes *"and no longer."* (Emphasis supplied.) The city was entitled to a deed conveying a determinable fee. The language of the will is the classic language for creation of such an estate. When and if the conditions are not fulfilled, the estate of the city in the Maplewood Park, so-called, will cease and end, and the property will revert to the heirs of the testator.

In *Pond* v. *Douglass,* 106 Me. 85, 75 A. 320, the court said at page 88:

> "The estate known in law as a base, determinable or qualified fee with the possibility of a reverter is recognized in this State and Massachusetts and is descendible. *Moulton* v. *Trafton,* 64 Maine, 218; *Farnsworth* v. *Perry,* 83 Maine, 447; *First Univ. Soc.* v. *Boland,* 155 Mass. 171.
>
> "By his deed conveying this lot to the proprietors of the free meeting house 'to their use and benefit so long as said lot shall be occupied for a meeting house or house of public worship' Jesse Washburn conveyed to the Society a qualified fee determinable on the cessation of the use of the lot for church purposes and retained in himself a mere possibility of reverter."

The principle is stated in 19 Am. Jur. 488, Estates, Sec. 28, as follows:

> "The classical examples which are usually given to illustrate the creation of a determinable fee are to a man and his heirs, tenants of the manor of Dale, or till the marriage of B, or so long as St. Paul's Church shall stand, or as long as a tree shall stand. In the case of a grant to A and his heirs, tenants of the manor of Dale, whenever the heirs

> of A cease to be tenants of the manor of Dale, their estate determines."

An interesting illustration is found in Restatement of the Law, Property, Sec. 23, at page 57, as follows:

> "A, owning Blackacre in fee simple absolute, transfers Blackacre 'to the Town of B and its successors and assigns to be held by it and them so long as the said Blackacre is used for public school purposes.' Town B has an estate in fee simple determinable. A has a possibility of reverter."

In 2 American Law of Property (1952) Sec. 9.56, it is said:

> "The type of interest acquired by a municipality in a public park or square is usually dependent upon the manner of its creation. Where the land was acquired by grant, whether by purchase or by gift, the terms and provisions of the deed determine whether the municipality has acquired a fee simple absolute estate, a determinable fee simple with a possibility of reverter left in the grantor, or a mere easement of use for park purposes."

See also *Neely* v. *Hoskins,* 84 Me. 386, 24 A. 882; *Hamlin* v. *Meeting House,* 103 Me. 343, 69 A. 315; *Bancroft* v. *Sanatorium Assn.,* 119 Me. 56, 109 A. 585; *Whitmore* v. *Congregational Parish,* 121 Me. 391, 117 A. 469; *Lyford* v. *Laconia,* 75 N. H. 220, 72 A. 1085; 1 Kerr on Real Property 370; 15 A. L. R. (2nd) 975; 31 C. J. S. 22, Estates, Sec. 10; McQuillin on The Law of Municipal Corporations, 3rd. Ed. (1950) Vol. 10, Sec. 28.52; 1 American Law of Property (1952) Sec. 4.13, Requisites for Creation of Possibility of Reverter.

Without question there exists an obligation on the part of the city to use Bass Park for the purposes set forth in the will. To this extent it may properly be said that Bass Park is held in trust. The Legislature in permitting a municipality to accept gifts for public parks and playgrounds surely intended that the wishes of the donor be honored. R. S.,

Chap. 84, Sec. 3. (Unchanged since R. S., 1916, Chap. 4, Sec. 85, before the testator's death.)

This obligation, however, does not alter the nature of the title which the city has received (or is entitled to receive) from the donor. It cannot change a determinable fee into a fee simple held in trust. No one suggests that the City of Bangor did not accept the property upon the conditions of the will. The acceptance must be of what is given. It is the donor and not the donee who measures the extent of the gift.

The case of *Manufacturers National Bank* v. *Woodward,* 138 Me. 70, 21 A. (2nd) 705, is not inconsistent with this view. There a gift by will to a town of a house and lot "for use as a public library" was held a gift in trust. The court held the trust did not fail on refusal of the town to accept the gift and ordered the appointment of a new trustee. The estate left in trust was clearly not a determinable fee. The language used does not point directly to the termination of the estate, and so the significant feature of a determinable fee is missing. There are no phrases such as "so long as" or "and no longer." Whether or not a determinable fee may be held in trust was not an issue under consideration.

The question then becomes whether or not the leasing and use of the property for a fair and in particular for night racing under the Mourkas lease are permitted under the will. If not, there follows the termination of the city's interest in the property.

If we were concerned with the use of property for public park purposes, taking the words in their ordinary meaning, it would be impossible to sustain the action of the city.

In *Campmeeting Association* v. *Andrews,* 104 Me. 342, 71 A. 1027, 1030, the court said, at page 349:

> "A park may be defined as a piece of ground set apart to be used by the public as a place for rest,

> recreation, exercise, pleasure, amusement and enjoyment. See cases collected under 'Words and Phrases,' vol. 6, page 5176, title 'Park.' The full use and benefit of a park is not realized by the enjoyment only of an open view and the right of passage upon it. The right to enjoy the pleasures and advantages that beauty and ornamentation may afford is also included in the uses and purposes of a public park."

We, however, are not again defining public park purposes, but are interpreting Article 12 of the will in which the testator gives broader limits to his gift, namely, for "Public Park purposes including, if the City shall see fit, semi-public purposes such as circuses, fairs, the City charging rental for such uses."

Horse racing whether in the daytime or at night, in our view, fairly comes within the meaning and intent of the testator's gift. We find no essential difference which would permit the circus and fair and deny racing. They are all "semi-public purposes" for which the city may charge a rental with the expectation that the public will pay admission fees.

We are not here touching upon the details of the Mourkas lease or the uses intended thereunder, but upon the principle involving whether the lease of the property (and of course its use) for a period of ten years violates the limitations of the will.

We are not called upon to decide whether horse racing in daytime or at night benefits or harms the community or whether such use is wise or unwise. The point is the extent of the power of the city to act in this manner. So far as the use of the property under the lease is concerned, we see no objection thereto under the terms of the will. Nor was a lease of ten years a surrender of the property for such a clearly unreasonable time that forfeiture for the benefit of the testator's heirs has followed.

We may readily agree that a lease for the indicated purposes for, let us say, 999 years would be void, or that the city must at all times retain control of the premises, yet it is a matter of common prudence for both lessor and lessee to insist upon a lease for a term of years. Both parties require the certainty of a lease for a reasonable period to make possible a profit on their investment. We cannot say that a reasonable period is necessarily less than the ten years of the lease in question.

We find no violation by the city of the conditions surrounding the gift. There has been no termination of title, and no reversion to the testator's heirs. The city is entitled to a conveyance of Maplewood Park, and a trustee should be appointed to give the deed.

There is no necessity of discussing the nature of the title of the city in the Musical Association or Auditorium property. There is no suggestion that the same considerations about forfeiture for violation of purposes found with respect to Maplewood Park are not here equally applicable. In any event, the Bangor Recreation Center which holds our chief interest does not propose to use any of the Auditorium property, but only a part of the old Maplewood Park area.

We turn to the problems of the Bangor Recreation Center. It is a "body politic and corporate," a quasi municipal corporation, covering "the inhabitants of and the territory within the City of Bangor" for carrying out certain municipal purposes. The Bangor Recreation Center is a newcomer in the list of districts—water, school, sewer, light and power —each with a different name and for a different purpose. It is designed no doubt, apart from the administration of desired facilities, to give an opportunity for raising needed funds without use of the city's credit, although in the final event payments will be met by the taxpayers of Bangor.

The Recreation Center wishes to erect a recreation building within the Park area. Can the city grant to the Center,

a separate and distinct corporation from the city, rights which will make possible the accomplishment of its purposes?

First: The intended use is a proper use for public park purposes. We find nothing unusual or inherently wrong in the utilization of fifteen acres of the park for recreational purposes of the nature outlined in the record. It is common knowledge that auditoriums, as indeed in Bangor, and buildings of various types designed to serve the recreational and cultural needs of the public are found in parks. In *Moore* v. *Valley Garden Center,* 185 P. (2nd) 998 (Ariz. 1947), a lease to a non-profit corporation for horticultural gardens, etc., was held proper as a lease for recreational purposes.

Cases illustrating proper uses of land devoted to park purposes are: *Slavich* v. *Hamilton,* 201 Cal. 299, 257 P. 60 (Veterans' Memorial Hall); *Los Angeles Athletic Club* v. *Long Beach,* 128 Cal. App. 427, 17 P. (2nd) 1061 (Municipal auditoriums); *Aquamsi Land Co.* v. *Cape Girardeau,* 346 Mo. 524, 142 S. W. (2nd) 332 (Recreational building, community center and fair ground, including race track and athletic field); *Bernstein* v. *City of Pittsburgh,* 366 Penn. 200, 77 A. (2nd) 452 (Open air auditorium); *City of Neb.* v. *Neb. City,* 186 N. W. 374 (License for horse racing for limited periods but not to lease park for twenty-five years). See also 67 C. J. S. 859; 39 Am. Jur. 826, Parks, Sec. 29, and annotations in 18 A. L. R. 1246, 63 A. L. R. 484, 144 A. L. R. 486.

Second: We find no objection to use of land within the Park by the Bangor Recreation Center for the desired purpose under suitable arrangements with the city. No question arises of the validity of such use for the benefit of private business interests. The city and the Bangor Recreation Center are both municipal corporations. In carrying out the proposal it is not necessary that the city convey or give up control of any part of the park given by Mr. Bass.

It would be proper, in our view, for the city to lease sufficient land for purposes of the Center for a period of time covering, let us say, the estimated life of the building. The use of the building and other facilities erected and maintained by the Center must be subject to the control of the city to prevent any possible infraction by the Center, or by anyone acting under it, of the terms of the will of Joseph P. Bass. In no event, may the use by the Center extend beyond the use of the property for public park purposes within the meaning of the will.

All of the problems arising in the future from the use of Bass Park will not be settled in the decree to be entered in this case. We here answer the request for instructions about a proposed Recreation Center. In later years instructions may properly be sought in connection with other projects. The fact that the city holds a determinable fee does not preclude it from seeking aid from the court upon the construction of the will and the nature and extent of the city's authority and duties under the terms of the testator's gift.

We answer the questions asked by the plaintiff in its bill as follows: (1) The purposes of the Bangor Recreation Center come within the meaning of public park purposes, as set forth in the will of Joseph P. Bass; (2) the manner and extent to which the City of Bangor may rent or lease to the Bangor Recreation Center land within Bass Park can best be determined by the single justice under the principles stated herein; (3) the single justice should appoint a successor trustee under the will of Joseph P. Bass to execute and deliver to the City of Bangor the deed called for in Article 12 of the will. The entry will be

Ordered that a decree be entered below in accordance herewith.

CHARLES A. PERRY ET AL.
vs.
INHABITANTS OF THE TOWN OF LINCOLNVILLE,
MALCOLM E. JOY, ALLEN M. MORTON, AND
RAYMOND MILLER

Waldo. Opinion, August 28, 1953.

Equity. Taxes. Liens. Notice. Assessment. Abatement. Towns. De Jure Officers.

If a resident taxpayer's property is overvalued his only remedy is by abatement.

The statutory provisions relating to abatement of taxes are exclusive. R. S., 1944, Chap. 81, Secs. 39-46. Neither the Supreme Judicial nor Superior Court sitting in equity has authority to abate taxes.

A town meeting held in April, rather than in March as required by R. S., 1944, Chap. 80, Sec. 12, is not illegal where there is no design or fraud and its calling was occasioned by the illegality of the March meeting because of inadvertent errors in the call thereof.

The failure of assessors to give notice to bring in a true and perfect list of polls as required by R. S., 1944, Chap. 81, Sec. 35 does not render the assessment invalid.

A description of land contained in a lien and notice as "said real estate being bounded and described as follows: recorded in Book 402, Page 448 at Waldo County Registry of Deeds, Belfast Maine" is sufficient even if the notice referred for a description of the land on which the lien is claimed to the record of a deed between strangers; nevertheless the record referred to must otherwise contain a description of the real estate sufficient to identify it.

ON APPEAL.

This is a bill in equity seeking to have tax liens on real estate declared illegal and void. A Justice of the Supreme Judicial Court entered a decree dismissing the bill. The case is before the Law Court on appeal. Appeal dismissed. Case remanded for a decree dismissing the bill.

Charles A. Perry, for plaintiff.

David A. Nichols, for defendant.

SITTING: MERRILL, C. J., THAXTER, WILLIAMSON, TIRRELL, JJ. MURRAY, A. R. J. FELLOWS, J., did not sit.

MERRILL, C. J. On appeal. This is a bill in equity brought to have tax liens placed by the town of Lincolnville upon the homestead lot of the plaintiff, Charles A. Perry, and upon another parcel of land owned by the plaintiffs, Charles A. Perry and Frank C. Perry, as joint tenants, declared illegal and void and to restrain the town from acquiring or asserting title thereunder. The bill also indirectly seeks an abatement of the taxes through a prayer that the court, "after viewing it determine the equitable value of the plaintiff's property as provided in the constitution of the State of Maine."

Hearing was had on the bill before a Justice of the Supreme Judicial Court sitting in equity. He made a finding that the lien on the joint property was void on account of an insufficient description. He made a finding sustaining the validity of the lien on the individual property of Charles A. Perry. After the findings were filed, the town discharged the lien on the jointly held property. Reciting this discharge the justice entered a final decree dismissing the bill. From this final decree both plaintiffs appealed. The case is now before this court on the appeal.

The tax lien upon the jointly owned property now having been discharged, that lien need not be considered on the appeal.

If a resident taxpayer's property is over valued, his only remedy is by abatement. *Stickney* v. *Bangor,* 30 Me. 404; *Terminal Company* v. *City of Portland,* 129 Me. 264; *Hemingway* v. *Machias,* 33 Me. 445; *Gilpatrick* v. *Inhabitants of Saco,* 57 Me. 277.

In this State proceedings to abate taxes cannot be commenced by a bill in equity. Neither the Supreme Judicial Court nor the Superior Court sitting in equity has authority to abate taxes, that is, relieve from an over valuation of the property assessed. The power to abate taxes in the first instance is in the Board of Assessors upon application therefor. From their decisions appeals may be taken to the County Commissioners, from whose decision an appeal may be made to the Superior Court, or appeals may be taken directly from the Assessors to the Superior Court. See R. S. (1944), Chap. 81, Secs. 39 to 46, inclusive. These statutory provisions are exclusive. The appeals are entered in the Superior Court on the law side of the court, and may be brought forward to this court on exceptions in the manner provided in the statutes.

We hold that the bill states no ground upon which the equity court has jurisdiction to determine the equitable value of the plaintiffs' property or to grant any relief in the nature of an *abatement* of the taxes as assessed thereon. Nor has the plaintiff, Charles A. Perry, stated any ground sustained by the record which would authorize a court of equity to declare the tax lien filed against his property illegal or void, or which would authorize the court to restrain the town from acquiring or asserting title thereunder.

He attacks the validity of the lien on two grounds, (1) the illegality of the election of the Board of Assessors who assessed the tax, and the consequent invalidity of their acts, they being, as he alleges, only *de facto* officers, and (2) the insufficiency of the description of his property in the assessment list and in the lien notice.

He bases the claimed invalidity of the election of the assessors upon the following facts. The town of Lincolnville held a so-called annual meeting in the month of March, 1950, within the time therefor provided by statute. The warrant as posted calling the meeting was fatally defective. It was

not manually signed by the selectmen issuing the same, and it was directed to one of the selectmen issuing the same as a constable. He claims that the assessors elected at that meeting, which was illegally called, were at best *de facto* assessors. This contention we sustain. However, the situation having been discovered, the defendant town proceeded to hold another town meeting on April 8, 1950. This meeting was duly called and the same persons as before became the assessors. The plaintiff attacks the validity of the choice of assessors at this meeting because it was not held in the month of March, as provided by R. S. (1944), Chap. 80, Sec. 12. In this statute it is provided, "Annual town meetings shall be held in March, and the voters shall then choose, by a majority vote, * * * three or more assessors, * * *." It is the position of the plaintiff that this provision specifying the month in which annual meetings shall be held is mandatory, and that the provision that the voters shall "then choose" assessors is likewise mandatory. He further claims that because the assessors were not chosen at a meeting held in the month of March but at a meeting held later, they are only *de facto* officers. These contentions of the plaintiff cannot be sustained.

The foregoing provisions that annual town meetings shall be held in March and that the assessors shall be then chosen are directory, not mandatory. The failure to have a legal meeting in March was not a fatal error on the part of the town. The later meeting was regularly called and there was no "design or fraud" in holding the same. It was called and held because of the illegality of the first meeting. This illegality was due to the inadvertent errors in the method adopted in calling the same. In no sense can the illegality of the first meeting be attributed to "design or fraud." The second meeting was a legal meeting. The action taken thereat was *de jure* and the assessors then chosen were *de jure,* not *de facto* officers of the town. *State* v. *Marcotte et al.,* 148 Me. 45, 89 Atl. (2nd) 308.

After the first, or invalid meeting, the then *de facto* assessors gave the statutory notice to bring in lists of polls and estates as required by R. S. (1944), Chap. 81, Sec. 35. Said lists were to be returned on April 1, 1950. After the second town meeting the assessors who were then *de jure* assessors, gave a second notice to bring in lists of polls and estates. This second notice was dated April 28, 1950 and the lists were to be returned May 4, 1950.

R. S. (1944), Chap. 81, Sec. 35 provides that "Before making an assessment" the assessors shall give "seasonable notice" in writing to the inhabitants to bring in "true and perfect lists of their polls and all their estates real and personal, not by law exempt from taxation, of which they were possessed on the 1st day of April of the same year." This statute does not provide when said notice shall be given other than that it shall be given "before making an assessment" and that it be "seasonable."

The second notice given by the assessors was given seasonably, and given before they made the assessment in question. Furthermore, the assessors who gave the notice were *de jure* assessors. The validity of the lien cannot be successfully attacked on the ground that the assessors were *de facto* officers or that they did not give the notice required by R. S. (1944), Chap. 81, Sec. 35. In this connection we call attention to the fact that failure to give the notice provided for in R. S. (1944), Chap. 81, Sec. 35 does not render an assessment invalid. R. S. (1944), Chap. 81, Sec. 101; *Boothbay* v. *Race,* 68 Me. 351; *City of Rockland* v. *Farnsworth,* 111 Me. 315. The tax in question was legally assessed.

This brings us to the remaining ground asserted against the validity of the lien, viz.: insufficient description of the property assessed to Charles A. Perry. It is extremely doubtful whether the allegations in the bill are sufficient to raise the question of the validity of the lien on the ground of

insufficient description of the property against which it was filed, there being neither direct allegation thereof in the bill nor any allegation of facts from which the nature of the description used in the lien notice can be determined. However, as the justice below received the lien notice in evidence and passed upon its sufficiency, and especially because the question is of great importance in the administration of the tax lien law, we choose to examine the sufficiency of the description contained in the lien notice. We sustain the ruling thereon made by the sitting justice. The description contained in the notice and lien claim is as follows: "Said real estate being bounded and described as follows: recorded in Book 402, Page 448 at Waldo County Registry of Deeds, Belfast, Maine."

The plaintiff, Charles A. Perry, attacks the sufficiency of this description on two grounds, (1) that from the lien claim standing alone it is impossible to identify the land which is made the subject thereof, and (2) that notwithstanding the fact that the record of the deed referred to contains a sufficient description by metes and bounds of the land owned by him, the record referred to in the lien notice is not a deed *to him* but a deed by and in which *he conveyed the described land to another.* Neither ground urged by the plaintiff is tenable.

Although the description of the land assessed must be definite and certain, it is definite and certain within that rule if it refers to something by which it can be made certain. See *Adams* v. *Larrabee,* 46 Me. 516. The rule is laid down in *Inhabitants of Orono* v. *Veazie,* 61 Me. 431 as follows:

> "The description of the real estate assessed, in this class of cases, must be certain, or refer to something by which it can be made certain. *Adams* v. *Larrabee,* 46 Maine, 517; Blackwell on Tax Titles, 353; *Haven* v. *Cram,* 1 N.H. 93."

We said in *Greene* v. *Lunt,* 58 Me. 518:

> "The assessment must be complete in and of itself as much as a deed or contract. Parol proof may be resorted to for the purpose of applying the terms of the description to the face of the earth, but no further. It cannot supply any deficiency in the buts or bounds. These must be ascertained from what is written and from that alone."

In *Marr* v. *Hobson,* 22 Me. 321 it was held that a description of "a certain tract of land situated in Standish as will appear by deed dated July 3, 1833, and recorded in the Cumberland Registry of Deeds, Book 135, page 292" without reference to the names of the grantors or grantees in the deed was a sufficient description to pass title to all of the premises described in the deed dated and recorded as set forth.

We hold that the description used in the lien notice referring to the volume and page in the Registry of Deeds, on which page there was the record of a deed containing a sufficient description by metes and bounds of the real estate of the plaintiff, Charles A. Perry, is sufficient.

We further hold that the fact that the deed which is recorded was a deed from the plaintiff, Charles A. Perry, to another in no way invalidates the description in the lien notice. Land which a man *now* owns may be as well described in a lien notice by referring therefor to the record of a deed by which he has previously conveyed the land away as by referring to the deed by which he has reacquired the same. The deed by which he conveyed the same away might, as did the deed in this case, contain a description of the land by metes and bounds, while the deed by which he reacquired the same might describe the land by merely referring to the description in the prior deed. In fact, a lien notice would be sufficient if it referred for a description of the land on which the lien is claimed to the record of a deed between strangers.

It is to be noted that the reference to the record in the lien notice is silent as to the parties to the deed. The record was not referred to in this lien notice as stating, or as evidence of the title of the plaintiff, Charles A. Perry, to the land against which the lien was filed. It was referred to merely for the purpose of describing the land.

We hold that when the purpose of describing real estate assessed for taxation reference is made "in the inventory and valuation upon which the assessment is made" and in the notice and claim of lien to a record in the Registry of Deeds for the county in which the land lies by volume and page, such reference is a sufficient description of said real estate and meets the requirements of R. S. (1944), Chap. 81, Sec. 97 with respect thereto, *provided and upon condition that the record referred to contains a description of the real estate sufficiently accurate to identify it.* Measured by these standards, the lien notice here in question filed against the individual real estate of Charles A. Perry was sufficient.

The appeal must be dismissed and the decree below dismissing the bill affirmed and the case remanded to the court below for a decree dismissing the bill.

So ordered.

SEWALL C. STROUT, TRUSTEE
U/W HARRIET E. WHIDDEN
vs.
LITTLE RIVER BANK & TRUST COMPANY,
ADMINISTRATOR OF THE ESTATE OF
HAROLD F. WHIDDEN, DECEASED, ET AL.

Cumberland. Opinion, August 29, 1953.

Wills. Heirs. Life Tenant. Remaindermen.

The intention of a testator must be found from the language of the will read as a whole. In case of doubt the circumstances surrounding its making may be considered.

It is an elementary rule of construction that estates, legal or equitable, given by will should always be regarded as vesting, unless the testator has by very clear words manifested an intention that they would be contingent upon a future event.

The fact that a life tenant is a sole heir is not sufficient to bar him as remainderman.

ON REPORT.

This is a bill in equity for the construction of a will. The case is before the Law Court on report. Bill sustained. A decree may be drawn according to this opinion to be presented to the sitting justice.

Frank M. Coffin,
Verrill, Dana, Walker, Philbrick & Whitehouse,
for plaintiff.

Frank G. Hinckley,
Berman, Berman & Wernick,
Hutchinson, Pierce, Atwood & Scribner,
Linnell, Brown, Perkins, Thompson & Hinckley,
for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ. MURRAY, A. R. J.

MURRAY, A. R. J. This case is in this court on report. It is a bill in equity brought by the plaintiff as trustee under the will of Harriet E. Whidden for construction of her will. All interested parties are in court. The material parts of the will follow:

> "First I give, devise and bequeath to Charles A. Strout of said Portland all my estate real, personal and mixed, however described and wherever situated to have and to hold to him and his successors in trust for the following purposes, to manage and control the same and apply the net income thereof to the support and maintenance of my son Harold F. Whidden during his lifetime. Said trustee to use the whole or any part of the principal in case he considers that the comfort and suitable maintenance of said Harold F. Whidden require the same to be so used and this may be done at any time.
>
> Said trustee shall have the right to sell any part or the whole of said estate if he deems it advisable and invest and reinvest the same as may in the exercise of his best judgment be advisable.
>
> At the decease of said Harold F. Whidden the estate remaining in the hands of said trustee shall go to my legal heirs."

At the time of the decease of Harold F. Whidden there was in the hands of the trustee income amounting to $542.23, and principal amounting to $30,340.92. He died leaving neither widow nor children. Defendant, Little River Bank & Trust Company, is his qualified administrator. He survived the testatrix, and was her only child. Her father, mother, and husband predeceased her. She was survived by two sisters, Elizabeth Lynch and Mary Page, a niece, Hazel D. Belisle, the only child of another sister, Annie Burns, who predeceased the testatrix.

The trustee asks this court to instruct it whether it should pay the principal to the administrator of Harold F. Whidden, as her only heir, at the time of the death of the testatrix, or to whom he shall pay it if it is to be distributed at the time of the death of said Harold F. Whidden. He also asks as to whom he shall pay the income accrued at the time of the death of Harold F. Whidden.

The question as to the income is easily answered. By the will, the trustee was commanded—he had no discretion—to apply the net income to the support of Harold F. Whidden. It matters not that he had not used the balance now in his hands for that purpose. At the death of Whidden it had accrued and was his in equitable fee simple, subject to the trust imposed thereon. *Davis* v. *McKown,* 131 Me. 203, 208, 160 Atl. 458.

The other question is not so easily answered, in order to do so we must ascertain the intention of the testator, and that intention must prevail and effect given to it, provided that it be consistent with the rules of law. *Merrill Trust Co.* v. *Perkins,* 142 Me. 363, 53 Atl. (2nd) 260; *Abbott* v. *Danforth,* 135 Me. 172, 192 Atl. 544.

The intention of the testatrix must be found from the language of the will, read as a whole. In case of doubt as to intention, the circumstances surrounding its making may be considered. *Cassidy* v. *Murray,* 144 Me. 326, 68 Atl. (2nd) 390.

This case appears to be one in which the will and the surrounding circumstances should be considered.

The administrator of Harold F. Whidden contends that Whidden was the only heir at law of the testatrix when she died, that the remainder vested in Whidden at the death of the testatrix, and cites a number of cases which he says sustain this position.

The other claimants contend that it is apparent that testatrix intended that Harold F. Whidden should have a life estate and as much of the principal as trustee considered would be required for the comfort and suitable maintenance of said Whidden, and no more. That he was excluded as an heir and that the remainder vested in them at his death.

The fact that there was a power of disposal in trustee, did not prevent the remainder from vesting at death of testatrix. It might be divested in whole or in part but this only affects the enjoyment. *Abbott* v. *Danforth, supra.*

So strong is the presumption that testators intend the vesting of estates, that it is an elementary rule of construction that estates, legal or equitable, given by will, should always be regarded as vesting, unless the testator has, by very clear words manifested an intention that they should be contingent upon a future event. *Abbott* v. *Danforth, supra; Blaine* v. *Dow,* 111 Me. 480, 485, 89 Atl. 1126, 1129.

The presumption is, when the words legal heirs are used in the will, that they are used in the sense that has been accredited to them by usage and sanctioned by judicial decisions, unless a clear intention to use them in another sense is apparent from the will and surrounding circumstances. *Morse* v. *Ballou,* 112 Me. 127.

The fact that the life tenant is the sole heir is not sufficient to bar him as remainderman. *Abbott* v. *Danforth, supra.*

Heirs at law are not to be disinherited by conjecture but only by express words or necessary implications. *Howard* v. *American Peace Society,* 49 Me. 288.

These are some of the cases cited by the administrator, and as we understand from the briefs of the other claimants, they do not quarrel with those cases. Nor does the court. The court has given them careful consideration.

But as pointed out in *Abbott* v. *Danforth, supra,* which in turn cites *Bradbury* v. *Jackson,* 97 Me. 449, 54 Atl. 1068, 1070, they lack the authority properly accorded to precedents in the application of legal principles generally. The reason given is the intention of the testator under the particular instrument, is what is sought, and all rules of construction are designed to ascertain and give effect to that intention. It must prevail, provided it be consistent with rules of law, and this rule is one to which all other rules must bend.

The circumstances surrounding the making of the will which are of assistance in finding the intention of this testatrix follow. At the time of the making of the will, she was a widow about fifty years of age, Harold F. Whidden, her only child, was about twenty-five years of age, and unmarried. There were also some sisters. The will was executed October 19, 1909. Testatrix died February 22, 1917.

The will shows that testatrix was very careful that her son should be well cared for during his lifetime. It also shows that she was just as careful that he should not have the handling of her estate. It was the trustee who was to manage, control, and sell should the occasion arise. Even the income was to be applied by the trustee to Whidden's support. She probably felt she would have no more children, but there is nothing to show that she was not like a normal mother and perhaps hoped to have grandchildren. To her "son" she gave the life estate, to "her legal heirs" she gave the remainder. She was careful that as life tenant he could not control her estate, yet, if she intended to consider him as an heir, he could convey his remainder. If her intention was that her son was "her legal heirs," then she, after having taken such great care that her estate should not be wasted during the lifetime of Harold, intended to disinherit possible grandchildren.

We think the word "son," and the words "legal heirs," one singular and the other plural, is significant, and as she wrote her will, she meant son and legal heirs to have two different meanings. It seems to this court that the facts surrounding the making of her will show that she did not intend Harold F. Whidden to be included within the words "legal heirs." Her intention was that the remainder was contingent, it was to vest in her legal heirs—possible grandchildren, sisters, nieces or nephews, at the death of Harold F. Whidden.

The true meaning of the will is that the accrued income should be paid to the administrator of the estate of Harold F. Whidden. The remainder should be paid to her heirs at the time of death of Harold F. Whidden according to the laws of descent, to wit, one-sixth to each of the following: Hazel Belisle, Ethel Johnston, Margaret Hersey, Bertha Smith, Dorothea Cornwell, and Lawrence Lynch.

The sitting justice is directed to fix reasonable counsel fees for all parties, to which shall be added necessary disbursements, which sums shall be paid by trustee and allowed in his account.

Bill is sustained.

A decree may be drawn according to this opinion, to be presented to the sitting justice.

FLOYD E. COLBATH

vs.

BRYANT A. KENT

Penobscot. Opinion, August 18, 1953.

PER CURIAM.

This case is before the Law Court on motion for a new trial filed by the defendant after a jury verdict for the plaintiff at the January 1953 Term of the Superior Court for Penobscot County.

The plaintiff sued for damages resulting from a collision between his 1950 GMC truck with Dorsey trailer and a V-Type caterpillar tractor snowplow having two wings each eight feet long operated by the defendant, who claimed that not only was he not negligent but also that plaintiff was guilty of contributory negligence. In other words, this court is asked to decide disputes upon questions of fact. As we view the case, it is unnecessary to review the facts except to state that the evidence, as is usual, in this type of action, was conflicting. No errors of law were claimed. The record, which included the charge of the presiding justice, to which no exceptions were taken, has been carefully examined by us and we conclude, as we have in many recent cases, that this court is not a tribunal of the first instance having authority to hear and decide disputes upon questions of fact. Our power is limited to decisions of the question whether the verdict is so plainly contrary to the evidence that manifestly the jury was influenced by prejudice, bias, passion or mistake. Otherwise, its findings of facts are binding upon this court. See *Witham* v. *Quigg,* 146 Me. 98, 102, 77 A. (2nd) 595, and cases cited. We have many times stated the principles of law applicable to a case of this nature and it hardly seems necessary to reiterate the rule so well known and so consistently applied by our courts. As we said in

Witham v. *Quigg, supra,* the burden of proving to the satisfaction of the court that the verdict was manifestly wrong is upon the one seeking to set it aside. The record shows that there was ample credible evidence on behalf of the plaintiff which would support the decision of the jury on the questions of fact appearing in this case and when the further rule of law is applied, to wit, that the credit of the testimony of the witnesses of the plaintiff was for the jury and not for this court to decide, see *Jenness* v. *Park,* 145 Me. 402, 76 A. (2nd) 321, and cases cited, we come to the conclusion, as we have many times before, that this court, sitting as a court of law, is without right to disturb the verdict of a jury which has heard the evidence on questions of fact where the record shows that no bias, prejudice or other errors of law or fact appear which would permit this court to take action. It, therefore, follows that the motion for a new trial must be overruled.

Overruled.

Harry Stern, for plaintiff.

Burton G. Shiro, for defendant.

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

LEON M. DAVIS ET AL.

vs.

VINCENT SCAVONE

Kennebec. Opinion, September 5, 1953.

Executors and Administrators. Wills. Powers. Survivorship.

A devise of land to executors to sell gives a power coupled with an interest. In such case legal title vests in the executors and it may be exercised by those qualifying. This is true at common law and under the statute of 21 Henry VIII, c. 4.

A devise directing executors to sell confers a power without interest, or a naked power. In such case the fee vests in the devisees or the heirs according to the remaining terms and provisions of the will, subject to being divested upon execution of the power.

Statute of 21 Henry VIII, c. 4 (providing that where lands are willed to be sold by executors, and part of them refused to be executors, all sales by the executors that accept administration shall be as valid as if all had joined) is a part of the common law of this state.

Except in cases where a power of sale under a will amounts to a personal confidence reposed in the discretion of executors personally, the liberality of modern times would induce the courts to hold that in almost every case, where the power is given to executors, as the office survives so may the power.

A will authorizing executors "hereafter named, as soon as they deem it advisable in the settlement of my estate" to sell certain real

estate is not, without more, a sufficient indication that the testator intended to confer the power of sale as a personal confidence that must be exercised by all executors named.

ON EXCEPTIONS.

This is a writ of entry brought to recover possession of real estate. The case is before the Law Court upon exceptions to the direction of a verdict for plaintiff. Exceptions overruled.

Dubord & Dubord, for plaintiff.

Eaton & Eaton,
A. Raymond Rogers, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ. MURRAY, A. R. J.

MERRILL, C. J. This is a writ of entry brought to recover possession of certain real estate situated at Rome in the County of Kennebec. The defendant has pleaded the general issue with a brief statement. The brief statement attacks the title of the plaintiffs as invalid.

The plaintiffs' title rests on a conveyance made under a power of sale given by the will of Lydia E. Scavone who died testate December 14, 1940. The following is so much of her will as is pertinent to the questions here involved and the power of sale under which the plaintiffs claim:

> "After my just debts and funeral charges, I give bequeath and devise as follows: I authorize my executors, hereafter named, as soon as they deem it advisable in the settlement of my estate, to sell the Realestate in Maine and any other property belonging to me at time of decease.

> I give devise and bequeath to my husband Vincent Scavone now residing with me in Maine, and my sister's Mary M. Ross, 59 Morris St. New Brunswick, New Jersey, and Emma J. Clinton of Elberon, New Jersey, equal shares in Estate left by me, after debts are paid.
>
> I nominate and appoint said Sister's to be executors of this my last will, and I direct that they be exempt from any surety or surety's on their Official Bond."

Emma J. Clinton, one of the two executors named, never qualified as an executrix and, in fact, declined to serve as such.

The plaintiffs claim under a deed executed by Mary M. Ross, the other executrix, alone. The question to be decided is whether or not this deed conveyed a valid title to said property. Nothing was ever done in the administration of the estate except to issue a warrant and inventory and settle a claim by the State of Maine. On these facts which were admitted the presiding justice directed a verdict for the plaintiffs. Exceptions were taken to such ruling and are now before us.

There is no reason why an executor who is nominated in a will must serve, and provision is made by statute for the exercise of the duties of the office by those who legally qualify. See R. S. (1944), Chap. 141, Sec. 12.

The question of whether the *surviving* executor or executors or the *qualifying* executor or executors, they *being less than all* of the executors *named in a will,* can execute a power given to the executors is not without difficulties, and on which the decisions are not in entire accord.

The power devised to the executors in this will was a naked power as distinguished from a power coupled with an interest. By a naked power we mean a power devised to the executors without investing them with the legal title. *Bradt* v. *Hodgdon,* 94 Me. 559.

A devise of land to executors to sell gives a power coupled with an interest. In such case legal title vests in the executors and it may be exercised by those qualifying. This is true both at common law and under the statute of 21 Henry VIII, c. 4 hereinafter referred to. *Bonifaut* v. *Greenfield,* Cro. Eliz. 80, 78 English Reprint, 340. A devise directing executors to sell confers a power without interest, or a naked power. In the latter case the fee vests in the devisees or the heirs according to the remaining terms and provisions of the will, subject to being divested upon execution of the power. *Shelton* v. *Homer,* 5 Met. 462; *Larned* v. *Bridge,* 17 Pick. 339. See Sugden on Powers, 1st American Edition from the 3rd London Edition, Pages 106-111; Bergen & Bennett, 1 Caines Cases, 1, 16; *Houell* v. *Barnes,* Cro. Car. 382, 79 English Reprint, 933.

Formerly where a naked power was given to executors to sell, and one of them refused the trust, it was clear that the others could not sell. But the statute of 21 Henry VIII, c. 4 provided, that where lands are willed to be sold by executors, and part of them refused to be executors, and to accept the administration of the will, all sales by the executors that accept such administration shall be as valid as if all the executors had joined. A copy of said statute is to be found in Vol. V, Gray's Cases on Property, 348.

By Section 6 of the Act of Separation between Maine and Massachusetts it was provided:— "That all the laws which shall be in force within said District of Maine, upon the

said fifteenth day of March next, shall still remain, and be in force, within the said proposed State, until altered or repealed by the government thereof, such parts only excepted as may be inconsistent with the situation and condition of said new State, or repugnant to the Constitution thereof."

By our Constitution as originally adopted, by Article 10, Section 3 thereof it was provided: "All laws now in force in this State, and not repugnant to this Constitution, shall remain, and be in force, until altered or repealed by the Legislature, or shall expire by their own limitation." This provision of the Constitution as originally adopted has remained in force to the present time.

In *Commonwealth* v. *Churchill,* 2 Met. 118, 123, speaking of the Massachusetts Constitution as originally adopted, the court, speaking through Chief Justice Shaw, said:—

> "By that constitution, it was declared that 'all the laws, which have heretofore been adopted, used and approved in the colony, province, or state of Massachusetts Bay, and usually practiced on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution.' This constitution has been construed as adopting the great body of the common law, with those statutes made before the emigration of our ancestors, which were made in amendment of the common law, so far as these rules and principles were applicable to our condition and form of government. *Commonwealth* v. *Leach,* 1 Mass. 59. *Commonwealth* v. *Knowlton,* 2 Mass. 534."

Although this case was subsequent to the separation, in a Kennebec County case decided by the Supreme Judicial Court of Massachusetts at the June Term 1807, that court

had said in the case of *Commonwealth* v. *Knowlton,* 2 Mass. 530 at 534:—

> "Our ancestors, when they came into this new world, claimed the common law as their birth right, and brought it with them, except such parts as were judged inapplicable to their new state and condition. The common law, thus claimed, was the common law of their native country, as it was amended or altered by English statutes in force at the time of their emigration. Those statutes were never reenacted in this country, but were considered as incorporated into the common law. Some few other English statutes, passed since the emigration, were adopted by our courts, and now have the authority of law derived from long practice. To these may be added some ancient usages, originating probably from laws passed by the legislature of the colony of the *Massachusetts Bay,* which were annulled by the repeal of the first charter, and from the former practice of the colonial courts, accommodated to the habits and manners of the people.
>
> So much therefore of the common law of *England* as our ancestors brought with them, and of the statutes then in force, amending or altering it; such of the more recent statutes as have been since adopted in practice; and the ancient usages aforesaid, may be considered as forming the body of the common law of *Massachusetts,* which has submitted to some alterations by the acts of the provincial and state legislatures, and by the provisions of our constitution."

This quotation was cited *in extenso* and with approval by this court in *The State* v. *Temple,* 12 Me. 214 at 219.

Interpreting the above quoted portion of the Massachusetts Constitution, the Massachusetts court in *Commonwealth* v. *Churchill, supra,* said:—

> "But it was contended, at the argument, that under this provision no principle or rule of the common law could be regarded as adopted, unless it could be shown affirmatively that it had been adjudicated before the revolution. But we apprehend this would be much too narrow a construction. Before the revolution, we had no regular reports of judicial decisions; and the most familiar rules and principles of law—those which lie at the foundation of our civil and social rights—could not be so proved. No: We rely on usage and tradition, and the well known repositories of legal learning, works of approved authority, to learn what are the rules of the common law; and we have no doubt that these were the great sources to which the above pregnant provision of our constitution refers."

If there be language in the opinion in *State* v. *Knight,* 43 Me. 11, 116 et seq., that would seem to place a different construction on the Massachusetts Constitution, *Commonwealth* v. *Churchill* being a decision of the Supreme Judicial Court of that Commonwealth is conclusive upon the construction of its Constitution.

It is upon the foregoing provisions of the Constitution of the Commonwealth of Massachusetts, the Act of Separation and the Constitution of Maine, and the foregoing decisions that we hold that the Statute of 21 Henry VIII, c. 4, is a part of the common law of this State. Although we have found no express holding by the Massachusetts court that said statute was a part of the common law of Massachusetts, it, together with an English case interpreting it, was cited with approval in the case of *Shelton* v. *Homer et al.,* 5 Met. 462, 465.

In *Brassey* v. *Chalmers,* 16 Beav. 223, 51 English Reprint, 763, the question was whether a power given "to my executors hereinafter mentioned" could be executed by the sur-

vivor. Sir John Romilly, the Master of the Rolls, stated:—

> "This question depends on the words of the will, and whether the powers of sale thereby given is given to Thomas Seacombe and Thomas Brassey as individuals or in the character of executors of his will.
>
> It is settled, by repeated authorities, that where a naked power is given to several persons, it cannot be executed by the survivors. It is a power, the execution of which is intrusted to several individual persons jointly, which can only be executed by them all, and if one of them should die the authority will not survive. It is also equally settled, that if the power be annexed to the office any persons who fill the office of executor will have also the power which is attached to that office. The difficulty arises in cases like the present, where the power is given to certain persons by name, and they are also appointed executors, and in these cases the proper distinction seems to be that stated at the Bar, viz., that it is incumbent on the Court to ascertain in such cases whether the power is given to the executor or to the person. In this case, I think that the power is given to Thomas Seacombe and Thomas Brassey individually, and not to them in their character of executors. That it is not given to the executors simply is plain. The words 'to my executors hereinafter mentioned' are, in my opinion, equivalent to these words, viz., 'to my executors Thomas Seacombe and Thomas Brassey,' whom I hereby appoint executors; in which latter case I should consider, that the power was given to the individuals. This view of the case is confirmed by the rest of the will. The executors are occasionally referred to generally as 'my executors,' and occasionally individually as 'my said executors.' And it was, in my opinion, well observed by Mr. Baily, that the reference to them as individuals occurs in every case which relates to the sale of the land, and not in any other case."

However, on appeal, the Lord Justices did not concur in this decision but reversed the same on the authority of

Houell v. *Barnes, supra. Brassey* v. *Chalmers,* 4 De G. M & G 526, 43 English Reprint, 613. In that case the power was conferred upon "his executors hereunder named." Commenting upon the case of *Houell* v. *Barnes,* Sugden in his book on Powers, *supra,* at page 164 says:—

> "But Jenkins thinks that this case depends upon the executors not being at first named by their proper names; and that they took *qua* executors. He gives it as his opinion, that if a devise be that A and B, the executors, shall sell certain land, and near the end of the will the testator also names them executors, if the one dies the other may sell, for the interest is annexed to the executorship by this repetition in the will. Mr. Hargrave has endeavored to establish, that where the power is given to *executors,* or to persons *nominatim* in *that character,* the survivor may sell, as the power is given to them *ratione officii;* and as the office survives, by parity of reason the authority should also survive. And the liberality of modern times will probably induce the courts to hold, that, in every case where the power is given to *executors,* as the office survives so may the power."

The history of the interpretation of the statute of 21 Henry VIII and similar statutes in this country has in general borne out the view expressed by Sugden in 1821 that the liberality of modern times would induce courts to hold that in almost every case where the power is given to executors, as the office survives so may the power.

One exception to the rule that the qualifying executor or executors can exercise the power of sale has been recognized, and that is that where the power of sale is a personal confidence reposed in the discretion of the executors personally, it must be exercised by all of those named. The old English case of *Houell* v. *Barnes, supra,* decided in 1634, where the power was given to "executors hereunder named"

and the case of *Brassey* v. *Chalmers,* 4 De G. M & G 526, 43 English Reprint, 613, where the power was given to "executors hereinafter mentioned," are authorities that such powers are given to the executors *virtute officii* and not *nominatim* individually.

In this view we concur. Nor do we think that because the executors under this will were authorized to sell "as soon as they deem it advisable in the settlement of my estate," coupled with the fact that the power was to "my executors hereafter named" is a sufficient indication that this power is a personal confidence reposed in the discretion of the executors later named in the will so that it must be exercised, if at all, by all of the executors named. This construction is in accord with the general statutory declaration with respect to the exercise of powers by a majority of executors found in R. S. (1944), Chap. 141, Sec. 12.

A full discussion of the American authorities on this subject may be found in 21 Am. Jur. pages 777-779, inclusive, Sections 708 and 709, and especially in the very full annotation referred to therein found in 36 A. L. R. 826 et seq. While individual cases may be found contrary to the decision herein made, we believe that the rule we have adopted is sustained not only by reason but by the weight of authority.

The contention of the defendant that the deed by the sole qualifying executor was void cannot be sustained.

The further equitable defense attempted to be set up by the defendant, that said executor's deed to the plaintiff Leon M. Davis, and upon which the joint title of the plaintiffs depends, was obtained by fraud and collusion, even if it could be sufficiently pleaded as a defense to a real action, a question upon which we need and do not express any

opinion, is so devoid of merit on the evidence that a discussion thereof would serve no useful purpose. There was no error on the part of the court below in directing a verdict for the plaintiffs.

The entry must be,

Exceptions overruled.

LIPMAN BROTHERS, INC.

vs.

HARTFORD ACCIDENT & INDEMNITY CO.

Penobscot. Opinion, September 9, 1953.

Evidence. Admissions. Criminal Records. Relevancy. Competency. De bene esse. Referees.

It is well settled that a conviction in a criminal case, as such, is not evidence in a civil case against the convicted person to establish the facts on which it is rendered. Even though such conviction is admissible in an action *against the party convicted* when based upon a plea of guilty, it is the admission by the plea, not the fact of the conviction which is evidence.

Criminal convictions of several of plantiff's employees even though based upon pleas of guilty to larceny of plaintiff's poultry are not competent evidence of "loss x x x caused by the x x x theft x x x of an employee" under an insurance policy.

In a suit by an employer against his insurer for loss occasioned by theft of his employees, criminal proceedings against his employees

are *res inter alios acta* so that neither the convictions nor admissions of the employees are admissible against the insurer to prove the loss.

The rule which permits the reception of evidence *de bene esse* should be limited to cases wherein the objection to the testimony relates mainly to its relevancy to the issue, and does not extend to cases in which the objection is to its legal incompetency to prove the fact.

Before a decision will be disturbed for the erroneous reception of evidence it must appear that the objecting party was prejudiced thereby.

When a case is heard by the *Court* without the intervention of a jury, a party is not aggrieved by the reception of inadmissible testimony if there be legal testimony to authorize or require the court to render the decision made.

Referees are not the court.

There is no presumption that a referee has decided a case upon so much of the testimony as is legally admissible.

In determining whether the reception of evidence by a referee is prejudicial the same principles should be applied as in jury trials and new trials should be granted when evidence in addition to being irrelevant is of such a character as to be liable to mislead, confuse, or improperly influence the trier of facts, unless it clearly appears that the referee *did not* base his decision at least in part on the inadmissible testimony.

ON EXCEPTIONS.

This is an action to recover upon an insurance policy. The case is before the Law Court on exceptions to the rejection of a referee's report. Exceptions overruled. Case remanded to Superior Court.

Abraham M. Rudman,
Gerald Rudman, for plaintiff.

James E. Mitchell,
John W. Ballou, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ. MURRAY, A. R. J., did not sit.

MERRILL, C. J. On exceptions by the plaintiff to the rejection of the report of a referee. The plaintiff was a processor and dealer in poultry, to wit, chickens. It operated a processing plant in Bangor in which it had about fifty employees. At this plant it received live chickens, killed and dressed the same. Save for minor local sales, it shipped the dressed poultry to New York. The defendant issued to and covered the plaintiff by a comprehensive Dishonesty, Disappearance and Destruction Policy, so-called, which was in force during all times material to the claim here in question. By said policy the plaintiff was insured for loss not exceeding $22,500.00 as follows:—

"I Employee Dishonesty Coverage — Form A

Through any fraudulent or dishonest act or acts, committed anywhere by any of the Employees acting alone or in collusion with others, including loss of Money and Securities and other property through any such act or acts of any of the Employees, and including that part of any inventory shortage which the Assured shall conclusively prove to have been caused by the fraud or dishonesty of any of the Employees; provided that the Company's aggregate liability as to all Employees shall not exceed the Limit of Liability applicable to this Insuring Agreement I, subject, however, to the provisions of Section 9.

Loss Caused by Unidentifiable Employees

If a loss is alleged to have been caused by the fraud or dishonesty of any one or more of the Employees and the Assured shall be unable to designate the specific Employee or Employees causing such loss, the Assured shall nevertheless have the benefit of this Insuring Agree-

> ment I, provided that the evidence submitted reasonably (in case of inventory shortage, conclusively) establishes that the loss was in fact due to the fraud or dishonesty of one or more of the said Employees, and provided further that the aggregate liability of the Company for any such loss shall not exceed the Limit of Liability applicable to this Insuring Agreement I."

The plaintiff claimed that it sustained loss by theft by its employees between December 6, 1950 and February 6, 1951 of 5,449 chickens of the value of $1.332 each, and of the total value of $7,258.07. Against this sum it credited $203.-89, the amount of salaries earned and withheld from the employees it alleged participated in the theft, leaving a balance claimed of $7,054.18. Failing to arrive at a settlement of this claim, the plaintiff brought an action on the policy against the defendant insurer returnable to the Superior Court for the County of Penobscot at the January Term 1952. At this term the defendant entered a plea of the general issue with a brief statement setting forth eight specifications of defense thereunder. So far as material to the record before us, we need but consider the issues offered under the general issue and the seventh specification of defense which is as follows:—

> "That by the terms of said policy of insurance the burden is upon the plaintiff in proving or establishing any inventory shortage, loss by theft, dishonesty or misappropriation by employees, or other loss, to 'conclusively prove' such loss and to 'conclusively prove' that such loss has been caused by the fraud, dishonesty, theft or misappropriation of an employee or employees of the plaintiff; and the defendant avers that the plaintiff lacks, cannot furnish and has not furnished the defendant, or anyone else, such 'conclusive proof' of loss, nor any proof thereof, for that matter:"

The case was referred under rule of court with right of exceptions as to matters of law reserved by both parties. The referee found for the plaintiff and made a specific finding that,

> "In this case the evidence establishes that there were stolen by the employees of the plaintiff the following: 5449 chickens, not dressed, of the value of $1.16 each $6,320.84 from which is deducted labor of employees 203.89 Balance $6,116.95 Interest from date of writ 269.15 Total $6,386.10. Judgment is for the plaintiff for this amount."

The referee's report with the evidence before the referee was presented to the Superior Court at the September Term 1952. Motion for acceptance of the report, and written objections to its acceptance were filed at that term. In vacation the justice presiding at the September Term rendered his decision rejecting the report. To this action of the presiding justice exceptions were taken and allowed and the case is before us on these exceptions.

By its objections to the acceptance of the referee's report the defendant alleged as the grounds thereof that there was error in law by the referee (1) because there was no evidence in the record of the case to support the findings of fact made by the referee, which findings necessarily form a basis of the referee's conclusions and report; (2) the report is erroneous in law because upon all of the testimony in the case there was no evidence to support the referee's findings quoted above in this opinion. In addition to certain objections which are immaterial to the issues now before the court, numbered (3), (4) and (5), the defendant also objected to the report upon the ground that "(6) upon all of the testimony in the case, the plaintiff did not sustain the burden which was upon it of proving or establishing an inventory shortage, loss by theft, dishonesty or misappropriation by employees, or other loss within the pro-

visions of said policy of insurance, nor did the plaintiff (as required by said policy) 'conclusively prove' that any loss to it within the terms of said policy had been caused by any fraud, dishonesty, theft or misappropriation of an employee, or employees, of the plaintiff." The defendant further objected to the report "(7) Because the said report is error as a matter of law for the reason that, upon all of the testimony in the case, said report was necessarily based upon inadmissible evidence to the legal detriment of the defendant, without which inadmissible evidence, as a matter of law, and for that matter, so the defendant contends, even with it, the said Referee could not possibly, as a matter of law, have found for the plaintiff, especially in the following particulars." Thereafterwards followed a specification of the alleged inadmissible testimony which the written objections and the record show was admitted over objection and subject to exception noted.

This testimony consisted of warrants issued by the Bangor Municipal Court, all dated February 10, 1952, charging (a) William Carl Wilson, Fred Leteure and Edward A. Nelson with the larceny of 25 chickens belonging to the plaintiff on February 1, 1951; (b) Earl A. Drew with the larceny of 2 chickens belonging to the plaintiff on December 22, 1950; (c) Carl R. Drew with the larceny on January 10, 1951 of 1 chicken belonging to the plaintiff; (d) Floyd Drew with the larceny of 1 chicken belonging to the plaintiff on December 20, 1950; that to these several warrants Edward A. Nelson, Earl A. Drew, Carl R. Drew and Floyd Drew entered pleas of guilty and that neither of them took appeals from the sentences imposed (these several respondents all being employees of the plaintiff during the time when said larcenies were alleged to have been committed).

The admission of this evidence over the defendant's objection and noted exception constituted legal error. This error was sufficiently specified in the written objections to

the acceptance of the referee's report under Rule 21, and justified its rejection by the Justice of the Superior Court presiding.

To understand the evidence hereinafter discussed and the full force and effect of the foregoing inadmissible testimony, it is necessary to digress and to describe in outline the procedure by which chickens were processed by the plaintiff.

The chickens were received at the plant in ordinary wooden chicken crates. They were removed from these, counted, weighed, and placed alive in metal coops called batteries, and there fed and watered. The chickens were taken from the batteries and hung alive by the feet upon a conveyor. On the conveyor, which moved along, they passed the killer. After being killed they were immersed in a hot bath to loosen the feathers, were plucked mechanically and finished by hand, cropped, weighed, sorted, cooled, packed, and placed in refrigerated trucks for transportation.

As the birds were being plucked the wet feathers fell to the floor and were from time to time gathered in a pile. These feathers were later wheeled out by barrow and dumped in a truck operated by one Frederick Leteure who carted them away to the city dump.

On either the 8th or 9th of February, 1951, the date being immaterial, Mr. Bernard Lipman, Treasurer of the plaintiff corporation, was present in the dressing plant. He discovered a bird or two in the barrow and upon examination more in the feathers, some 34 in all. These were pretty well processed, marketable chickens. Leteure was then engaged in the process of trucking the feathers away, and was at that time making a load. Lipman contacted the police. They met the truck driven by Leteure at the dump and found some 75 marketable birds amongst the feathers. Over sea-

sonable objection the referee admitted evidence of the conviction of Leteure of the larceny of the chickens on a warrant alleging said larceny to have been committed on February 9. He later struck out the evidence of the conviction of Leteure on the ground that the larceny of which he was convicted was subsequent to the period in which the losses sued for were alleged to have occurred. It further appeared in evidence that, as the plaintiff had recovered the chickens discovered amongst the feathers in marketable condition, it made no claim against the defendant therefor.

After discovering the chickens amongst the feathers and the arrest and conviction of its employees, the plaintiff sought to ascertain the number of chickens, if any, it had lost by theft in the period December 6, 1950 to February 6, 1951. It arrived at the number of chickens it claimed were stolen by deducting from the number of chickens it claimed it had received at its processing plant during the period the number of chickens sold during the same period, and making allowance for what it claimed was the average loss during processing. It had no records of average loss. Therefore, it kept an account of the actual loss during processing for a test period of from one to two weeks and worked out a loss ratio. It applied this loss ratio to the number of chickens processed from December 6, 1950 to February 6, 1951 (approximately 400,000) and computed the normal loss between those dates at 1121 chickens.

We now return to the legal questions presented by the admission of evidence of the conviction of larceny of chickens by employees of the plaintiff upon their several pleas of guilty.

It is well settled that a conviction in a criminal case, as such, is not evidence in a civil case against the convicted person to establish the facts on which it is rendered. *State*

of Maine v. *Fitzgerald et al.,* 140 Me. 314 at 318. Even though such conviction is admissible in an action *against the party convicted* when based on a plea of guilty, it is the admission by the plea, not the fact of the conviction which is evidence. *State* v. *Fitzgerald et al., supra.* See also *Mead* v. *City of Boston,* 3 Cush. 404, 407. In that case Chief Justice Shaw said:—

> "The admission, in a civil action, of a conviction on an indictment founded on a plea of guilty, is not an exception to this rule (that the conviction is not evidence of the facts upon which it is based). That is received, not as a judicial act, having the force and effect of a judgment, but as a solemn confession of the very matter charged in the civil action. 1 Greenl. Ev. § 537."

In the section just cited by Chief Justice Shaw in *Mead* v. *City of Boston,* Greenleaf said:—

> "Upon the foregoing principles, it is obvious that, as a general rule, a verdict and judgment in a *criminal case,* though admissible to establish the fact of the mere *rendition* of the judgment, cannot be given in evidence in a civil action, to establish *the facts on which it was rendered.*"

The same author in a prior section, to wit, Section 527 a. stated:—

> "A record may also be admitted in evidence in favor of a stranger, against one of the parties, as containing a *solemn admission,* or judicial declaration by such party, in regard to a certain fact. But in that case it is admitted not as a judgment conclusively establishing the fact, but as the deliberate declaration or admission of the party himself that the fact was so. It is therefore to be treated according to the principles governing admissions, to which class of evidence it properly belongs. * * * And on the same ground, in a libel by a wife for a

> divorce, because of extreme cruelty of the husband, the record of his conviction of an assault and battery upon her, founded upon his plea of 'guilty' was held good evidence against him, as a judicial admission of the fact but if the plea had been 'not guilty', it would have been otherwise."

As authority for the statements relative to the admission and rejection of the evidence in divorce actions Greenleaf cites *Bradley* v. *Bradley,* 11 Me. 367, and *Woodruff* v. *Woodruff,* 11 Me. 475. That even a plea of guilty by a party to a civil action is only an admission and not conclusive upon him in the civil case is well illustrated by the case of *Karlen* v. *Hadinger* quoted with approval in *State of Maine* v. *Fitzgerald, supra.*

The underlying reason for the admissibility of the conviction upon a plea of guilty being that it is an admission, its admissibility in civil suits is therefore governed by the law relative to admissions. This law conclusively demonstrates that the admission of the evidence of the convictions of the several employees of the plaintiff on their several pleas of guilty was erroneous. The employees were not parties to the present suit. The criminal proceedings in which the pleas were entered and the convictions were had, were *res inter alios acta* in their entirety. Neither party to the criminal prosecution is a party to this action. The admissions of the employees by their pleas cannot be construed to be admissions of either of the parties to the instant suit. Neither the convictions as such nor the admissions by the pleas were competent evidence in this action to prove loss by larceny by employees of the plaintiff. It would seem unnecessary to multiply authorities, but see:—30 Am. Jur. 1002 et seq., Secs. 289-294, inclusive, and annotations. See notes 31 A. L. R. 261, 57 A. L. R. 504, 80 A. L. R. 1145, 87 A. L. R. 1262, 31 L. R. A. N. S. 670, 21 Ann. Cas. 1184, and 7 Encyc. of Evidence, Sec. IV, Par. 1-5, pp. 850-852.

We would not leave this subject without calling attention to the cases of *Anderson* v. *Anderson,* 4 Me. 100, and *Randall* v. *Randall,* 4 Me. 326. In these cases, which were actions for divorce because of adultery by the husband, the court received evidence of the conviction of the husband of adultery as proof of that fact. Although these cases are in apparent conflict with the rule that the conviction of a person in a criminal case cannot be used as evidence of the facts upon which it is based in a civil action, if not overruled in effect by *Bradley* v. *Bradley* and *Woodruff* v. *Woodruff, supra,* they may be and have been explained as exceptions thereto peculiarly applicable in divorce actions. See *Tucker* v. *Tucker,* 137 Atl. (N. J.) 404 and the cases cited therein, and especially a discussion of the rule in divorce cases in the extract from Bishop on Marriage, Divorce, and Separation, Section 1406 as quoted therein.

The reception of the evidence objected to relative to the conviction of the employees of the plaintiff, as above stated, was legal error. Nor is this error aided by the fact that the referee announced that he was receiving the evidence or at least a part thereof *de bene.* It is often necessary to receive evidence, which standing alone would be inadmissible as immaterial, as a preliminary step in proving a material fact. Such evidence is often received upon the assurance of counsel that evidence will later be introduced showing its materiality or that it is introduced as one step in proving a material fact. In such instances the court may receive such testimony *de bene esse* or, in the contractive form more commonly used, *de bene.* The

> "Phrase 'de bene esse' or its contraction 'de bene,' with reference to admission of evidence, properly refers to doctrine of conditional relevancy, and is most accurately expressed by word 'conditionally,' so that admission of evidence de bene esse properly means that admission is conditioned upon sub-

> sequent showing of facts necessary to demonstrate admissibility. Doe v. Lucy, 139 A. 750, 752, 83 N. H. 160." 11 Words & Phrases, 185.

This doctrine and its limitations have been recognized and stated by this court in *Mussey* v. *Mussey,* 68 Me. 346, 349 et seq. In that case we said:—

> "We have not overlooked the fact that in the trial of causes evidence apparently irrelevant often is, and, from the necessity of the case, must be admitted upon the statements of counsel that its pertinency will be made to appear by evidence afterward to be produced. But when this is done counsel must see to it at their peril that the connecting link in the chain of evidence is supplied; for, if this is not done, and the evidence was seasonably objected to, its admission will be error, and cause for a new trial. To hold otherwise would virtually repeal the rule of law excluding irrelevant evidence.
>
> The efforts to get before juries evidence which can have no other effect than to create in their minds some improper prejudice or bias, are constant, persistent, and too often successful. It is a practice which ought not to be encouraged. To hold that evidence apparently irrelevant may be received upon the statement of parties or their counsel that its relevancy will afterward be made to appear, and then allow it to remain in, when no such evidence is produced, and then hold that no peril is thereby incurred, would greatly encourage a practice which is already an existing evil, and virtually repeal a valuable and fundamental rule of the law of evidence.
>
> We do not mean to say that a new trial should be granted for every inadvertent or accidental admission of irrelevant evidence. Such is not the law. If the court can see that the irrelevant evidence was perfectly harmless, — that it could not by any

> possibility have had any improper influence upon the jury — a new trial may properly be refused. But when, in addition to being irrelevant, it is of such a character as to be liable to mislead, confuse, or improperly influence the jury, a new trial should be granted. And such we understand to be the well settled rule of law. *Ellis* v. *Short,* 21 Pick. 142, *Farnum* v. *Farnum,* 13 Gray, 508. *Brown* v. *Cummings,* 7 Allen, 507. *Ellingwood* v. *Bragg,* 52 N.H. 488."

There is a further limitation upon the rule of admitting evidence *de bene esse.* It is well stated in Jones on Evidence, Vol. 3, Sec. 812 at page 1496:—

> "The rule under discussion should be limited to cases wherein the objection to the testimony relates mainly to its relevancy to the issue, and does not extend to cases in which the objection is to its legal incompetency to prove the fact. 'In the one case, there is a fact proved which subsequent developments may show to be relevant to the issue, but in the other, there has been no legal proof of the fact itself, and when made relevant it would still be incompetent.' "

See also *Wilson* v. *Barkalow,* 11 Ohio St. 470 at 474.

This distinction stated by Jones and the case of *Wilson* v. *Barkalow, supra,* may be aptly illustrated with respect to evidence relating to convictions of crime. In the instant case, the referee when the first warrant upon which one of the employees was arrested was offered, admitted the same *de bene.* If the ultimate conviction of the employee upon a plea of guilty was a fact material to the issue and legally competent to prove theft of the plaintiff's property *in this case,* as the referee evidently believed, it would be proper to admit the warrant *de bene.* It was one of the steps in proving the conviction on such plea of guilty. On the other hand, if the ultimate fact of the conviction, even upon a

plea of guilty, as in this case, was not relevant to the issue and was legally incompetent proof of the larceny of the plaintiff's property by the convicted employee, it would be improper to admit evidence of any of the preliminary facts to prove the ultimate fact of conviction on plea of guilty. In other words, if the ultimate fact sought to be established is legally incompetent as proof of any issue in the case, it is entirely improper to admit evidence of the preliminary facts leading up thereto *de bene esse.*

When the party offering evidence which is received *de bene* fails to furnish the necessary connecting links a distinct ruling which lays the defective evidence out of the case will leave the objecting party no substantial cause for complaint. *Billings* v. *Monmouth,* 72 Me. 174 at 177. This rule, of course, is subject to the general limitation that evidence improperly received may be so prejudicial that striking it out, coupled with an instruction to disregard the same will not cure its wrongful admission. Furthermore, evidence may be received *de bene* upon a condition expressed so plainly by the court at the time of its admission that if the condition is not later complied with, this court will presume that the jury understood the matter and that they actually did disregard the evidence. See *Bangor* v. *Brunswick,* 30 Me. 398.

The procedure with respect to, and effect of the admission of evidence *de bene* must not, however, be confused with that obtaining with respect to its *exclusion de bene.* In the former case the evidence has been received and the burden of overcoming the effect of its wrongful admission, if it was objected to, is upon the party introducing it. *Mussey* v. *Mussey, supra.* In the latter case, when the evidence has been excluded *de bene* the one offering it has an opportunity to offer it again and obtain the benefit thereof. The rule

with respect thereto is well stated in *Dudley* v. *Paper Co.*, 90 Me. 257, 261:—

> "But we rest our decision upon the ground that a postponement is not an exclusion; that when the admissibility of evidence is reserved for further consideration, and it is not again offered, and the attention of the court is not again called to it, an exception can not be sustained on the ground that it was excluded. We hold that in such cases postponement is not exclusion, and can not be so treated."

To the same effect see *Hotchkiss* v. *Coal & Iron Company*, 108 Me. 34, 62.

Admission of evidence *de bene*, when properly allowed, is a necessary step in the regular, orderly and efficient conduct of the trial of cases. However, it is neither to be resorted to by the court as a device to avoid responsibility for erroneous rulings, nor employed by counsel as the means to get inadmissible testimony before the jury without suffering the consequences thereof.

Having determined that the admission of the evidence of the convictions of the several employees of the plaintiff could not be sustained, as against the defendant, either on the ground that they constituted a judicial determination of the facts upon which they were based, or as admissions by the convicted persons, their admission by the referee constituted error in law. This error in law is set forth in the written objections as one of the grounds for rejecting the report.

The mere fact that irrelevant evidence is admitted over objection and subject to exception in and of itself does not require the vacating of a decision against the party objecting to the reception of the evidence, be the trier of fact jury, judge or referee.

Before a decision will be disturbed for the erroneous reception of evidence it must appear that the objecting party was prejudiced thereby.

In the case of a jury trial the test of whether or not the erroneous admission of testimony is prejudicial is well stated in the extract above quoted from *Mussey* v. *Mussey*: "If the court can see that the irrelevant evidence was perfectly harmless, — that it could not by any possibility have had any improper influence upon the jury — a new trial may properly be refused. But when, in addition to being irrelevant, it is of such a character as to be liable to mislead, confuse, or improperly influence the jury, a new trial should be granted." This same rule is well stated in 3 Jones on Evidence, Sec. 896. In that section the author states, among other things,

> "Doubtless, if the trial court has admitted irrelevant or incompetent evidence which has had a tendency to prejudice the minds of the jury or to mislead them, a new trial should be granted. So long as the chances are equal that it may have had some effect one way or the other, the aggrieved party is entitled to the benefit of the principle that irrelevant testimony should be shut out from the jury."

In *Farmers' & Manufacturers' Bank* v. *Whinfield,* 24 Wend. 419, 427, the court said:—

> "But so long as he insists upon it, he is entitled to his neat point, on error, that the testimony was irrelevant, whether the court are disposed to guess it may have weighed but a feather or even made for the party excepting. If they see that it must necessarily have tended in his favor; if it made for him in its own nature, or could not possibly prejudice his case, that might be an answer; but so long as the chance is equal that it may have had some

> effect one way or the other, the party is entitled to the benefit of the principle that irrelevant testimony should be shut out from the jury."

See also *Hoberg* v. *State,* 3 Minn. 262.

On the other hand, when a case is heard by the *court* without the intervention of a jury, a party is not aggrieved by the reception of inadmissible testimony if there be sufficient legal testimony to authorize or require the court to render the decision made. "Inadmissible evidence received by the court, hearing the case without a jury, furnishes no ground for exception unless it appears his decision was based in whole or in part upon such evidence." *Jolovitz* v. *Redington & Co., Inc.,* 148 Me. 23, 30. This principle has recently been reiterated in *Knapp, Appellant,* 149 Me. 130, 99 Atl. (2nd) 331, not yet reported. See also 3 Jones on Evidence, Sec. 896, *supra.*

The basis for this distinction between jury and court cases lies in the fact that a court learned in the law is presumed to render its decision on the evidence in the case which is legally admissible even though inadmissible testimony be received. This presumption must be rebutted before the reception of such evidence by the court will be deemed prejudicial.

Referees, though in fact they often are, are not required to be learned in the law. Although a referee to whom a case is submitted under a rule of court is a tribunal selected by the parties to hear and determine the cause, he is not a court. We said in *Newell* v. *Stanley,* 137 Me. 33, 36:—

> "Referees appointed under a rule of court, by agreement of the parties, undoubtedly act judicially, but they are not the court. They constitute a special tribunal of the parties' own choosing, whose report must be accepted by the court before any judg-

ment can be rendered thereon. *Perry* v. *Ames, Appellant,* 112 Me., 202, 91 A., 931; *Staples* v. *Littlefield,* 132 Me., 91, 167 A., 171; *Kliman* v. *Dubuc,* 134 Me. 112, 182 A., 160."

The finality of the decision of a referee in the absence of a reservation of the right of exception as to matters of law is based upon the agreement of the parties and the selection of the referee as the tribunal to hear the cause, not upon any presumption of legal learning on his part. When, therefore, the right of exception as to matters of law is reserved and the referee receives inadmissible testimony, there is no presumption that he decided the case upon only so much of the testimony as is legally admissible. Whether or not his reception of inadmissible testimony is prejudicial, unless it clearly appears that he *did not* base his decision at least in part thereon, should be decided on the same principles as those applied in jury trials in determining whether or not the admission of inadmissible testimony is prejudicial. Such is the effect of reserving the right of exception as to matters of law on the reception of inadmissible testimony before referees.

In the instant case it is immaterial whether we apply the rule applicable to hearings before a court or jury to the reception of the evidence respecting the convictions of the employees of the plaintiff of the larcenies of its chickens.

One swallow does not make a summer. Neither does one frustrated attempted theft of 109 chickens, on a single occasion, even though committed by an employee or employees of the plaintiff, establish that an invoice loss of 5,449 chickens sustained over a period of 2 months was occasioned in its entirety by the theft or dishonesty of plaintiff's employees. The referee must have relied upon the convictions of the several employees to reach the result at which he arrived. This testimony was both irrelevant and legally in-

competent. The reception of the inadmissible testimony respecting the convictions was clearly prejudicial.

The action of the presiding justice in rejecting the referee's report can be sustained upon any or all of the written grounds of objection numbered (1), (2), and (7) *supra.* This being true, it becomes unnecessary for us to consider the 6th ground of objection or to determine the effect of the phrase "conclusively prove" contained in Form A hereinbefore quoted. As before stated, objections (3), (4) and (5) have become immaterial to the issue now before the court.

We held in *Water District* v. *Maine Turnpike Authority,* 145 Me. 35 at 55:—

> "If a report be rejected, and the rejection can be sustained on *any ground specifically set forth in the written objections, exceptions to the rejection cannot be sustained even though an erroneous ground be assigned for the rejection.*"

If such be the case when an erroneous reason for rejection is stated, surely under the same conditions the exceptions to the rejection cannot be sustained when the justice presiding assigns no reason therefor.

The exceptions must be overruled, and the case remanded to the Superior Court.

Exceptions overruled.

Case remanded to Superior Court.

STATE OF MAINE

vs.

JAMES E. HAMILTON

Androscoggin. Opinion, September 10, 1953.

Manslaughter. Intoxication. Opinion Evidence.
Circumstantial Evidence. Mistrial.

The principal objective symptoms of being under the influence of liquor are so well known that witnesses have always been permitted to express their opinion as to the inebriety of a person. Such is regarded as a conclusion of fact to which his judgment, observation, and common knowledge have led him.

As a general rule, any fact which would convince or tend to convince a person of ordinary judgment in carrying on his every day affairs, as to the identity of a person, will be received. The evidence will be permitted to take a wide range.

To warrant a conviction upon circumstantial evidence, facts and circumstances proved must be sufficient to establish guilt of the accused to a moral certainty and to exclude every other reasonable hypothesis.

The ordering of a mistrial is discretionary with the Presiding Justice and no exceptions lie to his refusal unless that discretion is abused.

To convict of manslaughter based upon the fact that death was caused involuntarily while the respondent was in the performance of an unlawful act, it must be shown that the unlawful act was *malum in se*, or if *malum prohibitum*, that it was the proximate cause of the homicide.

It is within the province of the jury to weigh and resolve conflicting evidence.

There is a presumption in favor of a jury verdict supported by material evidence.

ON EXCEPTIONS AND APPEAL.

The respondent was indicted for manslaughter. The case is before the Law Court on appeal and exceptions following a jury verdict of guilty. Exceptions overruled. Appeal denied. Judgment for the State.

Edward J. Beauchamp, County Attorney, for State.

Berman & Berman, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ. MURRAY, A. R. J.

TIRRELL, J. On exceptions and appeal. The respondent was indicted for manslaughter. It is claimed by the State that one Carl C. Berry was killed by the criminal negligence of the respondent in the operation of a motor vehicle on a public highway while under the influence of intoxicating liquor.

The prosecution stems from an automobile accident which occurred on December 24, 1951 at Danville, in the City of Auburn. An automobile in which Carl C. Berry, deceased, was riding, in order to avoid an impending collision with the respondent's truck, swerved off the road and crashed, killing the deceased. At the time in question the respondent was a truck driver employed by J. E. Faltin Transportation Company, of Portland. He had been a truck driver for the past twenty years and had been employed by the Faltin Company for a period of eight months prior to the accident. His regular route was from Portland to Lewiston and Au-

burn, stopping in Lewiston and Auburn for pickups and deliveries, and returning to Portland in the evening. The tractor-trailer which he was driving was equipped with pneumatic tires and was registered for a gross weight of 50,000 pounds.

On the day in question, December 24, 1951, the day before Christmas, the respondent, following his usual routine, came to Lewiston and Auburn, driving a Mack trailer truck loaded with merchandise for delivery at various points in Lewiston and Auburn. He made various stops for delivery, and about 1 o'clock in the afternoon he came to the National Tobacco & Candy Company, a wholesale concern on Park Street in Lewiston. It being the day before Christmas, the concern had whiskey available for its customers and employees, as was its custom. The respondent was offered a drink of whiskey at this time and accepted one. Later in the afternoon, shortly after 3 o'clock, the respondent returned to the National Tobacco & Candy Company and had two additional drinks of whiskey. The drinks were from an ounce to an ounce and a half each of whiskey. The respondent admitted on direct examination taking the three drinks of whiskey as specified. From the National Tobacco & Candy Company the respondent went to Roy Brothers Trucking Terminal in Lewiston. A witness employed by Roy Brothers testified that his observation of the respondent at that time was that the man had probably had a few drinks.

At approximately 5 o'clock the respondent was driving his truck on Lincoln Street in Lewiston northerly toward Main Street on his way back to Portland. His route as described by various witnesses for the State who encountered him at various stages of his journey was Lincoln Street northerly to Main Street, westerly on Main Street in the direction of Auburn. At about 5:10 o'clock a witness for the State testified he observed a Faltin tractor-trailer

double-parked on Spring Street in Auburn, headed north toward Court Street, and as he observed it a man came out of a house at 87 Spring Street, stumbled on the front step of the house against a picket fence, fell to his knees, arose, and then walked to the truck. The driver of the truck, who was not identified by the witness, drove the truck northerly toward Court Street and turned left on Court Street toward Minot Avenue.

The Portland Manager of the J. E. Faltin Transportation Company and other witnesses testified that the company operated five trucks in Maine on December 24, 1951, and four of these trucks, other than that driven by the respondent, were present and accounted for in Portland on that day between 4:30 and 5 o'clock; hence, at the time in question there was only one Faltin truck not accounted for at the home office. This truck was being operated by the respondent in Lewiston and Auburn at that time.

A witness for the State further testified that his car was stopped at a traffic light at the corner of Court and Spring Streets in Auburn, headed easterly, and that as he waited for the light to change, the respondent, driving a Faltin trailer-tractor, came out of Spring Street and turned onto Court Street. As the respondent did so, the truck brushed the rear left portion of the witness' vehicle.

At approximately 5:10 the respondent was in collision, at the Grand Trunk Railroad crossing on Route 100, — on the Portland Road, — with a vehicle coming from the direction of Portland. The collision occurred on the respondent's left side of the road. The driver of the other vehicle turned and followed the respondent's vehicle at varying intervals to the scene of the accident. The respondent at that time was driving at about 55 miles an hour. This collision at the railroad crossing was observed by another witness for the State, who also followed the respondent's vehicle on Route

100 to the scene of the accident. This witness further testified that as he was following the truck he was driving at a speed of 55 miles per hour and that the respondent's truck was pulling away from him. At various points on the route to the scene of the accident, the respondent was observed operating his vehicle on the left hand side of the road and came close to cars coming from the opposite direction.

At the Oakdale Bridge, so-called, the respondent swerved sharply to his left as he came off the bridge toward an oncoming vehicle operated by a State trooper. The State trooper swerved sharply to his right to avoid being hit, then turned around and followed the respondent to the scene of the accident. The State trooper was driving his car at about 60 miles an hour in an attempt to catch up with the respondent.

The scene of the accident was a curve in the road just northerly of the railroad overpass in Danville. The visibility is unobstructed from the point of impact for a distance of some hundreds of feet northerly toward Auburn. At the time of the accident the main travelled portion of the highway was free from ice, although there was some ice at the outside edges of the shoulder. The road was dry and in good condition. The respondent testified that as he came to the curve and to the scene of the accident he was traveling in the center of the road and the truck pulled to the left.

As the respondent approached the scene of the accident, a car driven by a Mr. Anten, and containing the deceased, was approaching from the opposite direction. The truck at that time was coming down on the left side of the road. In order to avoid the truck the driver of the approaching car turned sharply to the opposite side of the road and crashed into the ditch. As a result of this crash the decedent was killed. Immediately behind the Anten car and coming from

the same direction was another vehicle operated by a Mr. Pinette. This vehicle was in actual collision with the respondent's truck.

As a result of the collision the respondent was pinned under the left rear wheels of the tractor and remained there until he was extricated.

The respondent attributed the truck's being on the left hand side of the road to defective steering mechanism and defective braking. He was aware of these defects on the morning of December 24th, but made no effort to have them remedied.

There were no signs of brake marks on the highway along the path of respondent's truck prior to the point of impact. Two police officers testified after the accident that they smelled a strong odor of liquor.

The respondent was badly injured as a result of the accident and was taken to the hospital immediately thereafter. Three doctors who observed respondent at the hospital during emergency treatment testified that, in their opinion, respondent was under the influence of intoxicating liquor.

The case is before this court on exceptions and by appeal from the ruling of the Presiding Justice denying the motion of the respondent for a new trial.

The respondent's Bill of Exceptions contains seven distinct exceptions which we will consider in order as they appear in the bill.

EXCEPTION NO. 1

Simone Dumond, a witness called by the State, testified that she entered the cab of the truck operated by the re-

spondent, and sat in the passenger's seat while the truck proceeded northerly a short distance to Main Street, where she alighted.

Under interrogation by the County Attorney, she testified as follows:

Q. Could you see Mr. Hamilton's face from where you were sitting in the cab?

A. Yes.

Q. Do you remember the color of his face?

A. Same color he has got now.

Q. Did you notice his eyes at all? Was there anything that you noticed about his eyes, if anything?

A. Well, his eyes were just like he had been drinking.

MR. BERMAN. I didn't get that.

A. Like he had been drinking.

MR. BERMAN. May that be stricken out?

Q. I don't see how it could—observation that even a child could make, Bro. Berman.

MR. BERMAN. May it be stricken out?

The Court. No.

MR. BERMAN. Your Honor reserve my exception?

THE COURT. Yes.

At the conclusion of all of the evidence and in the presence of the jury the Presiding Justice addressed the jury as follows:

> "Mr. Foreman and members of the Panel:
> A witness named Simone Dumond testified in this trial and on several occasions or in several instances she testified that the respondent was under the influence or was intoxicated. You will remember what she said. You will disregard that testimony. Consideration of her testimony reveals to me that she did not give any reasonable basis for drawing a conclusion, so you will not consider her testimony in those respects; and her testimony has been stricken in reference to her opinions or judgments."

The respondent claims this testimony was inadmissible and that the respondent was prejudiced when it was not stricken immediately upon his motion. The respondent further argues that if the motion had been granted when first made and the evidence then stricken, then when the State rested there would be no evidence for the jury to consider on the question of the respondent's intoxication, and a directed verdict would have been required.

The witness without objection testified as follows:

> A. Well, I got in the truck and he didn't speak very much. Well, seemed as if he had something to drink. Seems as if he had something to drink.

At the request of the respondent's attorney this answer was read by the reporter and no objection was then made nor any motion to strike the answer from the record.

The record further discloses testimony of this same witness:

Q. When you first got into the truck after you made your observation about his having something to drink, did you smell anything?

A. I didn't pay attention.

Q. You didn't pay attention?

A. I didn't pay attention.

Q. Did you say anything to him about —

A. Well, I asked him if he was feeling good —

Q. Yes?

A. But he didn't answer.

Q. As a result of that observation didn't you tell him something?

A. Well, I told him, I said, "Be careful going to Portland."

Q. Is that all you told him?

A. Well, he didn't say — I said nothing and he said nothing.

Again on direct examination the record reveals:

THE COURT: You may ask the lady if she made observations, yes.

Q. That is correct.

A. If I noticed something about him, you mean? Well, I thought he was drunk.

As stated in the case of *Holton* v. *Boston Elevated Ry. Co.*, 21 N. E. (2nd) (Mass.) 251:

"Liquor affects individuals in various ways and it is sometimes difficult to determine degrees of intoxication. 'Whatever difficulties there may be in framing with precision a definition of the extent of inebriety which falls short of and which constitutes drunkenness, there is a distinction between that crime on the one hand and merely being under the influence of liquor on the other hand, which is recognized in common speech, in ordinary experience, and in judicial decisions.' *Cutter* v. *Cooper,* 234 Mass. 307, 317, 318 125 N.E. 634, 637; *Commonwealth* v. *Hughes,* 133 Mass. 496; *Commonwealth* v. *Lyseth,* 250 Mass. 555, 146 N.E. 18. But the manifestations of intoxication may present different aspects. While it might not be easy accurately to describe each and every minute detail indicative of intoxication, yet the principal objective symptoms are so well known that witnesses have always been permitted to express their opinion as to the inebriety of a person. *Edwards* v. *Worcester,* 172 Mass. 104, 51 N.E. 447; *Gorham* v. *Moor,* 197 Mass. 522, 524, 84 N.E. 436."

Also in *The People* v. *Eastwood,* 14 New York 562, at 566, 567, the court stated:

". . . . . A child six years old may answer whether a man (whom it has seen) was drunk or sober; it does not require science or opinion to answer the question, but observation merely; but the child could not, probably, describe the conduct of the man, so that, from its description, others could decide the question. Whether a person is drunk or sober, or how far he was affected by intoxication, is better determined by the direct answer of those who have seen him than by their description of his conduct. Many persons cannot describe particulars; if their testimony were excluded, great injustice would frequently ensue. The parties who rely on their testimony will still suffer an inconvenience, for court and the jury are always most impressed by those witnesses who can draw and act a living picture before them of what they have

> seen, so that if there is any controversy as to the fact, such witnesses control; if there is no controversy as to it, the general testimony answers all useful purposes."

Further, in *Commonwealth* v. *William E. Sturtivant,* 117 Mass. 122, at 133:

> "The exception to the general rule that witnesses cannot give opinions, is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill or learning; but includes the evidence of common observers, testifying to the results of their observation made at the time in regard to common appearances or facts, and a condition of things which cannot be reproduced and made palpable to a jury. Such evidence has been said to be competent from necessity, on the same ground as the testimony of experts, as the only method of proving certain facts essential to the proper administration of justice. Nor is it a mere opinion which is thus given by a witness, but a conclusion of fact to which his judgment, observation, and common knowledge has led him in regard to a subject matter which requires no special learning or experiment, but which is within the knowledge of men in general."

> "A witness may state his conclusions as to the sobriety or inebriety of another." (C.J.S., Vol. 32, p. 183, sec. 508).

The Presiding Justice, notwithstanding the fact that the statement by the witness as to the sobriety of the respondent was admissible and proper, in order to preserve the utmost impartiality and to guarantee and protect the respondent in all of his rights, instructed the jury to disregard all testimony of the witness as to whether or not the respondent was intoxicated or under the influence of intoxicating liquor.

The respondent was in no way prejudiced by the delay in striking the testimony. It is argued that at the close of the State's case the respondent, because of the delay in striking this particular evidence, was prevented from moving for a directed verdict.

The State did not rely alone on the ground that the respondent was operating the motor vehicle while under the influence of intoxicating liquor. It also relied on the fact that the respondent drove the motor vehicle in a reckless, wanton and criminal manner, offering proof and introducing testimony of the speed at which the motor vehicle, namely a tractor with trailer or box attached, weighing in the aggregate in excess of ten tons, was travelling. Testimony was given, and if believed by the jury, could have led them to believe that this huge, heavy, speeding vehicle was being driven in a reckless and wanton manner in that it veered from one side of the highway to the other, and travelled on its wrong side of the road, in utter disregard of the rights or safety of others.

The respondent was in no way prejudiced by the failure to strike the evidence complained of and takes nothing by his first exception.

EXCEPTION No. 2

Mr. Edwin Cox, a witness called by the State, was being examined and questioned on direct examination by the County Attorney. This same witness had testified twice previously that he did not, at the time of seeing certain events take place, identify the man he saw as this respondent; neither could he identify the respondent in the courtroom as being the man he saw on Spring Street in Auburn on the late afternoon of December 24th. The witness testified that shortly after 5 o'clock he visited a grocery store on Spring Street and made some purchases.

The County Attorney then asked this question:

Q. And leaving the store for your home was your attention attracted to anything in particular?

A. Yes, sir.

Q. What was that?

MR. BERMAN: Now if your Honor please, this witness has already testified twice,—in the first instance, that he did not and could not identify the defendant, Mr. Hamilton. Now, if that is so, then we submit that his evidence as to what he saw at 5:10 would have no bearing upon the case and has no relevancy, has no factual connection, and is not associated with the respondent.

THE COURT: I will admit it and you may have your right —

MR. BERMAN. Note my exception.

THE COURT. Yes.

Q. Will you answer what your attention was attracted to, Mr. Cox?

A. I noticed a truck double parked in the street with the cab door open just about between 82 and 83 Spring Street.

Q. And is that closer to Court Street than the store was?

A. Yes.

Q. Now, in what direction was the tractor part of the truck?

A. It was headed north toward Court Street.

Q. Toward Court Street. Was it plump in the middle of the road?

A. That I could not say. It was double parked.

Q. Yes. Did you observe anybody in the cab, as you looked in that area?

A. No, sir.

Q. And was there — did you know — did you recognize or see any name on that truck?

A. It was a Faltin truck.

Q. And where was — where were you when you made the observation, how far would you say in feet away from the truck when you saw it?

A. Approximately 50 feet.

Q. And then what was your attention attracted to?

A. Someone came out of a door, a man, at 87 Spring.

Q. Yes?

A. Started down the front porch steps and stumbled onto —

MR. BERMAN. May it please the Court, I object to that since this witness cannot identify the respondent or associate him with it.

THE COURT. I will admit it subject to your —

MR. BERMAN. Note my exception.

THE COURT. Yes.

MR. BERMAN. Came out of 87?

A. Yes.
(Mr. Beauchamp, resuming.)

Q. Will you tell the Jury what you saw?

A. Saw a man stumble on next to the last front step and get up. And there is a picket fence runs along on the left of the sidewalk and he stumbled against the picket fence and then stumbled again to his knees. Just fell where the snowplow plows out and removes the snow. Then crossed the street and got into his truck.

Q. Between the time he stumbled the last time to his knees how did he propel himself? How did he walk? In what manner did he walk towards the truck?

A. Well, he acted as if he was in a hurry, that's about all.

"Testimony cannot be excluded as irrelevant, which would have a tendency, however remote, to establish the probability, or improbability of the fact in controversy." (*Trull* v. *True,* 33 Me. 367); *State* v. *Charles H. Witham,* 72 Me. 531.

The identity of the accused is always an important element and its proof is always essential. The relevancy of evidence of identification depends upon the circumstances of the case. As a general rule, any fact which would convince or tend to convince a person of ordinary judgment in carrying on his every-day affairs, as to the identity of a person, will be received. The evidence will be permitted to take a wide range. *State* v. *Lewis Stebbins, Andrew L. Roberts and Porter Kellogg,* 29 Conn. 463.

Direct evidence of identification is not required, but to warrant conviction upon circumstantial evidence, facts and circumstances proved must be sufficient to establish guilt of the accused to a moral certainty and to exclude every other reasonable hypothesis.

Identity of accused may be established by circumstantial evidence. *People* v. *Fitzpatrick et al.*, 359 Ill. 363, 194 N. E. 545.

The fact that the witness could not *himself* identify the respondent as the person whose actions he described is not conclusive on the question of the admissibility of his testimony. If, as here, the other evidence in the case is sufficient to go to the jury on the question of the identity of the person described, the admission of the testimony is not per se reversible error. The respondent could have protected himself by request for proper instructions to the jury with respect thereto.

The respondent's Exception No. 2 is overruled.

EXCEPTION NO. 3

This exception relates to the refusal of the Presiding Justice to order a mistrial.

The reason set forth by the respondent in his Bill of Exceptions occurred during the direct examination of a witness for the State.

> Q. (By County Attorney)
> May I direct the next question — I will strike out that question. As you approached the south side of the bridge so-called, the side near Portland, were you pushed off the road as you travelled towards Lewiston?

MR. BERMAN. I object, if your Honor please.

THE COURT. Because it is leading?

MR. BERMAN. Leading. My Brother is assuming a conclusion. His characterization of what the situation is is entirely prejudicial and improper.

THE COURT. That is excluded.

In the absence of the jury, counsel for respondent addressed a motion to the court asking that a mistrial be declared, arguing that the use of the words: "Were you pushed off the road?" was prejudicial to the respondent. After the argument by the respondent's attorney, answered by the County Attorney, the Presiding Justice said:

> "A question was asked which was inadmissible and which was excluded. I did not and do not sense any reaction of the Jury to it. I think the matter is cured. I know of no reason for granting a mistrial, and the officer may bring the jury back."

To this ruling the respondent duly excepted.

The ordering of a mistrial is discretionary with the Presiding Justice and no exceptions lie to his refusal unless that discretion is abused. *Mary A. Gregory* v. *Benjamin C. Perry,* 126 Me. 99; *Theodore Ritchie* v. *F. Hewell Perry,* 129 Me. 440; *State of Maine* v. *Leo Rheaume,* 131 Me. 260; *Helen Collins* v. *Anne Dunbar, Constance M. Poland* v. *Anne Dunbar, Frances Poland* v. *Anne Dunbar,* 131 Me. 337.

An examination of the record in this case shows that there was no abuse of his prerogative by the Presiding Justice.

This Exception No. 3 is overruled.

EXCEPTION NO. 4

This exception deals with the testimony of Dr. Theodore Stevens Smith, called on behalf of the State in rebuttal.

The record reveals that this witness was a graduate of Columbia College and of New York Medical School, having received the degree of Doctor of Medicines. He was serving his internship at the Central Maine General Hospital at the time of this accident, and was in the accident room, so-called, when this respondent, Hamilton, was brought in.

The respondent objected to the testimony of this witness —"In my opinion, the man (meaning the respondent), was under the influence of alcohol."

In order to make this exception clear we quote from the record and the Bill of Exceptions:

Q. From your observation what was your opinion as to his sobriety?

MR. BERMAN. I object

THE COURT. What is the ground?

MR. BERMAN. I don't believe there has been sufficient basis for an opinion. Witness has testified the patient was incoherent—already in the record. He was badly hurt. State of shock.

THE COURT. Can't you ask the witness to describe his condition?

MR. BERMAN. I might also add, if Your Honor please, this is not rebuttal.

Q. Would you kindly describe the condition of Mr. Hamilton to the Jury, in your own words?

THE COURT. As you observed it.

Q. Yes, as you observed it.

A. As I observed Mr. Hamilton, he was not in a state of surgical shock. His blood pressure, and his pulse were good. He was not sweating and his skin was not cold; and on the contrary, his skin was flushed and he was warm. That is not the picture of shock. And at no time during the course of the evening or the next day that followed was Mr. Hamilton given any treatment for shock otherwise than sedation which we normally give to a patient. His actions were loud, abusive in his language to the Trooper and to myself and to all those who attempted to aid him, and he demanded help for his leg in no uncertain terms. In my opinion, the man was under the influence of alcohol.

MR. BERMAN. I ask that that be stricken from the record, last sentence?

THE COURT. I will leave it in.

MR. BERMAN. Reserve our exception?

THE COURT. Yes.

Although the grounds for the exception are not clearly stated in the record, counsel for the respondent apparently is claiming that the witness did not make sufficient observations of the respondent to allow him to formulate an opinion as to his condition with regard to alcohol. This ground is more or less spelled out with regard to the exception to Dr. Smith's testimony. Actually, however, the claim of respondent appears to be that since the respondent had suffered certain injuries as the result of the accident, the doctor would be unable to state whether the symptoms observed were the result of alcohol or the result of the injuries. This, however, would be a question of fact to be determined by the jury from all the testimony involved.

The general rule with regard to opinion evidence as to intoxication has already been discussed under Exception No. 1 and needs no further citations of authorities.

The witness in question was a doctor who, although not licensed to practice, had considerable experience as an interne and as a medical student. He had ample opportunity to observe the respondent, estimate his injuries, and ascertain to what extent those injuries affected his behavior. It was his considered opinion that respondent's behavior as testified to was the result of alcohol rather than from his injuries. There being a conflict of testimony on this issue, it was for the jury to decide on the basis of all the facts.

This exception has no merit.

EXCEPTION No. 5

This exception deals with the opinion given by Dr. John Wellington Carrier, another interne at the Central Maine General Hospital. Over the objection of the respondent this witness was allowed to express his opinion that the respondent was intoxicated when he was being treated at the hospital, following the accident.

What has been said regarding respondent's Exception No. 4 applies equally to this exception.

EXCEPTION No. 6

This exception deals with the refusal of the Presiding Justice to strike from the record the testimony of the State's witnesses, Dr. Theodore S. Smith, Dr. John W. Carrier and Dr. Ralph Timberlake because it relates to their opinions as to the respondent being under the influence of intoxicating liquor.

We have discussed under Exceptions No. 4 and No. 5 the testimony of Dr. Smith and Dr. Carrier, and as explained, see nothing in the respondent's contention as to the admis-

sibility of their testimony. The respondent now attempts to press the same reasons under a motion to strike. The testimony of all three doctors should stand as the record indicates and not be stricken therefrom.

EXCEPTION NO. 7

This exception deals with the refusal of the Presiding Justice to declare a mistrial because of improper argument by the County Attorney, and in order to make the exception clear, we quote the following excerpts from the record:

> MR. BERMAN. For the record, the Attorney for the State has argued that the person whom he saw and identified, staggered. Diametrically opposed to what was Mr. Cox's testimony. Mr. Cox testified he did not stagger.
>
> THE COURT. The Jury will remember.
>
> MR. BERMAN. May it please the Court, we object to my Brother's reference and we quote "We knew that he knew somebody there at 87 Spring Street," and that reference in connection with the argument is calculated and intended to inflame the Jury, prejudicial to the defendant; and we ask that the Court either instruct the Jury or declare a mistrial. In this argument it is impossible for this respondent to protect his constitutional rights. We feel that the rights of the respondent are being violated by this type of argument. And we respectfully submit, under the authority of State vs. Hines, that this Court now declare a mistrial.
>
> THE COURT. Motion denied. You may proceed, Bro. Beauchamp.
>
> MR. BERMAN. Will you reserve our Exception?
>
> THE COURT. Certainly.

As stated under Exception No. 3, the ordering of a mistrial is discretionary with the Presiding Justice and no exceptions lie to his refusal unless that discretion is abused. We see no abuse of discretion apparent upon reading the record.

APPEAL

After verdict for the State, the respondent filed a motion for a new trial and upon its denial an appeal was duly taken.

The motion was based on the usual grounds that the verdict was against the law, the evidence, and contrary to the charge of the Presiding Justice. In addition, as a reason for a new trial, that the respondent was prejudiced by improper questions submitted by the attorney for the State, in the presence of the jury to the respondent and other witnesses, which were calculated to arouse the prejudice of the jury against the respondent, thereby denying to the respondent a constitutional trial and violating his constitutional rights.

In cases of this kind, in order to convict a respondent of manslaughter based upon negligence, it is incumbent on the State to establish a degree of negligence or carelessness which is denominated gross or culpable. *State* v. *Wright,* 128 Me. 404. "Gross or culpable negligence in criminal law involves reckless disregard for the lives or safety of others. It is negligence of a higher degree than that required to establish liability upon a mere civil issue." *State of Maine* v. *Ela,* 136 Me. 303, 308. Furthermore, if the State seeks to convict of manslaughter based upon the fact that death was caused involuntarily while the respondent was in the performance of an unlawful act, it must further show that that unlawful act was *malum in se,* or if *malum prohibitum,* that it was the proximate cause of the homicide. *State* v. *Budge,* 126 Me. 223.

The denial of the respondent's motion for a new trial presents first the question, whether the jury was warranted from all of the evidence presented in believing and finding beyond a reasonable doubt the guilt of the respondent.

The denial of the respondent's motion for a new trial and appeal therefrom bring into question the jury's right to render the verdict as given. The general rule is that it is within the province of the jury to weigh and resolve conflicting evidence, and not of the appellate court in review. As stated in 24 C. J. S. 809:

> "It is within the province of the jury to weigh and resolve conflicting evidence, and ordinarily the appellate court may not determine the credibility of such evidence. . . . . The presumption is in favor of the verdict, and the appellate court will not interfere when the evidence is conflicting if there is material evidence tending to support the verdict, although it may differ from the jury as to the preponderance of the evidence; the verdict ordinarily is binding and conclusive on review."

The jury could readily have believed beyond a reasonable doubt, from the evidence presented, that the respondent was operating his truck in a wilful and wanton manner on the day in question, disregardful of the rights and safety of others on the highway. That respondent admitted taking three drinks of whiskey during the afternoon prior to the accident. That two police officers smelled liquor on his breath after the accident. That three doctors believed he was under the influence of liquor when he was admitted to the hospital after the accident. That the respondent brushed a car with his truck at the corner of Court and Spring Streets. That some distance further, on the Oakdale Bridge, he almost collided with a car driven by a State trooper. That as he approached the scene of the fatal accident he was driving on the left side of the road. That the speed at which he was driving was excessive, having in mind he was

driving a huge tractor-trailer which weighed in excess of ten tons,—a menace on the highway. That at the point of impact he was completely on the wrong side of the road. That his entire progress from Spring Street in Auburn to the scene of the accident was a series of negligent, reckless acts, showing a mind completely abandoned to the consequences and disregardful of the rights of others.

The reason offered by the respondent for the accident was that the steering and braking mechanism of the truck were defective. That he knew of such defects in the morning at a time several hours prior to the accident. That he did nothing to remedy these defects before operating such a defective vehicle on the public highway. The jury could well have concluded that the respondent operated the motor vehicle recklessly and wilfully and such recklessness was a direct cause of the decedent's death.

The evidence as presented by the respondent conflicts with the testimony of witnesses for the State. This being so, it becomes a question for the jury to determine as to where the truth rests. *State of Maine* v. *Henry Lambert,* 97 Me. 51; *State of Maine* v. *Ignazio Albanes alias Joe Bill,* 109 Me. 199; *State of Maine* v. *Michael J. Mulkerrin, alias Michael Mulkern,* 112 Me. 544.

In his brief the respondent argues that he should be granted a new trial because he was deprived of his constitutional rights guaranteed to him by Amendment XIV of the Constitution of the United States and Article 1, Section 6, of the Constitution of Maine.

The real questions presented under this argument in the respondent's brief are whether or not the rights of the respondent were prejudiced. We do not believe that they were. All of the testimony, the conduct of Counsel, and the

wise and correct rulings of law made by the Presiding Justice, and his charge to the jury lead this court to believe that the respondent had all he was entitled to, namely, an impartial trial.

The evidence was not of that unsatisfactory character which would permit this court's interference with the verdict. The law has committed to the jury the determination of the credibility of witnesses and the weight to be accorded their testimony, and where the evidence may be merely conflicting this court will not substitute its judgment for that of the jury.

The motion for a new trial must be denied.

The entry shall be

Exceptions overruled.

Appeal denied.

Judgment for the State.

SERGY LYSCHICK

vs.

JOSEPH WOZNEAK

Penobscot. Opinion, October 5, 1953.

Trespass. Dogs. New Trial.

On a general motion for a new trial a verdict must stand unless it can be said there was no credible evidence to support it.

ON MOTION.

This is an action of trespass under R. S., 1944, Chap. 88, Sec. 15. The case is before the Law Court on motion for a new trial after verdict for plaintiff. Motion overruled.

Edward Stern, for plaintiff.

Wendell R. Atherton,
Albert H. Winchell, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ., MURRAY, A. R. J.

TIRRELL, J. This is an action of trespass brought under R. S., 1944, Chap. 88, Sec. 15, which provides for Liability for Damages by Dogs.

After trial, a verdict was rendered for the plaintiff for $250, and defendant alleges in a motion to set aside the verdict and grant a new trial, that the verdict is against law, against the evidence, against the weight of the evidence, and the damages are excessive.

The record discloses no exceptions. Therefore it must be presumed that the jury which heard the case was properly instructed as to the law.

This court is limited in its authority under such circumstances as are set forth by defendant's motion. The verdict must stand unless it can be said that there was no credible evidence to support it. See *Peter B. Jenness* v. *Ralph T. Park,* 145 Me. 402.

The general rule is that when the testimony is conflicting, the verdict must stand. *Andrew J. Moulton* v. *Sanford & Cape Porpoise Railway Company,* 99 Me. 508, 59 A. 1023; *Josephine Mizula, Pro Ami* v. *Emma M. Sawyer, et al.,* 130 Me. 428, 430, 157 A. 239; *Kenneth Weyman* v. *Raymond Shibley,* 145 Me. 391, 72 A. (2nd) 451.

There is conflicting testimony in this case. The weight of testimony and the credibility of witnesses are to be determined by the jury and not by the court. This court cannot say that the amount of damages awarded by the jury is clearly excessive.

Motion overruled.

CLARA I. MARSH

vs.

GEORGE P. WARDWELL

Cumberland. Opinion, October 6, 1953.

Negligence. Pedestrians.

A plaintiff, knowing that an automobile is approaching is not negligent *as a matter of law* in crossing the street (at a crosswalk) without looking again while crossing to observe the manner of its approach.

ON MOTION FOR NEW TRIAL AND EXCEPTIONS.

This is an action of negligence before the Law Court on motion for a new trial and exceptions after a jury verdict

for plaintiff. Motion for new trial overruled. Exceptions overruled.

Albert Knudsen,
William B. Mahoney, for plaintiff.

Edward J. Berman, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ., MURRAY, A. R. J.

PER CURIAM.

This was an action on the case to recover for personal injuries to the plaintiff caused by the alleged negligence of the defendant. The plaintiff was struck and seriously injured by the defendant's automobile while crossing a well-defined *crosswalk* at the intersection of State and Spring Streets in Portland. Before crossing the plaintiff looked and saw the defendant's car approaching. She determined that she had time to cross the street. It was after dark; it was raining and the plaintiff was carrying an umbrella in one hand and bundles under the other arm. She admitted that after she started to cross the street she did not look again before she was struck by the defendant's car, which was at a point within a few feet of the curb to which she was crossing.

The case resulted in a verdict for the plaintiff in the sum of $17,500. The case is before the court upon a motion for a new trial on the usual grounds, and also upon exceptions to the refusal to give certain requested instructions. The amount of damages was not questioned before this court.

The theory relied upon by the defendant in support of his motion is that the plaintiff, knowing that the automobile was approaching, was negligent *as a matter of law* in crossing the street without looking again while crossing to ob-

serve the manner of its approach. The question presented to us is whether the conduct of the plaintiff as disclosed by the record amounted to contributory negligence *as a matter of law,* or whether the question of the plaintiff's contributory negligence was *one of fact* for the jury.

A majority of the court, upon the authority of *Gosselin* v. *Collins,* 147 Me. 432; *Day* v. *Cunningham,* 125 Me. 328; *Sturtevant* v. *Ouellette,* 126 Me. 558; *Wetzler* v. *Gould,* 119 Me. 276; *Shaw* v. *Bolton,* 122 Me. 232; *Lange* v. *Goulet,* 144 Me. 16; *Dyer* v. *Ayoob,* 134 Me. 502; and *Wiles* v. *Connor Coal & Wood Co.,* 143 Me. 250, are of the opinion that on the facts disclosed in the record this was a question of fact for the jury.

The requested instructions, as set forth in the bill of exceptions (where not already covered in the charge), are based upon the premise that a pedestrian must, as a matter of law, not only look before starting to cross the street *at a crosswalk* but "continue his observations while crossing the street." These requested instructions are subject to the same infirmity as is the ground urged in support of the motion for a new trial.

A majority of the court being of the opinion that whether or not the plaintiff's conduct amounted to contributory negligence was a question of fact and not of law, both the motion and the exceptions must be overruled.

Motion for new trial overruled.

Exceptions overruled.

PATRICK PELKEY
vs.
CLYDE L. NORTON

Sagadahoc. Opinion, October 10, 1953.

Deceit. Intentional Misrepresentation. Negligence.

Although as a general rule in an action of deceit a plaintiff must allege and prove he did not know the defendant's representations to be false and by the exercise of reasonable care could not have ascertained their falsity, nonetheless a defendant cannot escape liability for *intentional misrepresentation* on the ground that the plaintiff negligently relied thereon. This is a limitation upon the general doctrine.

ON EXCEPTIONS.

This is an action of deceit before the Law Court upon plaintiff's exceptions to the direction of a verdict for defendant and refusal to direct a verdict for plaintiff. Exceptions to direction of verdict for the defendant sustained. Exceptions to the refusal to direct verdict for the plaintiff overruled.

Basil A. Latty, for plaintiff.

Edward W. Bridgham, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ., MURRAY A. R. J.

TIRRELL, J. This is an action "on the case" for deceit.

The plaintiff, who is a dealer in automobiles and trucks in the town of Topsham, alleged that he and the defendant entered into an agreement for the purchase and sale of a 1951 Packard automobile, by the terms of which the plaintiff sold the defendant a 1951 Packard automobile for a total

sales price of $3,007.84, and in payment thereof, the defendant paid to the plaintiff the sum of $1,807.84 in cash and sold or, as the term is commonly used, "traded in" a truck towards the purchase price of the Packard automobile, for which the plaintiff "allowed" the defendant a credit on the purchase price of $1,200, making payment in full.

The truck which the defendant sold or traded in was a 1947 Chevrolet truck. The plaintiff contends that at the time of their negotiation for the sale of the Packard automobile, the truck owned by the defendant was represented to be a 1949 Chevrolet truck by the defendant; whereas in truth and fact the truck was a 1947 model, and was known by the defendant to be a 1947 model, but was falsely represented by the defendant to induce the plaintiff to allow a greater amount as its trade-in value.

The undisputed testimony of witnesses for the plaintiff indicates the facts to be,—the plaintiff is an automobile dealer and had been for several years. On the date alleged in the declaration the defendant went to the place of business of the plaintiff and conversation was had between the parties concerning the sale by the plaintiff to the defendant of a 1951 Packard sedan. The selling price of the Packard, including extras, handling charges, and taxes, including the State sales tax, was $3,007.84. The defendant was the owner of a Chevrolet dump truck which he wished to "trade in" as part payment for the Packard sedan. It was, of course, essential for the plaintiff to know the year of manufacture of the truck in order to make the proper allowance as its "trade-in" value. The defendant informed the plaintiff it was a 1949 truck, saying: "I ought to know, I bought it new." The year of manufacture may be determined by securing serial and motor numbers imprinted on the frame and motor and by then referring to a certain book showing the year of manufacture. Included in the serial number is a key letter. The plaintiff by himself or his agents obtained

certain numbers and a serial letter from the impression on the car. A mistake was apparently made in reading the letter *Q* as *O*. No serial letter *O* was revealed in the Dealers Book. The letter *Q*, if read correctly, would have informed the plaintiff that the Chevrolet truck was a 1947 model. The 1947 and 1949 models were of the same general appearance. The plaintiff then asked the defendant to show him the original bill of sale but was informed by defendant that it was at his son's house in North Yarmouth. The difference in the trade-in price between a 1949 model and a 1947 model was approximately $700. The plaintiff allowed the trade-in price of a 1949 model. Applications for registration of this same truck signed by the defendant and introduced by plaintiff as exhibits show the year model as a 1947. The plaintiff sold this truck to a third person as a 1949 model who later informed the plaintiff of the error in the date of the model and brought suit for damages against this plaintiff.

Upon completion of the plaintiff's evidence the defendant rested, and moved for a directed verdict for the defendant, which was granted, to which the plaintiff seasonably filed his exceptions. After the motion for a directed verdict was granted for the defendant, and before judgment was rendered, the plaintiff filed a motion for a directed verdict for the plaintiff, which motion was denied, and to which denial the plaintiff also took exceptions.

The plaintiff now prosecutes in this court on his exceptions to the granting of the motion for a directed verdict for the defendant and the denial of the motion for a directed verdict for the plaintiff.

The presiding Justice, in a short summation to the jury, before directing the verdict for the defendant, gave his reasons based on the case of *Benjamin H. Coffin* v. *Winfred S. Dodge*, 146 Me. 3, explaining to the jury that among the elements of deceit is one that a plaintiff in such a case must prove "that the plaintiff did not know the representation to

be false, and by the exercise of reasonable care could not have ascertained its falsity."

In *Coffin* v. *Dodge, supra,* we said on pages 5 and 6:

> "In the case of *Crossman* v. *Bacon & Robinson,* 119 Me. 105, 109, the elements in deceit are stated to be '(1) a material representation which is (2) false and (3) known to be false, or made recklessly as an assertion of fact without knowledge of its truth or falsity and (4) made with the intention that it shall be acted upon and (5) acted upon with damage. In addition to these elements it must also be proved that the plaintiff (6) relied upon the representations (7) was induced to act upon them and (8) did not know them to be false, and by the exercise of reasonable care could not have ascertained their falsity. Every one of these elements must be proved affirmatively to sustain an action of deceit.' "

There is a well recognized exception to or limitation upon so much of the foregoing clause numbered (8) as requires proof that the plaintiff by the exercise of reasonable care could not have ascertained the falsity of the representation. This exception or limitation was recognized by us in *Coffin* v. *Dodge* when in that opinion we cited the cases establishing the exception, saying:

> "Although there are limitations on the foregoing general rules, (as to the elements of actionable deceit) see *Banking Company* v. *Cunningham,* 103 Me. 455; *Harlow* v. *Perry,* 113 Me. 239, and *Bixler* v. *Wright,* 116 Me. 133, see also 61 A.L.R. 492, 497 (b), the facts of this case do not bring it within such limitations."

The limitation on the foregoing clause numbered (8) is that one cannot escape liability for *intentional misrepresentation* on the ground that the plaintiff negligently relied thereon. In *Bixler* v. *Wright,* 116 Me. 133, 139 we said:

> "The law dislikes negligence. It seeks properly to make the enforcement of men's rights depend in

> very considerable degree upon whether they have been negligent in conserving and protecting their rights. But the law abhors fraud. And when it comes to an issue whether fraud shall prevail or negligence, it would seem that a court of justice is quite as much bound to stamp out fraud as it is to foster reasonable care."

Corpus Juris Secundum, Vol. 37, under the title "Fraud," classifies fraud as being "actual and constructive," and sets forth that these two classes of fraud are distinguished by the presence or absence of an intent to deceive. In actual fraud intent to deceive is an essential element. It implies deceit. It consists in deception intentionally practiced to induce another to part with property or to surrender some legal right. Falsehood is an ingredient thereof. (See 37 C.J.S., p. 208, Sec. 2).

Many decisions hold that one guilty of actual fraud may not excuse his own wrongful acts by claiming that the person defrauded was guilty of contributory negligence.

In *Eastern Trust & Banking Company* v. *Andrew W. Cunningham,* 103 Me. 455, 465, 466, the court said:

> "But the defendant contends further that if the plaintiff did not know, it ought to have known, and would have known but for its own negligence. We think this defense cannot avail. There are cases which hold that where one carelessly relies upon a pretence of inherent absurdity and incredibility, upon mere idle talk, or upon a device so shadowy as not to be capable of imposing upon anyone, he must bear his misfortune, if injured. He must not shut his eyes to what is palpably before him. But that doctrine, if sound, is not applicable here. We think the well settled rule to be applied here is that if one intentionally misrepresents to another facts particularly within his own knowledge, with an intent that the other shall act upon them, and he does so act, he cannot afterwards excuse himself by saying 'You were foolish to believe me.' It does not lie in his mouth to say that the one trusting him was

> negligent. In this case the fact whether or not there were funds in the Gardiner bank to meet the checks was peculiarly within the knowledge of the defendant. The rule is stated in Pollock on Torts, sect. 252, as follows:—'It is now settled law that one who chooses to make positive assertions without warrant shall not excuse himself by saying that the other party need not have relied upon them. He must show that his representation was not in fact relied upon. In short, nothing will excuse a culpable misrepresentation short of proof that it was not relied upon, either because the other party knew the truth, or because he *relied wholly* on his own investigations, or because the alleged fact did not influence his actions at all.' " *(Emphasis ours)*

Also, in *Charles Linington* v. *George H. Strong et al.*, 107 Illinois 295, 296:

> "A party guilty of fraudulent conduct, whereby he induces another to execute a written contract, will not be allowed to impute negligence to the latter as against his own deliberate fraud. Even where parties are dealing at arms' length, if one of them makes to the other a positive statement upon which the latter acts, with the knowledge of the party making such statement, in confidence of its truth, and such statement is known to be false by the party making it, such conduct is fraudulent, and from it the guilty party can take no benefit.
>
> "While the law requires of all persons the exercise of reasonable prudence in the business of life, and does not permit one to rest indifferent in reliance upon the interested representations of an adverse party, still there is a certain limit to this rule; and as between the original parties, when it appears that one has been guilty of an intentional and deliberate fraud, by which, to his knowledge, the other has been misled and influenced in his action, he cannot escape the legal consequences of his fraudulent conduct by saying that the fraud might have been discovered had the party whom he deceived exercised reasonable care and diligence."

This case has been twice quoted with approval by this court, to wit, in the cases of *Bixler* v. *Wright,* and *Eastern Trust & Banking Company* v. *Cunningham,* both *supra.* The same doctrine was recognized in *Elmer E. Harlow et al.* v. *Fred E. Perry,* 113 Me. 239, when we said:

> "We think the well settled rule to be applied here is that if one intentionally misrepresents to another facts particularly within his own knowledge, with an intent that the other shall act upon them, and he does so, he cannot afterwards excuse himself by saying, 'you were foolish to believe me.' It does not lie in his mouth to say that the one trusting him was negligent."

The present case is clearly distinguishable from *Coffin* v. *Dodge, supra.* The facts bring it within the limitation on the general rules laid down therein. In this record there is testimony which, if believed by the jury, would justify a finding that the defendant was guilty of an actual, intentional, false and fraudulent misrepresentation to the plaintiff. If so, negligence on the part of the plaintiff in reliance thereon was no defense to his action of deceit. There was sufficient evidence in this record to justify a finding by the jury of the existence of every essential element of actionable fraud.

On this record it was error to direct a verdict for the defendant and the plaintiff's exception thereto must be sustained. The plaintiff's motion to direct a verdict for himself having been made after verdict had been ordered for the defendant came too late. Exception to its denial must be overruled. Entry will be

Exception to direction of verdict for the defendant sustained.

Exception to refusal to direct verdict for the plaintiff overruled.

LEWIS ZORZY

vs.

EDWARD J. WHITNEY, SR.

Penobscot. Opinion, October 14, 1953.

Assumpsit. New Trial.

A motion for new trial will not be granted by the Law Court where there is evidence to support the jury verdict and the only issue is one of fact.

ON MOTION.

This is an action of assumpsit before the Law Court on motion for new trial after jury verdict for defendant.

Pilot, Pilot & Collins, for plaintiff.

R. A. Weatherbee,
Rudman & Rudman, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ. MURRAY, A. R. J., did not sit.

THAXTER, J. This was an action of assumpsit brought in the sum of $10,000 for the failure to deliver certain potatoes. It is alleged that the plaintiff and the defendant entered into a written contract on April 7, 1951 whereby the defendant agreed to sell to the plaintiff approximately 3,500 barrels of potatoes which the plaintiff agreed to buy for the sum of $2.00 per barrel. This contract was in the following form:

"April 7 1951

M Edward Whitney Sr.
Chester, Maine

To White Mountain Distributg Co. Dr.
16 Colter St., Peabody, Mass.
Tel. Peabody 2793

Terms

I agree to sell aproximatly 3500 Barrells of Potatoes at ($2.00) two dollars per barrell graded and loaded, the bags to be furnished by the purchaser (White Mtn Dist Co)

Signed

E.W.Sr. Edward J. Whitney,Sr.
W.M.D.C. L3 Lewis Zorzy"

It will be observed that though the contract involved the sale and purchase of a large amount of potatoes nothing was said about the time and manner of payment or the time when deliveries would be made. The plaintiff viewed the potatoes in bins of the defendant and apparently satisfied himself that the defendant had enough potatoes on hand to carry out the terms of the contract. The defendant delivered four loads and took for them a note which was apparently the subject of litigation in Massachusetts. Without more ado the plaintiff brought this action against the defendant claiming that the defendant refused to complete the contract and seeking damages for the breach.

The case was heard by a jury which brought in a verdict for the defendant and is now before us on the plaintiff's general motion for a new trial.

The only evidence that the defendant was unable or unwilling to carry out his contract in full is the testimony of

the defendant wherein he stated to Zorzy that he sold 381 barrels to a man named Underhill but there is no evidence how many potatoes the defendant had left after such sale and certainly none that he had depleted his stock of potatoes on hand so that he could not carry out his contract. The plaintiff was apparently clutching at a straw.

Whether or not the defendant committed a breach of his contract with the plaintiff was a question for the jury in whose findings we concur. No exceptions were taken to the charge of the presiding justice. In fact the charge is not even printed. We must assume that the jury were properly instructed.

There is no error apparent in the record.

Motion overruled.

STATE OF MAINE

vs.

MAURICE SIMON

Kennebec. Opinion, October 14, 1953.

Bribery, R. S., 1944, Chap. 122, Sec. 5. Constitutional Law. Executive. Highways.

That portion of the Statute, R. S., 1944, Chap. 122, Sec. 5, prohibiting bribery of an executive officer which states "with intent to influence his action, vote, opinion or judgment *in any matter pending or that may come legally before him* in his official capacity" when pertaining to the Governor means *everything pertaining to the executive department* since the Governor as head of the executive department under the Constitution has the duty to "take care that the laws be faithfully executed."

Matters pertaining to the maintenance of state highways are "matter(s) pending or matter(s) which may legally come before (the

Governor) in his official capacity" within the meaning of R. S., 1944, Chap. 122, Sec. 5 even though the Governor has no direct authority with respect to purchase of highway material.

ON EXCEPTIONS.

This is an indictment for bribery. The case is before the Law Court upon exceptions to the overruling of a demurrer to the indictment. Exceptions overruled.

Alexander A. LaFleur, Atty. Gen.,
James Archibald,
Harold J. Rubin, for State.

Goodspeed & Goodspeed,
Albert Knudsen, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ., MURRAY, A. R. J.

WILLIAMSON, J. This case is before us on exceptions to the overruling in the Superior Court of the defendant's demurrer to an indictment charging the attempted bribery of the Governor under R. S., Chap. 122, Sec. 5. The exceptions are overruled.

The statute, insofar as it is here material, follows:

> "Whoever gives, offers, or promises to an executive, legislative, or judicial officer, before or after he is qualified or takes his seat, any valuable consideration or gratuity whatever, or does, offers, or promises to do any act beneficial to such officer, with intent to influence his action, vote, opinion, or judgment in any matter pending, or that may come legally before him in his official capacity, shall be punished . . ."

The indictment is in eight counts based upon facts arising from one transaction. For convenience we may consider that there are four counts, for each even numbered count

differs from the preceding count only in the substitution of the phrase "to cause to be paid to" for the phrase "to pay to."

The four counts are alike to the point indicated below:

> "THE GRAND JURORS FOR SAID STATE, upon their oath present, that Maurice Simon, of Brookline in the County of Norfolk and Commonwealth of Massachusetts on the 20th day of April in the year of our Lord one thousand nine hundred fifty-three at Augusta in said County of Kennebec, did then and there feloniously and corruptly offer to one Burton M. Cross, the said Burton M. Cross being then and there to the knowledge of the said Maurice Simon an executive officer of the State of Maine, to wit: the duly elected and legally qualified Governor of the State of Maine, to do a certain act beneficial to the said Burton M. Cross, to wit, to pay to the said Burton M. Cross a certain sum of money, to wit, one-quarter of a cent per gallon of all of the total gallonage of a certain highway surfacing material to be purchased and used thereafter during the year 1953 by the State of Maine for the surface treatment of highways within the State of Maine, said material being known as "Rode-Rite" treated cut-back inverted emulsified asphalt, . . ."

The counts then read:

> FIRST and SECOND counts: "with intent then and there to influence the action of the said Burton M. Cross in a matter then and there pending before him, the said Burton M. Cross, in his said executive capacity as Governor of the State of Maine, to wit, to procure the said Burton M. Cross, in his said capacity aforesaid, to exercise his influence with the State of Maine Highway Commission to cause said Commission, on behalf of the State of Maine to continue the policy of causing to be purchased by the State of Maine said "Rode-Rite" treated cut-back inverted emulsified asphalt, against the peace of the State and contrary to the form of the Statute in such case made and provided."

THIRD and FOURTH counts: "with intent then and there to influence the judgment of the said Burton M. Cross in a matter that might legally come before him in his said official capacity, to wit, as said Governor and, as such, a legal member of the Standardization Committee as defined by Chapter 14 Section 39 of the Revised Statutes of the State of Maine, to wit, to procure the said Burton M. Cross, in his said capacity aforesaid, to use his influence with said Standardization Committee to prevent a change in the existing standard specifications applying to the purchasing policy of the State of Maine with reference to the purchasing of treated cut-back inverted emulsified asphalt, against the peace of the State and contrary to the form of the Statute in such case made and provided."

FIFTH and SIXTH counts: "with intent then and there to influence the vote of the said Burton M. Cross in a matter that might legally come before him in his said official capacity, to wit, as said Governor and, as such a legal member of the Standardization Committee as defined by Chapter 14 Section 39 of the 1944 Revised Statutes of the State of Maine, to wit, to procure the said Burton M. Cross in his said capacity aforesaid, to use his vote as a member of said Standardization Committee to prevent a change in the existing standard specifications applying to the purchasing policy of the State of Maine with reference to the purchasing of treated cut-back inverted emulsified asphalt, against the peace of the State and contrary to the form of the Statute in such case made and provided."

SEVENTH and EIGHTH counts: "with intent then and there to influence the action, opinion and judgment of the said Burton M. Cross in a matter then and there pending before him, the said Burton M. Cross, in his said capacity as Governor of the State of Maine, to wit, to influence the said Burton M. Cross to change, alter and modify his decision that the State Highway Commission should no

> longer cause the State of Maine to purchase "Rode-Rite" treated cut-back inverted emulsified asphalt, against the peace of the State and contrary to the form of the Statute in such case made and provided."

The defendant in brief is charged with offering a bribe to the Governor; in counts one and two, to exercise his influence with the State Highway Commission to continue its policy of causing "Rode-Rite" to be purchased by the State; in counts three and four, to use his influence with the Standardization Committee to prevent a change in existing specifications; in counts five and six, to influence the vote of the Governor in the Standardization Committee; and in counts seven and eight, to "change, alter and modify his decision that the State Highway Commission should no longer cause the State of Maine to purchase 'Road-Rite.' "

The State joined in the demurrer. The right of the defendant to plead over if the demurrer should be overruled was granted by the presiding justice.

All will agree that an offer to the Governor of our State of the nature described in the indictment is an attempt to debauch the public service and thus to destroy the integrity of our government.

The argument of the defendant is not that the facts stated do not constitute a moral wrong, but that they do not set forth a crime. The issue for our determination is whether an offense under the bribery statute, *supra,* is sufficiently set forth in any one of the eight counts of the indictment. If so, the demurrer was properly overruled and the defendant must stand trial on the indictment. *State* v. *Miles,* 89 Me. 142, 36 A. 70.

The sufficiency of the indictment is attacked on two main grounds, to quote from the defendant's brief:

> "(1) That the Governor had no official or executive capacity, authority or legal duty, either at

> common law or under the bribery statute, over the matter concerning which the bribe was allegedly offered; and (2) That if he did have such official capacity and legal duty, it is not properly alleged in any count in the indictment."

The defendant takes too small a view of the office of Governor. To say that a person with impunity may attempt to blind the eyes of a Governor in the manner outlined, shocks the conscience. The defendant would have us believe that in 133 years of statehood we have failed to provide criminal penalties for such an evil.

From our study of the statutes we conclude that the Governor has no direct authority with respect to the purchase of "Rode-Rite." Without going into detail it would appear that the State Purchasing Agent, the Committee on Standardization, and of course the State Highway Commission, all have a direct part in the purchase of the supplies for the maintenance of our highways. Reference to the statutes will disclose the specific authority and duty of the several officials. It is not the Governor's function to attend to such purchases.

We place our decision, however, not upon construction of the statutes which provide in varying degrees of detail for the conduct of the executive business of the State, but upon the broad constitutional authority and power of the Governor. It is fundamental that the powers of the Governor found in the Constitution cannot be altered or changed, increased or lessened, through action of the Legislature, and that the Governor cannot escape his constitutional powers and obligations.

The pertinent provisions of the Constitution in Article V, Part First, read:

> "Sec. 1. The supreme executive power of this state shall be vested in a Governor.
>
> "Sec. 10. He (Governor) may require information from any military officer, or any officer in the

executive department, upon any subject relating to the duties of their respective offices.

"Sec. 12. He (Governor) shall take care that the laws be faithfully executed."

In an Opinion of the Justices, 72 Me. 542, 545, it is said, with respect to Sec. 1:

> "Article 5, part first, of the constitution, relates to 'executive powers' and defines and limits the same.
>
> "By § 1, 'The *supreme executive* power of the State shall be vested in a governor,' thus recognizing him as the head of the executive department of government. But he is not the executive department. 'He shall take care that the laws be faithfully executed.' He may issue commissions, sign warrants, remit penalties, grant reprieves, commutations and pardons, but he does all this by and with the advice of his council. He carries into effect the doings of the executive department of which he is the head but he does not control it.
>
> "If he was clothed with supreme and uncontrolled executive power, the council would have no duties. His powers are only what are specially given him by the constitution or necessarily inferable from powers clearly granted. He is to execute the powers conferred, in the manner and under the methods and limitations prescribed by the constitution and the statutes enacted in accordance therewith."

It will be seen from the Opinion of the Justices relating to the power of removal of an officer that the Governor, while obviously not the entire executive department, is nevertheless the head of it.

In *State ex rel. Stubbs* v. *Dawson,* 119 P. 360, 363, 39 L. R. A. (NS) 993, the Kansas Court said:

> "An executive department is created, consisting of a Governor and the other officers named, and he is designated as the one having the supreme executive power; that is, the highest in authority in that

> department. In the same connection, it will be noticed that the other executive officers are required to furnish information upon subjects relating to their duties, and to make annual reports to him, and withal he is charged with the duty of seeing that the laws are faithfully executed. It is manifest from these various provisions that the term 'supreme executive power' is something more than a verbal adornment of the office, and implies such power as will secure an efficient execution of the laws, which is the peculiar province of that department, to be accomplished, however, in the manner and by the methods and within the limitations prescribed by the Constitution and statutes, enacted in harmony with that instrument."

So then, the officer whom the defendant is charged with seeking to corrupt was the head of the executive department of the State.

The Governor is charged in Sec. 12 with the duty to "take care that the laws be faithfully executed."

In giving their opinion that a sheriff is an executive officer, Justices Mellen and Preble said in Opinion of the Justices, 3 Me. 484, 486:

> "In doing this important service, the power of sheriffs and coroners must be resorted to, when legal coercion is necessary; in which case they are expressly aiding the governor in the execution of the laws, and acting under his commission. In fact, in all cases, their power, when lawfully exercised, is in aid of the governor, and to enable him to do his duty in causing the laws to be executed faithfully. These duties he cannot perform. These powers he cannot exercise in person. Such a performance, such an exercise was never contemplated."

The Governor of the State under our Constitution has the power to require information from any officer in the executive department. He has the duty to "take care that the laws be faithfully executed." He is the head of the executive

department. To carry out these great constitutional powers, in our view, everything pertaining to the executive department is at all times pending before the Governor in his official capacity.

The moment a proposal for the purchase of "Rode-Rite," under the conditions outlined, was made, the matter was then and there pending officially before the Governor. It would be a poor executive who did not thereafter take steps to see that any purchase of this product should be examined with the utmost care to the end that no fraudulent charges might be contained in the price paid by the State. Let us suppose a Governor is informed that the State Highway Commission proposes to purchase "Rode-Rite." We think he can inquire from the State Highway Commission, and is entitled to information from any other executive officer, about the details of the contract, although the Governor himself has no authority to make such a purchase. The eyes of the Governor are at all times open upon the activities of the executive department. Nothing officially escapes his attention. Thus the proposed purchase of "Rode-Rite" by the State in connection with which the defendant is charged with offering to pay the Governor a share of the purchase price, was before the Governor. Had he information, let us say, that a similar proposal had been made to the State Highway Commission, or the Purchasing Agent, or anyone else in the executive department, it would have been his constitutional duty to have taken steps to see that the contract was not made. If the Governor must put a stop to corrupt agreements involving other state officers, certainly he must not permit the State to enter into a contract in which his own good faith and honesty are at stake. By the same token an attempt to corrupt the Governor of the State of Maine through offering a commission on the sale of goods to the State of Maine is neither more nor less than an attempt to bribe a state officer in the performance of his official duties.

In the several counts the State has set forth essentially the one transaction with different facts to cover questions of proof. Each count stands as a valid and sufficient count on the general principle that everything pertaining to the executive department of the State, and more particularly in this instance to the maintenance of our highways, is at all times a matter pending or a matter which may legally come before the Governor in his official capacity. The indictment sufficiently sets forth an offense under the statute. The entry will be

Exceptions overruled.

STATE OF MAINE

SUPREME JUDICIAL COURT AND SUPERIOR COURT

All of the Justices concurring, Rule 43 of the Revised Rules of the Supreme Judicial and the Superior Courts as recorded in Volume 147 Maine, Page 482, is hereby amended by striking out the following clause in the ninth, tenth and eleventh lines of said Rule, to wit: "the second day of the April term and the first day of the September term in Hancock County," and inserting in place thereof the following: "the second day of the April term and the first day of the September and December terms in Hancock County."

The foregoing clause to become effective January 1, 1954. Dated at Skowhegan, Maine, this 13th day of October, A. D. 1953.

EDWARD F. MERRILL
Chief Justice

EDMUND M. ROWE

vs.

CHRISTOPHER C. HAYDEN

AND

BENJAMIN F. EATON

Penobscot. Opinion, November 3, 1953.

Equity. Bona Fide Purchaser. Decree.

The notice referred to in R. S., 1944, Chap. 154, Sec. 18 means actual or constructive notice.

Where an intending purchaser has actual notice of any fact sufficient to put him on inquiry as to the existence of *some right or title in conflict with that which he is about to purchase* he stands charged with notice of that which inquiry would have revealed by the exercise of ordinary diligence.

Equity acts *in personam* and not *in rem.*

Maine has no statute which provides for the transfer of title by the mere recording of a decree in equity ordering the transfer.

ON APPEAL.

This is a bill in equity before the Law Court on appeal by the defendant. Case remanded for entry of a decree modifying the final decree below in accordance with this opinion.

Matthew Williams, for Plaintiff.

Judson A. Jude,

B. M. Siciliano, for Defendant.

SITTING: MERRILL, C. J., THAXTER, WILLIAMSON, TIRRELL, JJ. MURRAY, A. R. J. FELLOWS, J., did not sit.

MERRILL, C. J. On appeal. The plaintiff, Edmund M. Rowe, was the owner of certain real estate in the town of Garland, against which said town had filed tax liens. The plaintiff had been negotiating with the town for the release of said real estate from the tax liens or its reconveyance to him. The town, through its selectmen, had set a date within which time it would release or convey the land upon payment of taxes, interest and charges.

Just before the expiration of this time the plaintiff was taken sick and went to the Veterans Hospital in Togus. He appointed the defendant, Christopher C. Hayden, his agent to obtain the money for him with which to settle with the town and free his property from the tax liens.

It is a reasonable inference from the testimony that Hayden attempted to borrow the money therefor for Rowe from the defendant Eaton. Mrs. Hayden testified that she talked with Mr. Eaton alone and that she asked him if he was going to help Chris out buying the property. Respecting this conversation, Mrs. Hayden said:— "He says he don't know, if he can get a paper and Rowe signs off it is a good investment, but he says he won't have nothing to do with Rowe."

From this testimony of Mrs. Hayden it is reasonable to suppose that Hayden had taken the matter up with Eaton and tried to get the money of Eaton for Rowe. Mr. Eaton was very evasive in his testimony and apparently tried to avoid admitting that he had any knowledge of Rowe's interest in the property. He did, however, admit that he requested Mr. Hayden to obtain some kind of a paper from Mr. Rowe.

Following this request by Eaton, Hayden had a power of attorney running from Rowe to himself prepared and executed. This power of attorney, which was under seal and acknowledged, was dated the 22nd day of January, 1952 and recorded in the Penobscot Registry of Deeds the following day. This power of attorney authorized Hayden "to lease or grant, sell or convey absolutely, and in fee simple, for such price and to such persons as he shall think fit, the following described real estate and particularly to cut and remove therefrom any and all wood growing thereon necessary, in his opinion, to provide funds for payment of taxes assessed against said property by the town of Garland: * * * And for me and in my name to mortgage the aforementioned property and to sell, execute, deliver and acknowledge such deeds and conveyances thereof, or any part thereof, as he shall think fit, hereby ratifying all leases, deeds and conveyances as shall be executed by my said attorney concerning the premises." The property described in the power of attorney is the property of the plaintiff here in question.

Following the record of this power of attorney, the defendant Hayden informed the defendant Eaton that he had obtained a paper from the plaintiff Rowe and had placed the same on record. So far as the evidence discloses, Eaton made no further or other inquiry as to the nature of the paper which Hayden had obtained, did not ask to see it and did not examine the record to find out its nature. This power of attorney as recorded clearly disclosed that Hayden represented the plaintiff as his agent, and that, with respect to

transactions concerning the title to the plaintiff's property, Hayden stood in a fiduciary relationship toward him. After this conversation between the defendant Hayden and the defendant Eaton, they proceeded to the office of the selectmen of the town of Garland where it was determined that the plaintiff's indebtedness to the town of Garland, upon the payment of which they would convey his property, amounted to $2,006.44. The defendant Hayden was also indebted to the town of Garland for $418.17 for taxes on certain property owned by him. Hayden was also personally indebted to the defendant Eaton in a sum approximating $1,500.00.

Thereupon, and at the defendant Eaton's request, the town of Garland conveyed the plaintiff's property and Hayden's own property to Hayden. This conveyance was by quit-claim deed of all right, title and interest of the town therein. Eaton advanced the sum of $2,006.44, the amount necessary to discharge the claim against the Rowe property, $418.17 to discharge the claim against the Hayden property, and took a mortgage from Hayden of the plaintiff's property and his, Hayden's, property to secure these sums, together with Hayden's other personal pre-existing indebtedness to Eaton, said sums amounting in all to $4,336.00.

After the plaintiff learned that Hayden had taken title to the property in his own name, and had mortgaged the same to Eaton not only to obtain money to pay what the plaintiff owed the town of Garland, but also to pay to the town of Garland certain taxes owed by Hayden to the town, as well as to secure Hayden's personal pre-existing indebtedness to Eaton, the plaintiff contacted both Hayden and Eaton.

Hayden claimed that he had bought the property for himself, that it was his own and that he would do nothing in the premises. Eaton claimed that he was entitled to hold the

property to secure the full amount of his mortgage. Thereafterwards, the plaintiff brought the present bill in equity against Hayden to recover his property. Eaton was subsequently made a party thereto. Both Hayden and Eaton appeared and filed answers denying the plaintiff's rights. Although the defendant Eaton answered by the name of Benjamin *F.* Eaton, from his testimony it appears that his name is Benjamin *E.* Eaton. It was by that name he took as grantee in the mortgage here in question.

The court below filed a final decree directing Hayden to convey the equity of redemption of the plaintiff's property to the plaintiff. It also directed the defendant Eaton to account to the plaintiff in the sum of $130.00 for wood cut and removed from the land. It directed the plaintiff, Rowe, to pay to the defendant Eaton the sum of $2,006.44 paid by him to the town of Garland for the Rowe property, less the above amount of $130.00. Said payment to Eaton, together with nine months' interest, was to be made not later than six months from the date of the decree. The decree further provided that the defendant Eaton release and convey to the plaintiff Rowe any and all interest he may have in the above described Rowe property in Garland, upon payment by Rowe to Eaton of the balance as found due as aforesaid. The decree also granted certain injunctive relief against the defendant Hayden. The defendants Hayden and Eaton seasonably appealed from said decree. It is upon this appeal that this case is now before this court.

Upon the record of this case it is clear that the defendant Hayden stood in a confidential relationship toward the plaintiff. It is also clear that by taking the deed of the plaintiff's property from the town of Garland to himself, and by mortgaging the plaintiff's property together with his own to the defendant Eaton, as security not only for the amount of money advanced by Eaton which was used to free the plaintiff's property from lien but also as security for his, Hay-

den's, own personal indebtedness, both to the town and to Eaton, the defendant Hayden committed a fraud upon the plaintiff. The equity of redemption standing in his name is clearly charged with a trust in favor of the plaintiff. As between the plaintiff and the defendant Hayden, it is the equitable duty of Hayden to exonerate the plaintiff from all of the mortgage indebtedness in excess of the $2,006.44 advanced for the protection of his, the plaintiff's, property.

The defendant Eaton, so far as the plaintiff's property is concerned, claims, as mortgagee, to stand in the position of a purchaser for a valuable consideration without notice of the plaintiff's equities. If this claim were true, he would be entitled to assert his mortgage against the plaintiff's property for the full amount secured thereby.

It is provided by R. S. (1944), Chap. 154, Sec. 18 that:—

> "The title of a purchaser for a valuable consideration or a title derived from levy of an execution cannot be defeated by a trust, however declared or implied by law, unless the purchaser or creditor had notice thereof. When the instrument, creating or declaring it, is recorded in the registry where the land lies, that is to be regarded as such notice."

In the leading case of *Knapp* v. *Bailey,* 79 Me. 195, it was held that the notice referred to in this statute means "actual or constructive notice."

In the comparatively recent case of *Devine* v. *Tierney & Findlen,* 139 Me. 50 at 54, discussing the meaning of the word notice in R. S. (1944), Chap. 154, Sec. 18, then R. S. (1930), Chap. 87, Sec. 18, we said:—

> "Under the statute the notice which will defeat the title of a purchaser for a valuable consideration is actual notice either of the trust or of facts which would or ought to put him upon inquiry in reference to it. Where an intending purchaser has

> actual notice of any fact sufficient to put him on inquiry as to the existence of *some right or title in conflict with that which he is about to purchase* he stands charged with notice of that which inquiry would have revealed by the exercise of ordinary diligence. This, in the judgment of the law, is actual notice inferred or implied as a fact from circumstances and the equivalent of actual notice proved by direct evidence. As to what facts are sufficient to excite inquiry in such a case and charge the purchaser with implied actual notice under the statute there is no hard and fast rule. They must be such facts as would lead a fair and prudent man with ordinary caution to make inquiry. *Knapp* v. *Bailey,* 79 Me., 195, 9 A., 122, 1 Am. St. Rep., 295; *Bradley* v. *Merrill,* supra." (Emphasis ours.)

This case, it will be noted, cited *Knapp* v. *Bailey, supra,* which is the leading case in this State on the interpretation of the word notice in this statute. In that case this court said:—

> "The doctrine of actual notice implied by circumstances (actual notice in the second degree) necessarily involves the rule that a purchaser before buying should clear up the doubts which apparently hang upon the title, by making due inquiry and investigation. If a party has knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make further inquiries, and he avoids the inquiry, he is chargeable with notice of the facts which by ordinary diligence he would have ascertained. He has no right to shut his eyes against the light before him. He does a wrong not to heed the 'signs and signals' seen by him. It may be well concluded that he is avoiding notice of that which he in reality believes or knows. Actual notice of facts which, to the mind of a prudent man, indicate notice — is proof of notice. 3 Wash. Real Prop. 3d ed. 335. * * * As to what would be a sufficiency of facts to excite inquiry no rule can very well establish; each case depends upon its own facts."

The principles laid down in *Knapp* v. *Bailey* have been many times recognized by this court. See *Brown* v. *Reed,* 81 Me. 158 at 163; *Morey* v. *Milliken,* 86 Me. 464, 475; *Bradley* v. *Merrill,* 88 Me. 319 at 335, 336; *Coleman* v. *Dunton,* 99 Me. 121; *Hopkins* v. *McCarthy,* 121 Me. 27, 29; *American Realty Co.* v. *Amey,* 121 Me. 545 at 553, 555; *Shattuck* v. *Jenkins et al.,* 130 Me. 480, 484. The rule is well set forth in *Hopkins* v. *McCarthy,* 121 Me. 27 at 29, where we said:—

> "Actual notice and actual knowledge are not necessarily synonymous expressions. Actual notice is that which gives actual knowledge, or the means to such knowledge. It is a warning brought directly home to one whom it concerns to know. Actual notice may be either express or implied. It is express when established by direct proof. It is implied when inferable as a fact by proof of circumstances. 'Express actual notice' is its own definition. Implied actual notice is that which one who is put on a trail is in duty bound to seek to know, even though the track or scent lead to knowledge of unpleasant and unwelcome facts. *Knapp* v. *Bailey,* 79 Me., 195; *Bradley* v. *Merrill,* 88 Me., 319."

To multiply authorities would serve no useful purpose. Measured by the standards set forth in the foregoing opinions, Eaton had *notice* of the equities existing in favor of the plaintiff. There was, to use the words of *Knapp* v. *Bailey, supra,* "a sufficiency of facts to excite inquiry." To adopt the test set forth in *Hopkins* v. *McCarthy, supra,* the plaintiff was "put on the trail," he was "in duty bound to seek to know, even though the track or scent lead to knowledge of unpleasant and unwelcome facts."

Why the defendant Eaton did not follow the trail to *actual knowledge* we may never know. The opportunity to obtain *ample security* not only for the money presently advanced but also for Hayden's *substantial pre-existing indebtedness* to him, even though not sensed by him, may have dulled the

scent and have blinded his eye to the plain trail. This trail led to actual knowledge of the confidential relationship existing between the plaintiff and Hayden and would have disclosed the consequent equities of the plaintiff in any title to the plaintiff's property if acquired by Hayden.

Paraphrasing the words of Chief Justice Peters speaking for the court in *Knapp* v. *Bailey, supra,* we do not say that he did not believe he could legally take the mortgage here in question, "nor do we impute more than a want of caution and diligence. Men's interests spur their judgments to one-sided conclusions oftentimes. The great dramatist makes a character, reluctant to acknowledge the situation, say, 'I cannot dare to know that which I know;' while another, more quicksighted, because anxious to believe, exclaims, 'Seems, madam! Nay, it is. I know not seems.' One rejects proof on the clearest facts; the other accepts it on the slightest."

With the information which he actually had, and that which he not only could, but in the exercise of due care, should have obtained, either from the power of attorney itself or from the record thereof, Eaton had notice, within the meaning of R. S. (1944), Chap. 154, Sec. 18, of the confidential relationship existing between Hayden and the plaintiff and of the plaintiff's equitable title. He took his mortgage, so far as it covered the plaintiff's properties, subject to the plaintiff's equitable title thereto.

The defendant Eaton cannot in equity and good conscience assert his mortgage against the plaintiff's property in excess of the amount advanced by him to obtain the release thereof from the claim of the town of Garland against the plaintiff. To this extent the plaintiff had authorized Hayden to encumber the same.

The plaintiff is entitled (1) to a conveyance from the defendant Hayden of the equity of redemption of his property

described in the bill; (2) to a perpetual injunction against Hayden restraining him, his servants, agents, or attorneys from entering on the plaintiff's property, from cutting or removing any wood therefrom, or selling or conveying any of said property except to the plaintiff Rowe; (3) to a discharge of the Eaton mortgage, insofar as it constitutes an encumbrance upon his property, upon payment or tender to Eaton within six months of the date of the final decree of the sum advanced to obtain the conveyance of his property from the town of Garland, together with interest thereon, deducting therefrom any rents and profits received by Eaton. These matters were properly taken care of in the final decree entered by the justice below, which properly named the defendant Eaton, Benjamin *E.* Eaton in accord with the fact.

In that decree, however, appeared the following provision:— "Since the whereabouts of Hayden are unknown, a copy of this decree, certified by the Clerk of Courts and recorded in the Penobscot Registry of Deeds, will transfer record title of the above described Rowe property from Christopher C. Hayden to Edmund M. Rowe." This provision of the decree is unauthorized.

Equity acts *in personam* and not *in rem.* We have no statute which provides for the transfer of title by the mere recording of a decree in equity ordering the transfer. However, if the whereabouts of Hayden are still unknown, or if known and he is personally without the jurisdiction of the court, the court below, upon application therefor, will in aid of the decree appoint a master to make conveyance to the plaintiff of Hayden's title to the plaintiff's property. *Du Puy* v. *Standard Mineral Co.,* 88 Me. 202.

The time which the decree fixed within which the plaintiff should make payment to Eaton of the amount to which Eaton is equitably entitled, as a condition precedent to a release by Eaton of the plaintiff's property from his mort-

gage, has expired. Furthermore, the time for which interest upon the money is to be paid by the plaintiff to Eaton, due to the lapse of time since the filing of the decree below, should be adjusted.

The appeal is sustained only on the foregoing points, and the case remanded for entry of a decree modifying the final decree below in accordance with this opinion. In all other respects the final decree below is affirmed with additional costs for the plaintiff.

So ordered.

LAINA M. BRYANT, PETITIONER

vs.

THEODORE A. BRYANT, RESPONDENT

Kennebec. Opinion, November 3, 1953.

Jurisdiction. Special Appearance. Waiver.

Exceptions.

Divorce. Order. Vacation.

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 exceptant is aggrieved thereby and that he excepts thereto is sufficient.

Where a court has jurisdiction of the subject matter but has not obtained personal jurisdiction over a party because of irregularity in the summons or notice, he may waive objections by appearing and taking *any other part in the proceeding* than making objections thereto.

ON EXCEPTIONS.

This is a petition for new trial as to a divorce under R. S., 1944, Chap. 153, Sec. 65.

The case is before the Law Court upon exception to an order dismissing the petition. Exceptions sustained.

Louis Scolnick, for Plaintiff.

McLean, Southard & Hunt, for Defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ. MURRAY, A. R. J.

MURRAY, A. R. J. This case is here on exceptions. It is a petition for a new trial as to a divorce according to R. S., 1944, Chapter 153, Section 65. The petition is headed as follows:

STATE OF MAINE

KENNEBEC, SS. SUPERIOR COURT

APRIL TERM
1953

It was entered in vacation prior to the return day of the April Term. A justice in vacation ordered service. According to the petitioner, the order was returnable to the court. According to the respondent, it was returnable to a justice in vacation. We shall refer to this matter later.

At the April Term the respondent appeared specially to deny the jurisdiction of the court. He filed a motion to dismiss the petition for the reason that the order of service thereon was returnable to a justice in vacation. It was returnable on the 7th day of April, 1953 on which day the April Term convened, and while the term is in session, it

has exclusive jurisdiction over all actions and petitions for Kennebec County. At the term the court heard the motion and dismissed the petition. To which ruling the petitioner excepted.

The respondent attacks the adequacy of the exceptions. He contends in substance that the bill on its face does not show enough to comply with R. S., 1944, Chapter 94, Section 14. With this contention the court does not agree. "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." *Clapperton* v. *U. S. Fidelity and Guaranty Co.*, 148 Me. 257, 265, 93 Atl. (2nd) 336, 340.

The bill in this case shows the ruling to be one of law and contains a statement of sufficient facts to show that the exceptant is aggrieved thereby. The bill of exceptions is properly before this court.

According to the respondent's brief, "the second issue is whether a process directed to a Justice of our Superior Court, in chambers, and made returnable on the same day and hour that the April, 1953, term of the Kennebec County Superior Court convened is legally before said court so as to give the justice presiding over said court (April term of Court) jurisdiction."

It is very plain from respondent's brief that the process to which he refers and attacks, is not the petition but is the order issued by the justice in vacation. Under our theory of the case, it is not necessary to decide as to the validity of the order.

The petition was in the April Term, 1953, Superior Court, Kennebec, SS, which court had jurisdiction of the subject matter. The respondent filed in that court a motion to dis-

miss the petition for want of jurisdiction of the person of the respondent, on account of a void order of service, but within his motion, in addition to jurisdictional matters concerning the order of notice, he set forth facts not apparent upon the face of the petition or of the order as affording other grounds for the dismissal of the petition. These other grounds in no way related to jurisdiction over the person of the respondent. If tenable they would have been available to a respondent over whom the court had jurisdiction. He thereby gave the court jurisdiction of the respondent, if it did not have it before. "But where the court has jurisdiction of the subject matter and from any irregularity of summons or notice, it has not obtained jurisdiction over a party to the controversy, he may waive the objection by appearing and taking any other part in the proceedings then making objection thereto." *West Cove Grain Company* v. *James A. Bartley et al.*, 105 Me. 293.

We hold in this case that at the time of the ruling by the court, it had jurisdiction of the subject matter and of the parties.

Exceptions sustained.

STATE OF MAINE

vs.

ROOSEVELT MORIN

Aroostook. Opinion, November 3, 1953.

Criminal Law. Witness. Marriage. New Trial. Exceptions. Errors of Law. Charge.

A respondent in a criminal case cannot render a complaining witness incompetent by marrying her after his indictment and before trial.

On appeal from the denial of a motion for a new trial in felony cases the single question before the Law Court is whether in view of all the testimony the jury were warranted in believing and finding beyond a reasonable doubt that respondent was guilty as charged, subject however to the exception that the Law of the case may be examined where and only where manifest error in law has occurred and injustice would otherwise inevitably result.

The correctness of a charge by a presiding justice is not to be determined from mere isolated statements extracted from it.

ON APPEAL.

This is an indictment under R. S., 1944, Chap. 117, Sec. 10. After verdict of guilty the case is brought before the Law Court on appeal from the denial of a motion for new trial. Appeal dismissed. Motion for new trial denied. Judgment for the State.

Melvin E. Anderson, County Attorney, for State.

W. P. Hamilton, for Respondent.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, WEBBER, JJ.

MERRILL, C. J. On appeal. The respondent, Roosevelt Morin, was indicted for the rape of Brenda Zetterman, a female child under the age of 14 years, to wit, of the age of 13 years. The indictment was returned at the April *1953* Term of the Superior Court for the County of Aroostook. Capias was issued, and on the fifth day of the term the respondent was arraigned, pleaded not guilty, and was admitted to bail for his appearance from day to day. He was tried on the seventeenth day of the term. Verdict of guilty was rendered. Written motion for a new trial, alleging that the verdict was (1) against the law, (2) against the evidence, and (3) against the weight of the evidence was filed and denied. The respondent seasonably appealed to this

court. After appeal he was sentenced. The case is now before us on said appeal.

Brenda Zetterman's 14th birthday was *November 27, 1952.* She gave birth to a child on *February 8, 1953.* Between the time of his arraignment on the indictment and the date of the trial twelve days later, the respondent married Brenda Zetterman at Andover, in the Province of New Brunswick. Brenda testified that the respondent first spoke to her about marriage a week before the trial. This would be after the indictment and arrest. When the State called Brenda to the witness stand, the respondent's counsel, even before any question was asked, objected to her testifying on the ground that she was the wife of the respondent. This objection was overruled and Brenda was allowed to testify. She testified that she and the respondent, Roosevelt Morin, had sexual intercourse at Thomas Park in New Sweden in April, 1952. If the respondent had sexual intercourse with Brenda while she was under 14 years of age, with or without her consent, he would be guilty of rape. See R. S. (1944), Chap. 117, Sec. 10.

On appeals from the denial of a motion for a new trial in felony cases, subject to an exception hereinafter discussed, the single question before this court "is whether in view of all the testimony, the jury were warranted in believing beyond a reasonable doubt and therefore in declaring by their verdict," that the respondent was guilty as charged. *State* v. *Priest,* 117 Me. 223, 227, 103 Atl. 359; *State* v. *Gross,* 130 Me. 161, 163, 154 Atl. 187; *State* v. *Brewer,* 135 Me. 208, 193 Atl. 834; *State of Maine* v. *Smith & Poirier,* 140 Me. 44, 47.

The testimony of Brenda that the respondent had intercourse with her prior to her 14th birthday stands uncontradicted and unchallenged on the record. Counsel for the respondent did not even seek by cross-examination to cast doubt thereon. Cross-examination was waived. Although

corroboration of her testimony was not necessary, *State* v. *Newcomb,* 146 Me. 173, 2 Wharton Cr. Ev. Sec. 916, the conduct of the respondent in marrying Brenda after his indictment and prior to his trial, and his futile attempt to thereby close her mouth as a witness, is significant. The jury were clearly justified in finding that the State had established the guilt of the respondent beyond a reasonable doubt.

The respondent noted numerous exceptions during the course of the trial. The noted exceptions were not preserved by any written bill of exceptions. No bill of exceptions having been presented to and allowed by the justice presiding at the trial, there are no exceptions before this court for decision. R. S. (1944), Chap. 94, Sec. 14. We have recently and exhaustively reviewed the authorities and practice with respect to bills of exceptions in *Bradford* v. *Davis et al.,* 143 Me. 124, and in *State of Maine* v. *Johnson,* 145 Me. 30. To again review them here would serve no useful purpose.

The respondent, however, seeks to review on this appeal rulings of law made by the presiding justice. He asserts his right to such review on the ground that his motion contains an allegation that the verdict is *against the law.*

There is, as heretofore noted, an exception to the general rule that the only question before the court on an appeal from the denial of a motion for a new trial is whether in view of all the testimony the jury were warranted in believing beyond a reasonable doubt and therefore in declaring by their verdict that the respondent was guilty as charged. This exception is set forth in *State* v. *Wright,* 128 Me. 404, at 406, where we said:—

> "In our practice, in civil cases, errors of law are not as a general rule open to review on a motion for a new trial directed to this court. The same general rule applies to statutory appeals in criminal cases. The appropriate practice is to present such errors to this court in a Bill of Exceptions, and a departure from this practice is not to be encouraged.

> In civil cases, however, an exception to this general rule has been recognized, and *where, and only where, manifest error in law has occurred in the trial of cases and injustice would otherwise inevitably result,* the law of the case may be examined upon a motion for a new trial on the ground that the verdict is against the law, and the verdict, if clearly wrong, set aside. *Pierce* v. *Rodliff,* 95 Me., 346, 348; *Simonds* v. *Maine T.&T. Co.,* 104 Me., 440, 443. (Emphasis ours.)
>
> The same exception must be recognized in the review of criminal appeals. In this state the principles applicable to the review of civil trials on a general motion govern appeals in criminal cases. *State* v. *Dodge,* 124 Me., 243, 245; *State* v. *Stain et al,* 82 Me., 472, 489. And so in its review of criminal appeals, where the single question considered under the appeal was whether the verdict was against the evidence, this court has repeatedly ruled that the only question there to be determined was whether, in view of all the testimony in the case, the jury were warranted in believing beyond a reasonable doubt, and therefore in finding, that the respondent was guilty of the crime charged against him, *State* v. *Lambert,* 97 Me., 51; *State* v. *Mulkerrin,* 112 Me., 544; *State* v. *Howard,* 117 Me., 69; *State* v. *Pond, supra; State* v. *Dodge, supra.*"

This rule stated in *State* v. *Wright,* after we again examined and reviewed the authorities in both civil and criminal cases was applied in *Cox* v. *Life Insurance Co.,* 139 Me. 167, 172 and 173, and again in *State* v. *Hudon,* 142 Me. 337. We also recognized the exception and set aside a verdict on an appeal from denial of a motion for a new trial as against the law because of a manifest error in the charge in the very recent case of *State of Maine* v. *Peterson,* 145 Me. 279, 288.

The respondent seeks an application of the above exception to the general rule under the following circumstances.

The indictment alleged that the offense took place on the eighteenth day of June, 1952. During the trial the respond-

ent sought to confine proof of the offense to that date. The court properly ruled that the State was not confined to the date alleged in the indictment but that if the offense was committed at any time within six years prior to the finding of the indictment, the respondent could be found guilty thereon.

In the course of his charge, while discussing the variance between the date of the commission of the offense as alleged in the indictment and as shown by the evidence, the presiding justice said:— "The law requires that a date be alleged in the complaint or indictment, but the proof of any date within the statute of limitations satisfies the requirements of criminal pleadings in this type of case. The words 'statute of limitations' may need further definition, but, briefly, as far as this case goes, proof of the act complained of upon any date within six years prior to the date of the indictment satisfies criminal pleading."

Counsel for the respondent says that under this statement of the law, the jury could have convicted the respondent if they had found that he had had intercourse with Brenda after her fourteenth birthday in November and before the return of the indictment the following April.

"the correctness of a charge is not to be determined from mere isolated statements extracted from it, without reference to their connection with what precedes, as well as that which follows,". *State* v. *Day,* 79 Me. 120, 125.

The statement complained of must be considered in connection with the previous statement in the charge when the presiding justice said, "your only question is whether you are satisfied beyond a reasonable doubt, as I have defined it, whether this respondent had sexual intercourse with Brenda Zetterman when she was under 14 years of age."

As stated in *Hunnewell* v. *Hobart,* 40 Me. 28, 31:— "The law in this case was very fully, and, we think, fairly stated

by the presiding judge. If he erred in any particular, the defendants had no right to complain of the error. A single proposition in the charge, standing alone, might be open to objection, but taken in connection with other parts of the charge, and as it must have been understood by the jury, was not exceptionable."

Viewed in the light of these cases, even had this statement been before us on a bill of exceptions it would not have been prejudicial. The charge taken as a whole clearly required, and the jury must have understood, that before the respondent could be convicted proof of intercourse with Brenda *before she arrived at the age of 14 years* must be proved beyond a reasonable doubt.

As said in *Oxnard* v. *Swanton,* 39 Me. 125, 128, with respect to instructions to the jury:— "If a single phrase in them considered alone and without regard to those combined with it might lead them into error, other instructions on the same point appear to have been so full and clear, as to remove any doubt which might have been occasioned by the use of that phrase."

This case does not present a situation requiring us to set aside a verdict *as against the law.* No manifest error of law occurred in the trial of the case. The respondent was rightfully convicted of the crime with which he was charged by proof of his guilt beyond a reasonable doubt. Injustice would inevitably result, not by sustaining the conviction, but by setting it aside. Entry will be,

Appeal dismissed.

Motion for new trial denied.

Judgment for the State.

EDWARD D. TALBERTH

vs.

GUY GANNETT PUBLISHING COMPANY

Kennebec. Opinion, November 4, 1953.

Labor

Contracts. Severance Pay.

Article VII of a collective bargaining contract providing

Sec. (2) "Upon dismissal, *other than for . . . gross misconduct while on duty, not provoked by management,* an employee shall receive a cash severance. . . ."

and

Sec. (4) "Upon completion of 20 years service . . . an employee may terminate his employment and, upon written application to the publisher, shall receive (severance pay) . . ."

precludes severance pay where an employee is dismissed for *gross misconduct while on duty not provoked by management* even though such employee had 20 years' service and after such dismissal management allowed this employee to write a resignation which was published in management's newspaper.

ON REPORT.

This is an action of assumpsit before the Law Court upon report by agreement of the parties for final determination upon the admissible evidence. Remanded for entry of judgment for the defendant.

Dubord & Dubord, for Plaintiff.

Goodspeed & Goodspeed, for Defendant.

SITTING: MERRILL, C. J., FELLOWS, WILLIAMSON, TIRRELL, JJ. MURRAY, A. R. J., dissenting, THAXTER, J., dissenting in concurrence with MURRAY, A. R. J.

MERRILL, C. J. On report. This was an action of assumpsit brought by the plaintiff to recover from the defendant so-called severance pay in the amount of $3,135.00. The plaintiff was an employee of the defendant and a member of the Portland Newspaper Guild, Local 128, with which the defendant had an operating agreement or contract. This contract was entered into by the Guild, as bargaining agent, in behalf of itself and certain employees of the defendant who were engaged in the publication of certain of the defendant's newspapers. The plaintiff was among the employees of the defendant in whose behalf said contract was entered into and was entitled to the benefit of the terms and provisions thereof.

It has been stipulated that if the plaintiff is entitled to recover, the amount of his recovery shall be $3,135.00. Nor is there any controversy relative to the fact that plaintiff's employment by the defendant terminated on May 27, 1952, that he had completed more than twenty years' service at that time and was a member of said newspaper guild at the time his employment was terminated.

Among the provisions of the guild contract were the following which are pertinent to the facts in this case:—

"ARTICLE VII

(Severance Pay)

1. Upon dismissal, an employe, upon his request, shall receive a written notice from the Publisher, or his agent, stating the cause for his dismissal.
2. Upon dismissal, other than for gross neglect of duty, or gross misconduct while on duty, not provoked by management, an employe shall receive a cash severance payment equal to his salary for one week, at the highest rate received during his employment, for each six months or major fraction thereof that he has been employed by the Publisher. In no event shall this exceed thirty (30) weeks.

> 3. In the event of the death of an employee, the Publisher shall pay his beneficiary, designated by the employe in writing in advance or his executor or administrator, an amount equal to the amount of severance pay to which the employe would have been entitled upon dismissal.
>
> 4. Upon completion of 20 years' service or because of illness or having reached the age of 65, an employee may terminate his employment and, upon written application to the Publisher, shall receive a cash lump sum based on length of service as computed under Section 2 of this article. Payments under this section shall be in lieu of any other terminal benefits provided for elsewhere."

The plaintiff seeks to recover severance pay under the provisions of the foregoing contract. The issues in this case are, (1) whether or not the plaintiff was dismissed for "gross misconduct while on duty, not provoked by management," and if so, whether or not he would be entitled to severance pay under the provisions of Section 2 of Article VII of the contract *supra;* or (2) whether or not the plaintiff himself "terminated his employment" within the meaning of Section 4 of said Article VII under such circumstances that he would be entitled to severance pay "as computed under Section 2" of Article VII.

By agreement of the parties the case was reported to this court for final determination upon the admissible evidence.

The plaintiff was *the staff political writer* for the Gannett newspapers, so-called, published by the defendant company. Just prior to the severance of his relations with the defendant company he became actively involved in a serious and disgraceful political scandal. A recital of the details of this scandal and of the part played by the plaintiff therein would serve no useful purpose if set forth at length in this opinion and perpetuated in our reports. Suffice it to say, they were of such a nature and character that if and when they became

known, the plaintiff's usefulness as a political writer was sure to come to an end, and his retention by the defendant as a political writer would reflect discredit upon itself and its publications.

On the eve of the certain disclosure of the facts with relation to the scandal and the plaintiff's participation therein before a legislative investigating committee, the plaintiff, by his counsel and in person, made known to the defendant the existence of the facts and that the same were to be immediately made public.

The plaintiff's involvement and active participation in this scandal constituted gross misconduct on his part while on duty, not provoked by the defendant company or the management thereof and afforded sufficient ground for his immediate dismissal within the meaning of Section 2 of Article VII *supra.*

The defendant claims that *it* dismissed the plaintiff on account of gross misconduct within the meaning of Section 2 of Article VII of the contract, *supra,* and that the plaintiff because of the provisions thereof is not entitled to severance pay.

The plaintiff, on the other hand, claims that *he* terminated his employment after the completion of twenty years' service within the meaning of Section 4 of said Article VII, *supra,* and is entitled to severance pay thereunder in the sum of $3,135.00.

The facts are undisputed and it is upon the inferences from undisputed facts that we are to decide whether or not the plaintiff was dismissed under Section 2 or terminated his employment within the meaning of Section 4.

The difference arises because after the facts became known to the defendant, and after the defendant's Vice President had notified the plaintiff that he was already

through, the plaintiff was allowed to write a resignation which was published in the defendant's newspapers.

Upon the undisputed evidence we conclude that the defendant dismissed the plaintiff for "gross misconduct while on duty, not provoked by management." The essential nature of the termination of the plaintiff's employment was not changed by the fact that the plaintiff wrote and the defendant received, after it had dismissed the plaintiff, a statement by him in the form of a resignation which it used in connection with its publication of the facts respecting the termination of the plaintiff's employment.

As we said in *Lord, Berry & Walker* v. *Mass. Ins. Co.,* 133 Me. 335 at 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 a discussion. Suffice it to say that the evidence submitted by defendant fully sustains its contentions,".

See also *Robinson* v. *Clark,* 76 Me. 493.

The testimony with respect to the dismissal was given not only in the presence of the plaintiff but also in that of his counsel. Both of them had been present when the representative of the defendant informed the plaintiff of his dismissal. They both heard the entire conversations respecting the same which were testified to by this official and the other representatives of the defendant who were present when the conversations took place. Their testimony stands undisputed and undenied upon the record. Neither the plaintiff nor his counsel took the witness stand, as witnesses, to deny, explain, or to attempt to modify the same in any particular.

In our opinion Article VII must be interpreted as a whole. We hold that Section 4 thereof, which refers to Section 2,

must be interpreted in connection therewith, and that the right to severance pay under Section 4 is subject to the same limitation as that contained in Section 2.

It is the intent of the contract that if the employee be dismissed for "gross misconduct while on duty, not provoked by management," he shall not receive the severance pay to which he would otherwise be entitled under either Section 2 or Section 4 of Article VII of the contract.

The right to severance pay, although enforcible, is but a contingent right which does not become absolute unless the terms of the contract making provision therefor are complied with. It is never due and payable until the termination of the contract of employment, and then only if the contract be terminated under such conditions that it is payable according to the terms thereof.

Nor is the employee at the mercy of management with respect to his right to severance pay. His *right* to such pay depends upon his own conduct and upon that alone. The right to severance pay is not lost by *mere dismissal for cause,* but only when the dismissal is *"for gross misconduct while on duty, not provoked by management."*

The plaintiff was guilty of "gross misconduct while on duty, not provoked by management," and was dismissed therefor. The defendant is entitled to judgment. In accordance with the stipulation the entry will be

Remanded for entry of
Judgment for the defendant.

DISSENTING OPINION.

MURRAY, A. R. J. — Dissenting. We agree with the majority opinion that the facts show that the plaintiff was discharged for gross misconduct as described in Section 2 of the contract. We also agree with this part of the opinion: "Nor is there any controversy relative to the fact that plaintiff's employment by the defendant terminated on May 27, 1952, that he had completed more than twenty years' service at that time and was a member of said Newspaper Guild at that time."

While the opinion states that we are to decide whether or not the plaintiff was dismissed under Section 2, or terminated his employment within the meaning of Section 4, we contend that the employment was terminated not by plaintiff but by the defendant, which dismissal by the defendant made it impossible for the plaintiff to terminate the employment by resigning.

We also agree with the statement in the opinion, "the right to severance pay, although enforceable, is but a contingent right which does not become absolute unless the terms of the contract making provision therefor are complied with." We do not agree with its further statement, "It is never due and payable until the termination of the contract of employment ***." We agree to this as to Section 2, but not as to Section 4. We say it is due under Section 2 upon dismissal, but it is *due* under Section 4 on completion of twenty years' service, it is *payable* on resignation. The majority opinion states that Article VII of the contract must be interpreted as a whole. With this, of course, we differ, but do say that the contract as a whole should be interpreted, including Section 2 and Section 4, to get the intention of the parties thereto.

Section 2 and Section 4, Article VII follow:

> "2. Upon dismissal, other than for gross neglect of duty, or gross misconduct while on duty, not provoked by management, an employe shall receive a cash severance payment equal to his salary for one week, at the highest rate received during his employment, for each six months or major fraction thereof that he has been employed by the publisher. In no event shall this exceed thirty (30) weeks.
>
> 4. Upon completion of 20 years' service or because of illness or having reached the age of 65, an employe may terminate his employment and upon written application to the publisher, shall receive a cash lump sum based on length of service as computed under Section 2 of the article. Payments under this section shall be in lieu of any other terminal benefits provided for elsewhere."

The construction, according to the majority opinion, is that Section 2 is in effect from the time of the commencement of the employment until there is a dismissal or a resignation, the construction of the dissenting opinions is Section 2 is in effect until there has been a completion of twenty years' service. At the completion of twenty years' service Section 2 has expired, and the right to resign and the right to severance pay vests. We are strengthened in our belief that Section 2 expired by the statement in Section 4: "Payments under this section shall be in lieu of any other terminal benefits provided for elsewhere."

The contract discloses that it was made by the defendant and the Portland Newspaper Guild for itself and on behalf of all employes of the publisher. As between this plaintiff and this defendant, the defendant drew the contract.

What was the intention of the parties to this contract? "The first maxim of construction, and that upon which rests

all the rules, is this, namely, that, so far as the law will permit, the apparent intent of the contracting parties shall be regarded. Operation and intent are to be ascertained from the purpose of the parties; their meaning and understanding as shown by the language they use, applied to the subject matter." *Katz et al.* v. *New England Fuel Oil Co.*, 135 Me. 452. Intention should be gathered from the whole instrument. *Monk* v. *Morton,* 139 Me. 291.

"Retirement pay is defined as 'adjusted compensation,' presently earned *** payable in the future. The compensation is earned in the present, payable in the future. *** until the *time* arrives when he may retire, his retirement pay is but an inchoate right; but when the conditions are satisfied, at that *time* retirement pay becomes a vested right of which the persons entitled thereto cannot be deprived; it has ripened into a full obligation." *Retirement Board of Allegheny County* v. *McGovern,* (Penn.), 174 Atl. 400, 404, (underscoring ours), citing *Lynch* v. *U. S.*, 292 U. S. 571, 54 S. Ct. 840.

In *Division of Labor Law Enforcement* v. *Ryan Aeronautical Co.*, 236 Pac. (2nd) 236 (Cal.), a case for the collection of vacation pay in which the plaintiff had not complied with a required one year service, the contention of the defendant was, the clause was a condition precedent to the right of recovery. The court held it was ambiguous and not necessarily a condition precedent. The clause was inserted to accomplish continuous and faithful service and to induce the employee to remain in the employment. That the objects have been substantially procured, the benefit inured to the employer. Equity and justice require a liberal construction. That courts are disinclined to construe the stipulations or the contract as a condition precedent, unless compelled by the words of the contract plainly expressed, and particular-

ly so when result would work a forfeiture. This case also decides that provision for vacation pay is not a gratuity or gift but a contract for additional wages.

"An employee fulfilling these conditions then has a vested interest in retirement pay which cannot be destroyed, weakened, or departed from by subsequent legislation. Neither dismissal from service or office, nor any involuntary removal, can affect this vested right to retirement pay. We endeavored to specifically hold in the McGovern case that eligibility for retirement pay is complete as soon as an employee or member of the retirement system has satisfied the conditions requisite for retirement, whether the employee chooses to retire immediately or to continue in active service. His rights to such pay are fixed as of the time he attained eligibility. Until retirement pay is earned as above described the right is inchoate. During this period retirement pay is being built up. The inchoate right becomes a complete vested right when the conditions connected with the particular retirement system are complied with. This right cannot be thereafter disturbed by legislation." *McBride* v. *Retirement Board* (Penn.), 199 Atl. 130, 132.

We say there is no ambiguity, but if there is ambiguity, following is the law: "The rule that an ambiguous contract will be construed more strongly against him who uses the words concerning which doubt arises, is more than an arbitrary rule. Its purpose is to give effect to the intention of the parties. To the maker of an instrument is available language with which to adequately set forth the terms thereof. It is presumed that he will not leave undeclared that which he would claim as his right under the agreement. *** 'He who speaks should speak plainly, or the other party may explain to his own advantage.' " *Monk* v. *Morton, supra.*

"The Restatement of Contract, Sec. 261 provides where it is doubtful whether words create a promise or an express condition, they are interpreted as creating a promise ***

and Professor Williston in his work on contracts Section 665 says thereof: 'Such an interpretation protects both parties to the transaction and does not involve the consequences that a slight failure to perform wholly discharges all right under the contract.' " *Division of Labor Law Enforcement* v. *Ryan Aeronautical Co.*, 236 Pac. (2nd) (Cal.).

It must be borne in mind that this defendant, not the plaintiff, made this contract, and for that reason it should be construed strongly against the defendant. The construction which the majority opinion gives to the contract is strongly in favor of the defendant.

Unless Section 4 is construed a promise to pay on completion of twenty years' service, an employee could work more than twenty years, then the defendant might be adjudged a bankrupt before employee resigned, the bankruptcy is neither a dismissal nor a resignation. After the twenty years' service and before the resignation, the contract might not be renewed, employee could collect nothing because he had not resigned while the contract was in effect. The opinion states that severance pay is never due and payable until the termination of employment, and then only if the contract be terminated under such conditions that it is payable according to the terms thereof.

The majority opinion has not construed this contract, it has written a new one. It has made resigning a mountain and the completion of twenty years' service a mole hill. It has written the contract so strongly against the plaintiff that it has succeeded in bringing about a forfeiture of this man's twenty years' service, and given the remuneration for it, not to the State but to this defendant. We think judgment should be for the plaintiff.

DISSENTING OPINION.

THAXTER, J., Dissenting. The only issue which I originally thought was in this case was whether the plaintiff was properly dismissed by the Guy Gannett Publishing Company for cause. Judge Murray's dissenting opinion has convinced me that I was wrong. No such simple solution exists. The question is whether the plaintiff became entitled to severance pay provided in Article VII, Section 4, of his contract of employment in spite of the fact that he was dismissed for cause.

Upon written application to the publisher to terminate his employment, he became entitled to severance pay after he had completed twenty years of service. There is no other qualification. That right could not be taken from him, as was done here, even though he may have misbehaved after his right to severance pay accrued by his having worked for twenty years.

This is a contract which is binding on the employer as well as on the employee. The employee did not lose all his rights which had accrued under it because he may have misbehaved after such rights had accrued.

In interpreting these labor contracts it is essential that we construe them strictly as written, not as we may think they should have been written, and certainly not by interpolating words in them which are not there.

I concur in the dissenting opinion of Judge Murray.

STATE OF MAINE

vs.

JOHN SCHUMACHER

Lincoln. Opinion, November 5. 1953.

Appeal.

Criminal Law. Demurrer. Courts. Pleading.

Negative Averment.

The general rule in criminal cases is that upon an appeal from a magistrate or lower court to the Superior Court the matter comes before the Superior Court for trial *de novo*. This means that the matter comes forward on the complaint and further upon the plea of the respondent, the word "*de novo*" applying to the actual trial of the case.

A Presiding Justice of the Superior Court impliedly consents to the withdrawal of a plea of not guilty made before the lower court by taking before him for the first time the merits of a demurrer to a warrant and ruling thereon.

A warrant charging defendant "did sell a . . . quantity of intoxicating liquors . . . the said (defendant) not having then and there a license therefor issued by the State Liquor Commission as provided by the laws of the State of Maine, . . ." is a sufficient allegation under P. L., 1951, Chap. 137, which states in part "any person . . . who sells liquor . . . without a license shall be punished . . ."

It is not necessary for a warrant to contain a negative allegation that defendant was not a "physician, surgeon, osteopath . . . etc." since the words "against the peace of the State, and contrary to the form of the statute in such case made and provided" are equivalent to an allegation that the act was unlawfully done.

ON EXCEPTIONS.

This is a warrant and complaint charging a violation of the State Liquor Law. The case is before the Law Court upon exceptions to the overruling of a demurrer. Exceptions overruled. Judgment for State.

James Blenn Perkins, Jr., for State.

Christopher S. Roberts, for Defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, WEBBER, JJ.

TIRRELL, J. This case is here on exceptions to the overruling of a demurrer filed in the Superior Court for the County of Lincoln.

The case originated by complaint to the Lincoln Municipal Court. The complaint on its face tends to show a violation of the State Liquor Law so-called. Upon the complaint a warrant was issued by the Judge of the Lincoln Municipal Court.

The charging part of the complaint is as follows:

> "that John Schumacher, of Damariscotta in the County of Lincoln, on the sixth day of February A. D. 1953 at Damariscotta in the County of Lincoln aforesaid, did sell a certain quantity of intoxicating liquors, to wit; one pint of intoxicating liquor labelled Sevilla Rum, to one Charles Thayer of North Whitefield for the amount of three (3) Dollars, the said John Schumacher not having then and there a license therefor issued by the State Liquor Commission as provided by the laws of State of Maine; said offense being the second, the said John Schumacher being found guilty of a single sale in the Lincoln Municipal Court of Lincoln County on the first day of October 1951, and sentenced to pay a fine of $300.00 and costs of $17.86. Against the peace of the State, and contrary to the form of the Statute in such case made and provided."

The so-called record as sent forward from the Lincoln Municipal Court to the Superior Court is not an independent record as is proper (see *State* v. *Houlehan*, 109 Me. 281, at page 283), but the printed record of the case as it is now before us shows that the record forwarded to the Superior Court was made on the back of the complaint and warrant. This record shows that the respondent, having been brought

before the Lincoln Municipal Court upon this complaint and warrant, was arraigned and pleaded *not guilty.* Hearing was waived by the respondent, whereupon he was adjudged guilty and sentenced. An appeal to the Superior Court from this finding was filed and completed.

At the May 1953 Term of the Superior Court for the County of Lincoln the County Attorney for the County of Lincoln nolle prossed that part of the above complaint as refers to a prior conviction. Thereafter respondent filed a demurrer which was joined by the county attorney. This demurrer was acted upon by the presiding justice who overruled the demurrer and gave judgment for the State. To this ruling the respondent excepted and the exceptions were allowed by the presiding justice. The presiding justice then sentenced the respondent, and the clerk was authorized to accept bail, the case being then marked "LAW" on the docket.

The general rule in criminal cases is that upon an appeal from a magistrate or lower court to the Superior Court the matter comes before the Superior Court for trial *de novo.* This means that the matter comes forward on the complaint and further upon the plea of the respondent, the words *"de novo"* applying to the actual trial of the case. The withdrawal of the plea made in the lower court must be by and with the consent of the presiding justice. In the instant case the presiding justice did not directly give to the respondent leave to withdraw his former plea, the county attorney stood by, made no objections to the filing of the demurrer, and as a matter of fact joined it and made that the issue. The presiding justice took before him the merits of the demurrer and ruled thereon. In doing this this court holds that he, the justice presiding, impliedly gave his consent to the respondent to withdraw the former plea of not guilty.

In *State* v. *Whitten,* 90 Me. 53 the court heard a demurrer

which was filed in the court above without withdrawal of the plea in the court below and overruled the same, stating, however, that it was an irregular proceeding "but possibly permissible inasmuch as the demurrer was duly joined by the prosecuting officer."

In *State* v. *Thomas,* 90 Me. 223, the demurrer was filed by consent of the parties and consent was granted to plead over, it not appearing whether that consent was granted by the court or was agreed to by the county attorney.

In *State* v. *Haapanen,* 129 Me. 28, Judge Dunn, later Chief Justice Dunn, held that a motion to quash came too late after plea in the municipal court unless leave was granted prior to the filing of the motion without withdrawal of the plea or the withdrawal of the plea by consent of the court.

Having the above citations in mind and holding that the respondent impliedly was given the right to plead anew, we now turn to the merits of the demurrer.

The complaint was intended to be drafted under the provisions of R. S. (1944), Chap. 57, Sec. 66, the pertinent parts of which read as follows:

> "Whoever, by himself, his clerk, servant or agent, sells any liquor in this state, in violation of law, shall be punished . . . . . Any clerk, servant, agent or other person in the employment or on the premises of another, who violates or in any manner aids or assists in violating any provision of law relating to intoxicating liquors, is equally guilty with the principal and shall suffer like penalties."

The above quoted section was amended, Public Laws of Maine 1951, Chap. 137, the pertinent provisions of which read as follows:

> "Whoever, being licensed to sell liquor, by himself, his clerk, servant or agent sells any liquor in this state, in violation of law, shall be punished. . . . . .

> Any person or his clerk, agent or servant who sells liquor within the state without a license shall be punished. . . . . Any clerk, servant, agent or person in the employment or on the premises of another, who violates or in any manner aids or assists in violating any provisions of law relating to intoxicating liquors is equally guilty with the principal and shall suffer like penalties."

This above quoted amendment is divided into two parts and controls the sale of intoxicating liquor. The first part prohibits the sale by a person *licensed to sell liquor* by himself, his clerk, servant or agent in this state, *in violation of law*. This part of the statute is to prohibit a sale of intoxicating liquor by those licensed to sell liquor in this state *in violation of law*. It may be readily seen that although one has a license to sell intoxicating liquor in this state, one may do so in violation of law. For instance, a person might be licensed to sell intoxicating liquor at a certain defined place in one city in the state, and should he sell it from another location in the same city or some other city in this state, it would be in violation of law. This second provision of this amendment applies to a person, his clerk, agent or servant who sells intoxicating liquor within the state *without a license.*

The first cause set out by the respondent in support of his demurrer is that the complaint does not allege, as he says in the words of the statute, that "the sale was made in violation of law" or words equivalent thereto, as "without lawful authority." And he argues that this must be alleged where the complaint is drafted to define a crime under the first as well as the last clause therein. And in his brief he states:

> "The questions for decision would be these:
>
> > Are the words in the complaint 'not having then and there a license therefor issued by the State Liquor Commission' the same meaning as 'without a license'?

> . . . . . are the words 'without a license' equivalent to the words 'in violation of law?' "

The complaint alleges in part: "the said John Schumacher not having then and there a license therefor issued by the State Liquor Commission as provided by the laws of State of Maine." It may be readily seen that the alleged violation was of that part of the statute which prohibits the sale of intoxicating liquor at all times or under any circumstances by persons not licensed. It is true that this complaint sets forth that the respondent "not having then and there a license therefor" issued by the State Liquor Commission as provided by the laws of the state. A search of the Statutes of Maine reveals that the only person or agency authorized to issue licenses is the State Liquor Commission (see R. S. (1944), Chap. 57, Sec. 6, Subsec. VI).

It may be noted that Subsection VI, above referred to, gives the State Liquor Commission the right to *issue all licenses*. The respondent gains nothing by this first cause of demurrer as argued by him.

The second and other ground set forth by the respondent as a reason why his demurrer should be sustained is that the complaint is insufficient in law because it contains the following words, to wit: "one pint of intoxicating liquor labelled Sevilla rum." The demurrant, in his brief and by oral argument, concedes that the words "labelled Sevilla rum" are surplusage. This court thoroughly agrees with the contention of the respondent concerning the use of the words "labelled Sevilla rum" and it, too, without hesitation says that the use of the words "labelled Sevilla rum" can be and is no other than surplusage. The respondent, however, contends that in some instances a person could sell alcohol in the State of Maine without being duly licensed therefor. The respondent in this contention and assertion makes reference to R. S. (1944), Chap. 57, Sec. 6, Subsec. II. The caption appearing at the beginning of said Section 6 is as

follows: "POWERS AND DUTIES OF COMMISSION." Subsection II, referred to above, reads as follows:

> "II. (1937, c. 232, Sec. 2; c. 250) To have control and supervision of the purchase, importation, transportation, and sale of alcohol; and to make rules and regulations for such purchase, importation, transportation, and sale of same to any industrial establishment in this state for industrial uses, or schools, colleges, and state institutions for laboratory use only, or to hospitals for medicinal use therein only, or to any licensed pharmacist in this state for use in the compounding of prescriptions and other medicinal use but not for sale by such pharmacists unless compounded with or mixed with other substances, or to any physician, surgeon, osteopath, chiropractor, optometrist, dentist, or veterinarian for medicinal use only."

It is apparently by virtue of this portion of the Revised Statutes that the respondent claims that one might sell alcohol without being duly licensed therefor. However, this Subsection II refers to industrial establishments, schools, colleges, state institutions for laboratory work, hospitals for medicinal use only or to licensed pharmacists in this state for use in the compounding of prescriptions and other medicinal use to any physician, surgeon, osteopath, chiropractor, optometrist, dentist or veterinarian for medicinal use only.

It is true that this complaint does not negative the fact directly that this respondent was in one of the classes referred to in the statute. We note, however, that the complaint in question contains the customary and usual phrase "against the peace of the State, and contrary to the form of the Statute in such case made and provided." It is apparent, therefore, on inspection of the complaint that the respondent did sell intoxicating liquor "against the peace of the State, and *contrary to the form of the Statute in such case made and provided*" (see opinion of this court in *State*

v. *Chase,* 99 A (2) 71, at page 76), wherein Mr. Chief Justice Merrill, in speaking for this court, said:

> "The allegations in this indictment that the respondent killed and murdered Yoksus 'against the peace of said State, and contrary to the form of the statute in such case made and provided' are equivalent to an allegation that the killing was unlawfully done."

It has so long and universally been held that all that is necessary in a complaint or indictment is to substantially charge the respondent with the criminal offense that no citations appear necessary. Had this respondent desired or wished to know the kind of intoxicating liquor that he was alleged to have sold to the certain specified person he could readily have petitioned the court to order the state to file a Bill of Particulars concerning that particular point. This he failed to do.

The Presiding Justice of the Superior Court was correct when he overruled the respondent's demurrer.

The docket entry and mandate to the Superior Court must be

Exceptions overruled.

Judgment for the State.

J. FRED TOBEY, JR.

vs.

RICHARD QUICK

EDNA T. TOBEY

vs.

RICHARD QUICK

Sagadahoc. Opinion, November 5, 1953.

Negligence.
Witnesses. Executors and Administrators.
Hearsay. Self Serving Statements.
R. S. 1944, Chap. 100, Sec. 120.

At common law, a *party* to the record in a civil suit could not be a witness. This rule has been changed by statute except where one of the parties has deceased.

Where the defendant has died and his personal representative has not taken the witness stand the plaintiff's mouth is closed.

Declarations by the deceased in his lifetime against his interest are always admissible.

Statements by the living party to the party now deceased and the statements of the deceased party to the now living would not be hearsay that is prohibited and, if self serving, would not for that reason be inadmissible if the whole conversation of both parties was admitted.

Evidence that a deceased defendant sought to have a physician examine plaintiff is not necessarily proof that deceased defendant was conscious that he had injured plaintiff and exclusion of such evidence is discretionary with the court.

ON EXCEPTIONS.

These are actions of negligence. At the time of trial defendant had deceased and his executor had been cited in to

defend the actions. The cases are before the Law Court on exceptions to the exclusion of testimony offered by plaintiff and exceptions to the direction of a verdict. Exceptions sustained.

Berman & Berman, for Plaintiff.

Edward Bridgham,

Harold Rubin, for Defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, WEBBER, JJ.

FELLOWS, J. These two actions for negligence were tried together, and tried against the personal representative of the deceased defendant. They come to the Law Court on exceptions. The action of Edna T. Tobey is to recover for alleged personal injuries sustained by her in an automobile accident that occurred in the city of Bath on the second day of November, 1944. The action of J. Fred Tobey, Jr., is brought as her husband to recover consequential damages.

After suits were brought, and while they were pending, the defendant, Richard Quick, died after a very long illness. His executrix was duly cited in and now defends both actions. Both cases were brought in May 1945 and continued on the docket of the Superior Court for Sagadahoc County term after term, either by agreement or by order of court. Trial was had at the October term, 1952.

It was the claim of the plaintiff that she was standing at a bus stop on Washington Street in Bath, Maine waiting for a public bus, when the then living defendant, Richard Quick, negligently drove his automobile in reverse out of his driveway, located opposite the bus stop, and that he crossed Washington Street, and struck the plaintiff Edna T. Tobey.

During the progress of the plaintiffs' cases, the plaintiffs attempted to introduce certain testimony which was ex-

cluded by the presiding justice because the defendant was deceased, and exceptions taken to his refusal to admit such testimony. At the conclusion of the plaintiffs' evidence, the defendant rested, without offering any testimony, and moved for a verdict for the defendant in both cases, which was granted by the court. The personal representative of the deceased defendant, Richard Quick, did not take the stand to testify, nor was any evidence offered on behalf of the defendant.

The bill of exceptions of the plaintiffs sets forth seven matters wherein the plaintiffs excepted to the rulings of the court. Six of the seven related to the exclusion of certain testimony offered by the plaintiffs. The final exception was taken to the granting of the defendant's motion for a directed verdict in both cases. The cases are before this court on the seven exceptions.

EXCEPTION I

Donald H. Specht, a witness called by the plaintiffs and not a party, testified that he had been employed by the defendant to investigate this alleged accident, and during such investigation he had a certain conversation with the now deceased defendant describing the manner of backing out of the driveway, and that a memoranda was then signed by the deceased. The evidence was excluded and exception taken.

EXCEPTIONS II AND III

Susan Quick Cahoon, who was not a party to the actions and was called by the plaintiffs, testified that she was a daughter of the deceased defendant and lived with him at 300 Washington Street; that she was home on the afternoon of November 2, 1944 when the plaintiff, Mrs. Tobey, came to her father's home and had some conversation relating to the accident with her father in her presence. The court would not admit all the conversation. That part of

the talk which was made by the plaintiff to the defendant was excluded on the ground that statements made by the plaintiff during the conversation would not be against her interest.

EXCEPTIONS IV AND V

The plaintiff sought to prove through the witness, Susan Quick Cahoon, the fact that her deceased father knew of the bus stop, as bearing on his knowledge and his care commensurate, by asking if she had ever seen her father taking the bus. This evidence was also excluded, and exceptions noted. The plaintiff further attempted to show, by this witness, a conversation between Mrs. Tobey and defendant Quick when she demonstrated to him a damaged shoe. This evidence was excluded because "asking for conversation by this plaintiff."

At common law, a party to the record in a civil suit could not be a witness. The ancient rule was established not only because of interest but also to avoid perjury. I Greenleaf (6th Ed.), 329; *Hall* v. *Otis,* 77 Me. 122. This old rule has been changed by statute, except in cases where one of the parties has deceased. Revised Statutes 1944, Chapter 100, Sections 115-120. Under the present statute, when the party prosecuting an action or the party defendant is an executor or administrator, the other party is not permitted to testify as to facts happening before the death of the deceased person. (There are some exceptions, not material here, stated in Revised Statutes 1944, Chapter 100, Section 120). The reason for the statute is plain. Where death has closed the mouth of one party, the law seeks to make an equality by closing the mouth of the other.

One applicable portion of the statute relating to the admission or exclusion of testimony, where one of the parties to the action is deceased, is as follows:

> "In all cases in which an executor, administrator, or other legal representative of a deceased person is a

> party, such party may testify to any facts, admissible upon the rules of evidence, happening before the death of such person; and when such person so testifies, the adverse party is neither excluded nor excused from testifying in reference to such facts, and any such representative party or heir of a deceased party may testify to any fact, admissible upon general rules of evidence, happening after the decease of the testator, intestate, or ancestor; and in reference to such matters the adverse party may testify."
>
> Revised Statutes 1944, Chap. 100, Sec. 120, II.

In the case at bar, evidence offered under the foregoing five exceptions should have been admitted. Had the defendant lived, both the plaintiff and the defendant would have been permitted to tell their recollections of all the facts and circumstances, including all of the claimed conversations. Where the defendant has died, and his personal representative has not taken the witness stand, the plaintiff's mouth is closed. This does not prevent the plaintiff, however, from calling witnesses, who are not parties, to testify to previous talks they may have had with the deceased party, or conversations they heard between the parties, when both were living, provided of course that the testimony is relevant and otherwise admissible under rules of evidence. It does not prevent a witness from stating the words of the living party made in the presence of the then living and now deceased party, and his replies if any, or that he made no reply. The whole of a conversation should be given if asked for. See *Burrill* v. *Giles,* 119 Me. 111, which case comes within one of the statutory exceptions not pertinent here as both parties in the *Giles* case were representative, but the widow and legatee of decedent was called and testified to conversation, and the court construed the statutory meaning of "adverse party." See also *Lombard* v. *Chaplin,* 98 Me. 309, 314, holding where part is admissible the whole of a letter or conversation is admissible.

During the trials of these two cases, the plaintiffs evidently recognized that their lips were sealed, and they endeavored to prove their cases through Susan Quick Cahoon and Donald H. Specht. The testimony of these two witnesses should have been admitted, if the evidence was relevant and otherwise admissible under the general rules of evidence. "The statute of this State includes only parties to the action." *Hospital* v. *Carter,* 125 Me. 191, 193. An interested witness can testify. It is only a party who cannot, in cases where the other party is deceased. *Rawson* v. *Knight,* 73 Me. 340. See *Haswell* v. *Walker,* 117 Me. 427; *Ladd* v. *Bean,* 117 Me. 445; *Haskell* v. *Hervey,* 74 Me. 192. Declarations by the deceased in his lifetime against his interest are always admissible. *Peacock* v. *Ambrose,* 121 Me. 297.

Defense counsel claims that the testimony offered was not admissible and that the rulings of the court were correct because the offered testimony was self serving and hearsay. The defense further claims that the plaintiff was not aggrieved by excluding testimony of Susan Quick Cahoon because she said she could not remember certain parts of the conversation between the parties. The fact that an interested witness could not remember, might permit the plaintiffs under leave of the court to cross examine, which cross examination might refresh recollection. The statements by the living party to the party now deceased and the statements of the deceased party to the now living, would not be the hearsay that is prohibited. It is evidence from the parties when they were together, and if self serving, would not for that reason be inadmissible if the whole conversation of both the parties were admitted for consideration by the jury. *Lombard* v. *Chaplin,* 98 Me. 309, 314.

EXCEPTION VI

This plaintiff, Mrs. Tobey, through witness Donald H. Specht, attempted to show that the deceased defendant was conscious that he did injury to the plaintiff because he

sought to have a physician examine her. The evidence was excluded. It might be only a matter of argument. It would not necessarily contain the proof claimed. It was a matter of discretion, and we cannot see that the discretion was abused.

EXCEPTION VII

The exception to the granting of defendant's motion for a directed verdict is not necessary to be now considered, in view of the fact that the first five of the plaintiffs' exceptions should be sustained. If the testimony that was improperly excluded was admitted, and was as definite and certain as is claimed in the offer of proof, there may be sufficient evidence to go to the jury.

Under the facts shown by this record, the court is fully aware of the difficulties of presenting proof where the defendant has deceased and his personal representative defends. The living party must endeavor to prove his case by some witness who is not a party, when, as here, the personal representative has not permitted the "closed door" to open. The law is jealous of the rights of each, and although it may sometimes work an injustice by closing the mouth of the living, it approaches exact justice in the great majority of cases. The witness who is called and is not a party, however, should be permitted or compelled to tell all his knowledge of the relevant facts, subject only of course to the general laws relating to admissible evidence.

The entry will be

Exceptions sustained.

HAROLD PEARSON

vs.

AROOSTOOK COUNTY PATRONS

MUTUAL FIRE INSURANCE CO.

Androscoggin. Opinion, November 6, 1953.

Words and Phrases.

Insurance. Windstorm.

A "windstorm" under an insurance policy is a wind of force and velocity sufficient to cause damages to the insured property if in reasonable condition.

ON EXCEPTIONS.

This is an action on an account annexed under R. S., 1944, Chap. 100, Sec. 40. The case is before the Law Court on exceptions by the plaintiff to the direction of a verdict for defendant at close of the evidence.

Exceptions sustained.

Frank W. Linnell, for Plaintiff.

Frank M. Coffin,
Linnell, Brown, Perkins,
Thompson & Hinckley, for Defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, WEBBER, JJ.

WILLIAMSON, J. This is an action against an insurance company to recover damages for the destruction of plaintiff's hen house under a fire insurance policy with extended coverage against "direct loss by windstorm." The action

lies in assumpsit upon an account annexed under R. S., Chap. 100, Sec. 40. The case is before us on exceptions by the plaintiff to the direction of a verdict for the defendant at the close of the evidence.

The insurance policy was originally written in the amount of $12,000 in September 1949, for the term of five years. In December 1949 the amount of the policy was increased $5,000 to cover the new hen house. The policy was in full force and effect at the time of plaintiff's loss, and the amount of the loss, namely, damage to the hen house of $5,000 and damage to machinery of $1,000, is not questioned by the defendant.

The only issue is whether the hen house was destroyed by a windstorm within the meaning of the policy. Under the familiar rule that the evidence must be taken in the light most favorable to the party, here the plaintiff, against whom a verdict is directed, a jury in our view would be warranted without going into detail in finding the following pertinent facts:

(1) The hen house, a three story wooden building one hundred thirty feet by forty feet attached at one end to the plaintiff's barn, collapsed shortly after one o'clock P. M. on March 5, 1952, from the force of the wind. We are not concerned, as in *Unobskey* v. *Continental Insurance Co.*, 147 Me. 249, 86 A. (2nd) 160, with whether the loss was caused by a windstorm or surface water or some other cause. We have here a single known cause in the sense that a jury could so find, namely, the wind. To paraphrase the words of the policy, there was "direct loss by wind." The question is whether the *wind* which caused the loss was a *windstorm* within the meaning of the policy.

(2) One wall of the building was pushed an estimated seven feet from the foundation. Pieces of a wall or "siding" were blown "clear over the fence in Goss's field" a distance of seventy-five feet.

(3) The plaintiff and his wife who were in their farmhouse described the weather conditions in part in these words:

Mr. Pearson:

"Q. Addressing yourself to - - Do you remember what kind of a day it was?

A. It was stormy; the wind blowed.

**THE COURT: What the conditions were right there at the farm.

THE WITNESS:

A. Windy.

Q.**Some time after that, what happened?

A. Shortly after that, there was a gust of wind that really - - Well, it shook the house, and, why, instants after that, or seconds, we thought the furnace had blowed up or - - what a crash we heard. I run right out in the kitchen and I met Mrs. Pearson - -.

****

A. Well, it was an awful gust of wind.

Q. How do you know it was a gust of wind?

A. Of course, I can't prove it was wind. It was a kind of a - - I don't know - - pressure against the house; that is the first notice.

****

Q. Prior to that time, had you been conscious of any particular amount of wind?

A. Wind blowed hard all the forenoon, in gusts.

Q. How could you tell?

A. Well, you can hear it.

****

Q. Could you see the snow blowing?

A. Yes.

Q. Could you hear the wind blowing?

A. Yes.

Q. At the time the building went down, could you hear it then?

A. I guess you could hear it. Just before the building went down, you could hear it plenty; sounded like a gust come.

Q. Could you feel the house shake?

A. It jarred the house."

Mrs. Evelyn Pearson:

****

"Q. Do you recall what the weather was on that day?

A. Yes. I was in the kitchen at the time and it was very windy and we heard this terrible, it seemed to be a gust of wind, and it - - I would say it shook the house, it was so bad."

Mr. Nay, who arrived soon after the collapse of the hen house, said:

"It was windy, was half rain, half sleet; driving conditions were very poor throughout the whole area."

****

"It was windy, gusty, raining and snowing."

(4) There was much evidence of the manner in which the hen house was constructed. The plaintiff produced evidence to show that the hen house was in sound condition; and the defendant, evidence that the building could readily have collapsed from the force of a very light wind. There was no evidence of destruction of other property in the vicinity at the time the hen house collapsed.

We are not called upon to determine where the truth lies in the mass of contradictory but credible evidence. The fact-finder, that is the jury, must determine the force and violence of the wind insofar as it may be measured by the resistance offered by the hen house.

The defendant in its brief argues that the day was "nothing more than an ordinary March day in Maine, not a windstorm within the meaning of any decided cases or any standard dictionary definition."

Unobskey v. *Continental Insurance Co., supra,* is the only case in which our court has been called upon to determine the meaning of "windstorm" under an insurance policy. The court, hearing the case on report and so finding the facts, at page 252, said:

> "In the early morning hours of March 9, 1950, a heavy wind and rainstorm occurred. There was a high wind for several hours with a heavy downpour of rain."

and again, at page 256:

> "The wind was unusual, and at times of 'gale force.' "

Clearly there was a storm, and the only question on this phase of the case was whether it was a windstorm or some other type of storm. The decision was rendered for the defendant on the ground that although there was a windstorm, direct loss therefrom was not shown. It is apparent that we were not considering the minimum force or velocity of wind marking a windstorm. Much less severe conditions of weather fairly would have been called a windstorm. The decision does not help in solving the present problem.

We must turn elsewhere to reach the meaning of "windstorm" under the policy. From the dictionary we take the following definitions: "wind" — air in motion with any degree of velocity; "windstorm" — a storm characterized by high wind with little or no precipitation; "storm" — a disturbance of the atmosphere, attended by wind, rain, snow, hail, sleet, or thunder and lightning; hence, often, a heavy fall of rain, snow, or hail, whether accompanied with wind or not. *Webster's New International Dictionary,* Second Ed. (1946).

In holding a blizzard was a windstorm, the Iowa Court said in *Jordan* v. *Iowa Mut. Tornado Ins. Co.* (1911), 151 Iowa 73, 130 N. W. 177, 178, Ann. Cas. 1913 A 266, a case often cited: "(A windstorm) must assume the aspect of a storm, i.e., an outburst of tumultuous force."

In *George A. Hoagland & Co.* v. *Insurance Co.,* (1936), 131 Neb. 105, 267 N. W. 239, 241, the Nebraska Court said: "(A windstorm) must be a wind of unusual violence." See also 29 Am. Jur. 792, "Insurance," Sec. 1052; 45 C. J. S. 962, "Insurance," Sec. 888; Annot. in 126 A. L. R. 707, and 166 A. L. R. 380.

In *Gerhard* v. *Travelers Fire Ins. Co.,* (1945), 246 Wis. 625, 18 N. W. (2nd) 336, 337, we find the following definition:

> "In the absence of definition or limitation in the policy, we think that a windstorm must be taken to be a wind of sufficient violence to be capable of damaging the insured property either by its own unaided action or by projecting some object against it. This is especially true where as here the more violent forms of windstorm are specifically named as something different from a mere windstorm. . . If the defendant wishes to adopt some scale which establishes the velocity of wind necessary for a windstorm, or if it desires to limit its liability beyond the point that we have indicated, it should incorporate its proposed standard in the policy by clear terms and such ambiguities as are left in this policy should be resolved against it."

The Oklahoma Court in *Fidelity-Phenix Fire Ins. Co. of New York* v. *Board of Education of Town of Rosedale et al.* (1948), 201 Okla. 250, 204 P. (2nd) 982, 985, after quoting with approval the rule stated in the *Gerhard* case, *supra,* has added the following:

> "Considering the purpose of the coverage and the field of the risk, it would seem that any wind

> that is of such extraordinary force and violence as to thereby injuriously disturb the ordinary condition of the things insured is tumultuous in character, and is to be deemed a windstorm within the purview of the policy, in absence of a provision therein to the contrary."

In *Druggist Mut. Ins. Co.* v. *Baker* (1952), 254 S. W. (2nd) 691, 692, the Kentucky Court said:

> "It seems to us that in the absence of a definition or a limitation in the policy a windstorm must be taken to be a wind of sufficient violence to be capable of damaging the insured property, assuming the property to be in a reasonable state of repair. Applying that test to the evidence in this case, we are of the opinion that the evidence, although slight, was sufficient to take the case to the jury on the question of whether or not appellee's loss resulted from windstorm."

See also *Old Colony Ins. Co. et al.* v. *Reynolds et al.* (Ky. 1953), 256 S. W. (2nd) 362.

The cases cited *supra* sufficiently illustrate different approaches taken to the problem. To say that a windstorm must be "an outburst of tumultuous force" or "a wind of unusual violence," hardly more than states the difficulty. The vital questions are, accepting this definition of a windstorm, how much force or violence of wind does it take to make a windstorm, and how may it be measured.

In construing the meaning of windstorm, and the standard we are to use in determining the fact of storm or no storm, we must bear in mind the weather conditions existing in Maine against which protection is intended to be given. In the course of a year there will be windstorms in Maine within any common sense meaning of the term. If a year seems too short a period, we may take the term of the policy before us, namely, from December 1949 to September 1954. During this period the hen house of the plaintiff would be ex-

posed to a windstorm. In this respect windstorm insurance differs from fire insurance. There may never be exposure to fire during the term of the policy; there will necessarily by the nature of our climate be exposure to windstorm.

A second consideration we may fairly take into account is this: most buildings in Maine are not damaged by windstorm, and all windstorms do not cause damage. Surely the company would not have covered this hen house (and machinery therein) if hen houses of this type and size and in good repair would not withstand ordinary winds and indeed most windstorms.

We do not hold that any wind that damages insured property is a windstorm. Such a rule leaves out of consideration a highly important factor — namely the condition of the property. A *windstorm,* in our view, under the policy is a wind of force and velocity sufficient to cause damage to the property *if in reasonable condition.* The Kentucky Court has set forth in *Druggist Mut. Ins. Co.* v. *Baker, supra,* a rule which is reasonable, understandable, and workable.

On applying this rule to the permissible findings of fact, a jury could find a "direct loss by windstorm." The entry will be

Exceptions sustained.

DEAN C. RANDALL, PET'R.

vs.

HARRY W. PINKHAM, SHERIFF

Kennebec. Opinion, November 13, 1953.

Habeas Corpus. Extradition. Rendition. Exceptions.

A respondent in extradition proceedings has no constitutional right to a hearing on the question of rendition before the Governor.

An alleged exception is insufficient where there is no statement either in the bill of exceptions or in the record that petitioner (for habeas corpus) excepts to any of the rulings or that he is aggrieved thereby or that he prays that his exceptions thereto may be allowed.

It is only when in the opinion of the Law Court that the "ends of justice require" that a remand for correction of errors of procedure may be allowed. (See R. S., 1944, Chap. 91, Sec. 14.)

ON EXCEPTIONS.

This is a petition for habeas corpus before the Law Court on exceptions to rulings below by a Justice of the Supreme Judicial Court.

Exceptions I, II and III overruled. Exceptions IV dismissed.

Bartolo M. Siciliano, for Plaintiff.

Joseph B. Campbell, County Attorney, for State.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, TIRRELL, WEBBER, JJ. WILLIAMSON, J., did not sit.

MERRILL, C. J. On exceptions. The petitioner having been arrested by the Sheriff of Kennebec County on a rendition warrant in extradition proceedings on a demand for his extradition by the Governor of Georgia, petitioned to a Justice of the Supreme Judicial Court of this State for a writ of habeas corpus. The writ of habeas corpus was issued, proper notice thereof given and it was returned to and hearing had before said Justice of the Supreme Judicial Court.

The respondent, the Sheriff of the County of Kennebec to whom the warrant of the Governor of Maine was directed, by his return justified his detention of the petitioner under said warrant. After hearing the Justice of the Supreme Judicial Court dismissed the writ of habeas corpus, remanded the prisoner to the custody of the Sheriff of the

County of Kennebec to be held and delivered pursuant to the terms, conditions and requirements of the warrant of extradition issued by the Governor of Maine dated July 9, 1953. The said justice further ordered that the execution of the governor's warrant be stayed pending final disposition of the cause, and that pending such final disposition or until further order of court, the petitioner continue to be retained in the custody of the Sheriff of the County of Kennebec.

The petitioner has brought the case before this court on a bill of exceptions to rulings below by the Justice of the Supreme Judicial Court.

Exceptions I, II and III are to the exclusion of evidence by the justice below in the course of the hearing on the writ of habeas corpus. By the evidence excluded the petitioner sought to show by what means or on what evidence the Governor of the State of Maine arrived at his decision to issue a warrant of rendition.

The petitioner had no constitutional right to a hearing on the question of rendition before the governor. *In Re Murphy,* 72 N. E. (2nd) (Mass.) 413. Nor was such right conferred upon him by any applicable statute. As the governor may issue the warrant of rendition without hearing, if he does issue the warrant the conduct of such hearing as he may have afforded the prisoner is immaterial in habeas corpus proceedings to test the validity of the warrant actually issued. Exceptions numbered I, II and III are overruled.

In each of the exceptions numbered I, II and III, after setting forth the ruling of the justice which was the subject thereof, the petitioner concluded with the following allegation:—"Wherefore by reason of the foregoing your petitioner respectfully submits that the ruling of the presiding justice excluding (in Exception I, 'the said exhibits,' in Exception II, 'said testimony,' in Exception III, 'such evidence') was error, as a matter of law, to which ruling he ex-

cepts and says that he is aggrieved and prejudiced thereby and prays that his exception may be allowed."

After Exception III the bill of exceptions is as follows:—

"EXCEPTION IV

> The following objections to the validity of the demand for extradition, the papers accompanying said demand, and the validity of the warrant of rendition, were presented to the Presiding Justice for his consideration at the hearing on the writ.
>
> These objections or points were over-ruled and held to be without merit. The Presiding Justice then ruled that the writ of Habeas Corpus be dismissed."

Then follow fourteen numbered objections. Following these objections is a statement listing the documents which form a part of the bill. There is no statement either in the bill of exceptions or in the record that the petitioner excepts to any of the rulings set forth in the paragraph headed "EXCEPTION IV," or that he is aggrieved thereby or that he prays that his exceptions thereto may be allowed. After the signatures to the bill by counsel in the ordinary form, the following appears at the end of the bill, "Exceptions Allowed." Signed by the Justice of the Supreme Judicial Court.

The so-called "EXCEPTION IV" does not show that any exception was taken to the rulings of the court set forth therein. It is clearly insufficient as an exception to test the validity of the said rulings of the presiding justice.

While we have held that it is unnecessary to state in a bill of exceptions that the excepting party is aggrieved by a ruling when the ruling on its face shows that he is necessarily aggrieved thereby, we find no case where the sufficiency of an exception to a ruling has been sustained when there is no statement in the bill of exceptions or in the record that the party bringing forward the bill of exceptions took exceptions to such ruling of the presiding justice.

Even if we would be authorized to remand the case to the court below under R. S. (1944), Chap. 91, Sec. 14 (a question upon which we neither express nor intimate our opinion) we would not be justified in so doing in this case. It is only when in the opinion of the Law Court that *"the ends of justice require"* that it may remand the case to the court below for the correction of errors of procedure.

Without holding or intimating thereby that this particular defect in the bill of exceptions could be corrected under said Section 14, we have examined the various objections to the sufficiency of the papers supporting the request of the Governor of Georgia for extradition of the petitioner and the warrant issued by the Governor of the State of Maine as set forth in the bill of exceptions in the paragraph numbered "EXCEPTION IV" and we find them sufficient to justify the issue of the warrant of rendition and that the latter is valid. Therefore, even if we could otherwise remand the case to the court below, the ends of justice do not require that the same be done.

The entry will be

Exceptions I, II and III overruled.

Exception IV dismissed.

EVERETT W. BICKFORD

vs.

ALVIN BRAGDON

Piscataquis. Opinion, November 18, 1953.

Referees. Exceptions. Trespass ab initio. Animals. Distraint. Liens. Abandonment. Trover.

Exceptions that a referee's report is (1) against the law, (2) against the evidence and (3) against the weight of the evidence are too general and cannot be considered.

Questions of fact once settled by referees, if their findings are supported by any evidence, are finally decided.

The remedies of lien by distraint under R. S., 1944, Chap. 165, Secs. 11-19 inclusive, and the common law action of trespass are mutually exclusive.

The abandonment of a lien by distraint and the commencement of an action of trespass results in a loss of the lien by distraint from its inception and such lien cannot thereafter justify the first taking.

To justify a taking under R. S., 1944, Chap. 165, Secs. 11-19 inclusive, a defendant must show full compliance with the statute. If he does not he becomes a trespasser *ab initio*.

It is unnecessary to prove in trover that the conversion occurred on the date alleged in the writ if the proof discloses a conversion prior to suit and within the Statute of Limitations.

ON EXCEPTIONS.

This is an action of trover for sheep. The case is before the Law Court on exceptions to the acceptance of a referee's report. Exceptions overruled.

Anthony J. Cirillo, for Plaintiff.

Lester A. Olson, for Defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, WEBBER, JJ.

WEBBER, J. This was an action of trover for sheep. By agreement of the parties the matter was committed to reference with the right of exceptions reserved as to questions of law. The referee found, after hearing, that on July 22, 1952 the plaintiff's sheep went upon the land of the defendant and damaged the defendant's garden; that the defendant distrained the sheep and gave the required statutory notices, claiming a lien; that on the same day the plaintiff demanded the sheep and the defendant demanded damage and refused to release the sheep; that after giving the statutory notices defendant did nothing further to perfect his lien, but

on August 2, 1952 defendant brought an action of trespass against plaintiff and attached the sheep and pursued that action to a final judgment of two hundred dollars. The referee found for the plaintiff and assessed damages. Defendant seasonably filed written objections to acceptance of the referee's report. The court below accepted the report of the referee and the matter now comes before us on defendant's exceptions to that action.

The allegation in plaintiff's writ was that a conversion occurred on July 25, 1952. The defendant filed the general issue and by a brief statement set up in substance that on July 25, 1952 he took up the sheep as strays and doing damage, claiming a statutory lien therefor; that on July 26, 1952 he gave the required statutory notice to the Town Clerk; that on July 30, 1952 he caused to be posted the required statutory notice in a public place; and that on August 14, 1952 he published the required statutory notice in a newspaper, and thereby set up as a defense to a claim of conversion a right to possession under a lien.

The defendant's bill of exceptions does not include as a part thereof any record of the whole evidence before the referee. The defendant has incorporated in his bill of exceptions by reference certain exhibits, but it nowhere appears in the bill of exceptions that these exhibits comprise the whole of the evidence or even that they comprise all of the evidence bearing upon the issues sought to be raised by the bill of exceptions. It is obvious that the findings of the referee rested in part upon evidence, oral or otherwise, which is not now before us. Plaintiff's counsel in his brief suggests that there was no reporter present at the hearing before the referee and no record of the oral testimony heard by the referee was made.

There are nine exceptions set out in the bill and they are duplicates of the nine objections to acceptance of the ref-

eree's report which were presented for the consideration of the court below.

EXCEPTIONS I, II, AND III

The first three exceptions set out in substance that the report of the referee is (1) against the law, (2) against the evidence, and (3) against the weight of the evidence. Exceptions as thus stated are general and not specific and cannot be considered. *Throumoulos* v. *Bank of Biddeford,* 132 Me. 232.

EXCEPTIONS IV AND V

The fourth and fifth exceptions in substance seek to set aside findings of fact by the referee, (1) that the conversion occurred on July 22, 1952, and (2) that the defendant gave notice to the Town Clerk on July 22, 1952. Nowhere in these two exceptions is it set out that there was *no evidence before the referee tending to establish those facts,* and only thus can an issue of law be raised. *Staples* v. *Littlefield,* 132 Me. 91. Questions of fact once settled by referees, if their findings are supported by any evidence, are finally decided. It may be noted in passing, however, that whether the date of notice to the Town Clerk was July 22, 1952 or July 26, 1952 was entirely immaterial in view of the fact that notice on either date was seasonable and a different finding of fact as to that could not have changed the result.

EXCEPTION VI

This exception asserts in substance that it was error in law to find that the trespass action begun by defendant against plaintiff on August 2, 1952 was an alternative remedy under the meaning of R. S., 1944, Chap. 165, Sec. 19. Upon careful examination of this exception it becomes apparent that here again defendant is in reality seeking review of a finding of fact. The theory of the defendant apparent

in this exception and apparent as a thread running through the entire bill of exceptions is that the sheep trespassed once on July 22, 1952, for which ultimately suit in trespass was brought, and that they trespassed again on July 25, 1952, for which remedy was sought by distraint and lien. The facts, however, are not so found by the referee, who, in effect, found but one act of trespass by the sheep and that on July 22, 1952. The referee found that thereafter the sheep remained in the hands of the defendant by distraint, and the two remedies employed by the defendant, distraint and lien on the one hand, and an action for trespass on the other, *were for but one single trespass.* For the reasons already stated, these findings of fact will not be set aside.

EXCEPTION VII

This exception sets out in substance that by the giving of the notices required by R. S., 1944, Chap. 165, Sec. 11 to 19 inclusive, pursuant to the taking up of the sheep, the defendant has fully justified his taking and that it was error in law for the referee to find a tortious conversion. In the days of pounds and pound keepers, one remedy in the case of beasts astray and doing damage was by distraint, lodging in the pound, lien, appraisal and public sale. R. S., 1883, Chap. 23, entitled "Pounds, and Impounding Beasts" provided the remedy. Section 4 of that chapter provided the alternative remedies of lien to be acquired either by distraint and proceedings pursuant thereto, or by an action of trespass and attachment of the beasts. In P. L., 1903, by Chap. 40, pounds and pound keepers were abolished and R. S., 1883, Chap. 23, was repealed save only Section 4. The same Legislature (P. L., 1903, Chap. 36) merged into one law provisions for rights and duties to arise upon the finding of money or goods, upon the finding of stray beasts, and upon the trespass of stray beasts doing damage. Sec. 10 of that new law was, in fact, with but the change of a few words, the old alternative remedy for damage by stray beasts which

had appeared as R. S., 1883, Chap. 23, Sec. 4. The one difference noted was that the old Section 4 employed the words, "by distraining any of the beasts doing it, and proceeding as hereinafter directed," whereas the new Section 10 substituted the words, "by taking up any of the beasts doing it, and giving the notice provided in Sec. 2." In the revision of the statutes thereafter, the Legislature merged the old Section 4 into the new Section 10 by adopting the wording of the latter (R. S., 1903, Chap. 100, Sec. 19). The historical development of the statutes which now appear as R. S., 1944, Chap. 165, Secs. 10-19 inclusive, captioned "Lost Goods and Stray Beasts," indicates clearly that one damaged by stray beasts may have a lien by distraint or by attachment in an action of trespass; but if by distraint, there must be compliance with the requisites of notice as required by Section 11, appraisal as required by Section 12, retention for two months before any sale as required by Section 13, sale by public auction after notice as provided by Section 15, and deposit and disposition of proceeds as provided by Sections 14 and 16. Section 19 of the present law provides as follows:

> "Any person injured in his land by sheep, swine, horses, asses, mules, goats, or neat cattle, in a common or general field, or in a close by itself, may recover his damages by taking up any of the beasts doing it, and giving the notice provided in section 11, or in an action of trespass against the person owning or having possession of the beasts at the time of the damage, and there shall be a lien on said beasts, and they may be attached in such action and held to respond to the judgment as in other cases, whether owned by the defendant or only in his possession. If the beasts were lawfully on the adjoining lands, and escaped therefrom in consequence of the neglect of the person suffering the damage to maintain his part of the partition fence, their owner shall not be liable therefor."

Section 13 provides as follows:

> "If the owner of such lost money or goods appears within 6 months, and if the owner of such stray beasts appears within 2 months after said notice to the town clerk, and gives reasonable evidence of his ownership to the finder, he shall have restitution of them or the value of the money or goods, paying all necessary charges and reasonable compensation to the finder for keeping, to be adjudged by a justice of the peace of the county, if the owner and finder cannot agree."

We hold that the word "charges" as it appears in the phrase "paying all necessary charges" as used in Section 13 includes such damages as may arise from the trespass, and if the owner and finder cannot agree on the amount, the same will be adjudged by a Justice of the Peace of the county as required by Sections 13 and 16. Thus by compliance with the several applicable sections of the present law, a lien begun by distraint is by an orderly process reduced to money or property in the hands of the injured party. The remedies of distraint and of suit in trespass are alternative and mutually exclusive. In *Mosher* v. *Jewett,* 59 Me. 453, at 456, Justice Danforth said, "He may distrain the animals doing the mischief, and proceed as thereinafter directed, or he may have an action of trespass. In the former case, the remedy is not by distraint alone, but by that and such subsequent proceedings as are provided in the same Chapter." The "chapter" referred to was R. S., 1883, Chap. 23.

When on July 22, 1952 the plaintiff's sheep strayed upon the defendant's land doing damage, the defendant had two courses of action open to him. He elected to take up the sheep and claim his lien for the damage, as he had a right to do. He began seasonably the giving of the statutory notices. He properly recognized that the beasts had a value of more than $10 and that he was therefore required to publish a notice in compliance with the provisions of Sec. 10 and Sec. 11 of R. S., 1944, Chap. 165. Before he published that

notice in a newspaper on August 14, 1952 he abandoned that remedy, and on July 31, 1952 brought his action in trespass and on August 2, 1952 attached the sheep thereon, and thereafter pursued that remedy to final judgment. Moreover, he had not then taken any of the other steps in compliance with the statutes to perfect his lien. Upon his election to abandón his first remedy and pursue the second, he lost his lien by distraint *from its inception* and could no longer justify his first taking by a showing of distraint and lien.

> "The defendant justifies the taking, and must sustain that justification by the law. He must show a full and entire compliance with the requisitions of the Statute. If he does not do it, *he becomes a trespasser ab initio.*" (Emphasis supplied)
>
> *Morse* v. *Reed,* 28 Me., 481.

And to the same effect *Sherman* v. *Braman,* 54 Mass. 407. There was then no error on the part of the referee in finding the conversion as a matter of law and defendant takes nothing by his seventh exception.

EXCEPTION VIII

This exception sets out in substance that there was *no evidence* to sustain the finding of the referee that the defendant abandoned one statutory remedy and resorted to an alternative statutory remedy. Here again the defendant incorporates into the exception by reference the writ in his trespass action alleging trespass by beasts on July 22, 1952, and the several notices which aver that the defendant took up the sheep on July 25, 1952. We recognize that there are instances in which the record of the whole evidence need not be incorporated in a bill of exceptions. See *Bradford* v. *Davis, et al.,* 143 Me. 124. It is unnecessary to say here what our holding would have been if the documentary evidence incorporated in the bill of exceptions had been of such nature as to be finally conclusive of the facts, but here they

are not so. That the notices were given is true as certified by the court below in allowance of the exceptions, and as found by the referee. It does not follow that facts stated by those notices, which are in essence declarations of the defendant published by him, are either true or binding or conclusive upon the referee. Here then is an instance where the general rule applies as well stated in 45 Am. Jur. 568, Sec. 37, "Where the evidence is not reported, the findings (of fact) are final and cannot be disturbed." In *Bernstein* v. *Ins. Cos. and Maccabees,* 139 Me. 388, at 391, our court said: "In this jurisdiction, questions of fact once settled by referees, if their findings are supported by any evidence, are finally decided. They and they alone are the sole judges of the credibility of the witnesses and the value of their testimony." The second sentence of the quotation emphasizes the reason for the necessity for a report of the whole evidence in any case where a review of findings of fact is sought and those portions of the evidence selected by the defendant for incorporation in the bill of exceptions are not in and of themselves conclusive of the facts. The same general principle was relied upon in *Benjamin et al.* v. *Chemical Co.,* (Miss.) 87 So. 895, when the court said: "We are unable to say that the testimony taken in the absence of the stenographer was of no effect, or that it would not change the effect of the evidence of said witness as a whole." In the absence of opportunity to examine the whole evidence before the referee, we cannot say that there was *no evidence to sustain his findings of fact.*

EXCEPTION IX

This exception sets out in substance that the plaintiff's writ in trover having alleged a conversion on July 25, 1952, and the defendant's pleading, including brief statement, having alleged a taking up of the beasts on July 25, 1952, the date was thereby made material and there was required an adjudication of rights as of July 25, 1952.

It is unnecessary to prove in trover that conversion occurred on the date alleged in the writ if the proof discloses a conversion prior to suit and within the Statute of Limitations. *Dansro* v. *Scribner,* 108 Vt. 408, 187 A. 803; 53 Am. Jur. 939, Sec. 170; 65 C. J. 83, Sec. 136. It is apparent that allegations of the parties in their pleadings in this case yielded to the proof in the mind of the referee and his findings will not be set aside.

The entry will be,

Exceptions overruled.

STATE OF MAINE

vs.

DEANE E. SMITH

Cumberland. Opinion, November 21, 1953.

Motor Vehicles. Operating Under the Influence.

It is well settled that when the evidence is insufficient in law to support a verdict the refusal of the court to so instruct the jury is good ground for exception.

ON EXCEPTIONS.

This case is before the Law Court on exceptions by defendant to the refusal of the Presiding Justice to direct a verdict. Exceptions overruled. Judgment for the State.

Daniel C. McDonald,
Frederic S. Sturgis, for State.

Berman, Berman & Wernick, for Defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, WEBBER, JJ.

TIRRELL, J. This is a criminal prosecution by complaint and warrant against the respondent for operating a motor vehicle upon a public way while under the influence of intoxicating liquor, and upon appeal from the Municipal Court for the City of Portland to the Superior Court where it was tried before a jury.

The officer making the arrest testified that the respondent operated his automobile in such an unusual manner as to attract his attention to it when he was approaching from the opposite direction, the respondent was unsteady on his feet, fell while going down a flight of steps at the police station, and further, that the respondent made an admission to him, the officer, that he, the respondent, had been drinking since the night before the arrest. The respondent, while being examined by a doctor who testified for the State, according to the testimony of the doctor, made an admission to him, the examining doctor, that he had drunk a pint, this being contrary to the respondent's sworn testimony that he had partaken of only six ounces.

The arrest of the respondent took place at approximately five o'clock in the afternoon on Route 1, in the town of Cumberland,—over two hundred miles from the home of the respondent. An opened bottle containing whiskey was found on the front seat of the respondent's car.

The defense was that the respondent was not under the influence of intoxicating liquor but was under the influence of the drug known as phenobarbital which had been taken by him as a medicine under orders from his family physician, said drug having been taken between the hours of four and seven of the morning of the day on which he was arrested. The respondent claimed to have taken at that time approximately three grains of the drug. In order to have

believed that the respondent was under the influence of this drug rather than intoxicating liquor, the jury would have had to rely upon the unsupported and uncorroborated testimony of the respondent, and all of this being contra to his later statements of the amount of whiskey which he had taken.

The testimony of the respondent, if believed by a jury, could have led the jury to believe that after taking the phenobarbital at 7:00 a.m., that he left his home at that time, telling his wife, she being in charge and taking care of their three sick children, that he was going to his potato house to take care of the stove which was then burning to prevent the potatoes there stored from freezing. According to the testimony she heard not one word from him until approximately 12 hours later when he informed her by telephone that he was under arrest at Portland some 200 or 250 miles distant from Mars Hill, his home.

At the close of the State's case and after the respondent had offered testimony and closed his case, a motion was made in behalf of the respondent for a directed verdict of not guilty. The motion was refused, to which refusal to so direct a verdict of not guilty the respondent excepted and the case is before this court on that exception only. The case was thereupon submitted to the jury and a verdict of guilty was found.

The ruling of the justice in refusing to direct a verdict of not guilty was correct, and furthermore the jury in its finding of the respondent guilty was not only correct but any other finding, such as not guilty, would have been a miscarriage of justice.

For the law in criminal cases referring to the direction of verdicts citation of authorities may seem unnecessary. However, we cite *State of Maine* v. *Sullivan,* 146 Me. 381; 82 A. (2nd) 629; *State of Maine* v. *Clukey,* 147 Me. 123-127; *State of Maine* v. *Johnson,* 145 Me. 30; *State* v. *Bobb,* 138

Me. 242; *State of Maine* v. *Martin,* 134 Me. 448, at 455; *State* v. *Sarkis Keikorian,* 128 Me. 542; *State* v. *Roy,* 128 Me. 415, at 416; *State* v. *Jordan,* 126 Me. 115, at 117; *State* v. *Shortwell,* 126 Me. 484, 486, 487.

It is well settled law when the evidence is insufficient in law to support a verdict the refusal of the court to so instruct the jury is good ground for exceptions. The evidence must be sufficient to support the allegations beyond a reasonable doubt that the respondent operated a motor vehicle upon and along the State Road, Route 1, in Cumberland while being then and there under the influence of intoxicating liquor.

If the evidence fails to support this allegation, the exceptions should be sustained.

When the evidence in support of a criminal prosecution is so defective or so weak that a verdict of guilty based upon it cannot be sustained, the jury should be instructed to return a verdict of not guilty. *State* v. *Cady,* 82 Me. 426-428.

> "Our court has many times considered the rule governing the direction of verdicts in a criminal case. We said in *State* v. *Sullivan,* 146 Me. 381; 82A. (2nd) 629 (1950):
>
> > 'The rule governing the direction of verdicts in a criminal case is that when the evidence is so defective or weak that a verdict based upon it cannot be sustained, the trial court, on motion should direct a verdict for the respondent. A refusal to so direct is valid ground for exception if all the evidence is in.'
>
> See *State* v. *Martin,* 134 Me. 448; 187 A. 710; *State* v. *Shortwell,* 126 Me. 484; 139 A. 677; *State* v. *Roy,* 128 Me. 415; 148 A. 144.
>
> With the above rule in mind, we have carefully examined the record with a view of determining whether or not the evidence was so defective or so

> weak that a verdict based upon it could not be sustained and have come to the conclusion that the jury was warranted in finding the respondent guilty beyond a reasonable doubt. The evidence as reported presents a typical case which under our law is for the consideration of the jury. They saw and heard the witnesses for the State and for the respondent and it was within their province to determine not only what weight should be given to the testimony but also what part or parts of it should be believed in reaching their conclusion.
>
> See *State* v. *Bragg,* 141 Me. 157; 40 A. (2nd) 1;" "*State* v. *Cox,* 138 Me. 151, 163; 23 A. (2nd) 634; *State* v. *Merry,* 136 Me. 243; 8 A. (2nd) 143; *State* v. *Manchester,* 142 Me. 163, 166; 48 A. (2nd) 626; *State* v. *McKrackern,* 141 Me. 194; 41 A. (2nd) 817; *State* v. *Hudon,* 142 Me. 337, 350; 52 A. (2nd) 520." (*State of Maine* vs. *Clukey,* 147 Me. 123, at 127).

We are of the opinion that, if the testimony of the State's witnesses was believed, it was sufficient to establish the guilt of the respondent beyond a reasonable doubt. A direct denial of the State's charges and a contradiction of its witnesses raised an issue of fact which was for the jury. *State of Maine* v. *Robinson, Applt.,* 145 Me. 77, at 79.

Exceptions overruled.

Judgment for the State.

LOUIS BERUBE

vs.

FERNAND GIRARD, EXECUTOR ESTATE JOSEPH GIRARD

Androscoggin. Opinion, December 1, 1953.

Executors and Administrators.

R. S., 1944, Chap. 152, Sec. 15.

An action of assumpsit cannot be maintained against an estate where plaintiff as a condition precedent has not presented to the executor in writing, or filed in the Registry of Probate, supported by an affidavit anything in support of the claim under R. S., 1944, Chap. 152, Sec. 15.

ON EXCEPTIONS.

This case is before the Law Court on exceptions to the direction of a verdict for defendant. Exceptions overruled.

John A. Platz, for plaintiff.

Edward Beauchamp, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ. WEBBER, J., did not sit.

THAXTER, J. The declaration in this case is in assumpsit and is brought against the estate of Joseph Girard late of Lewiston in the County of Androscoggin. It is brought by the son-in-law of the testator. It is alleged that the testator

promised the plaintiff to pay him the sum of five dollars a week and would bequeath to him by will the proceeds of a certain bank account standing in the name of the testator in the First Federal Savings Loan Association, which bank is located in said Lewiston, and the plaintiff in consideration thereof promised the testator to furnish him with board and lodging so long as he, the testator, should live. The declaration then alleges that the testator neglected to carry out his agreement as aforesaid and made no such provision by will as he had agreed. It is not altogether clear whether the plaintiff is seeking to recover on an implied contract, or an express one, or just what the basis of this sought-for recovery is. It makes no difference.

At the close of the testimony a motion for a directed verdict was made by the defendant which the presiding justice granted. A number of grounds seem to have justified him in doing so. But one stands out. Exceptions to his ruling were taken which are now before us.

A careful examination of the evidence both oral and documentary does not reveal that the plaintiff as a condition precedent to the maintenance of this action has presented to the executor in writing, or filed in the registry of probate, supported by an affidavit of the claimant, anything at all that resembles the allegations set forth in plaintiff's declaration. Chapter 152, Section 15, Revised Statutes of 1944.

Exceptions overruled.

MILDRED WING, ADM'X. C. T. A.

LAST WILL AND TESTAMENT OF EUGENE H. HOLT

vs.

LILLA M. ROGERS
DORIS ROGERS LORD
MINNIE ROGERS DONNELLY
RATIE E. TOZIER
FLORENCE PLAISTED AYER
MILDRED CHASE CAMPBELL
CHARLES CHASE
JENNIE POWERS PERKINS AND
MATTIE POWERS THOMPSON

Somerset. Opinion, December 16, 1953.

Wills. Common Disaster. Words and Phrases.

The controlling rule to be applied in construing the meaning and force of the provisions of a will is that the intention of the testator as expressed must govern, unless it is inconsistent with legal rules.

There is a presumption against intestacy.

Where a testator in the residium clause of a will leaves all of his property to named beneficiaries "provided however x x x that both (his) wife and (himself) shall *be killed* in an accident *or otherwise*, and it shall be determined that (his) death occurred after that of his wife," the property passes to the named beneficiaries where the wife predeceased testator, notwithstanding that both testator and wife died from natural causes, since in the instant case "be killed" was intended in the sense of "die," "meet death," or "lose

their lives" and referred to the time not the cause of death, and the words "or otherwise" were intended to mean death in any other manner than by accident.

ON REPORT.

This is a Bill in Equity for construction of a will before the Law Court, on report upon the bill, answer, replications and an agreed statement of facts. Case remanded to Sitting Justice for a decree in accordance with this opinion. Costs and reasonable counsel fees to be fixed by Sitting Justice, paid by administratrix c. t. a. of the estate of Eugene H. Holt and charged to her probate account.

Perkins, Weeks & Hutchins, for plaintiff.

Sanford L. Fogg,

William H. Niehoff,

Eaton & Eaton, for defendants.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, WEBBER, JJ.

WILLIAMSON, J. On report. This is a bill in equity brought by the administratrix, c. t. a. for the construction of the will of Eugene H. Holt, made August 22, 1924. The case is before us on bill, answers, replications, and an agreed statement of facts.

In the first paragraph the testator provided for the perpetual care of a cemetery lot and for the purchase of gravestones or markers. The second and third paragraphs read as follows:

> "SECOND— I give, bequeath and devise all of the rest, residue and remainder of my estates of which I shall die seized and possessed, real, personal and mixed, wherever found and however situated, to my beloved wife, Cora B. Holt, to have

and to hold the same, to her, her heirs and assigns forever, provided, however, that in event that both my said wife and myself shall be killed in an accident or otherwise, and it shall be determined that my death occured after that of my said wife, then, and in such case, I give, bequeath and devise all of the rest, residue and remainder of my estates, including any estates that shall be devised or bequeathed to me by the will of my said wife, to the following named persons, the same to be equally divided among them, share and share alike,— Frank A. Smiley of Winslow, Maine, a brother of my said wife, Mildred Wing of Winslow, Maine, a niece of my said wife, Lilla M. Rogers, a daughter of the late Henry Rogers, and now residing in New York City, Doris M. Rogers, now of North Vassalboro, Maine, and the daughter of Benjamin Rogers, Minnie Rogers, now of North Vassalboro, Maine, also a daughter of the said Benjamin Rogers, and Ratie E. Tozier of Skowhegan, Maine; to have and to hold the same, to them and each of them, their heirs and assigns forever.

"THIRD— In no case or under any conditions do I want my sister, Elizabeth Plaisted, or either of my half sisters, Maria Chase and Annie Crawford, all of Waterville, Maine, or their heirs, to have any part of my estates."

Cora B. Holt, wife of the testator, died from coronary thrombosis on September 11, 1951. Eugene H. Holt, the testator, died from cerebral hemorrhage on October 23, 1951. There is no suggestion that the deaths of the testator and his wife were in any way connected, or that the death of either came as the result of an accident.

All the beneficiaries named in the second paragraph of the will survived the testator, except Frank A. Smiley who was not related to him by blood. Referring to the third paragraph of the will, the three named persons died before the testator.

The heirs of the testator, and the persons entitled to his estate in the event it passes by intestacy, except as affected by the third paragraph, are the following defendants: Florence Plaisted Ayer, a daughter of the testator's sister Elizabeth; Mildred C. Campbell and Charles Chase, children of his half sister Maria, and Mattie Powers Thompson and Jennie Powers Perkins, children of his half sister Ida H. Powers, who was not named in the third paragraph.

Two questions are presented: First—do the named beneficiaries surviving the testator take under the second paragraph of the will? Second—if not, are the heirs of the persons named in the third paragraph disinherited? The first question involves the intention of the testator, and the second, the effect to be given a clearly expressed intention.

The argument of the heirs in substance is this: (1) that the provision for the named beneficiaries became operative only upon condition that the wife and testator were "killed in an accident or otherwise," meaning that they met their deaths by violent means in an accident or on an occasion closely related to an accident; (2) that the condition stated did not occur; (3) that the exclusion of certain heirs under the third paragraph is ineffective, and (4) therefore the property passes by intestacy to all of the heirs.

Our task is to find the intent of the testator and to give effect to his intention if possible. The governing principles were well stated by Chief Justice Pattangall in *Green* v. *Allen, et al.*, 132 Me. 256, 258, 170 A. 504, 505:

> "The controlling rule to be applied in construing the meaning and force of the provisions of a will is that the intention of the testator as expressed must govern, unless it is inconsistent with legal rules. Such intention may be determined by an examination of the whole instrument, including its general scope, logical implications and necessary inferences. Language may be changed or moulded to give effect to intent, *Hopkins* v. *Keazer*, 89 Me.

> 345, 36 A. 615, and intent will not be allowed to fail for want of apt phrase or conventional formula, *Fuller* v. *Fuller,* 84 Me. 475, 24 A. 946."

Among the recent cases in which the rule has been applied are: *Dow* v. *Bailey,* 146 Me. 45, 77 A. (2nd) 567; *Mellen, Jr. et al. Trustees* v. *Mellen, Jr. et al.,* 148 Me. 153, 90 A. (2nd) 818; *Stewart* v. *Est. of Stewart,* 148 Me. 421, 94 A. (2nd) 912; *Strout, Trustee* v. *Little River Bank and Trust Co., Adm.,* 149 Me. 181, 99 A. (2nd) 342.

We must also bear in mind the presumption against intestacy, *Fox* v. *Rumery,* 68 Me. 121; *Davis* v. *Callahan,* 78 Me. 313, 5 A. 73; *Spear* v. *Stanley,* 129 Me. 55, 149 A. 603.

The controversy arises from the two clauses in the second paragraph reading: "that in event that both my said wife and myself shall be killed in an accident or otherwise, and it shall be determined that my death occured after that of my said wife."

Here are the conditions placed by the testator upon the gift to the named beneficiaries. Unless the conditions were met at the death of the testator, nothing passed under this provision. The testator survived his wife and so the second condition was satisfied. Our problem is confined to the meaning of the first condition. The critical words are "killed" and "or otherwise." If death by accident is a condition without which the gift is not effective, then plainly the named beneficiaries do not take. Neither the testator nor his wife died as the result of an accident.

Before considering the key clauses, we review certain indisputable intentions of the testator. First, he intended that his wife Cora should take his entire estate if she survived him. In such event he showed not the slightest interest in his heirs or any other persons. Second, he intended that if he survived his wife under the conditions stated, the named beneficiaries should take his entire estate. Again he showed

no interest in his heirs. Two of the named beneficiaries were said to be related to his wife and no one of them was an heir of the testator. Further, in this gift he made clear beyond the slightest doubt his intention that it should include property acquired by him under the will of his wife. His anticipation that he would benefit under his wife's will in the event he survived her is apparent. Third, he intended to exclude certain prospective heirs and their heirs from sharing in his estate.

In writing his will in 1924 the testator considered the several contingencies involving the relative time of the deaths of his wife and himself. First, he might predecease his wife. Second, he might survive his wife. Third, they might die at the same or approximately the same time, or under circumstances in which survivorship could not be determined. This is indicated by the conditions about death, and particularly by the express provision that "it shall be determined that my death occured after that of my wife."

Whatever other intentions the testator may have had, it is clear that unless his survival of his wife should be affirmatively established, the named beneficiaries were to take nothing. There is, it may be noted, no provision in the will covering the situation wherein survivorship should be uncertain or not determined. In such case the estate would pass by intestacy, except as affected by the third paragraph.

We come then to consideration of the key clauses taken not alone but in their proper setting in the will. The heirs argue that we have a common disaster clause. If this is so, the condition has not been met for admittedly there was no common accident or disaster.

A clause of this type is designed to cover the situation where in deaths resulting from a common accident or disaster survivorship cannot be determined or at least the death of one follows closely the death of the other. See, for

example, *Hackensack Trust Co.* v. *Hackensack Hospital Ass'n,* 183 A. 723, in which the New Jersey court held a condition that the testatrix and her daughter "perish in a common disaster" was met when the daughter survived her mother for a few hours. Such a provision normally places conditions of both cause and time of the deaths upon a gift to a survivor.

If the provision in the will before us read simply "that in event that both my said wife and myself shall be killed in an accident, — then I give, etc., to (the named beneficiaries)," we would have a common disaster clause. In such case survival of the wife beyond a brief period, as in the *Hackensack* case, *supra,* would be a condition upon the gift to her.

The testator, however, added two factors which mark the differences between his will and a common disaster clause, namely, "or otherwise," which we will later discuss, and the condition of the testator's survival of his wife. The gift to his wife in the event she survived the testator was in no way dependent upon conditions set forth in the clauses under discussion.

Neither the testator nor his wife, as we have seen, died in or as a result of an accident. Both died from what we commonly call "natural causes"; neither was "killed" in the sense that death came from violence. If death by accident or by being "killed" in the meaning mentioned were conditions of the gift, then the named beneficiaries must fail to take under the will.

We pass to the words "or otherwise." In our view, by these words the testator showed his intention that death in any other manner than by accident would satisfy the first condition of the gift. The heirs urge, on the contrary, that "or otherwise" has a far narrower meaning and indeed does not extend "accident" in any appreciable degree. The point

is made by counsel for one of the heirs in these words, "When he said *accident,* we presume he meant something like being hit by a train. And when he said *or otherwise* we think he had reference to some other manner of being killed, such as by food poisoning or by falling."

In the cases below we find examples of the broad meaning given to "or otherwise" when linked to death by accident.

In *Re Searl,* 186 P. (2nd) 913, 173 A. L. R. 1247, with annotation, the will provided "in event that my husband and I should meet death by accident or otherwise at the same time or approximately the same time," and the husband's will made like provision. The husband died 47 days after his wife. Neither met death by accident. The only question considered by the Washington Court was whether the husband died at approximately the same time as the wife. It was held he did not and the property did not pass under these provisions of the two wills.

In *Shippee* v. *Shippee, et al.,* 122 N. J. Eq. 570, 195 A. 728, the will read: "die simultaneously with me, or shortly before or after me, as the result of an accident, or otherwise." Death was not by accident. It was held that the death of A 41 days after the death of the testatrix was not "shortly—after me."

In *Damon & another* v. *Damon,* 90 Mass. (8 Allen) 192, 194, the Massachusetts Court said:

> " 'First, If by casualty or otherwise I should lose my life during this voyage, I give and bequeath to my wife Ann,' ' etc. The condition is thus grammatically, and according to the common use of phraseology, attached to and qualifies the particular bequest. He gives a certain piece of property to his wife, if he loses his life during the voyage. There is no gift to her without that qualification."

If, for the words "be killed," we read "lose their lives" as in *Damon, supra,* or "die" as in *Shippee, supra,* or "meet

death" as in *Searl, supra,* the first condition would be substantially like the conditions in the cases noted. In such case the intention to make the time of death and not the cause of death the controlling factor would be clear. We conclude that the testator used "be killed" with a like meaning, and with a like intent. He was interested in the time of death in terms only of survival. There is no condition, for example, of a limited length of time of survivorship as in *Searl* and *Shippee, supra,* or of death during a journey as in *Damon, supra.* Survival for a moment met the condition of testator's will. The key clauses are neither a common disaster clause nor what we may call an "uncertain or short survivorship" clause.

It seems unlikely that the testator intended the gift to be dependent upon two deaths by violence only. If so, upon the death of the wife from disease, for example, the possibility of the gift becoming effective would at once be ended. Unless both died from violence, or if either died from a natural cause, the beneficiaries would gain nothing under the will. Such a construction places too much weight upon a matter which in the light of the will and the surrounding circumstances was of no reasonable consequence to the testator.

We repeat what the testator wished to accomplish in the will. He sought (1) to provide for his wife if she survived, (2) to give to named persons in event he survived his wife in the belief he was a beneficiary under her will, and (3) to exclude certain heirs (and their heirs) from sharing in his estate. This is a reasonable, understandable and complete plan for the two contingencies of survivorship in which he was interested.

In our view of the case it is not necessary to discuss or answer the question involving the third paragraph of the will. The named beneficiaries (excluding Frank A. Smiley

who predeceased the testator) take the remainder of the estate, share and share alike.

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 administratrix, c. t. a. of the estate of Eugene H. Holt, and charged in her probate account.

DEAD RIVER COMPANY

vs.

ASSESSORS OF HOULTON

Aroostook. Opinion, December 17, 1953.

Taxation. Assessment. Abatement. Estoppel.

Logs. Pulpwood. R. R. Ties. Manufactured Lumber.

R. S., 1944, Chap. 81, Secs. 35, 38.

P. L., 1949, Chap. 431.

Words and Phrases.

It has been almost universally held that where one files a list or otherwise gives information to assessors upon inquiry, at least in the absence of fraud, accident or mistake, the taxpayer is estopped to deny its ownership or such other basic and essential facts upon which the assessors relied in making their assessment.

Under R. S., 1944, Chap. 81, Sec. 12 as amended, personal property is assessable to the owner in the town of his residence unless it falls within stated exceptions.

"Timber," "logs," "pulpwood" and "railroad ties" have no fixed definition in the law.

"Pulpwood" as a matter of common knowledge denotes wood logs, peeled or unpeeled, usually cut to four foot lengths and suitable and intended for manufacture into wood pulp commonly used in paper making.

"Pulpwood" is not "manufactured lumber" within the meaning of R. S., 1944, Chap. 81, Sec. 13, Subsec. I as amended.

Railroad ties prepared for final use are "manufactured lumber."

ON REPORT.

This is an appeal from a decision of the assessors declining to abate taxes. The appeal is before the Law Court upon report and stipulation. Judgment for the Town of Houlton for $11.22 without costs.

Locke, Campbell, Reid and Hebert, for plaintiff.

James P. Archibald, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, WEBBER, JJ.

WEBBER, J. On report. This was an appeal from the decision of the assessors of the Town of Houlton declining to abate a portion of taxes assessed to the appellant, Dead River Company, a corporation which was for purposes of taxation as of April 1, 1951 an inhabitant of the City of Bangor. Appellant maintains a place of business in Houlton, where a wholesale and retail oil business is conducted and where it buys some wood. Included in the assessment was an item of ties and lumber valued at $350 and producing a tax of $28.35. Actually this personal property comprised 35 cords of pulpwood and 200 ties. Some time in early April of 1951 and again in the middle of June, a Houlton assessor conferred with a corporate officer acting for appellant, who told the assessor of the existence of the ties and pulpwood, their value and location in Houlton. A rough

list of the items in question and their value was prepared and retained by the assessor. At these conferences the position of the appellant was that, although it was the owner of the items, they were in transit and therefore claimed not taxable in Houlton. After receipt of the tax bill, the appellant by its counsel on November 24, 1951 filed application for abatement and by letter indicated that the pulpwood and ties were deemed manufactured lumber in transit. On December 3, 1951 counsel by letter advised the assessors that the ties were the property of another company, and that the pulpwood was destined for a specific mill owned by a third party in another town to be manufactured therein. We find no satisfactory explanation in the evidence as to exactly when the appellant determined that it was not the owner, what basis or reasons, if any, it had for such determination, or what may have occurred, if anything, to cause accident or mistake with regard to title.

With regard to the pulpwood, appellant now takes the position that it had a contract with the Great Northern Paper Company to procure pulpwood from producers and ship to various points in Aroostook County. No written contract is shown. Appellant bought the pulpwood in question from third parties and on April 1, 1951 the pulpwood was located on a railroad siding in Houlton awaiting railroad cars for shipment. The pulpwood ultimately went to the Great Northern Paper Company at Millinocket, Maine, where that company manufactures paper. The representative of the appellant testified in substance that he considered the wood on April 1, 1951 to be still the property of appellant and in its possession. The assessors saw the pulpwood on the siding, but otherwise admittedly have no knowledge of the facts other than their dealings with appellant and the information given them by the appellant.

With regard to the ties, appellant now takes the position that on April 1, 1951 they belonged to the Cedar Tie Com-

pany of Bangor and had been delivered to the Bangor & Aroostook Railroad Company siding in Houlton apparently to be sold to the Railroad, and that they were there awaiting inspection by a Railroad representative preliminary to final payment. The ties were finished and ready for use. There is no suggestion in the evidence as to where the Cedar Tie Company procured the ties, whether or not appellant had had some prior connection with the ties, what transactions may have occurred tending to place title in the Cedar Tie Company as of April 1, 1951, or what reasons, if any, the representatives of appellant may have had during approximately six months after April 1, 1951 to deem the ties the property of appellant.

The parties agree that they are primarily concerned with novel legal issues, here presented, rather than with the relatively small tax involved.

The first issue for consideration is whether or not it is open to appellant at this stage to claim abatement as to any of the property in dispute on the ground that it was not the owner thereof on April 1, 1951.

R. S., 1944, Chap. 81, Sec. 35 provides as follows:

> "Before making an assessment, the assessors shall give seasonable notice in writing to the inhabitants by posting notifications in some public place in the town, or shall notify them, in such other way as the town directs, to make and bring in to them true and perfect lists of their polls and all their estates real and personal, not by law exempt from taxation, of which they were possessed on the 1st day of April of the same year. If any resident owner after such notice, *or any non-resident owner after being reasonably requested thereto by the assessors,* does not bring in such list, he is thereby barred of his right to make application to the assessors or the county commissioners for any abatement of his taxes, unless he offers such list with his application and satisfies them that he was unable

> to offer it at the time appointed. The request upon non-resident owners may be proved by a notice sent by mail directed to the last known address of the taxpayer *or given by any other method that brings notice home to the taxpayer.*" (Emphasis supplied)

Section 38 of that chapter provides as follows:

> "The assessors or any of them may require the person presenting the list required by section 35 to make oath to its truth, which oath any of them may administer, and any of them may require him to answer all proper inquiries in writing as to the nature, situation, and value of his property liable to be taxed in the state, and a refusal or neglect to answer such inquiries and subscribe the same bars an appeal to the county commissioners, but such list and answers shall not be conclusive upon the assessors."

It is not disputed here that appellant, through its duly authorized representative, did, as the result of an interview which brought notice home to the appellant, prepare the required list and answer all inquiries. In so doing, appellant merely complied with the law and, in fact, had no choice if it desired to retain status as a claimant for abatement.

The appellant having given the required information to the assessor including the fact that it was the owner of the property in dispute, the assessors having thereafter acted in reliance on such information in assessing the tax, can the appellant now deny that ownership in pursuit of an abatement?

Our examination of the authorities indicates that this question is one of novel impression in this state. It has been almost universally held that where one files a list or otherwise gives information to assessors upon inquiry, at least in the absence of fraud, accident or mistake, the taxpayer is later estopped to deny his ownership or such other basic and

essential facts upon which the assessors relied in making their assessment. For cases supporting this view, see notes found in 7 Ann. Cas. 862 and in 17 Ann. Cas. 1031. The rule has been applied to create estoppels to deny ownership, *Inland Lumber* v. *Thompson,* 11 Idaho 508; *People* v. *Stockton R. R. Co.,* 49 Cal. 414; *Hamacker* v. *Bank,* 95 Wis. 359; *Union School Dist.* v. *Bishop,* 76 Conn. 695, 58 A. 13; to assert an exemption, *Dennison* v. *County Commissioners,* 153 Ill. 516; to reduce valuation, *Blake* v. *Young,* 128 Okla. 153, 261 P. 923; *Kentucky River* v. *Knott County,* 54 S. W. (2nd) (Ky.) 377; to assert non-residence, *Matter of McLean,* 138 N. Y. 158, 33 N. E. 821; to assert taxability in another county, *Slimmer* v. *Chickasaw County,* 140 Iowa 448, 118 N. W. 779; to reduce acreage, *Bankers Coal Co.* v. *County Court,* 62 S. E. (2nd) (W. Va.) 801 (case decided on another ground).

The Massachusetts Court, on the contrary, refused to invoke an estoppel against a taxpayer whose property was not in fact taxable in the taxing town in *Charleston* v. *County Commissioners,* 109 Mass. 270; or where property was used for a public purpose and therefore not taxable in *Milford Water Company* v. *Hopkinton,* 192 Mass. 491. However, in *Williams* v. *Brookline,* 194 Mass. 44 the court seems to accept the principle of estoppel as applicable under some circumstances in these words:

> "Under the circumstances of this case we think that the question whether the tax is invalid by reason of being assessed to the petitioners as executors rather than as trustees is not open to the petitioners. They are executors and trustees under the will, and seem to have considered this property as held by themselves as executors, and so represented to the assessors. It is not a case where the property is not taxable, as in *Milford Water Co.* v. *Hopkinton,* 192 Mass. 491."

And again the court in denying an estoppel in *Hamilton Mfg. Company* v. *City of Lowell,* 274 Mass. 477, 175 N. E.

73, placed emphasis on the reliance put upon the listing by assessors in these words:

> "The defendant urges that the complainant is thereby estopped now to contend that the machinery was not subject to taxation. It is manifest that the assessors of Lowell were not misled by the list. It was accepted as true except as to valuation. No attack is now made on its verity. The transaction lacks essential elements of estoppel."

The statutory requirement as to the production of lists is a rigorous one and has been rigorously followed by our court even in cases where there existed on the part of the taxpayer an honest misapprehension as to the facts (See *Edwards Mfg. Co.* v. *Farrington,* 102 Me. 140). The statute clearly requires the production of "true and perfect lists * * * * * of all their estates real and personal, not by law exempt from taxation," and this requirement is imposed on non-resident owners by reasonable request made by the assessors by mail or in some form brought to the actual notice of the non-resident. Justice Fellows said in *Perry et al.* v. *Town of Lincolnville,* 145 Me. 362 at 365:

> "The purpose of this statute, which requires notice by the assessors and the furnishing of lists by the taxpayer, is to assist the assessors in making a correct and complete assessment. If no lists are supplied, the assessors must use their own judgment on information they may otherwise obtain, and the owner of property has no right to make application for abatement if he files no lists. The lists are used by the assessors, in arriving at the amount of property and values, in making their assessments. * * * * * The lists, required under the notice and given to the assessors, *are therefore to furnish correct information to the assessors,* and if the assessors desire, they have the right to require the individual, who files the list, to make oath to the same and to furnish other and additional information." (Emphasis supplied)

The owner is in the best position to know the facts as to title and related matters, and surely he is in far better position to know the facts than are the assessors. The assessors must be given the right to rely on the truth and perfection of the lists and their accuracy, at least until the contrary appears, and to act on that reliance. If there is doubt, as for example where a title is in dispute or in litigation, the taxpayer may state the facts and thereby disclose the existence of property which may be taxable and avoid that secrecy and concealment which are the great impediment to tax assessment and which the quoted statutes are designed to remove.

Here the taxpayer disclosed ownership without qualification. Later, after assessment in reliance thereon and even after the filing of petition for abatement, the appellant denied ownership for the first time. The reasons for this change of position nowhere appear in the evidence. Upon the facts peculiar to this case, the appellant is estopped to deny its ownership or seek any abatement from taxes for that reason. It is unnecessary to decide here and we neither suggest nor infer what our holding might be if we were presented with other facts and circumstances, or if it were apparent upon the evidence that a taxpayer while acting in good faith and without intention to mislead the assessors had made an honest mistake in the information produced for the assessors.

Assuming then that appellant was the owner of the pulpwood and ties on April 1, 1951, were they taxable by Houlton?

By the terms of R. S., 1944, Chap. 81, Sec. 12, personal property is assessable to the owner in the town of his residence, in this case Bangor, unless it falls within said stated exceptions.

R. S., 1944, Chap. 81, Sec. 13, Subsec. 1 as amended by P. L., 1949, Chap. 431, provides those exceptions as follows:

> "All personal property employed in trade, in the erection of buildings or vessels, or in the mechanic arts shall be taxed in the town where so employed on the first day of each April; provided that the owner, his servant, sub-contractor, or agent so employing it occupies any store, storehouse, shop, mill, wharf, landing place or ship yard therein for the purpose of such employment, except as hereinafter otherwise provided in this sub-section. Portable mills, logs in any town to be manufactured therein, and all manufactured lumber excepting lumber in the possession of a transportation company and in transit, all potatoes stored awaiting sale or shipment, except those owned by and in the possession of the producer, house trailers not properly to be taxed as stock in trade, store fixtures, office furniture, furnishings, fixtures and equipment, and professional libraries, apparatus, implements and supplies and coin operated vending or amusement devices, and all manufactured merchandise except products either intended for manufacture into other products or used or for use in connection therewith and except merchandise in the possession of a transportation company or other carrier for the purpose of transporting the same, shall be taxed in the town where situated on the first day of April each year."

In general, it may be said that the apparent purpose and design of the statute is "to prevent certain kinds of property, held and managed at a distance from the place of the owner's residence, from thereby escaping taxation." (See *Inhabitants of Ellsworth* v. *Brown*, 53 Me. 519). The situation may be likened to that which arises when several magnets are attracting the same piece of metal in different directions. Certain factors tend to draw after them for the purpose of taxation the property of the taxpayer, and the task of assessing authorities is to determine accurately by

legal statutory standards in what direction the property is effectively drawn. For example, there is the "pull" of the owner's residence; there is the "pull" of the physical presence of property in a particular place on April 1st; and there is the "pull" of an established business of the owner which may be in still another location in which the property may soon be employed in trade, or building, or the mechanic arts. There is also an underlying factor of the degree of permanence and finality of the physical presence of the property in a particular location on the effective tax date, as contrasted with a physical presence that is transient and fleeting as where the property is temporarily lodged and halted in a moving, flowing stream of commerce. (See *Bradley* v. *Fibre Company,* 104 Me. 276). It is with such considerations in mind that the court must construe and apply the applicable statutes in particular situations.

Such terms as "timber," "logs," "pulpwood," and "railroad ties" have no fixed definition in the law. Our examination of the authorities reveals that any one of such terms may have one meaning when used in a lien statute, another when used in a contract made by parties, and still a third when a tax statute is involved. As was said in *Bearce* v. *Dudley,* 88 Me. 410 at 416:

> "With so many peculiar significations, the intended meaning of the word usually depends upon the connection in which it is used or the character of the party making use of it, - - as, for instance, a ship carpenter would understand something quite different when he made use of it from what a cabinet maker, or last-maker or a carriage builder would, - - and the question is, therefore, not what is the popular meaning as understood by any one class, *but its meaning as used in the statute, and how the legislators have employed it.*"

THE PULPWOOD

What is pulpwood? We are unaided by the evidence before us in arriving at a definition, but we feel that the nature

of pulpwood is so much a matter of common knowledge, especially in this state where its production is a major industry, that we may properly take judicial notice that pulpwood denotes wood logs, peeled or unpeeled, usually cut to four foot length, and suitable and intended for manufacture into wood pulp commonly used in making paper. (See *Bradley* v. *Fibre Company, supra; Bondur* v. *LeBourne,* 79 Me. 21). It partakes far more of the attributes of so-called "saw-logs" than it does the attributes of "manufactured lumber." Although all logs have had something done to them changing them from their original state of growing trees, the statute itself carefully distinguishes between logs and manufactured lumber. ("Logs in any town to be manufactured therein, and all manufactured lumber," R. S., 1944, Chap. 81, Sec. 13, Subsec. 1, as amended; See *Desjardins* v. *Lumber Co.,* 124 Me. 113.) The work done in producing pulpwood is preliminary to, and preparatory for, the ultimate intended process of making wood pulp. *Bradley* v. *Fibre Company, supra.* As was said in *United States* v. *Pierce,* 147 Fed. 199, "Rossed pulpwood is not a manufactured timber in any true sense. It would be absurd to call hand-peeled logs manufactured timber." We hold that pulpwood is not "manufactured lumber" within the meaning of R. S., 1944, Chap. 81, Sec. 13, Subsec. 1 as amended. Rather does it fall within the meaning of "logs" as used therein. Upon the evidence here, these pulpwood logs were not in Houlton "to be manufactured therein," nor were they "employed in trade" or "in the mechanic arts" in Houlton, in connection with any "store, storehouse, shop, mill, wharf, landing place or ship yard." The pulpwood was taxable in Bangor, that being the residence of the taxpayer, and appellant here is entitled to abatement of the tax thereon.

THE TIES.

The parties have stipulated that the railroad ties in question were "finished so that they were ready for use." We

may properly infer from this evidence in the light of common knowledge that all the necessary work of cutting, sawing to standard length, peeling, and facing with flat sides had been done and the ties were ready to be laid in position to support rails, their ultimate intended use. That railroad ties prepared for final use in the location where they were first cut have been there "manufactured" has been recognized many times. *Butler et al.* v. *McPherson Brothers,* 95 Miss. 635, 49 So. 257; *Mahan* v. *Clark,* 219 Pa. 229, 68 A. 667; *Johnson* v. *Truitt,* 122 Ga. 327, 50 S. E. 135. The dictum in *Sands* v. *Sands,* 74 Me. 239 at 240 applies only to the lien statute there interpreted. For the same reason we distinguish *Kollock* v. *Parcher,* 52 Wis. 393, 9 N. W. 67. The completed ties were "manufactured lumber" within the meaning of R. S., 1944, Chap. 81, Sec. 13, Subsec. 1 as amended, and not being "in the possession of a transportation company *and* in transit," they were taxable to appellant in Houlton, "the town where they were situated" on April 1, 1951. (See *Desjardins* v. *Lumber Co., supra*).

Inasmuch as the pulpwood and ties were assessed together for a single sum producing a tax of $28.35, and the appeal is here sustained only as to the portion of the tax allocable to the pulpwood in the amount of $17.13, the entry will be,

Judgment for the Town of Houlton for $11.22, without costs.

CALVIN ROSS

vs.

DIAMOND MATCH COMPANY

Waldo. Opinion, December 17, 1953.

Sales. Implied Warranty. Use.

In order to recover upon an implied warranty under R. S., 1944, Chap. 171, Sec. 15, Par. I, the burden is upon the plaintiff to establish (1)

that he made known to the seller the *particular purpose* for which the goods were required, (2) that he relied upon the seller's skill or judgment, (3) that he used the goods purchased for the particular purpose which he made known to the seller, (4) that the goods were not reasonably fit for the purpose disclosed to the seller, and (5) that he suffered damage by breach of the implied warranty.

When the buyer makes known to the seller the manner in which the goods are to be used for the particular purpose for which they are required *such manner of use forms a part of the disclosed particular purpose* for which the goods are required.

ON MOTION FOR NEW TRIAL.

This is an action to recover upon an implied warranty. The case is before the Law Court upon general motion for new trial following a jury verdict for plaintiff. Motion sustained. Verdict set aside. New trial granted.

Lorimer K. Eaton, for plaintiff.

McLean, Southard and Hunt, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ. MURRAY, A. R. J. WEBBER, J., did not sit.

MERRILL, C. J. On motion. This is an action to recover damages for breach of an implied warranty with respect to building materials sold by the defendant to the plaintiff. Trial was had at the January 1953 term of the Superior Court in and for the County of Waldo. The jury returned a verdict for the plaintiff in the sum of $2,000. At said term the defendant filed a general motion for a new trial on the usual grounds. The case is now before this court upon said motion.

The action is brought to recover for breach of the implied warranty set forth in R. S. (1944), Chap. 171, Sec. 15, Par. I. Said Paragraph I is as follows:

"Where the buyer, expressly or by implication, makes known to the seller the particular purpose

> for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose."

For breach of the implied warranty set forth in said Paragraph I the buyer may accept or keep the goods and maintain an action against the seller for damages by the breach of warranty. R. S. (1944), Chap. 171, Sec. 69, Par. I, Subpar. B. The plaintiff kept and used the goods purchased and sues for breach of the implied warranty.

The plaintiff was about to construct a large chicken house on his farm in Troy, Maine. In the course of obtaining materials for the construction thereof he, together with his boss carpenter, went to the office of the defendant for the purpose of purchasing the same. He purchased from the defendant "Flintkote," a composition siding material which he subsequently used for the outside walls and roof of his chicken house.

In order to recover upon an implied warranty under R. S. (1944), Chap. 171, Sec. 15, Par. I the burden is upon the plaintiff to establish (1) that he made known to the seller the particular purpose for which the goods were required, (2) that he relied upon the seller's skill or judgment, (3) that he used the goods purchased for the particular purpose which he made known to the seller, (4) that the goods were not reasonably fit for the purpose disclosed to the seller, and (5) that he suffered damage by breach of the implied warranty.

When the buyer makes known to the seller the manner in which the goods are to be used for the particular purpose for which they are required, *such manner of use forms a part of the disclosed particular purpose for which the goods are required.* In such case the implied warranty that the goods shall be reasonably fit for the disclosed purpose

is conditioned upon their use in the manner disclosed by the buyer to the seller.

In this case the buyer disclosed to the seller that he intended to use the material purchased for the outside walls and roof of the proposed chicken house. He further disclosed that he intended to paint the outside walls of the chicken house. He also disclosed that he intended to cover the roof with a tar-like substance, called petrogum. Although the plaintiff covered the roof with the petrogum as disclosed to the defendant, he did not paint the outside walls of the chicken house as he stated he intended to do.

During the ensuing winter the "Flintkote" purchased pulled from the studding and exposed the chickens in the chicken house to the effects of the elements. The plaintiff claims that the pulling from the studding and the opening up of the "Flintkote" was due to its unfitness for use as an outside covering of the building. The defendant claims that had the "Flintkote" been used as proposed in the construction of a properly constructed building and then painted in accord with the declared purpose of the plaintiff, no damage would have occurred.

There was evidence of persuasive force that the loosening and opening of the "Flintkote" was due to the faulty construction and the faulty foundations of the chicken house. This, however, was a question of fact for the jury. However, there is no evidence from which it could be found that the "Flintkote" used upon the side walls of this building would not have been reasonably suitable for the particular purpose which the plaintiff disclosed to the defendant that the same was required, had the building been properly constructed and had the "Flintkote" been painted in accord with the plaintiff's disclosed purpose.

As to whether or not the material was reasonably suitable for use as roofing when covered with the petrogum we

neither express nor intimate an opinion. The jury must have included in the damages awarded a substantial though unascertainable sum to compensate the plaintiff for the defective side walls due to the opening and loosening of the unpainted "Flintkote" used thereon.

The plaintiff seeks to excuse his failure to paint the building because of a statement made to him as to the necessity therefor by a Mr. Boyd who was a representative of the company manufacturing "Flintkote." There is no evidence in the case from which it can be found that Mr. Boyd was the agent of the defendant, or that any statement that he made would excuse the plaintiff as between himself and the defendant from using the "Flintkote" in the particular manner in which he disclosed to the defendant that he intended to use the same when he discussed his purpose with the defendant. In other words, there is no evidence in the case from which a jury could find that the plaintiff was justified in not painting the side walls of his building in accord with his disclosed purpose.

The charge of the presiding justice is not made a part of the record nor printed therein. We must presume that the jury were properly instructed. As the record is barren of evidence that would justify a finding that the plaintiff used the "Flintkote" on the side walls of the buliding which he erected for the particular purpose for which the same was required and in the manner disclosed by him to the defendant, he can recover no damages based upon the unfitness of the "Flintkote" therefor. Damages based thereon in an unascertainable amount must have been included in the verdict.

The entry must be

Motion sustained.
Verdict set aside.
New trial granted.

ROSAIRE G. TARDIFF

vs.

HERBERT L. PARKER, SR.

Androscoggin. Opinion, December 28, 1953.

Negligence. New Trial. Damages.

A motion for a new trial will not be granted unless it is apparent that the jury acted under some bias, prejudice or improper influence, or have made some mistake of fact or law.

An award of $6419.48 for pain and suffering and permanent injuries in addition to $3830.52 for special damages is not excessive in the light of the facts of the instant case.

ON MOTION FOR NEW TRIAL.

This case is before the Law Court on defendant's motion for new trial after verdict for plaintiff.

Motion overruled.

Berman & Berman, for plaintiff.

William B. Mahoney,
Francis C. Rocheleau,
James R. Desmond, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, JJ. TIRRELL AND WEBBER, JJ., did not sit.

WILLIAMSON, J. This automobile accident case is before us on general motion after a jury verdict for the plaintiff in the amount of $10,250. The only question for our consideration is whether the damages were excessive. The defendant further urged that in the event damages were held to be excessive, then the case should be returned for new trial on liability as well as damages on the ground that

bias, prejudice or improper influence affecting damages also touched liability. In our view of the case it is not necessary that we consider the second point suggested by the defendant.

The defendant computes the special damages as follows: medical bills $1152.02, automobile and personal property damage $1153, loss of wages 13½ weeks at $113, $1525.50, total $3830.52. The plaintiff places the damages at $81.50 more than the defendant, a difference immaterial for our purposes.

Taking the figures of defendant, the jury allowed $6419.48 for pain and suffering and permanent injuries. It is here that the defendant objects to the verdict. In his brief he submits that an allowance of $3000 in addition to special damages, or a total of not more than $7000, is "the ultimate of a reasonable appraisal of the damages proved in this case."

The plaintiff is a mason doing work described by him as "refractory—checking boilers, lining and setting." At the time of the collision on March 27, 1952, the plaintiff, 33 years of age, received a deep laceration of the head, an injury to the right knee, a fracture of the lower jaw, and a sprained left thumb. He was rendered unconscious by the accident, was hospitalized for four days, and again for a period of some weeks preceding and following an operation upon his knee.

For a period of six weeks, to use the words of the dental surgeon, "the jaws were actually wired jaw to jaw to try to eliminate any motion of the lower jaw." During this period he suffered great discomfort. Thereafter he had some difficulty with his teeth and in October 1952 two teeth were removed and replaced with a denture.

In late April the plaintiff complained of stiffness and pain in his right knee. Complete bed rest and physio-

therapy treatment from April 29 to May 28 in a hospital proved unsuccessful. His surgeon then operated, opening the knee joint and removing the internal semilunar cartilage or "cushion." In the opinion of the surgeon the plaintiff suffers no permanent impairment. The plaintiff says of his condition at the time of the trial in April 1953:

"Q. How is your general health now?

A. Well, it is not too bad except for my knee and the jaw that I got trouble with.

Q. Not too bad except with your knee and your jaw.

A. Knee and jaw.

Q. How about headaches?

A. Well, I have got headaches quite often but take aspirin and stuff."

The principles governing the exercise of the power of the Law Court to set aside verdicts for excessive damages have been discussed and applied in recent cases. See, for example, *Pearson* v. *Hanna,* 145 Me. 379, 17 A. (2nd) 242, 16 A. L. R. (2nd) 1; *Jenkins* v. *Banks,* 148 Me. 276, 92 A. (2nd) 323; *Savoy* v. *Butler,* 149 Me. 7, 97 A. (2nd) 543.

From a careful examination of the record, having particularly in mind the severe injuries to the jaw and knee, we are unable to say that it is "apparent that the jury acted under some bias, prejudice or improper influence, or have made some mistake of fact or law," to quote again the familiar language from *Cayford* v. *Wilbur,* 86 Me. 414, 416, 29 A. 1117, 1118.

Motion overruled.

EDNA MAGLATHLIN ET AL.

vs.

ELI A. ISAACSON ET AL.

Androscoggin. Opinion, December 29, 1953.

Motion for Judgment N. O. V. New Trial. Exceptions.

Where a verdict is directed for a defendant because as a matter of law there is no evidence to support a plaintiff verdict, such directed verdict must be attacked by exceptions, if at all, and not by general motion for a new trial.

The motion for judgment *non obstante veredicto* is unknown in our practice where the same issue can be raised and determined either by motion for new trial or by motion for a directed verdict and exceptions to the refusal to grant the same.

ON EXCEPTIONS.

This case is before the Law Court upon exceptions to the direction of a verdict for defendants, exceptions to the denial of a motion *non obstante veredicto,* and general motion for new trial. Exceptions overruled. Exceptions to denial of motion for judgment overruled. Motion for new trial dismissed.

Seth May, for plaintiff.

John A. Platz, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ. MURRAY, A. R. J. (WEBBER, J., did not sit.)

THAXTER, J. This was an action of trespass for cutting certain timber on a farm owned by the plaintiffs. The defendants justify such cutting under a lease given by the plaintiffs to the defendants. The property leased on which

the defendants claim the right to cut is described in the lease "as the homestead farm formerly of Philomen A. Bradford, deceased, and the herein leased land being bounded and described as follows:

> "Northerly by lands now or formerly owned by Sanford Fiske, Octavia Shaw, Vance Merrill, J. F. Jennings, and Joshua M. Webb, now or formerly of James A. Jones, and Westerly by the County Road known as the North Parish Road.
>
> "Being the same premises conveyed to Philip Bradford by deed of Hattie J. Maglathlin and Others, dated September 12, 1884 and recorded in Androscoggin County Registry of Deeds, Book 114, Page 526 and 527."

There is a further clause of said lease containing an exception, which clause is worded as follows:

> "The parties of the first part hereby agree that the parties of the second part the said lessees, shall have the right to enter upon the within leased land and cut down and cart away all the lumber, both soft and hard wood, now standing on said land, EXCEPT that no lumber is to be cut off the ledge at the end of the lane leading from the house on said land. Also said lessees are to have all the logging privileges, together with the right of way needed for same, that go with said land."

The controversy in this case is whether or not the defendants cut lumber in violation of the clause in the lease "EXCEPT that no lumber is to be cut off the ledge at the end of the lane leading from the house on said land."

The plaintiffs allege that the defendants cut and carted away 179 trees of the value of $895 from the ledge on said land. The burden was upon the plaintiffs to establish that the trees were cut from "the ledge," to wit, the land described in the exception. There was no evidence in the case from which a jury would be warranted in finding that any

trees were cut upon that portion of the premises described in the exception as "the ledge at the end of the lane leading from the house on said land."

As above stated, the burden of proof was upon the plaintiffs to show that the defendants cut trees from the excepted portion of the premises. By no process of legerdemain can they shift this burden to the defendants and force them to prove that the trees they did cut were not cut from "the ledge at the end of the lane leading from the house on said land."

The trial judge directed a verdict for the defendants. No other ruling was possible on the record presented to us; and we have been over it very carefully in an effort to find whether or not there was any evidence in the case to support the plaintiffs' claim which would warrant submitting the case to the jury.

The case is before us upon exceptions to the direction of this verdict for the defendants, upon exceptions to denial of the plaintiffs' motion for a judgment *non obstante veredicto*, and upon a general motion for a new trial filed by the plaintiffs after they had noted exceptions to the direction of the verdict for the defendants and exceptions to the denial of their motion for a judgment *non obstante veredicto*.

As there was no evidence which would warrant the returning of a verdict for the plaintiffs the exceptions to the direction of a verdict for the defendants must be overruled.

The motion by the plaintiffs for a judgment *non obstante veredicto* cannot add anything to a case which discloses no cause of action. Such procedure is unknown in our practice here where the same issue can be raised and determined either by a motion for a new trial or by a motion for a directed verdict with exceptions to refusal to grant the same. The exceptions to the motion for a judgment *non obstante veredicto* must be overruled.

The ruling of a presiding justice directing a verdict for the defendant is a ruling that as a matter of law there is no evidence in the case which would support a verdict in favor of the plaintiff. This ruling must be attacked, if at all, by exceptions, not by motion. A general motion does not lie to set aside a verdict directed by the presiding justice. The motion must be dismissed.

Exceptions overruled.

Motion for judgment non obstante veredicto overruled.

Motion for new trial dismissed.

LEO HUTCHINS

vs.

ALBERT E. LIBBY, EXECUTOR

UNDER WILL OF JOHN C. ADAMS

Cumberland. Opinion, December 30, 1953.

Statutory Construction. Demurrer. Right to Plead Over.

R. S., 1944, Chap. 100, Sec. 38.

Damages.

It is fundamental that in construing a statute the intention of the legislature should be ascertained and carried out. The history of the statute may help to indicate intent. A statute reenacted after a judicial construction is presumed to take the judicial construction.

The rule is established that a demurrer to a declaration in a civil suit may be filed at the *first term*, and if overruled, the defendant has

the *right* to plead anew on the payment of cost, unless the demurrer is frivolous and intended for delay.

If a demurrer is not filed until a *later term*, there must be a stipulation and court order permitting the defendant to plead over, if overruled. If the right to plead anew has not been previously reserved and consent given by the court and expressly or impliedly by the opposite party, at or before the time when demurrer is filed at such later term, the defendant may not plead anew, and when the demurrer is overruled, judgment should be entered.

Right to plead anew on demurrer in criminal cases, see p. 375.

ON EXCEPTION.

This case involves proceedings following *Hutchins* v. *Libby, Exr.*, 148 Me. 433. The case is presently before the Law Court upon plaintiff's exception to the order of court allowing defendant the right to plead over after overruling defendant's special demurrer to the amended declaration.

Exceptions sustained. Case remanded for entry of judgment for the plaintiff at the next term and for assessment of damages.

Agger & Goffin,

Nathaniel W. Haskell, for plaintiff.

Benjamin Thompson,

Welch & Welch,

Clifford E. McGlauflin, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, WEBBER, JJ.

FELLOWS, J. This is an action of assumpsit on *quantum meruit* for alleged labor and services rendered to the defendant's testator in his lifetime. The writ is dated May 17, 1952 and was entered at the June Term 1952 of Superior Court in the County of Cumberland. A general demurrer

was filed by the defendant at the return term which demurrer was sustained. Exceptions by the plaintiff were taken to the Law Court and these exceptions were overruled. See *Hutchins* v. *Libby, Exr.*, 148 Me. 433. At the term of the Superior Court next following the decision of the Law Court, viz.: at the April term 1953, the plaintiff was allowed to amend, and filed an amended declaration. At the June Term 1953 of the Cumberland Superior Court, the defendant filed a special demurrer to the amended declaration, and hearing was had thereon at the said June term. The defendant at the time of filing his special demurrer did not stipulate or reserve the right to plead, if the demurrer should be overruled.

The presiding justice overruled the special demurrer and at the same time granted leave to the defendant to plead as follows:

"28d. Hearing had July 6 A.D. 1953. 29d. Demurrer is overruled. Defendant is accorded leave to plead over." Then follows the following notation under date of July 7, 1953: "Exceptions noted and allowed for plaintiff and defendant." The docket entry made in the vacation following is "July 28, 1953 Plaintiff's Extended Bill of Exceptions filed and allowed." The defendant waived his right to exceptions and filed no bill.

The plaintiff says in his bill of exceptions, after reciting the foregoing facts showing how the question arose, "The Plaintiff now complains of said ruling of the Single Justice in overruling said demurrer and granting leave to the Defendant to plead anew, with respect only, however, to that portion thereof of said decree as grants leave to the Defendant to plead over, and files this Bill of Exceptions thereto, because the ruling in that respect is erroneous in law and the Plaintiff is aggrieved thereby, as follows:

1. The ruling complained of fails to recognize that when a demurrer be overruled, the right of the defendant to plead

anew is conditional on the fact that (1) the demurrer was filed at the first term, or (2) if filed at a later term, a stipulation was made at the time of filing and assented to by the court and the plaintiff that the defendant might, if demurrer be overruled, plead anew."

The exceptions by the plaintiff raise this question: Did the presiding justice, after demurrer filed at a term later than the first term and which he overrules, have discretionary authority at the same term to grant leave to the defendant to plead over, without a previous request or stipulation?

The statute says:

> "A general demurrer to the declaration may be filed; and in any stage of the pleadings either party may demur, and the demurrer must be joined, and it shall not be withdrawn without leave of court and of the opposite party; but the justice shall rule on it, and his ruling shall be final unless the party aggrieved excepts; and before exceptions are filed and allowed, he has the same power as the full court to allow the plaintiff to amend or the defendant to plead anew. If the law court deems such exceptions frivolous, it shall award treble costs against the party excepting from the time the exceptions were filed. If the declaration is adjudged defective and is amendable, the plaintiff may amend upon payment of costs from the time when the demurrer was filed. If the demurrer is filed at the first term and overruled, the defendant may plead anew on payment of costs from the time when it was filed, unless it is adjudged frivolous and intended for delay, in which case judgment shall be entered. At the next term of the court in the county where the action is pending, after a decision on the demurrer has been certified by the clerk of the law court to the clerk of such county, and not before, judgment shall be entered on the demurrer, unless the costs are paid and the amendment or new pleadings filed on the 2nd day of the term; but by leave of court the time therefor may

> be enlarged, or further time may be granted by the court within which to pay said costs and to file such amendment or new pleadings." Revised Statutes 1944, Chapter 100, Section 38.

There is no similar statute relating to a demurrer in criminal cases. The common law rule in criminal cases is given in *State* v. *Cole,* 112 Me. 56, where it is held that in misdemeanor cases when demurrer is filed to a complaint and overruled, "the right to plead over cannot be had by merely 'reserving.' It must be granted by the Court." *State* v. *Munsey,* 114 Me. 408, 411. Whether in felony cases the judgment may be *respondeat ouster* is not free from doubt. See *State* v. *Merrill,* 37 Me. 329, 333; *State* v. *Norton,* 89 Me. 290; and also *State* v. *Dresser,* 54 Me. 569.

At common law a party to a civil action had the right to raise a question of law by formally admitting the facts stated by his adversary in declaration or pleading, or he had the right to make contest on the facts. In the early days a party had to decide whether he would raise a question of law by demurrer to the written statements contained in the declaration or pleadings of his opponent, or to try his case on the facts to be presented in court. In other words, he could "tender an issue in fact or tender an issue in law." He was generally bound by the result of his choice, and judgment was rendered thereon. Amendments could under some circumstances be made at the discretion of the court on reasonable terms and on payment of costs. See Stephen on Pleading, 5th American Edition (1845) pages 44, 54, 58, 62, 146; 3 Blackstone, 314; *Blanchard* v. *Hoxie* (1853), 34 Me. 376; Revised Statutes of Maine (1841), Chap. 115, Sec. 20. See generally 41 Am. Jur. "Pleading," 436, Sec. 204 and following sections, 71 C. J. S. "Pleading," 570, Sec. 274 and following sections.

The original statute, permitting amendments and pleading anew, after demurrer filed in a civil suit, was passed in order to mitigate the severity of common law pleading, and

also to avoid working an injustice to the parties through the ignorance, inexperience, or bad judgment of an attorney. This act was Chapter 211 of the Public Laws of 1856. This was an amendment to Revised Statutes 1841, Chap. 115, Sec. 20 (which was declaratory of the common law and authorized a demurrer to be filed at any stage of the proceedings). The right to pass upon a demurrer was conferred upon the presiding justice the following year. Public Laws of 1857, Chapter 55, Section 3. The provisions of both of these statutes were incorporated in the Revision of 1857, as Chapter 82, Section 19. The power to grant leave to amend or to plead anew was apparently reserved to the Law Court, because in 1859 the power "that the full Court has" to grant leave to amend or to plead anew was conferred upon the presiding justice. Public Laws of 1859, Chapter 73. This act was additional to Section 19 of Chapter 82 of the Revised Statutes of 1857. Since this enactment, the presiding justice apparently has the "same power to allow the plaintiff to amend or the defendant to plead anew that the full court has." See Revised Statutes 1944, Chap. 100, Sec. 38 above quoted. See *Tripp* v. *Motor Corp.*, 122 Me. 59, 61, where the court say "the Court may now, since Chapter 115, Public Laws 1915, extend the time for the payment of costs and filing of amendments and new pleadings." See also *Tibbetts* v. *Ordway Co.*, 117 Me. 423.

We find no case in Maine that decides that the court has the power in a civil suit to allow pleadings to be filed at a later term, without a prior reservation and consent of court and the opposite party, and no such case has been called to our attention. In fact all the decisions indicate the contrary.

In *Fryeburg* v. *Brownfield,* 68 Me. 145, 147 (decided in 1878), Walton, J., says: "The defendants complain because they were not allowed to withdraw their demurrer and plead anew, after it had been joined by the plaintiffs and ruled upon by the presiding judge. This complaint is groundless. A demurrer, not filed at the first term, cannot be withdrawn

without leave of the court and of the opposite party. 'If the demurrer is filed at the first term and overruled, the defendant may plead anew on payment of costs from the time it was filed, unless it is adjudged frivolous and intended for delay, in which case judgment shall be entered.' But when, as in this case, the demurrer is not filed at the first term, and leave of the court and of the opposite party to withdraw it is not obtained, no such right exists. The judgment in such a case is final."

In the case of *Fox* v. *Bennett,* 84 Me. 338, 340 (decided in 1892), when a defendant at the time of the filing of a demurrer to the declaration subsequent to the first term, expressly stipulates that he shall have leave to plead anew upon payment of costs, if the demurrer be overruled, and the court assents to such stipulation in the presence of and without objection from the plaintiff, the court has the power to carry out its stipulation and receive the plea, otherwise the court "might have had no power." The court say: "We only hold, however, that under the circumstances of this case the court has the power to permit the defendant to plead anew. Whether it is proper to exercise that power is for the justice presiding at nisi prius."

When a plaintiff's demurrer to a brief statement is sustained, the general issue having been pleaded and joined, the action will stand for trial upon the general issue, unless the court at *nisi prius* shall allow further plea. *Corthell* v. *Holmes,* 87 Me. 24, where on plaintiff's demurrer to plea in abatement which defendant joined, and which demurrer the presiding justice sustained, *held* that defendant waived right to answer further. *Furbish* v. *Robertson,* 67 Me. 35, but this case is overruled in *Stowell* v. *Hooper,* 121 Me. 152, 156, and other cases distinguished. See also *Wakefield* v. *Littlefield,* 52 Me. 21.

In *Stowell* v. *Hooper,* 121 Me. 152, 155, the court held that when a demurrer to a plea in abatement is sustained

the judgment is *respondeat ouster* i. e. that the defendant answer further. Filing exceptions to the sustaining of such demurrer is not a waiver of the right to plead anew. Neither is the erroneous certifications of the case to the Law Court. The court say "surely it is not necessary for a party to ask leave to do what the court has by its judgment ordered him to do."

In *Robert* v. *Niles,* 95 Me. 244, 246 (decided in 1901), where the demurrer was overruled, the court say: "As this demurrer was not filed at the first term, the judgment for the plaintiff must be final at the next term after this decision has been certified to the clerk, unless at the term when the demurrer was filed leave was obtained to plead anew, as to which the case is silent."

The opinion in *Winthrop Savings Bank* v. *Blake,* 66 Me. 285 is as follows: "Walton, J. This action was entered at the March term, 1876. At the March term, 1877, the defendants filed a general demurrer to the plaintiff's declaration. The demurrer was overruled, and the defendants thereupon moved for leave to plead anew. The motion was refused, and to this refusal the defendants filed exceptions. The court is of opinion that the exceptions must be overruled. The demurrer not having been filed at the first term, leave to plead anew could not be claimed as a legal right. R. S., Chap. 82, Sec. 19. The motion was addressed to the discretion of the presiding justice; and to the exercise of a discretionary power, exceptions do not lie." See *Fryeburg* v. *Brownfield,* 68 Me. 145, opinion written by Justice Walton a year later.

In the decision of *Palmer* v. *Blaine,* 116 Me. 524 (decided in 1917) it is held: "Where a demurrer is not filed until the second term, *and no leave to plead anew is granted,* the defendant has no right to plead anew after the demurrer has been overruled. In such case judgment is to be entered for the plaintiff." See also *Tibbetts v. Ordway Plaster Co.,* 117

Me. 423; *Clark* v. *Boyd,* 119 Me. 530; *Tripp* v. *Motor Corp.,* 122 Me. 59, 63.

In the case of *Clark* v. *Boyd,* 119 Me. 530, 534, after holding that the demurrer was properly overruled, the court said: "The demurrer having been filed at the second term without reserving the right to plead over the judgment should be final at the next term. Sec. 36, Chap. 87, R. S., Fryeburg v. Brownfield, 68 Me. 145; Fox v. Bennett, 84 Me. 338; Rollins v. Power Co., 112 Me. 175; Furbish v. Robertson, 67 Me. 38. *Exceptions overruled. Final judgment for the plaintiff at the next term after receipt of this mandate.*"

It is fundamental that in construing a statute the intention of the legislature should be ascertained and carried out. *Acheson* v. *Johnson,* 147 Me. 275. The history of a statute may help to indicate intent. *Cushing* v. *Bluehill,* 148 Me. 243; *Roy C. Knapp, Aplt.,* 145 Me. 189, 194. A statute reenacted after a judicial construction is presumed to take the judicial construction. *Bennett* v. *Bennett,* 93 Me. 241.

The history of this statute has been carefully considered, with the history of amendments and the contemporaneous decisions, and the court is of the opinion that the rule is established that a demurrer to the declaration in a civil suit may be filed at the first term, and if overruled, the defendant has the *right* to plead anew on payment of costs, unless the demurrer is "frivolous and intended for delay." If a demurrer is not filed until a later term, there must be a stipulation and court order permitting the defendant to plead over if overruled. If the right to plead anew has not been previously reserved and consent given by the court and expressly or impliedly by the opposite party at or before the time when demurrer is filed at the later term, the defendant may not plead anew when the demurrer is overruled, and judgment should be entered.

This is no new construction of the statute and no new rule. It is the construction that has been recognized by the law-

yers of Maine for at least two generations. See Spaulding's Practice in Civil Actions (Portland 1881), Chapter XX. The legislature has not considered it necessary, in view of this well known judicial construction, to extend the statute by amendment when it has been reenacted.

In this case, the plaintiff must be heard, and the defendant is entitled to be heard, in damages. It is only such damages as may be proved, for which final judgment can be entered. Damages will be assessed either by the court, by a jury, or by a master appointed by the court. The plaintiff only has the right to demand a jury. *Hanley* v. *Sutherland,* 74 Me. 212; *Cummings* v. *Smith,* 50 Me. 568.

Exceptions sustained.

Case remanded for entry of judgment for plaintiff at the next term and for assessment of damages.

STATE OF MAINE

vs.

CARROLL DEMERRITT

Oxford. Opinion, December 30, 1953.

Intoxicating Liquor. Automobiles. Courts. Constitutional Law.

R. S., 1944, Chap. 19, Sec. 121.

Statute of Limitations.

Equal Protection. Due Process. Privileges and Immunities.

The Superior Court has original concurrent jurisdiction with Municipal Courts and trial justices over prosecutions for the offense of operating under the influence of intoxicating liquor.

The limitation to prosecutions under R. S., 1944, Chap. 19, Sec. 121 is 6 years.

The fact that the State may have permitted a period of 11 days to elapse between the date of the alleged offense and the arrest of respondent under an indictment does not amount to a deprivation of respondent's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, Secs. 1 and 6 of the Constitution of the State of Maine on the assertion that such delay made it impossible for respondent to avail himself of a blood test under R. S., 1944, Chap. 19, Sec. 121.

In interpreting Article I, Sec. 6 of the Constitution of Maine "law of the land" means the same as "due process" under the Constitution of the United States.

The "blood test statute" gives a respondent no "privilege."

ON EXCEPTIONS.

This is an indictment under R. S., 1944, Chap. 19, Sec. 121. Respondent filed a special plea in bar. A State's demurrer was sustained and respondent excepted. At the trial the court denied respondent's motion for a directed verdict and respondent excepted. The case is before the Law Court on exceptions. Exceptions overruled. Judgment for the State.

Henry H. Hastings, for State.

Berman & Berman, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, WEBBER, JJ. TIRRELL, J., did not sit.

FELLOWS, J. This is an indictment in Oxford County Superior Court for operating a motor vehicle while under the influence of intoxicating liquor. It comes to the Law Court on respondent's exceptions to the sustaining of the State's demurrer to respondent's special plea in bar, and exceptions to the denial of the respondent's motion for a directed verdict.

The respondent, Carroll Demerritt, then Chief of Police of the town of Rumford, Maine, was indicted by the Grand Jury at the November Term, 1952 for operating a car on Waldo Street in Rumford, November 2, 1952, while under the influence of intoxicating liquor. The indictment was returned on November 13, 1952. The respondent was tried and the jury found a verdict of guilty.

The alleged act took place a few minutes after midnight on Saturday, November 1, 1952 near "210 Club" so-called, where local police officers, a deputy sheriff and several State liquor inspectors were busily engaged in the investigation of alleged violations of the liquor law at the Club, and were making search of the premises. The county attorney was in the neighborhood. The respondent drove his car to a point about the center of the street near the place where the officers were investigating, and where many civilian spectators had gathered.

Wilfred J. Bouffard, a local storekeeper, testified that when the respondent drove up "he opened the door and staggered out of his car. When he did I went up and told him 'get back in your car. There are too many people here that will see you. Get back into your car,' and he gave me an argument * * *. He says 'Bouffard, you can't make me move' and he used some profane language * * * he held onto the fender and slipped. I picked him up again." On the Tuesday following this early Sunday morning episode, the respondent told Bouffard at his store, "I can't recall what happened that night. All I had was about three drinks."

After speaking to one or more of the officers who came into the street, and after a deputy sheriff had told him to "take off," the respondent drove away. No arrest of the respondent was made on this Sunday morning, November 2, 1952. State Police Officer Weeks, who was with the county attorney from 1:30 A. M. until 4:15 A. M. on Sunday morning, stated that they "cruised around" looking for the re-

spondent, but did not call at his house, and did not find him. No warrant was applied for at the Municipal Court although the respondent (with other police officers of Rumford) was present in line of duty, when the Municipal Court was in session on Monday, November 3, 1952.

At the November Term of the Superior Court an indictment was found by the Grand Jury against the respondent, and returned eleven days after the alleged act.

Before the trial at the November, 1952 term, the respondent filed a special plea in bar, praying judgment for the respondent, and setting forth as grounds for the special plea in bar, a violation of the respondent's constitutional rights under the Fifth and Fourteenth Amendments of the Constitution of the United States, and under Article I, Sections 1 and 6 of the Constitution of the State of Maine.

The respondent's claim of infringement of his constitutional rights was based upon the fact that the State permitted a period of eleven days to intervene between the alleged date of commission of the offense and the arrest of the respondent under the indictment. The respondent claims that such delay made it impossible for him to avail himself of his right to request a blood test under Section 121, Chapter 19 of the Revised Statutes of Maine, 1944.

The Superior Court has original concurrent jurisdiction with Municipal Courts and trial justices over prosecutions for the offense of operating under the influence of intoxicating liquor. R. S., 1944, Chap. 19, Secs. 121 and 134; *State* v. *Boynton,* 143 Me. 313, 322.

The only bar to prosecutions under this statute with regard to lapse of time is the statute of limitations. The limitation is six years. R. S., 1944, Chap. 132, Sec. 17; *State* v. *Boynton,* 143 Me. 313, 322; *State* v. *Thompson,* 143 Me. 326. There is no inherent or constitutional right to drive a dangerous automobile on the highway, and whether one

shall be permitted to exercise the right and under what conditions and restrictions is a matter for the legislature. *State* v. *Mayo,* 106 Me. 62. It is only when the State's evidence is so weak or defective that a verdict of guilty cannot be sustained that a motion for a directed verdict should be allowed. *State* v. *Cady,* 82 Me. 426; *State* v. *Sullivan,* 146 Me. 381.

The respondent contends that both under the State and Federal Constitutions the verdict below should be set aside and that he should be discharged. The question presented to this court is whether the State, through the fact that the county attorney, several deputy sheriffs and several police officers had an opportunity to see the respondent, and did not then arrest him for the offense of driving under the influence of intoxicating liquor, deprived the respondent of his right to have a blood test. "By lulling him into a feeling of security" the respondent claims, he was deprived of a right. In other words, whether or not an indication that an automobile driver, who may be under the influence of intoxicating liquor, will not *now* be arrested is a violation of constitutional rights to secure a blood test.

The pertinent part of the blood test statute in question reads as follows:

> "Evidence that there was, at the time, 7/100%, or less, by weight, of alcohol in his blood, is prima facie evidence that the defendant was not under the influence of intoxicating liquor within the meaning of this section.
>
> Evidence that there was, at that time, from 7/100% to 15/100% by weight, of alcohol in his blood is relevant evidence but it is not to be given prima facie effect in indicating whether or not the defendant was under the influence of intoxicating liquor within the meaning of this section.
>
> Evidence that there was, at the time, 15/100%, or more, by weight, of alcohol in his blood, is prima facie evidence that the defendant was under the influence of intoxicating liquor within the meaning of this section.

> The failure of a person accused of this offense to have tests made to determine the weight of alcohol in his blood shall not be admissible in evidence against him."
>
> Revised Statutes, 1944, Chapter 19, Section 121.

The Constitution of the United States, which the respondent claims was violated, is the Fourteenth Amendment, the pertinent part of which is as follows:

> "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The sections of our State Constitution are Article I, Section 1, which read as follows:

> "All men are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness."

and parts of Section 6 of this same Article are as follows:

> "In all criminal prosecutions, the accused shall have a right to be heard by himself and his counsel, or either, at his election;
>
> To be confronted by the witnesses against him;
>
> To have a speedy, public and impartial trial; * * *
>
> He shall not be compelled to furnish or give evidence against himself, nor be deprived of his life, liberty, property or privileges, but by judgment of his peers, or by the law of the land."

The respondent's affirmative rights under the State and Federal Constitutions are not determined by the evidence against him. If there is a violation of a constitutional right the respondent is entitled to a discharge. *State* v. *King,* 123 Me. 256; *State* v. *Beane,* 146 Me. 328; *State* v. *Brown,* 142 Me. 16.

In interpreting the Maine Constitution "law of the land" the same rules are applicable as under the "Due Process Clause" of the U. S. Constitution. "Due process" and "law of the land" have the same meaning. *Jordan* v. *Gaines,* 136 Me. 291.

The foregoing "blood test statute" gives a respondent no "privilege." Any person can have a blood test at any time, and the result can be testified to in court under the common law as a scientific fact. So can any relevant fact be testified to in the trial of a case, if not otherwise inadmissible by some rule of exclusion. *McCulley* v. *Bessey,* 142 Me. 209, 214; *Rawley* v. *Palo Sales,* 144 Me. 375, 380. The statute itself reognizes this and gives no privilege. The statute simply says "evidence that there was at the time" a certain percentage of alcohol in the blood makes the test either "prima facie" evidence that he was, or that he was not, under the influence, or makes it evidence to be considered with no prima facie effect, depending in each case on the particular percentage found. The only privilege given by the statute (if in fact a statute is necessary to give it) is, that a failure to permit a blood test to be made, is not evidence against an accused.

The respondent was not deprived of his right to have a blood test. He had time and opportunity to go to a doctor and get one if, in fact, he desired one. See *State* v. *Corey,* 145 Me. 231. He was not prevented by any act of the State's officers. He knew that in his condition, because of warnings to "get off the street," that even he—the Chief of Police—might be arrested by some of his own officers or by some other officer, or upon some person's complaint. A police officer of his experience knew that he did not have to be actually arrested when "found intoxicated" as in Revised Statutes, 1944, Chap. 57, Sec. 95, relating to intoxication in a public place. The offense of driving an automobile while intoxicated has a limitation of six years. Revised Statutes,

1944, Chap. 132, Sec. 17. *State* v. *Boynton,* 143 Me. 313; *State* v. *Thompson,* 143 Me. 326.

If this statute gave a "privilege," as the respondent in this case claims, every driver of an automobile who drives under the influence of liquor must be arrested immediately. No person thus breaking the law could ever be convicted and sentenced unless he was "found" so driving and immediately arrested, and be at once permitted to have a blood test if he requested. This would practically result in a statute of limitations of not more than a few hours, which is an absurdity. Officers are not always present when a driver operates his car when under the influence of liquor, and some officers might not arrest if they are present, because the driver might not appear to them as intoxicated, or for other reasons. Some citizen might know, or the driver might appear intoxicated or under the influence to some other person. The citizen might attempt by complaint within six years to enforce the law. There might also be an investigation and indictment by a grand jury.

The Courts of Maine have zealously guarded the constitutional rights of all citizens including rights under statutes relating to motor vehicles. *State* v. *Corey,* 145 Me. 231; *State* v. *Boynton,* 143 Me. 313. We fail to find in the case at bar that any right of this respondent has not been protected. His trial was absolutely fair. The evidence clearly indicates that all officials were friendly to the respondent Chief of Police and endeavored to protect him. Officers and friends told him to get off the street because the "gallery" of citizens watching the liquor raid would see him. He was not arrested until eleven days later, following an indictment found as a result of investigation by a grand jury. He did not by any trickery of officers, or by any deceit, fall under the influence of intoxicating liquor (if in fact he was under the influence). He was not by deceit led into Waldo Street to witness, with other citizens, an investigating raid of

liquor law enforcement officials. Instead of being "trapped" by his officers, he was told by officers to get off the road. He was not "lulled into a feeling of security," as he now claims, but on the contrary, feeling insecure and liable to arrest, asked prosecuting officials on Sunday to "give him a break" so that members of his family might not suffer because of his arrest.

The record clearly shows that no constitutional right of the respondent was denied or abridged, and under the protective guidance of most capable counsel, he certainly received a fair trial. The State's evidence was amply sufficient for the jury to pass upon it, and if they believed it, to find the respondent guilty.

Exceptions overruled.
Judgment for the State.

HAROLD C. TABBUT

vs.

EARLE W. NOYES

EARLE W. NOYES

vs.

HAROLD C. TABBUT

Cumberland. Opinion, December 1, 1953.

Negligence.

PER CURIAM.

These were cross actions arising out of a collision of two motor vehicles on Route 1 between Yarmouth and Portland. Tabbut, the plaintiff in one action, #1605, was driving in a Chevrolet pick-up truck in the easterly lane toward Yarmouth. Noyes, the plaintiff in the cross action, #1683, was

driving his 1952 Oldsmobile automobile on the same highway toward Portland in the westerly lane with his wife who was killed in the ensuing collision. The cases were tried together.

It was very foggy. Suddenly the Tabbut car, according to Noyes' testimony, veered to the left and Noyes became fearful of a collision head on. He tried to avoid it by steering to his left and by attempting in this manner to go around the oncoming car. He failed and the collision took place.

Just how the accident happened and who was at fault were questions of fact for the jury. Almost too many times we have reiterated that such questions are for the jury. The cases were tried by the court impartially and with great care. No exceptions were taken. They should have been taken if there was complaint about any ruling of law, particularly as to the charge. If errors of law exist, they cannot be considered on a general motion for a new trial except in an exceptional case of which this is not one.

We might add, however, that there was nothing improper for the trial judge to say specifically that no question of liquor was involved in these cases where there was not a scintilla of evidence that there was any.

The jury found verdicts for Noyes in both cases. These verdicts were fully justified. Counsel for Tabbut by their motions seem to be only clutching at a straw. The entry in each case must be

Motion overruled.

Robert Wilson,

Basil Latty, for Harold C. Tabbut.

William B. Mahoney,

Francis C. Rocheleau,

James R. Desmond, for Earle W. Noyes.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, WEBBER, JJ.

PETER P. CAREY

vs.

BOURQUE-LANIGAN POST NO. 5, THE AMERICAN LEGION

AND

BOURQUE-LANIGAN POST NO. 5, THE AMERICAN LEGION BUILDING CORPORATION ET AL.

Kennebec. January 6, 1954.

Exceptions. Time. Extended Bill.

R. S., 1944, Chap. 94, Sec. 14 controls the presentation of exceptions which may be presented during the 30 days of the term next following the action complained of, excepting only that if the term does not continue for 30 days the exceptions will be received only if filed and allowed before final adjournment of the term.

Exceptions are not finally allowed until the extended bill is filed and allowed.

Extensions of time beyond the statutory limits for filing extended bills must be allowed during the term and with the consent of the parties.

By waiver and consent the parties may permit the same Justice for good cause to further enlarge the time for filing extended bills of exceptions.

Another Justice at another term has no authority to further enlarge an extension of time for the filing of an extended bill of exceptions.

The unqualified allowance of an extended bill of exceptions by the Justice who presided at the term creates a *conclusive presumption* that they were regularly and properly filed and allowed. Such decision by the Justice is not reviewable.

Compare exceptions allowed by Justices in vacation, p. 394.

ON EXCEPTIONS.

This case is before the Law Court upon plaintiff's exceptions to the direction of a verdict for defendants. Exceptions retained for argument at the February 1954 term of the Law Court. So ordered.

Jerome G. Daviau, for plaintiff.

Thomas N. Weeks,
Eaton & Eaton,
Cyril Joly, Jr., for defendants.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WEBBER, JJ. WILLIAMSON AND TIRRELL, JJ., did not sit.

WEBBER, J. This matter comes up on plaintiff's exceptions to the direction of a verdict for defendants. The issue here presented is, "Were these exceptions regularly and properly allowed below, or should they be dismissed?"

At a regular April Term of the Superior Court below, the presiding justice directed a verdict for the defendants. Seasonably thereafter during the term, a docket entry was made of "Exceptions filed and allowed." On the same day the presiding justice fixed the time for filing an extended bill of exceptions, and an appropriate docket entry was recorded, "Extended Bill of Exceptions to be filed on or before return day of June Term, 1953." A transcript of the evidence was seasonably filed on May 29, 1953. On the first Tuesday of June, 1953, the return day for the June Term, no extended bill had been filed and no docket entry had been made disclosing any further extension of the time for such filing. The presiding justice at the June Term was not the justice who presided at the April Term. On the fifth day of the June Term, the justice then presiding ordered the time further extended for filing bill and the following docket

entry was made, "By order of the Court extended Bill of Exceptions to be filed on or before July 1, 1953." Ten days later the extended bill now before us was filed and allowed without qualification by the justice who originally presided at the April Term. The extended bill of exceptions was signed by counsel for the defendants as "Seen and agreed to as to form only."

R. S., 1944, Chap. 94, Sec. 14 controls and the applicable portions may be paraphrased as follows. When a party deems himself aggrieved by any opinions, directions or judgments of the presiding justice during a term of court, he may present written exceptions thereto during the thirty days of the term next following the action complained of, excepting only that if the term does not continue for thirty days, the exceptions will be received only if filed and allowed before final adjournment of the term.

Our court in *Bradford* v. *Davis*, 143 Me. 124, has fully set forth the purpose of exceptions and the method of perfecting them properly. At page 127, that opinion states:

> "It is customary in practice, however, because of time necessary to prepare a formal bill, to note upon the term docket that exceptions have been 'filed and allowed.' Then if the exceptant believes that he will not have sufficient time or opportunity to write out and to prepare a complete bill of exceptions before adjournment, or if there will be an unavoidable delay due to transcription of evidence by the court reporter, it is also the practice for the exceptant to ask the presiding justice for an extension, by making further docket entry that the completed bill may be filed on or before a certain date. In this manner the statute has been complied with, the exceptions are filed and allowed 'during the term,' leaving only mechanical details for some future time."

This procedure was the one properly followed in the case at bar. Where the usual docket entry of "Exceptions filed

and allowed" is made during term time, "the effect of this entry under our practice and the decisions of this court must be construed to be that the presentation of a bill of exceptions after the close of the term *shall by consent of parties* be considered as presented as of the date of the docket entry." (Emphasis supplied.) *Borneman* v. *Milliken,* 118 Me. 168 at 169.

It must be noted, however, that exceptions are neither completed nor finally allowed until the extended bill of exceptions has been filed and allowed by the justice who is a party to and controls it. This can be done only during the term as provided by statute *(supra),* unless the presiding justice, during the term and *with the consent of the parties,* extends the privilege to file an extended bill at a time after the term set by that justice. "The presiding justice is not only not required to allow exceptions after the term is adjourned, *but without waiver and consent he has no power to do it.*" (Emphasis supplied.) *Poland* v. *McDowell,* 114 Me. 511 at 513.

"It is competent for the parties, with the consent of the presiding justice, to waive, expressly or impliedly, these requirements. Such is not an uncommon practice. *Dunn* v. *Motor Co.,* 92 Me. 165 at 167.

Where it was clear that there had been *no waiver and consent* and the certificate of allowance after the term was qualified in that respect, the bill of exceptions was deemed to be filed and allowed too late. *Fish* v. *Baker,* 74 Me. 107.

Just as waiver and consent given expressly or by implication during the term will operate to permit the presiding justice to enlarge the time for filing extended bill beyond the term, so also and only by such waiver and consent the parties may permit the same justice to further enlarge the time beyond the date originally set, when it becomes apparent to them that for good cause the original deadline for filing and allowance cannot be met.

"The justice who presides over the term at which the exceptions are taken is the only justice who has authority over the bill of exceptions." *Bradford* v. *Davis, supra.* So in the case at bar the act of the justice presiding at the June Term purporting to enlarge the time for filing extended bill was without authority and therefore void and of no effect. It may be noted that a different rule applies to matters decided by a justice *in vacation.* Here the applicable statute is R. S., 1944, Chap. 100, Sec. 39, as amended by P. L., 1945, Chap. 136. This statute expressly confers power on *"any* justice" to enlarge the time for filing exceptions. The provisions found in the last paragraph of Rule 18 of the Revised Rules of the Supreme Judicial and Superior Courts (effective August 1, 1952) have no application here as they pertain only to those matters not covered by the quoted statutes *(supra).*

In order to avoid frequent controversy and litigation especially in the Law Court as to whether or not there had in fact been waiver and consent as to time requirements, we long ago deemed it advisable to place reliance on the certificate of the justice allowing the exceptions and make that certificate decisive of the question. Our court has assumed that the learned justices below would not permit unreasonable enlargements of time, but would promote an end to litigation and would not be unmindful of any definite and positive denial of waiver and consent by any party. Accordingly we have repeatedly held that the unqualified allowance of an extended bill of exceptions by the justice who presided at the term creates a conclusive presumption that they were regularly and properly filed and allowed; that the certificate of allowance is decisive of such questions as time requirements and whether or not there was waiver and consent by parties; and such decision by the justice is not reviewable. *Bradford* v. *Davis, supra; Colby* v. *Tarr,* 140 Me. 128; *Mann* v. *Homestead Realty Co.,* 134 Me. 37; *Poland* v.

McDowell, supra; Dunn v. *Motor Co., supra.* In *Royal Insurance Co.* v. *Nelke,* 117 Me. 366, counsel for the adverse party expressly refused waiver during the term. We assume that no justice will allow exceptions after the time fixed by him has expired solely in reliance upon the protection afforded his action by the "conclusive presumption," whenever he knows that the time has expired and there is in fact no consent to further extension. We assume that in every such case, the justice will afford *both* parties an opportunity to be heard. *Such is his duty.*

It is not necessary that the record show support for a finding of waiver. *Colby* v. *Tarr, supra.* In the case before us it may be noted, however, that during the term, docket entries were made which clearly denoted waiver and consent of the parties as to enlarging statutory time requirements; and later, presumably after the expiration of the deadline first fixed by the presiding justice, the counsel for defendants in writing agreed to the exceptions as to form and did not as a matter of record then refuse waiver and consent as to any further enlargement of time. The justice then found in effect that he had from the parties either express or implied waiver and consent as to a further enlargement of time, and *that finding was conclusive.*

At the December Term of the Law Court, we announced that if the exceptions were deemed to be regularly and properly filed and allowed and before us for consideration, the case would be argued upon the merits at a later term. It is now apparent that the exceptions should be retained for argument at the February Term, 1954.

So ordered.

WILLIAM H. NIEHOFF

vs.

HERMAN D. SAHAGIAN

Kennebec. Opinion, January 14, 1954.

Libel and Slander. Perjury. Subornation. Per Se. Attorneys at Law. Demurrer. Pleading. Colloquium. Specifications. Words and Phrases.

Perjury and subornation of perjury are defined in R. S., 1944, Chapter 122, Section 1.

It is an essential element of subornation of perjury that both the suborner and suborned know the testimony to be false and the former must be aware that the latter so knows it.

It is essential to the crime of subornation of perjury that the suborner procured another to give testimony known by him and such other to be false and that such false testimony was in fact given.

To constitute misconduct on the part of an attorney he must *at least* act corruptly and either know of the falsity of the testimony or other facts evidencing his bad faith in procuring the testimony to be given.

By inducement, colloquium and innuendo a plaintiff may show that words innocent in and of themselves interpreted in the light of the circumstances *under which and in reference to which* they were uttered or written, constitute an accusation of crime or misconduct in his profession.

Unless the words standing alone in and of themselves, if true, are sufficient to charge the plaintiff with the commission of a crime *and* unless they are necessarily inconsistent with the plaintiff's innocence of the crime alleged to have been charged thereby, the words are not actionable *per se* as charging the plaintiff with such crime. This principle applies to allegations of misconduct in relation to a particular trade, profession or vocation so that words are not

actionable *per se* unless in and of themselves they impute some matter which would render one unworthy of employment *and* unless, if true, they are necessarily inconsistent with innocence.

The colloquium of a declaration is sometime framed in the limited sense of an "averment that the words were used concerning the plaintiff"; however, whenever words have a slanderous meaning only by reason of the existence of some extraneous fact, which fact must be averred in traversable form in the inducement, the colloquium must be employed in the broader sense and aver that the slanderous words were spoken of and concerning this fact.

Where the slander consists in the false accusation of a crime *eo nomine*, the declaration need not set out the words charging the crime although a defendant on motion is entitled to a specification of the words used and such upon being specified becomes part of the declaration. If the words alone are specified and they are *per se* insufficient to import the commission of the crime charged, the declaration is demurrable. Such words are made sufficient only by appropriate inducement *and* colloquium.

ON EXCEPTIONS.

This is an action for slander. The case is before the Law Court upon exceptions by plaintiff to the sustaining of a general demurrer to each of two counts of the amended declaration. Exceptions overruled.

Dubord & Dubord, for plaintiff.

Goodspeed & Goodspeed, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, WEBBER, JJ. TIRRELL, J., did not sit.

MERRILL, C. J. On exceptions. This is an action for slander. The amended declaration contains two counts. The first count alleges that the defendant slandered the plaintiff by falsely and maliciously accusing him of the crime of subornation of perjury by speaking of and concerning the plaintiff the following words:

> "I had not wanted to admit on the stand in Portland, that I had committed a crime, since I had not

> committed any. However, I was urged to do so by Bird and Assistant Attorney General William H. Niehoff. Bird and Niehoff told me that if I did not testify to a crime, then no crime could be proved against Papalos who would then fail to be convicted. So I went ahead and said on the witness stand that I had, in fact, committed a crime, after Bird and Niehoff had urged me to do so."

The second count alleges that the defendant did speak and publish of and concerning the plaintiff *in his capacity as an attorney-at-law* the same words above set forth and contains the further allegation that by means of said statements the defendant did falsely accuse the plaintiff of having committed the heinous crime of subornation of perjury.

In neither count is there a claim for special damages nor is there any allegation that the plaintiff suffered special damages because of the alleged slander.

The defendant filed a general demurrer to each count. These demurrers were sustained by the presiding justice and it is upon exceptions to these rulings of said justice that the case is now before this court.

Perjury and subornation of perjury are felonies and are defined in R. S. (1944), Chap. 122, Sec. 1 as follows:

> "Whoever, when required to tell the truth on oath or affirmation lawfully administered, wilfully and corruptly swears or affirms falsely to a material matter, in a proceeding before any court, tribunal, or officer created by law, or in relation to which an oath or affirmation is authorized by law, is guilty of perjury; and whoever procures another to commit perjury is guilty of subornation of perjury;"

In order to constitute subornation of perjury "Both the suborner and the suborned must, as elements of the offense, know the testimony to be false, and the former must be aware that the latter so knows it, otherwise there is not

the needful corruption." 2 Bishop's New Criminal Law, 690, Sec. 1197, a. 2.

In order to be guilty of subornation of perjury it is not only necessary that the party suborned actually commit perjury but it is also necessary that the suborner knows that the testimony to be given will be false and that the one giving the same "will wilfully testify to a fact knowing it to be false." 41 Am. Jur. Page 41, Sec. 74.

As said in 70 C. J. S. Pages 549 and 550:

> "It is essential to the offense of subornation of perjury that perjury, in all of its elements, shall have been committed by the suborned witness. * * *
>
> In order to constitute subornation of perjury, it is essential that the suborner should have known or believed that the testimony would be false, that he should have known that the witness would testify willfully and corruptly with knowledge of its falsity, and that he should have knowingly and willfully induced or procured the witness to give such false testimony."

As said by the Massachusetts court with respect to the conduct of a defendant charged with subornation of perjury, in *Commonwealth* v. *Douglass*, 5 Met. 241, 244:

> "The defendant might know, or believe—for he could not know with certainty—that the witness whom he called would testify as she did; and he might know that her testimony would be false; but if he did not know that she would willfully testify to a fact, knowing it to be false, he could not be convicted of the crime charged. If he did not know or believe that the witness intended to commit the crime of perjury, he could not be guilty of the crime of suborning her. To constitute perjury the witness must willfully testify falsely, knowing the testimony given to be false. 1 Hawk. c. 69, § 2. Bac. Ab. Perjury, A. 2 Russell on Crimes, (1st ed.) 1753. A witness, by mistake or defect of

> memory, may testify untruly without being guilty of perjury or any other crime. * * * To constitute subornation of perjury, the party charged must have procured the commission of the perjury, by inciting, instigating, or persuading the guilty party to commit the crime. The calling of a witness to testify, with the knowledge or belief that he will voluntarily testify falsely, is certainly not sufficient to constitute the crime of subornation of perjury."

See also Archbold's Criminal Pleading and Evidence, 4th American Edition, Page 545. May's Criminal Law, Page 130, Sec. 153.

It is essential to the crime of subornation of perjury that the suborner procured another to give testimony known by him and such other to be false and that such false testimony was in fact given. See 2 Wharton's Criminal Procedure, 10th Edition, 1516, Sec. 1071.

As said in 2 Wharton's Criminal Law, 1844, Sec. 1595:

> "To constitute subornation of perjury, which is an offense at common law, the party charged must procure the commission of the perjury, by inciting, instigating, or persuading the witness to commit the crime. Perjury must have been actually committed, and this must appear in the indictment. The suborner must be aware of the intended corruptness on part of the person suborned. Thus though a party, who is charged with subornation of perjury, knew that the testimony of a witness whom he called would be false, yet if he did not know that the witness would wilfully testify to a fact, knowing it to be false, he cannot be convicted of the crime charged."

Although it may not be necessary to constitute misconduct on the part of an attorney who procures a witness to testify to facts that are not true that the attorney be guilty of subornation of perjury in its technical sense, yet to con-

stitute misconduct on his part he must *at least* act corruptly and either know of the falsity of the testimony or other facts evidencing his bad faith in procuring the testimony to be given. The only fact stated in either count that would indicate that Niehoff acted corruptly in his office as an attorney-at-law is the statement in the inducement that he knew that Sahagian was not guilty of the offense the commission of which he was urged to testify, of which later.

The real issues between the parties are whether or not the language above set forth when spoken of and concerning the plaintiff by the defendant charged the plaintiff with having committed the crime of subornation of perjury, and whether or not it charged him with misconduct in his office as an attorney-at-law.

It is the position of the defendant that there is nothing in the language itself, which, standing alone, can be interpreted as a statement by the defendant that the plaintiff knew that the testimony to be given and actually given by Sahagian would be false.

The defendant's interpretation of the words standing alone is the correct one. This, however, is not necessarily fatal. Words perfectly innocent in and of themselves when spoken under certain circumstances may have an entirely different meaning. By inducement, colloquium *and* innuendo a plaintiff may show that words innocent in and of themselves interpreted in the light of the circumstances *under which and in reference to which* they were uttered or written constitute an accusation of crime or misconduct in his profession.

This court has so many times and so recently stated the essential elements of defamation by libel and by slander that it would be superfluous to repeat them *in extenso*. We said in *Barnes* v. *Trundy*, 31 Me. 321, 323:

> "Certain doctrines respecting the maintenance of actions for slanderous words spoken, may be re-

> garded as so fully established as to preclude further debate or controversy.
>
> Words in themselves actionable must charge some punishable offence, impute some disgraceful disease, or be spoken of the person in relation to some profession, occupation, or official station in which he was employed.
>
> Words in themselves not actionable may be the foundation of an action by reason of some special damage occasioned by them."

See also, especially with respect to charges with respect to defamation of one in the conduct of his profession, *Orr* v. *Skofield,* 56 Me. 483, *Buck* v. *Hersey,* 31 Me. 558, and *Pattangall* v. *Mooers,* 113 Me. 412.

Furthermore, words innocent in and of themselves may be actionable because of the surrounding circumstances *under which and with relation to which* they are spoken. In other words, in this manner by the use of words innocent in and of themselves the speaker may accuse another of having committed a crime, or impute to him some matter in relation to his particular trade, vocation or profession which, if true, would render him unworthy of employment.

Unless the words standing alone in and of themselves, if true, are sufficient to charge the plaintiff with the commission of crime *and* unless they are necessarily inconsistent with the plaintiff's innocence of the crime alleged to have been charged thereby, the words are not actionable *per se* as charging the plaintiff with such crime. Likewise, the same general principle applies to allegations with respect to and of the plaintiff's conduct in relation to some matter relating to his particular trade, profession or vocation. Unless the words standing alone in and of themselves, if true, are sufficient to impute to him some matter in connection with his trade, profession or vocation which would render him unworthy of employment, *and* unless, if true,

they are necessarily inconsistent with his innocence of such matter rendering him unworthy of employment, the words are not actionable *per se* as spoken of the plaintiff of and in relation to his trade, vocation or profession.

In the very recent case of *Judkins* v. *Buckland,* 149 Me. 59, 63 and 64, we said:

> " 'A declaration for slander ordinarily contains, as here, (1) the inducement, or statement of the alleged matter out of which the charge arose (2) the colloquium, or averment that the words were used concerning the plaintiff (3) and the innuendo, or meaning placed by the plaintiff upon the language of the defendant. 2 Greenleaf Ev. (4th Ed.) "Libel and Slander," 405; Starkie on Slander "Averments," 262; 37 C.J. "Libel and Slander," 22, Par. 328; *Patterson* v. *Wilkinson,* 55 Me. 42; *Bradburg* v. *Segal,* 121 Me. 146; *Brown* v. *Rouillard,* 117 Me. 55.' "
> * * *
>
> "The published article in libel, and the words in slander, must be construed, stripped of innuendo, insinuation, colloquium, and explanatory circumstances. Words must be taken in their ordinary and usual meaning because words may convey one idea to one person and another idea to another. 'It is not the intent of the speaker or author, or even of the understanding of the plaintiff, but of the understanding of those to whom the words are addressed and of the natural and probable effect of the words upon them.' *Chapman* v. *Gannett,* 132 Me. 389, 391; *Bradburg* v. *Segal,* 121 Me. 146; *Nichols* v. *Sonia,* 114 Me. 545."

It is to be noted in the first passage above quoted the word "colloquium" is used only in the limited meaning attributed therein thereto, to wit, "(2) the colloquium, or averment that the words were used concerning the plaintiff" and it is undoubtedly in this same limited sense only that the word "colloquium" is used in the second passage above quoted. There is, however, another sense in which

the word "colloquium" is used in relation to allegations in the pleadings in actions for libel and slander. Colloquium is defined in Ballentine's Law Dictionary as follows:

> "*colloquium.* That part of a declaration or complaint in an action for libel or slander consisting of a direct allegation that the language published was concerning the plaintiff or concerning the plaintiff and his affairs, or *concerning the plaintiff and facts alleged as inducement.* See 33 Am. Jur. 218." (Emphasis ours.)

In Bouvier's Law Dictionary, Baldwin's Century Edition, it is said at page 185 et seq.:

> "COLLOQUIUM In Pleading. A general averment in an action for slander connecting the whole publication with the previous statement. 1 Stark. Sl. 431; Heard, Lib. & Sl. 228; or stating that the whole publication applies to the plaintiff, and to the extrinsic matters alleged in his declaration. 1 Greenl. Ev. § 417.
>
> An averment that the words were spoken 'of or concerning' the plaintiff, where the words are actionable in themselves. 6 Term 162; 16 Pick. 132; Cro. Jac. 674; Heard Lib. & Sl. § 212; 1 Greenl. Ev. § 417; or where the injurious meaning which the plaintiff assigns to the words results from some extrinsic matter, or of and concerning, or with reference to, such matter. 2 Pick. 328; 16 *id.* 1; Heard, Lib. & Sl. §§ 212, 217; 11 M. & W. 287.
>
> An averment that the words in question are spoken of or concerning some usage, report, or fact which gives to words otherwise indifferent the peculiar defamatory meaning assigned to them. Shaw, C. J., 16 Pick. 6.
>
> Whenever words have the slanderous meaning alleged, not by their own intrinsic force, but by reason of the existence of some extraneous fact, this fact must be averred in a traversable form, which averment is called the *inducement.* There must then be a *colloquium* averring that the slanderous words were spoken of or concerning this

> fact. Then the word *'meaning'*, or *innuendo,* is used to connect the matters thus introduced by averments and *colloquia* with the particular words laid, showing their identity and drawing what is then the legal inference from the whole declaration, that such was under the circumstances thus set out, the meaning of the words used. Per Shaw, C.J.; 16 Pick. 6. By the Com. L. Proc. Act (1852) in England the colloquium has been rendered unnecessary. See INNUENDO; Odger, Lib. & Sl."

It is in this broader meaning of the word "colloquium" that this court used the same in *Patterson* v. *Wilkinson,* 55 Me. 42, 43, 45, when it said:

> "The words spoken, not importing a crime, and not being upon their face slanderous, the rule as to declaring is thus stated by Chitty, in his work on Pleading, vol. 1, p. 342, 'When the words do not naturally and *per se* convey the meaning the plaintiff would wish to assign to them, or are ambiguous and equivocal, and require explanation by reference to extrinsic matter, to show that they are actionable, it must not only be stated that such matter existed, but also that the words were *spoken of and concerning it.*' The count does not indicate that any conversation was had in reference to the misconduct of the plaintiff's sister. The fact of such misconduct is stated, but in what is technically termed the *colloquium,* it is not averred that the words were spoken in relation to such misconduct. If spoken generally, without any such reference, they were obviously not slanderous. 'When the words spoken,' observes LORD ELLENBOROUGH, in Hawks v. Hawkey, 8 East, 431, 'do not in themselves naturally convey the meaning imputed by the *innuendo,* but also when they are ambiguous and equivocal, and require explanation by reference to some extrinsic matter to make them actionable, it must not only be predicated that such matter existed, but also that the words were spoken *of and concerning that matter.*' In *Sturtivant* v. *Root,* 7 Foster, 69, GILCHRIST, C.J., says, a *'colloquium* serves to show that the

words were spoken in reference to the matter of the averment. An innuendo is explanatory *of the subject matter sufficiently expressed before, and it is explanatory of such matter only;* for it cannot extend or limit the sense of the words beyond their own meaning, unless something is put upon the record for it to explain.' So, in *Carter* v. *Andrews,* 16 Pick., 1, Shaw, C. J., says, — 'If the words have the slanderous meaning alleged, not by their own intrinsic force, but by reason of the existence of some extraneous fact, the plaintiff must undertake to prove that fact, and the defendant must be at liberty to disprove it. The fact must be averred in a traversable form, with a proper *colloquium,* to wit, an averment, that the words in question are spoken *of and concerning* such usage or report or fact, whatever it is, which gives to words, otherwise indifferent, the particular defamatory meaning imputed to them.' For aught that appears in the declaration preceding the innuendo, the conversation might have had reference to the good and not to the bad conduct of the plaintiff's sister, and, if so, the words are entirely unobjectionable."

This same principle is discussed *in extenso* and is reaffirmed by the case of *Brown* v. *Rouillard,* 117 Me. 55, 59, 60. This court therein quoted from *Brettun* v. *Anthony,* 103 Mass. 37, as follows:

" 'Words in themselves harmless, or of doubtful import, become slanderous when used with reference to known existing facts and circumstances in such manner as to convey to the hearer a charge of crime. This limited protection to reputation the law attempts to give against indirect verbal imputation. It must however be made apparent, by suitable averments in the declaration, that the language employed was used by the defendant slanderously, to the extent stated; and the words, when taken in their plain and natural import, must be capable of the meaning attributed to them.'

'The facts which determine the alleged meaning are usually stated in a prefatory manner, followed

by a positive averment, or colloquium, that the discourse was of and concerning these circumstances. Whatever the particular order of their arrangement, these averments become material and traversable, and it must appear from them that the words impute the alleged offence. It is a further elementary principle, that the colloquium must extend to the whole of the prefatory inducement, necessary to render the words actionable.'

'An omission in the respect indicated will not be aided by mere innuendoes, whose office cannot add to or extend the sense or effect of the words set forth, or refer to anything not properly alleged in the declaration. *Snell* v. *Snow,* 13 Met., 278. General allegations, that the defendant charged the plaintiff, falsely and maliciously, with the commission of a particular crime, accompanied by innuendoes, however broad and sweeping, will not aid a declaration otherwise imperfect. Thus, the act of burning one's own property becomes a crime only under special circumstances, as when done for the purpose of defrauding the insurers, or in violation of the provisions of the bankrupt act. Conversation about such burning, otherwise innocent, or of doubtful import, may be made actionable, if reference was had in it to these special circumstances, in such manner as necessarily to impute the crime. And the declaration is defective, if it does not set this forth by suitable averments.'

'It is no answer, that facts and circumstances enough are stated, unless it is also averred that the speech of the defendant was with reference to such facts, or so many of them as are essential elements in the crime. Nor is this want supplied by alleging that the defendant, at the time of speaking the words, had knowledge of the particular circumstances which made the act of which he speaks criminal. He is to be charged only for a wrong actually committed, irrespectively of his secret knowledge or intent. He is responsible only for the meaning which the words used by him, reasonably interpreted, convey to the understanding

> of the persons in whose presence they were uttered. See *Fowle* v. *Robbins,* 12 Mass., 498; *Bloss* v. *Tobey,* 2 Pick., 320; *Carter* v. *Andrews,* 16 Pick., 1, 5; *Sweetapple* v. *Jesse,* 5 B. & Ad., 27.'"

Applying these rules to the amended declaration, each count is demurrable. The words upon which the action is founded not being actionable *per se* because they neither directly nor indirectly allege that the plaintiff knew of the falsity of the testimony which they charge he induced Sahagian to give, the plaintiff sought to make them actionable by setting forth the plaintiff's knowledge thereof by an inducement. If, without so holding, but for the purpose of argument only we grant that the counts each contain a sufficient inducement with respect to such knowledge on the part of the plaintiff, yet each of them is insufficient when tested by the foregoing rules. Although the fact of such guilty knowledge on the part of the plaintiff is stated in the inducement, in neither count is it averred that the words alleged to have been spoken were spoken of or concerning the same. It is no answer, that facts and circumstances enough are stated, unless it is also averred that the words of the defendant set forth in the declaration and alleged to be slanderous were spoken with reference to such facts, or so many of them as are essential elements of the crime.

If the words were spoken generally, and without any such reference, they were obviously not slanderous *per se* under the rules above set forth. The acts attributed to the plaintiff, by the words alleged to have been spoken if performed by the plaintiff in good faith and without knowledge of the falsity of the testimony to be given by the defendant neither constituted subornation of perjury nor any other crime, nor did they constitute misconduct upon the part of the plaintiff in his office as an attorney-at-law.

Although both counts in the declaration contain a general charge that the defendant accused the plaintiff of instigat-

ing Sahagian to testify that he was guilty of a crime when the plaintiff knew he was not guilty thereof, the effect of such general allegation is limited by the further allegation setting forth the false, scandalous and defamatory words alleged to have been spoken of and concerning the plaintiff, to wit, the words hereinbefore set forth verbatim.

A declaration alleging that the defendant falsely charged the plaintiff with the commission of a crime *eo nomine* is sufficient without setting out the words by which it is claimed the crime was charged. *True* v. *Plumley,* 36 Me. 466, *Kimball* v. *Page,* 96 Me. 487, *Burbank* v. *Horn,* 39 Me. 233. In such case, however, the defendant is entitled, on motion, to a specification of the words which the plaintiff claims the defendant used in making the charge of crime. When such specification is filed the words become a part of the declaration. If the words alone are specified and they are *per se* insufficient to import the commission of the crime charged generally, the declaration is demurrable. *Brown* v. *Rouillard,* 117 Me. 55. In such case it is necessary by inducement and colloquium to show that the words do in fact charge the crime.

In principle there is no difference whether the words are supplied by a specification as in *Brown* v. *Rouillard, supra,* or as here, are included in the declaration as the means by which the crime or misconduct is charged. In either case if the words are not slanderous *per se* unless made so by proper inducement and colloquium the pleading is insufficient and is demurrable.

In this case the words set forth in the first count are insufficient in and of themselves to constitute a charge of crime as alleged. Nor are the words made sufficient therefor by inducement *and* colloquium. The words in the second count are insufficient to charge the plaintiff with misconduct with respect to his profession. Nor are the words made sufficient therefor by inducement *and* colloquium. Un-

der the well established principles declared in *Patterson* v. *Wilkinson,* 55 Me. 42, and in *Brown* v. *Rouillard,* 117 Me. 55, both counts were demurrable. The entry must be

Exceptions overruled.

WILLIAM H. NIEHOFF

vs.

HERMAN D. SAHAGIAN

Kennebec. Opinion, January 14, 1954.

Libel and Slander.

See *Niehoff* v. *Sahagian, supra* p. 396.

ON EXCEPTIONS.

This is an action of slander before the Law Court upon exception to the sustaining of general demurrers to each count of the amended declaration. Exceptions overruled.

Dubord & Dubord, for plaintiff.

Goodspeed & Goodspeed,
Richard S. Chapman, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, WEBBER, JJ. TIRRELL, J., did not sit.

MERRILL, C. J. On exceptions. This is an action for slander. The amended declaration contains two counts. The first count alleges that the defendant slandered the plaintiff by falsely and maliciously accusing him of the

crime of subornation of perjury by speaking of and concerning the plaintiff the following words:

> "I was urged by the attorney general's department to testify in the Zahn-Papalos trials in Cumberland County that I had committed a crime when I believed I had not. I was urged by William Niehoff, Assistant Attorney General and prosecutor in the Zahn-Papalos trials, to tell the court that I had committed a crime."

The second count alleges that the defendant did speak and publish of and concerning the plaintiff *in his capacity as an attorney-at-law* the same words above set forth and contains the further allegation that by means of said statements the defendant did falsely accuse the plaintiff of having committed the heinous crime of subornation of perjury.

In neither count is there a claim for special damages nor is there any allegation that the plaintiff suffered special damages because of the alleged slander.

The defendant filed a general demurrer to each count. These demurrers were sustained by the presiding justice and it is upon exceptions to these rulings of said justice that the case is now before this court.

The amended counts, demurrers, and rulings of the court in this case, except for variation of the words alleged to have been used, are identical with those declared upon in the companion case between the same parties, *Niehoff* v. *Sahagian*, 149 Me. 396. That case was argued with this one and the opinion therein is simultaneously filed herewith. For the same reasons stated therein, we hold that the words set forth in the first count in this case are insufficient in and of themselves to constitute a charge of crime as alleged. Nor are the words made sufficient therefor by inducement *and* colloquium. For the same reasons we hold that the words in the second count are insufficient to charge the plaintiff with misconduct with respect to his profession.

Nor are the words made sufficient therefor by inducement *and* colloquium. Both counts were demurrable. Extended opinion herein is unnecessary. For detailed discussion and statement of the legal principles and authorities upon which we base this decision see *Niehoff* v. *Sahagian, supra.*

The entry must be

Exceptions overruled.

WILLIAM H. NIEHOFF

vs.

CONGRESS SQUARE HOTEL COMPANY

Kennebec. Opinion, January 14, 1954.

Libel. Slander. Defamation. Radio Broadcast. Demurrer.

Whether radio broadcast (read from script or not) constitutes libel, slander, or a special form of defamation is not decided.

See *Niehoff* v. *Sahagian, supra,* at p. 396 and p. 410.

If the defamatory words taken in their natural and ordinary signification fairly import a criminal charge it is sufficient to render them actionable although the court cannot upon demurrer pronounce them actionable unless they can be interpreted as such with at least a reasonable certainty.

ON EXCEPTIONS.

This is an action for defamation. The case is before the Law Court upon exceptions to sustaining of demurrers by the presiding justice of Superior Court. Exceptions overruled.

Dubord & Dubord, for plaintiff.

Verrill, Dana, Walker, Philbrick & Whitehouse, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, WEBBER, JJ. TIRRELL, J., did not sit.

MERRILL, C. J. On exceptions. This is an action for defamation by means of a radio broadcast. The amended declaration contains two counts. The first count alleges that the defendant libeled the plaintiff by accusing him of the crime of subornation of perjury by broadcasting over its radio station WCSH. It alleges the libel was published in a comment by its servant and agent over "radio station WCSH by means of the following false, malicious, scandalous and defamatory matter of and concerning the plaintiff, to wit:

> "Sahagian was the key witness in the Research Committee's hearing and later in the Portland trial. He told me that he had not wanted to admit on the stand at Portland that he had committed a crime since he had not committed any. However, he said he was urged to do so by Bird and Assistant Attorney General William H. Niehoff.
>
> Bird and Niehoff, he said, told him that if he did not testify to a crime that no crime could be proven against Papalos who would then fail to be convicted. So he told me he went ahead and said on the witness stand that he had in fact committed a crime after Bird and Niehoff had urged him to do so.
>
> Largely on the basis of his testimony at Portland his wine company has been suspended from further business with the State Liquor Commission. Sahagian feels that this is definitely unfair, since he did not commit any crime at all but was just gathering evidence with which to combat corruption in Maine.
>
> The Liquor Commission in ordering the suspension of the Fairview Wine Company pointed out that Sahagian had admitted on the witness stand that he was willing to commit a crime to keep his business going. Sahagian now says that this testi-

> mony should have been viewed in the light of his explanation of it, that he was saying these things at the urging of Bird and Niehoff.
>
> Sahagian was astonished to learn that he had been indicted by the Kennebec Grand Jury. He felt that he was the man responsible for opening up the entire investigation, then, too, he had testified as Bird and Niehoff wanted him to at Portland.
>
> 'I have been made to be the goat here. They wanted me to admit a crime in Portland, then they wanted to bring me back to Augusta and convict me there.' "

The second count alleges that the defendant did publish of and concerning the plaintiff by similar broadcast by the same servant and agent, over the same radio station, of and concerning the plaintiff *in his capacity as an attorney-at-law* the same words above set forth, and it contains the further allegation that by means of the publishing of the foregoing libelous statements the defendant did falsely accuse the plaintiff of having committed the heinous crime of subornation of perjury.

In neither count is there a claim for special damages, nor is there any allegation that the plaintiff suffered special damages because of the alleged libel.

Although the plaintiff in his declaration refers to the publication as libelous and has treated the action as an action for *libel,* in the view that we take of this case we are not called upon to now determine whether defamation by words spoken over the radio, whether read from a script or not, constitute in the strict legal sense slander, libel, or a special form of defamation, liability for which is to be measured by the standards applied to libel.

See 53 C. J. S. page 200, Sec. 121, c; 33 Am. Jur. page 39, Sec. 3. *Sorenson* v. *Wood,* 123 Neb. 348, 243 N. W. 82, 82 A. L. R. 1098. Appeal dismissed in 290 U. S. 599, 78 L. Ed. 527. See also notes in 82 A. L. R. 1109, 104 A. L. R. 877, 124 A. L. R. 997, and 171 A. L. R. 780.

The case of *Hartman* v. *Winchell,* 296 N. Y. 296, 171 A. L. R. 759, 73 N. E. (2nd) 30, is especially interesting. The majority opinion sets forth the grounds upon which they hold that broadcasting a script by reading the same constitutes libel instead of slander. Judge Fuld in an opinion concurring in the result advances the view that liability for broadcasting defamatory matter whether read from a script or not, and whether called libel or slander, should have applied to it the same standards for the determination of liability as are applied in actions for libel.

There is, however, no direct allegation in traversable form in either count of the amended declaration that the words were written or that they were broadcast from a written script.

Measured by the standards applicable to either libel or slander, the words set forth in the two counts in the amended declaration are not *per se* defamatory. The reasons therefor have been heretofore stated by this court in the full opinion written in the case of *Niehoff* v. *Sahagian,* 149 Me. 396, filed this day herewith. Nor are the words set forth in either count of the amended declaration made defamatory by means of inducement and colloquium when measured by the standards applicable to either libel or slander.

In each count of the amended declaration the plaintiff alleges that "in the aforesaid broadcast made by the agent and servant of the defendant corporation, the said defendant corporation stated publicly that the plaintiff knew that the said Herman D. Sahagian had not committed the crime of conspiracy to bribe certain public officials,". But each count of the declaration after further allegations as to the procurement by the plaintiff of the giving of false testimony by Sahagian that he had committed the crime of conspiracy, continues and alleges "all of which foregoing charges and accusations concerning the plaintiff were made

by the defendant corporation by its servant and agent in a comment over the aforesaid radio station WCSH *by means of the following false, malicious, scandalous and defamatory matter,* (emphasis ours) of and concerning the plaintiff, to wit:" the words attributed to the commentator agent of the defendant, above set forth.

We said in *Thompson* v. *Sun Pub. Co.,* 91 Me. 203, 207, which was an action for libel:

> "It is not necessary, in order to render words actionable, that there should be the same precision and certainty in the language employed to make the charge, as in the allegations of an indictment for the same offense. If the defamatory words, taken in their natural and ordinary signification, fairly import a criminal charge, it is sufficient to render them actionable. * * * Whether or not the language used will bear the interpretation given to it by the plaintiff, whether or not it is capable of conveying the meaning which he ascribes to it, is in such a case a question of law for the court. * * *
>
> But upon demurrer to the declaration, words alleged to be libelous cannot be pronounced actionable by the court 'unless they can be interpreted as such with at least reasonable certainty. In case of uncertainty as to the meaning of expressions of which a plaintiff complains, the rule requires him to make the meaning certain by means of proper colloquium and averment.' *Wing* v. *Wing,* 66 Maine, 62."

In this case we are confined in our interpretation of the words set forth in the declaration, to the words themselves stripped of all allegations in the declaration which might constitute an inducement. This is the result of the specification above set forth which alleges "all of the foregoing charges and accusations concerning the plaintiff" were made in the words set forth in the declaration. *Niehoff* v. *Sahagian,* 149 Me. 396, *supra,* and *Brown* v. *Rouillard,* 117 Me. 55.

We unhesitatingly hold that the language set forth in the counts of the amended declaration is incapable of conveying the meaning therein ascribed to it by the plaintiff. Although the words alleged to have been used in each of the counts in this amended declaration are different from those used in the two amended counts in the declaration in *Niehoff* v. *Sahagian,* 149 Me. 396, *supra,* they are subject to the same infirmities.

They neither charge the commission of the crime of subornation of perjury nor do they charge the commission of any other crime. Nor do they accuse the plaintiff of misconduct in his office as an attorney-at-law. Every act alleged to have been done by the plaintiff by these words might be true, yet if the plaintiff did not know of the falsity of the testimony which it is alleged by these words he instigated Sahagian to give, or if his acts were performed in good faith on his part, the words were not defamatory as accusing the plaintiff of the commission of any crime or of any misconduct in his office as an attorney-at-law, nor were they capable of holding him up to hatred, ridicule or contempt. Nor are these intrinsically non-defamatory words rendered defamatory by the use of inducement and colloquium.

Both counts in the declaration were demurrable. The action of the presiding justice in sustaining the demurrers to each of the counts must be sustained and the exceptions overruled.

The entry will be

Exceptions overruled.

NELLIE E. RILEY

vs.

OXFORD PAPER COMPANY

AND

LIBERTY MUTUAL INSURANCE CO.

Oxford. Opinion, January 19, 1954

Workmen's Compensation. Arising Out of Employment.

Idiopathic Falls. Floor Level Falls.

An idiopathic fall is one occasioned by the physical condition of the victim as when an employee is suddenly overtaken by an internal weakness, illness or seizure which induces a fall.

Injuries from idiopathic falls may be compensable whenever some special or appreciable risk or hazard of the employment becomes a contributing factor.

An idiopathic fall to floor level, not from a height, not onto or against an object, not caused or induced by the nature of the work or any condition of the floor, is not compensable under R. S., 1944, Chap. 26, Sec. 8 since the injury is in no real sense caused by any condition, risk or hazard of employment.

The degree of hardness of a floor cannot be made the basis of appreciable risk since one might fall upon a cement floor without injury, while another might fall upon soft sand and break a wrist.

The court is not bound to accept a finding of fact by the Commission which is contrary to all the evidence.

ON APPEAL.

This is an appeal from a *pro forma* decree of the Superior Court affirming an award of the Industrial Accident Commission. Appeal sustained. Compensation denied.

Allowance of $250.00 ordered to petitioner for expenses of appeal.

Berman & Berman, for plaintiff.

Robinson & Richardson, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, WEBBER, JJ. TIRRELL, J., did not sit.

WEBBER, J. On appeal from a *pro forma* decree of the Superior Court affirming a decree of the Industrial Accident Commission awarding compensation to petitioner as widow of deceased employee.

The essential facts as found by the Commission are not in dispute. After lunch on August 23, 1951, decedent was walking along a loading platform toward the location of his afternoon work assignment. Suddenly he fell, the fall being observed by other employees. He was seen to clasp both hands to his left side or abdomen, and heard to give some sort of outcry. He then slumped slowly and sidewise, and then fell to the platform, his face striking on the left side. He was rendered unconscious and died four days later. The cause of death was a fracture of the skull with possible brain lacerations resulting from the impact of the head of the decedent upon the platform.

The platform at the point of fall was composed of plates of heavy steel about a quarter inch thick with a small embossed pattern. The pattern was present for safety purposes and was serving those purposes. The day was hot and dry. The platform was dry and free from obstructions or foreign substances such as water, oil, grease, or clay. The decedent did not slip, trip or stumble. His work had been light and there was no suggestion of overexertion. The fall was caused not by any condition of the employment or any risk or hazard connected therewith, but was caused solely and exclusively by a seizure or sudden illness within

and personal to the decedent. In short, as properly found by the Commission, we are considering what is known as an idiopathic fall on and to a level floor. Whether such an accident is compensable appears to be of novel impression in this state.

It is not disputed that decedent was injured by an accident, that the injury caused his death, and that the accident occurred in the course of his employment. The only issue is whether or not the accident *arose out of his employment* as required by R. S., 1944, Chap. 26, Sec. 8. Upon this question there is a decided split of authority and much confusion in the reasoning employed. As some of this confusion appears to have arisen from a failure to distinguish between types of falls and the reasoning applicable thereto, some discussion of the several classifications may be helpful. In this discussion we are aided by the valuable summary in Larson's Workmen's Compensation Law, Vol. 1, pages 96 to 106 inclusive and pages 158 to 175 inclusive.

UNEXPLAINED FALLS

Where the cause of a fall is entirely unknown, but the fall occurs in the course of employment, most courts allow compensation. The theory of compensability seems to rest on a strong inference amounting to a presumption that the injury would not have occurred except for some condition, risk, or hazard of the employment, and therefore *arose out of* the employment. It falls upon the employer to rebut the inference and explain the fall. *Mailman's Case,* 118 Me. 172. The same presumption arises and the same result is reached in the case of unexplained deaths which occur in the course of employment. *Moriarty's Case,* 126 Me. 358; *Westman's Case,* 118 Me. 133; see Larson, *supra,* page 101.

IDIOPATHIC FALLS

When an employee is suddenly overtaken by an internal weakness, illness, or seizure which induces a fall, such a fall is usually referred to as an idiopathic fall. The peculiar

aspect of such falls is that their originating cause is a physical condition personal to the victim and unrelated to the situation in which he happens to be or the external conditions of his employment. Injuries from such falls have, however, been held compensable whenever some *special and appreciable risk or hazard* of the employment has become a contributing factor.

Falls from a height. When an employee suffers an idiopathic fall in the course of his employment from a height above the level floor, compensation has quite uniformly been allowed, at least where the height is sufficient to constitute an appreciable risk or hazard of employment. *Baltimore Dry Docks* v. *Webster,* 139 Md. 616, 116 A. 842; *Santacroce* v. *Brick Works,* 182 App. Div. 442, 169 N. Y. S. 695; *Carroll* v. *Stables Co.,* 38 R. I. 421, 96 A. 208.

Falls onto objects. Compensation has usually been allowed for the results of idiopathic falls against objects which are present as part of the conditions of employment and which present some appreciable risk or hazard of employment. Examples of such objects are plant machinery, motor boxes, sawhorses, tables, posts and the like. *Industrial Com.* v. *Nelson,* 127 Ohio 41, 186 N. E. 735; *Varao's Case,* 316 Mass. 363, 55 N. E. (2nd) 451; *Ins. Co.* v. *Ind. Acc. Com.,* 75 Cal. App. (2nd) 677, 171 P. (2nd) 594; *Connelly* v. *Samaritan Hosp.,* 259 N. Y. 137, 181 N. E. 76; *Garcia* v. *Tex. Ind. Co.,* 146 Tex. 413, 209 S. W. (2nd) 333.

Idiopathic falls induced by nature of work. When an idiopathic fall is itself caused or induced by the nature of employment, it is compensable. A common example is the fainting spell or dizziness attributable to overexertion in employment. We allowed compensation when a watchman's leg pained and then collapsed as a result of exertion in making rounds and climbing stairs. *Webber's Case,* 121 Me. 410. The resulting fall was "tracable to his work" and caused by it.

Level floor falls—no special risk. When we reach consideration of the idiopathic fall to the level floor, not from a height, not onto or against an object, not caused or induced by the nature of the work or any condition of the floor, we are dealing with an injury which is in no real sense caused by any condition, risk or hazard of the employment. "To arise out of the employment, the injury must have been due to a risk of the employment." *Boyce's Case,* 146 Me. 335 at 341. "It is not sufficient to sustain an award that the employment occasioned the presence of the employee where the injury occurred." *Gooch's Case,* 128 Me. 86 at 91. As was stated in *Dasaro* v. *Ford Motor Co.,* 280 App. Div. 266, 113 N. Y. S. (2nd) 413, "The ground below is a universal and normal boundary on one side of life. In any epileptic fit anywhere, the ground or a floor would end the fall." It is true that a hard floor may enhance an injury, but in varying degree all floors are hard. All places of employment must have floors, be such floors only the hard packed soil of Mother Earth. We do not care to undertake the confusing task of determining from case to case when a floor is hard enough to constitute an appreciable risk or hazard and when not. One might fall heavily upon a cement floor without injury, while another might fall upon soft sand and break a wrist. We feel that the test of "hardness" of the floor too readily lends itself to a *reductio ad absurdum.*

We have reviewed with interest those cases which hold the contrary. They rest primarily upon the difficulty of distinguishing between falls from heights or falls against objects and falls from and to the level floor. Such a case was *Savage* v. *St. Aeden's Church,* 122 Conn. 343, 189 A. 599. This appears to have been a case of an *unexplained fall* and might have been decided on that ground. However, in a three to two decision, the majority announced the rule that idiopathic level floor falls are compensable. The dissenters insisted that such a rule disregards the "arising

out of employment" test. In accord with the *Savage* case, *Protectu Awning Shutter Co.* v. *Cline,* 154 Fla. 30, 16 So. (2nd) 342; *Barlau* v. *Minneapolis-Moline Power Imp. Co.,* 214 Minn. 564, 9 N. W. (2nd) 6; *Pollock* v. *Studebaker Corp.,* 97 N. E. (2nd) (Ind.) 631; *General Ins. Corp.* v. *Wickersham,* 235 S. W. (2nd) (Tex.) 215. In the *Wickersham* case *(supra),* the court pointed out that the fall was in fact unexplained, but went on to treat it as though caused by a "dizzy spell." The fall was upon a tile floor. In the *Pollock* case *(supra),* the fall was on a wood floor after the employee "blacked out." Here the court seems to lay stress on the *hardness* of the floor, a test which we cannot accept for the reasons above stated. The *Barlau* case *(supra)* was likewise a case of an unexplained fall, but the court treated the case as one involving an idiopathic level floor fall and held such falls compensable. The *Protectu* case *(supra)* involved a heart condition causing fainting spells, during one of which the employee fell upon a concrete floor. A dictum lends support to the compensability of idiopathic level floor falls, but the case seems on its facts to be one of an idiopathic fall *induced by overexertion.* The court cited in support of its holding *Brown's Case,* 123 Me. 424, which did not involve a fall, but which allowed compensation for an acute dilation of the heart *induced by overexertion* in shoveling snow.

Another line of cases denies compensation for idiopathic level floor falls. *Andrews* v. *L. & S. Amusement Corp.,* 253 N. Y. 97, 170 N. E. 506; *Cinmino's Case,* 251 Mass. 158, 146 N. E. 245; *Stanfield* v. *Industrial Com.,* 146 Ohio 583, 67 N. E. (2nd) 446; *Sears, Roebuck & Co.* v. *Industrial Com.,* 69 Ariz. 320, 213 P. (2nd) 672; *Remington* v. *Louttit Laundry Co.,* 77 R. I. 185, 74 A. (2nd) 442. The *Stanfield* case involved an idiopathic fall upon a concrete floor causing death. The court said in part, "The floor was in no sense an added risk or hazard incident to the employment. The decedent's head simply struck the common surface upon

which he was walking—an experience that could have occurred to him in any building or on the street irrespective of his employment."

In *Cinmino's* case *(supra)*, the employee in the course of his employment "made an outcry, threw up his hands, 'reeled around,' and for some physical reason not connected with his employment fell, striking his face on a concrete floor." He died as the result of a skull fracture. The court said:

> "We think there is no measurable distinction between the hazard of an employment where the floors are made of concrete and an employment where the floors are of hard wood, of soft wood, or of dirt, because of the fact that one material is of greater or less resiliency than another. To hold that a concrete floor in a place of employment is a danger which affects the risks which an employee encounters and is a hazard which arises out of an employment, would require a further holding, when the occasion arose, that any flooring of any material is a hazard of employment against which the statute gives compensation whenever there is a causal relation between the hazard and the injury. The causal relation in such a case is too remote and speculative for practical application."

It is only necessary for us to substitute the words "steel floor" for "concrete floor" in this statement in order to state the law which we deem applicable in the case before us.

As was stated in *White* v. *Ins. Co.*, 120 Me. 62 at 69,

> "In arriving at the above conclusion, we do not lose sight of the well settled rule that the Compensation Act should receive a liberal construction so that its beneficent purpose may be reasonably accomplished. Its provisions, however, cannot be justly or legally extended to the degree of making the employer an insurer of his workmen against all misfortunes, however received, while they happen to be upon his premises. Such was not the intent of the statute."

The Commission's decree states, "The lucid description of the manner of the fall and the contact with this particular type of flooring present to us an almost vicious condition under these particular and fortunately most unusual circumstances and clearly establish a causal relationship between the injury and the employment." We do not know what was intended by the use of the word "vicious." If it was intended to describe the condition of the floor, such a finding has no support in the evidence and is at variance with all the other findings of fact in the decree. The floor was merely hard. Apart from hardness, it presented no appreciable risk or hazard whatever to any employee in the course of his employment. We are not bound to accept a finding of fact by the Commission which is contrary to all the evidence. The evidence disclosed without conflict a fall from and to a hard level floor caused exclusively by some internal weakness or seizure personal to the decedent. Injuries resulting from such a fall are not compensable.

This being a case of novel impression in this state with serious and important questions of law involved, the Law Court orders the allowance of $250 to be paid to the petitioner by the respondent employer for expenses incurred in the proceedings of this appeal in accordance with R. S., 1944, Chap. 26, Sec. 41.

Appeal sustained.
Compensation denied.
Allowance of $250 ordered to petitioner for expenses of appeal.

BRUNSWICK CONSTRUCTION CO., INC.

vs.

GEORGE LEONARD ET AL.

Cumberland. Opinion, January 25, 1954.

Constitutional Law. Witness. Self Incrimination.

Article I, Sec. 6 of the Constitution of Maine and the Fifth Amendment to the Constitution of the U. S. protect a witness from giving evidence against himself.

ON EXCEPTIONS.

This case is before the Law Court upon exceptions to rulings excluding certain questions to a witness, denying plaintiff's motion for a directed verdict, and granting defendant's motion for directed verdict. Exceptions overruled.

Basil A. Latty, for plaintiff.

Harold J. Rubin, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, JJ. TIRRELL AND WEBBER, JJ., did not sit.

THAXTER, J. This is an action brought against the defendants jointly. There are two counts, one for the conversion of a motor truck belonging to the plaintiff which it is alleged that the defendants took without authority or permission of the plaintiff; the second count is in case alleging that they drove the truck to Edgecomb, in the State of Maine, where they carelessly drove it off the road whereby it was seriously damaged. They were alleged to be intoxicated. There are two crimes imputed here by the pleadings; one, taking a motor vehicle without the consent of the

owner; and the second, driving under the influence of liquor. The defendants pleaded the general issue. There was evidence that the defendants were intoxicated, but who was driving the vehicle, or who actually took it, or whether the intoxication of the driver had anything to do with the accident, does not appear. The defendants rested without putting in any defense.

The plaintiff put Baker on the stand and asked him certain questions which, if answered, might have elicited the necessary information as to liability. The witness refused to answer on the ground that the answers might tend to incriminate him. He was sustained in such refusal by the presiding justice, who explained to him what his rights were under both the state constitution, Article I, Sec. 6, and under the Fifth Amendment of the Constitution of the United States, both of which are to the effect that a witness is protected from giving evidence against himself.

The Fifth Amendment to the Constitution of the United States has been liberally construed by the United States Supreme Court in the case of *Counselman* v. *Hitchcock,* 142 U. S. 547, 585, 35 L. ed. 1122, as follows:

> "It is a reasonable construction, we think, of the constitutional provision, that the witness is protected 'from being compelled to disclose circumstances of his offense, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction without using his answers as direct admissions against him'."

We need cite only the language of our own court in the case of *Gendron* v. *Burnham,* 146 Me. 387, 407, to show how broad the privilege against self incrimination is:

> "An examination of the questions and the background against which they were asked and a consideration of the nature of the inquiry before the grand jury makes it apparent that nearly all,

> if not all, of the questions which the prisoner refused to answer could have been self incriminatory, within the rule set forth in *Counselman* v. *Hitchcock, supra,* and that in all probability most of the answers, if truly given, would have been of that nature."

From this language, construing both the Fifth Amendment to the Constitution of the United States and our own constitution, it is apparent that the privilege against self incrimination not only applies to a case where a witness is directly charged with a crime but to a case where he may be asked to disclose the circumstances of an offense, the sources from which, or the means by which evidence of its commission or of his connection with it may be obtained "without using his answers as direct admissions against him."

Using such interpretation of the privilege against self incrimination, it hardly needs to be argued that the privilege against it applies to the answers which were sought to be elicited from the questions asked of the witness Baker in this case.

He was asked to disclose where he was, and his answer to such inquiry might well have been the basis for the disclosure of what he was doing, even to giving information of whether he was driving the truck, which may have been in itself under the circumstances of this case a criminal offense either in taking the truck without permission, or of driving it while under the influence of liquor.

The ruling of the sitting justice excluding such evidence on the ground of privilege was undoubtedly correct. Without such evidence there was no case whatever against either one of the defendants here. The substance of the case against either one of them is not present. We can conjecture that they took the truck and drove it; but conjecture is not enough, as we many times have said. That is all that there is to this case.

The ruling of the presiding justice in excluding the questions to the witness Baker, in denying the plaintiff's motion for a directed verdict against the defendants, and in granting a motion for a directed verdict in favor of the defendants, were all correct.

Exceptions overruled.

EARL D. SANBORN
vs.
CHARLES L. STONE

Cumberland. Opinion, January 27, 1954.

Negligence.

The Law Court is not a second jury.

Where no exceptions are taken to the Judge's charge it is presumed to be correct.

A general motion for a new trial is based upon the proposition that injustice will plainly be done if the verdict is allowed to stand.

Violations of law may raise a presumption of negligence.

When vision is destroyed there is a duty to stop.

R. S., 1944, Chap. 19, Sec. 102, as amended.

ON MOTION FOR NEW TRIAL.

This is a negligence case before the Law Court upon defendant's general motion for new trial. Motion overruled.

James H. McCann,
Clinton T. Goudy, for plaintiff.

Robinson, Richardson and Leddy, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, JJ. TIRRELL AND WEBBER, JJ., did not sit.

FELLOWS, J. This is an action for negligence wherein the jury in the Cumberland County Superior Court rendered a verdict for the plaintiff in the sum of $16,000. The

case comes to the Law Court on the defendant's general motion for a new trial, except that no claim is made that damages are excessive.

The testimony is conflicting, but the principal facts that the jury could find from the record are briefly these: On February 6, 1952, at about 5:30 in the afternoon, an automobile owned and operated by Charles L. Stone, the defendant, struck and severely injured Earl D. Sanborn, the plaintiff, then engaged in shoveling slush and snow at the entrance of his own driveway at 1468 Washington Avenue in Portland. It was necessary for the plaintiff to shovel so that the water running in the street and along the ditch would continue past his driveway and not freeze in it. If the water froze in the driveway it was very difficult to drive in with an automobile without getting a start from across the street.

The plaintiff was a mechanic, 49 years of age, whose home had been here on the westerly side of Washington Avenue for more than a dozen years. He arrived home from work about 5:10 P.M. on this day. Washington Avenue, in front of the plaintiff's house and driveway, is black macadam. The street runs northerly and southerly, and the macadam is 36 feet, 6 inches wide, with a surface crowned in the center for drainage. There is a clear and unobstructed view for 1200 feet in a northerly direction and for 800 feet in a southerly direction. The grade is southerly and very slight. This section of the city is a built-up portion and residential.

On the westerly side of the street, northerly and southerly of the plaintiff's driveway, snow had been pushed aside or piled by the city plows. This plowing had caused a margin of snow four or five feet out from the westerly edge of the highway and five or six inches deep, although witnesses disagree as to width and depth. Outside of the snow, and on the edge of it, a stream of water two feet wide was flow-

ing southerly. Some water was coming into the driveway. The traffic was using the bare part of the way between snow bank and water on the western side, and the bare eastern side of the way—approximately twenty-nine feet wide.

The plaintiff says he was shoveling at a point two feet from the westerly line of Washington Avenue and two feet southerly from the northerly line of his driveway. He looked southerly and saw the lights of an approaching car, which was a car of one Graffam. Then looking northerly the plaintiff saw the lights of an automobile over 200 feet distant (which was afterwards determined as the defendant's), and this car the plaintiff says was then traveling near the center of the highway.

The plaintiff was shoveling snow and slush out of the entrance of his driveway and near the edge of the highway and under a street light. The traffic was using the portion of road that was free of snow. The defendant coming from behind him, according to the plaintiff, must have swerved toward him into the snow and struck him. There was no warning given by the defendant driver. The plaintiff heard the defendant's automobile hit the snow behind him, but he did not have time to straighten up. After striking the plaintiff, the defendant swerved to the left, went about 70 feet, and struck the approaching Graffam car, forcing the plaintiff further along with him before he stopped his car.

The defendant, who was 74 years old and who has been a physician for 50 years, told the police that "he was driving south on Washington Avenue and he was blinded by the lights of an oncoming car and he hit a man and another car." The defendant could not remember that he so told the police. The defendant's signed report said "car coming toward me with bright lights." The defendant testified that he saw "something in the road ahead but could not determine what it was" and after this he saw that there was a man 10 or 15 feet away, but he did not attempt to stop un-

til he hit the man and crashed into the side of the other car. He says he swerved and tried to avoid, instead of trying to stop.

The testimony describing the exact point where, and the manner how, the plaintiff was standing with relation to the side of the road, and how and where, and at what speed the defendant was proceeding with relation to the snow and water on the westerly side of the way, and whether the defendant's car swerved to right and then left, was conflicting, as is usual in automobile cases. The measurements of the engineer tend to show that, from the point where plaintiff was hit to the point where the defendant stopped his car, was 182 feet in a direct line. The testimony shows that the plaintiff was carried along by and with the defendant's car 90 feet after the defendant's car hit him, and that the defendant's car after it dropped the injured plaintiff at the side of the road, went 92 feet further before it stopped. The defendant claimed that the plaintiff was out in the dry portion of the road "leaning somewhat forward as if in the act of stooping," and that he, the defendant, was driving in the dry part of the way at the statutory speed of 25 miles an hour. The defendant said "I could see him from his knees up," which might indicate to the jury that the plaintiff was in the snow as the plaintiff testified. The plaintiff said he was only two feet out from the edge of the highway in the strip of snow, or snow bank, where no traffic had been proceeding.

The defendant claims no negligence on his part, and that the plaintiff's negligence was the cause, or contributing cause of the accident. The damages were severe but no question is raised as to the amount being excessive.

The defendant "estimates" he was traveling at a speed of 25 miles per hour, but from what happened, and the distance traveled before stopping, together with the testimony of other witnesses that the car "zipped by" and was going

"very fast," the jury would be justified in finding that the speed was greater. If he was going at a speed of 25 miles, as he says, was it excessive under the circumstances, should he have seen the plaintiff sooner, should he have stopped if blinded, and did he have his car under proper control when he saw "something" ahead and did not then know what it was?

As to the plaintiff's care, it depends on where the plaintiff was and what he was doing at the time. Was he in the exercise of ordinary care at the time and under the circumstances? Was he where he testified that he was, at the entrance of his driveway and about two feet from the westerly edge of the highway, and was this negligence, or was he on the dry part of the macadam near the center of the way which traffic was then using, as the defendant says?

The evidence here is to be viewed in the light most favorable to the plaintiff. *Daughraty* v. *Tebbets,* 122 Me. 397, 120 A. 354, and general rule is that when the testimony is conflicting the verdict will stand. *Moulton* v. *Railway Co.,* 99 Me. 508, 509, 59 A. 1023; *Spany* v. *Cote,* 144 Me. 338, 343; *Gosselin* v. *Collins,* 147 Me. 432.

Where no exceptions are taken to the charge of the presiding justice, it is presumed that the charge correctly presented to the jury the applicable propositions of law. *Barlow* v. *Lowery,* 143 Me. 214, 219.

The burden which the proponent of a motion to overturn a verdict assumes, has been long and often declared. In determining the issue the Law Court must proceed upon the theory that the jury had a right to accept the testimony of the plaintiff's side as true, and to reject all the testimony of the defendant's side as untrue, mistaken, or unsatisfactory, unless the testimony, including the circumstances and probabilities, reveals a situation that proves the testimony on the plaintiff's side to be inherently wrong. *Daughraty* v.

Tebbets, 122 Me. 397, 398; *Eaton* v. *Marcelle,* 139 Me. 256; *Huntoon* v. *Wiley,* 142 Me. 262, 49 A. (2nd) 910.

A general motion for a new trial, is based on the proposition that injustice will plainly be done if the verdict is allowed to stand. It is a motion that asks that the verdict be set aside because it is against the evidence, and the weight of evidence, and that it is against the law, and that the damages are excessive (no excess of damages is claimed here). Under our system, if a jury hears and determines disputed facts, that determination is final, unless so clearly wrong that it is apparent that the verdict was the result of prejudice, bias, passion, or a mistake of law or fact. The court cannot, and does not, pass upon credibility or number of witnesses. If the evidence in support is substantial, reasonable, coherent, and consistent with circumstances and probabilities, the verdict should stand. The values of conflicting bits of testimony are for the jury, and the burden of showing, to the satisfaction of the court that the verdict is manifestly wrong, is upon the one seeking to set it aside. *McCully* v. *Bessey,* 142 Me. 209, 212. *Towage Co.* v. *State of Maine,* 142 Me. 327.

Violation of law, if proven by the evidence, is sometimes prima facie evidence of negligence, and as otherwise expressed, raises a presumption of negligence. While not conclusive, the defendant must overcome the presumption against him. *Rouse* v. *Scott,* 132 Me. 22, 164 A. 872; *Nadeau* v. *Perkins,* 135 Me. 215, 216.

One may assume at all events, until the contrary appears, that approaching automobile will be driven carefully. The plaintiff is not bound to anticipate negligence on the part of their drivers. *Davis* v. *Simpson,* 138 Me. 137, 145; *Ross* v. *Russell,* 142 Me. 101, 105.

No man is entitled to operate an automobile when his vision is destroyed by a glaring light, it is his duty to stop

his car. He must not proceed upon his way under circumstances of doubt. He must know what is ahead, or failing to know, should bring his car to a stop. *Cole* v. *Wilson,* 127 Me. 316; *House* v. *Ryder,* 129 Me. 135; *Haskell* v. *Herbert,* 142 Me. 133; *Spang* v. *Cote,* 144 Me. 338, 344.

The jury may have reasoned that the defendant should have applied his brake when he became temporarily blinded by lights (if he was blinded), without waiting until he saw the plaintiff in front of his radiator when it was too late to save him. Such reasoning was not erroneous. *Day* v. *Cunningham,* 125 Me. 328, 330, 331. Section 34, Chapter 19, R. S., 1944, provides that automobile must be equipped with front lamps capable of rendering any substantial object clearly discernible at least 200 feet ahead and at the same time at least 7 feet to the right of the axis of such vehicle for a distance of at least 100 feet.

It is agreed that the locus of this accident is within the definition of "compact or built up" as set forth in Subsection IV of R. S., Chapter 19, Section 102, as amended by 1949, Chapter 38, Sections 7, 8, and 1951, Chapter 292, Section 3. Accordingly the prima facie lawful speed limit at the scene of the accident was 25 miles per hour. Revised Statutes, 1944, Chap. 19, Sec. 102, Subsection II, Para. C.

The Law Court cannot substitute its own judgment for that of the jury when there is sufficient evidence upon which reasonable men might differ in their conclusions. *Frye, Lounsbury* v. *Kenney,* 136 Me. 112; *Perry* v. *Butler,* 142 Me. 154, 161; *Esponette* v. *Wiseman,* 130 Me. 297, 155 A. 650; *Shannon* v. *Baker,* 145 Me. 58, 71 A. (2nd) 318; *Daughraty* v. *Tebbets,* 122 Me. 397, 398; *Mizula* v. *Sawyer,* 130 Me. 428, 430; *Eaton* v. *Marcelle,* 139 Me. 256; *Wyman* v. *Shibley,* 145 Me. 391, 79 A. (2nd) 451.

This is true even though it may seem to the Law Court that the evidence as a whole preponderates against the jury

finding. *Barlow* v. *Lowery,* 143 Me. 214, 220; *Jannell* v. *Myers,* 124 Me. 229, 230; *Burchell* v. *Willey,* 147 Me. 339.

While the standard of care required is that which would be exercised by an ordinarily prudent person, it is only that degree of care which such person would use under the same circumstances. *St. Johnsbury Trucking Co., Inc.* v. *Rollins,* 145 Me. 217.

It is not the care of the very careful person, nor is it the care of the careless person. It is the care to be used under the circumstances by a person who is ordinarily careful and prudent. *Torrey* v. *Congress Square Hotel,* 145 Me. 234, 244. As a practical proposition this "ideal" man of ordinary foresight and prudence is usually a composite picture drawn from the combined ideas, knowledge, feelings, and experiences of the members of a jury, which picture may exonerate from blame, or fix a liability. Negligence, therefore, is the failure, in the opinion of the jury, to act as would the usual and prudent man of ordinary intelligence. *Towage Co.* v. *State,* 142 Me. 327, 334.

We have examined carefully the excellent and comprehensive brief filed by counsel for the defendant and have considered the cases cited therein. No case is called to our attention that varies the rules above stated. The case of *Mahan* v. *Hines,* 120 Me. 371, 378 cited by defendant, was an action for death and no living person testified as to how it happened, or whether the deceased fell off or jumped off the train, and the court held that "inferences based on mere conjecture or probabilities will not support a verdict." In *Cooper* v. *Can Company,* 130 Me. 76, 87, the pedestrian comes out from a position of complete obscurity, suddenly and directly into the path of the car and was struck. In *Page* v. *Moulton,* 127 Me. 80, the pedestrian "took a chance of crossing the street between two passing automobiles then thirty feet apart." In *Bernstein* v. *Carmichael,* 146 Me. 446, a six year old minor was found injured under parked car,

no witness saw him crossing the road, and no direct evidence that he was struck by defendant's car—the scintilla rule does not apply in Maine. In *Shea* v. *Hearn,* 132 Me. 361, the question whether automobile of the defendant went off the road because of excessive speed, or because of inattention, or by reason of failure to keep it under proper control, was left to the jury to determine. The cases cited by defendant of *House* v. *Ryder,* 129 Me. 135, *Haskell* v. *Herbert,* 142 Me. 133, *Cole* v. *Wilson,* 127 Me. 316, *Baker* v. *McGary Transportation Co.,* 140 Me. 190, *Dietz* v. *Morris,* 149 Me. 9, involved the question of headlights or blinding lights, and the rules given above of due care are applied. The case of *Dietz* v. *Morris,* 149 Me. 9, cited by the defendant, affirms the rule in *Spang* v. *Cote,* 144 Me. 338. In *Byron* v. *O'Connor,* 130 Me. 90, cited by defendant, the majority opinion holds the same rule of care to apply in an emergency, and in this case new trial granted because jury not justified to find negligence for applying brakes on a slippery highway under the circumstances. Two justices dissent. In *Milligan* v. *Weare,* 139 Me. 199, a pedestrian crossing street "cannot walk into danger." The case of *Rossier* v. *Merrill,* 139 Me. 174, cited by defendant, involved the care by defendant in a head-on collision where emergency was caused by failure of steering gear of plaintiff's car through breaking of tie rod. In *Tibbetts* v. *Dunton,* 133 Me. 128, plaintiff was changing a tire in the highway and oblivious of approaching traffic. In *Barlow* v. *Lowery,* 143 Me. 214, pedestrian at night, walking on right side of highway with back towards approaching traffic end engaged in conversation with companion. Jury evidently found contributory negligence of plaintiff. Verdict was for defendant.

If we apply the rules of law, stated in the foregoing cases, to the facts as shown by the record in the case at bar, the defendant's motion for a new trial must be overruled.

There was conflicting evidence and the jury has passed upon it. There was testimony tending to show how, when, where, and under what circumstances the plaintiff was working, and there was also evidence to answer the same questions with relation to the defendant's operation of his car that caused the injury. The court might have reached a different conclusion had the case been submitted to the Law Court, on report, in the first instance, but the court cannot now say that the jury verdict is "manifestly wrong." "We are not, of course, a second jury," as was said by Williamson, J., in *Hunt, Hersey* v. *Begin and Dow,* 148 Me. 459, 460.

It does not appear from the record that the verdict was "the result of prejudice, bias, passion, or a mistake of law or fact."

Motion overruled.

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE LAW COURT AT PORTLAND, OCTOBER 14, 1953,

IN MEMORY OF

HONORABLE CHARLES PUTNAM BARNES

Late Chief Justice of the Supreme Judicial Court

Born October 12, 1869 Died December 14, 1951

AND

HONORABLE NATHANIEL TOMPKINS

Late Associate Justice of the Supreme Judicial Court

Born May 17, 1879 Died April 22, 1949

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, WEBBER, JJ.

HON. AARON A. PUTNAM, of the Aroostook Bar Association addressed the court as follows:

MAY IT PLEASE THE COURT:

At the request of the Aroostook Bar Association I am instructed to ask this Honorable Court to pause for a brief time and permit Committees of the Aroostook Bar Association to present some resolutions and submit some remarks as a tribute to the lives, character and attainments of the late Charles P. Barnes, a former Chief Justice of this Court; and of the late Nathaniel Tompkins, a former Associate Justice of this Court. Resolutions in each case have been prepared by a Committee of the Aroostook Bar Association and will now be presented, with the request that they be entered upon and become a part of the records of this Court.

AARON A. PUTNAM

President of the Aroostook Bar Association

HON. SCOTT BROWN of the Aroostook Bar Association then addressed the Court:

MAY IT PLEASE THE COURT:

It is with a great sense of sorrow and personal loss that I formally bring to the attention of this Court the death of Charles P. Barnes, former Chief Justice of the Supreme Judicial Court of this State, on December 14, 1951.

To me he was one of the elder statesmen. I believe that the remarks of the late Chief Justice Charles Evans Hughes, made at a meeting of the American Law Institute at Washington, D. C., May 7, 1936 with reference to the late George Wickersham, are appropriate on this occasion. Chief Justice Hughes said:

> "The highest reward that can come to a lawyer is the esteem of his professional brethren. That esteem is won in unique conditions and proceeds from an impartial judgment of professional rivals. It cannot be purchased. It cannot be artificially created. It cannot be gained by artifice or contrivance to attract public attention. It is not measured by pecuniary gains. It is an esteem which is born in sharp contests and thrives despite conflicting interests. It is an esteem commanded solely by integrity of character and by brains and skill in the honorable performance of professional duty. No subservient 'yes man' can win it. No mere manipulator or negotiator can secure it. It is essentially a tribute to a rugged independence of thought and intellectual honesty which shine forth amid the clouds of controversy. It is a tribute to exceptional power controlled by conscience and a sense of public duty, — to a knightly bearing and valor in the hottest of encounters. In a world of

> imperfect humans, the faults of human clay are always manifest. The special temptations and tests of lawyers are obvious enough. But, considering trial and error, success and defeat, the bar slowly makes its estimate and the memory of the careers which it approves are at once its most precious heritage and an important safeguard of the interests of society so largely in the keeping of the profession of the law in its manifold services."

In behalf of the committee appointed by the President of the Aroostook County Bar Association I desire to present the following resolutions:

RESOLVED: That the members of the Aroostook County Bar Association desire to express their appreciation of the life, character and public service of the late Justice Barnes, and to place upon the records of this Court a tribute to the memory of the man they knew, honored and respected.

RESOLVED: That he was a generous and public spirited citizen, having close to his heart the welfare of the State and the communities in which he lived. In private life he was a man of exemplary and unspotted character. He was true to his friends, the number of whom was only limited by his acquaintance.

RESOLVED: That while we recall with pride his long outstanding career as a public official and able lawyer, and especially the honor and distinction he brought to the County of Aroostook by being the only Chief Justice from that County in the history of the State, yet we also remember and respect his simplicity, his old-fashioned virtue, his broad human understanding, his dislike of sham, his love of nature, and his devotion to his family and friends. There was about him something of the simple tastes and manners of the old school, and he left a memory in which affection

and respect are both combines which will long endure with the members of the profession which he loved and adorned.

He believed in the higher ideals in life; his instincts were all true to the nobler things. He was democratic, yet he was uncompromising toward all that is base or sordid. He had a keen sense of humor which often came to his relief in some of the trying circumstances of his judicial position.

For his pure and honorable life, for his high character, his love of truth and justice, and for the credit he reflected upon the legal profession and the courts of our State, his friends and associates will long remember him. The grateful remembrance of the men of his own times will follow him while they live; the legislative records of Maine, the records of the highest court of his State, the law reports of Maine, will be permanent and final witnesses of his work and his fame.

RESOLVED: That we present these resolutions to this Court respectfully requesting that they be entered upon its permanent records.

For the Aroostook County Bar Association
SCOTT BROWN

HON. JAMES P. ARCHIBALD, Member of the Aroostook Bar, then addressed the court:

That memorial services should be held for the late Chief Justice Charles P. Barnes is, in accordance with tradition, entirely proper. In this manner there can be spread upon the permanent records of the Court words, of themselves inadequate, but descriptive of the respect and affection which was felt by the members of the Bar for him. It is a great honor to have been asked to assist in this ceremony, and, recalling the close personal relationship that existed between my father and mother and Justice Barnes, or "Cousin Charles" as we knew and thought of him, it was accepted with humility.

It is also appropriate that the Resolution previously sub-

mitted and these remarks should emanate from Aroostook County and, in particular, from Houlton, for Judge Barnes, in both the literal and figurative sense, was a native of Aroostook and Houlton. In 1805 his great grandfather, Aaron Putnam, started to clear land in what is now Houlton and, in 1809, moved onto this land with his family. These were the first settlers and, from this humble beginning, the Aroostook was developed. Local history is filled with tales of hardship, the pioneer courage and the great faith that inspired his ancestors and gave them the courage to engage successfully in an eternal battle with the elements. Charles P. Barnes inherited these characteristics. A study of his life illustrates again and again the basic characteristics inherited from his forefathers. His success, both as a citizen and as a jurist, was based on hard work, courage and a great faith in the dignity of man.

Justice Barnes was a man of deep religious conviction. His grandfather, Phineas Barnes, was an ardent member of the Baptist Church and his father, Francis, was one of the original trustees and founders of the Court Street Baptist Church in Houlton where, at the time of his death, Judge Barnes had the longest continuous membership in the Church. It should also be said that during all of the years of that membership, he was a leader and an active worker in all the activities of the Church, thereby putting his religious convictions into practice.

At the time of his death, his son, Brother George B. Barnes, himself a distinguished and successful member of the Bar, wrote the obituary which appeared in the public press. It is felt both fitting and proper, to complete the factual aspects of the life of Justice Barnes, to incorporate herein the words of his son.

> "A native of Houlton, where he made his home for more than 60 years, he was born here October 12, 1869, the son of the late Francis and Isa (Putnam) Barnes.

After attending the public schools of this town, he continued his education at Ricker Classical Institute, then Houlton Academy. He later attended Colby College from which he was graduated in 1892 with the degree of Bachelor of Arts.

He began his public career in the field of education, becoming principal of the high schools at Norway and Lisbon Falls, Maine, and at Attleboro, Mass. He returned to Norway in 1896 to become superintendent of schools and it was at this time that his interest turned toward the legal profession.

He started reading law in the office of Judge Joseph W. Symonds of Portland and was admitted to practice before the Maine bar in 1900. He opened offices in Norway and early gave signs of the eminent position he was ultimately to attain in his chosen profession. He was elected county attorney of Oxford County in 1904, serving until 1909. For the next two years he served with distinction as deputy attorney general of Maine.

On August 12, 1896 he was married in Norway to the former Annie Maude Richardson of that town, also a graduate of Colby College. Death claimed Mrs. Barnes, October 18th, 1951, less than two months prior to the passing of her husband.

In 1911, already recognized as one of Maine's outstanding attorneys, the future Justice Barnes moved, with his family, to the place of his birth in Houlton.

He entered into a law partnership with the late Congressman Ira G. Hersey, under the name of Hersey and Barnes, which gained recognition throughout Maine. It was terminated in 1917 when Mr. Hersey was elected to Congress from the then Fourth Maine District.

During the 13 years which elapsed between the beginning of his practice in Houlton and his appointment as an Associate Justice of the Maine Supreme Judicial Court by former Governor Percival P. Baxter, the star of his ascendency in his

profession rose rapidly as well as did his recognition as a leading political figure throughout the State.

Despite a flourishing law practice that brought him into prominence in many a famous criminal and civil trial of that era, both in Aroostook and elsewhere in Maine he found time to serve as Food Administrator for this county during World War One and to serve the town of Houlton as its representative to the legislature for three successive terms, in 1917, 1919 and 1921.

He became Republican floor leader of the House of Representatives during his second term and, in 1921 was elevated to the Speakership, a position in which he achieved distinction as an able parliamentarian. He was later followed in the same office by his son, Sen. George B. Barnes, who occupied the post in 1945.

He was selected as the keynote speaker of the Republican state convention in 1922 and, in the ensuing two years, was prominently mentioned as a candidate for the Republican nomination for Governor of Maine. He turned a deaf ear to all these appeals, however, and continued to engage in his profession until early in 1924 when his appointment to the Supreme Court bench automatically retired him from the political scene and from the active practice of law.

He served as a member of the state's highest tribunal for the ensuing 16 years with a distinction that won full recognition in 1939, when he was appointed Chief Justice of Maine by former Governor Lewis O. Barrows. He held this state's highest judicial office until 1941 when, in his 71st year, he retired from the bench as well as from the active practice of law.

He was a past master of Oxford Lodge of Masons, of Norway, was a Knight Templar and a member of the Sons of the American Revolution. At the time of his death, he had the longest continuous membership in the Court Street Baptist

Church of Houlton, of which his father, the late Francis Barnes, was one of the original trustees. He was baptized into membership at the age of 17.

He was a charter member of the Houlton Rotary Club and was long an honorary member of that organization. He acted for many years as a trustee of the Cary Library and had often served his community as moderator at its annual town meeting as well as in many other capacities of public service, including a long tenure as a member of the Superintendent School Committee.

While in Colby College he was active in athletics as a pitcher on the baseball team and was a member of the Delta Kappa Epsilon fraternity. He served his alma mater for many years as a member of its board of trustees and also served Ricker Classical Institute for a long period of time in the same capacity.

In the case of Ricker, he accepted the responsibility as general chairman of the drive to raise funds for the rebuilding of the institution after the destruction of its main building, Wording Hall, by fire in 1944.

He belonged to the Aroostook County, the Maine State and the American Bar Association. A little known service to his state was contributed from 1913 to 1921 when he was commissioner for Maine of the National Commission on Uniform State Laws.

In addition to earning his Bachelor of Arts degree from Colby College, he was still further honored by his alma mater as the recipient of two honorary degrees, those of Master of Arts in 1893 and Doctor of Laws in 1927. The University of Maine similarly honored him with the bestowal of an honorary Doctor of Laws degree as did the University of Michigan from whom he received the degree of Master of Arts in 1923."

In conclusion, may I, as a younger lawyer but one who has an active memory of our late Chief Justice Barnes, ex-

press in simple phraseology, those traits of character which made him the leader that he was? Kindness and consideration seemed inherent. Whether in Chambers, on the street or in his home one was always met with the same smile, friendly greeting and wise advice. He loved nature, not in the sense of him who purchased his recreation, but as one who, in old clothes, worked with his hands in the garden on the farm just beyond Houlton which he loved, and as one who spent days and weeks in his rustic camp on Township B where, every fall, his sons would gather to be with him during the hunting season, as one who loved the beauties of nature, the flowers, trees and wild animals. His was the old-fashioned household where the common things were enjoyed and the basic truths impressed upon his children through his example. Things such as these made the man whose memory we honor today. It is a humble privilege to second the Resolutions presented.

JAMES P. ARCHIBALD

HON. GEORGE B. BARNES, member of the Aroostook Bar Association next addressed the court:

MAY IT PLEASE THE COURT:

At the request of the Committee on Memorials, I regretfully announce the death of Nathaniel Tompkins, and I shall shortly present the resolutions proposed by that committee.

MEMORIAL FOR
MR. JUSTICE TOMPKINS

For thirty years, Judge Tompkins was more than a mere acquaintance of mine; he was my friend. When a sophomore at Ricker Classical Institute, in 1919, I served as court messenger at Aroostook's *nisi prius* terms and became acquainted with Than Tompkins, who was at that time a young law partner of Thomas V. Doherty. Over the

years, through my college and law school courses he was my friend, offering generously of his counsel and encouragement and, at the September, 1929, term of the Supreme Judicial Court in Caribou, Brother Tompkins moved my own admission to the bar. Our friendship continued through a dozen years of practice as brother attorneys before the bar, and almost as many more years while he served his county and state as Justice, first of the Superior Court and later the Supreme Judicial Court, which high position he occupied at his untimely death. It is therefore with real sorrow and a sense of personal loss that I regretfully announce his death, which occurred after a brief though severe heart attack suffered while on his way to his office on April 22, 1949.

Nathaniel Tompkins was born in Bridgewater, Maine, on May 17, 1879, the son of Nathaniel and Emma Sargent Tompkins. He was educated in the public schools of Bridgewater. He attended Ricker Classical Institute and received his A.B. degree from Colby College in 1903. He then attended Harvard Law School where he received his LL.B. in 1907. Shortly thereafterward he was admitted to the Maine Bar and practiced law in Houlton continuously thereafter until October 9, 1941, when he was appointed to the Superior Court Bench.

On June 17, 1913, Nathaniel Tompkins married Ragnhild L. Iverson, who, with one daughter, Sigrid E. Tompkins, survives him. The latter is a member of the bar, presently practicing law in Portland, Maine.

His practice was of the type that demonstrated the complete confidence placed in him by the general public. He handled many estates through the probate courts with ability, competence, and integrity. To his office flocked widows and orphans, and his handling of their affairs was invariably excellent. He served as attorney for several of

the Houlton banks and was president of the Houlton Savings Bank for many, many years.

Mr. Justice Tompkins served his town and state as Selectman, Representative to the Legislature, and State Senator. He served as chairman of the first research committee of the legislature. The work of that committee, in its investigation of the robbery from the Lewiston motor vehicle registration office was outstanding. His part in the work of that committee was such that it was, and still is commonly known as the "Tompkins Committee." It has ever since served as a model for subsequent legislative research committees.

Judge Tompkins was Speaker of the House in 1935 and President of the Senate in 1941. In those capacities he both graced and dignified the legislative bodies over which he presided.

During the later years of his life, Judge Tompkins gave unstintingly of his time and abilities to Ricker Classical Institute and Junior College, serving as trustee. It must have pleased and gratified him to see the latter become a full four year college prior to his death.

I would like to add a few words as to Mr. Justice Tompkins' outstanding abilities on the bench. As a trial judge, on the Superior Bench, he was learned and impartial. We who tried causes before him were continually struck by these valued attributes.

On the Supreme tribunal of this State his innate common sense and his keen legal mind came to their full fruition. Needless to say he has been and will continue to be missed on that tribunal.

Now, if it may please the court, I present the following resolutions:

RESOLVED: That the members of the Aroostook Bar Association desire to express their deep appreciation of the

life and character of the late Nathaniel Tompkins, for forty-two years a prominent and respected member of their Association and to place upon the records of this Court a tribute to the memory of the man, the lawyer, and the judge whom they knew and loved.

RESOLVED: That, in his death, the State has lost an active and resourceful leader, his town, county, and State, a patriotic and public-spirited citizen, his family, a beloved husband and father, and his friends, a comrade whose memory they will long cherish. As a lawyer he was a wise counselor whose career at the Bar was characterized by devotion to his clients, fair and courteous treatment toward his opponents, and fidelity to the Courts. As a judge he was an able and learned arbiter, impartial in his rulings, kindly toward opposing advocates, and just in the judgments and decrees he pronounced. With his family he was a good husband and a kind and indulgent father; with his friends, a true friend indeed.

We of the bar mourn his passing which has left a great void in our midst and a very real sorrow in our hearts.

RESOLVED: That these remarks and resolutions be presented to the Court with the request that they be entered on its permanent records and that a copy be sent to our Brother's family conveying our deepest sympathy.

GEORGE B. BARNES

HON. LEONARD A. PIERCE, member of the Cumberland Bar Association, formerly of the Aroostook Bar, next addressed the court:

MAY IT PLEASE THE COURT:

There are some few men of such character and standing that to be publicly recognized as among their friends is a real honor. Such a man was Justice Tompkins and for that reason I am deeply appreciative of being asked to renew my

affiliation with the Aroostook Bar by taking part with them in these exercises.

Personal reminiscences are hardly appropriate on such an occasion. On the other hand, my close association with him over so many years is perhaps somewhat in point because it necessarily connotes opportunity of my knowing the real worth of the one whom you are met to honor.

We were in preparatory school together, Law School together, worked together and played together. Like so many other Americans of outstanding accomplishment, he taught school to earn part of his college and law school expenses, and thus his admission to the Bar preceded mine by less years than the difference in our ages. I was best man when he was married, our wives are intimate friends, his daughter is one of our partners.

I mention all that only because it shows how well I knew him, and from what accurate knowledge I can certify to the value of his friendship, his character and his service to his Community and State.

I do not know anyone who had greater innate modesty as to his own attainments or would more sincerely dislike any extravagant eulogy. Be that as it may, we are speaking today from and for the record, and choosing my words carefully I cannot say less than that I have never known here or elsewhere, a fairer, better, more useful man, citizen, lawyer or judge than he.

He was naturally a friendly man and his friendship was all inclusive, he liked people and they liked him. The younger men of his acquaintance who were in the service will remember the sincere interest he had in all of them, where they had been, what they had done, the warmth with which he greeted them on their return.

I am in no way forgetting that his legal skill and abilities were of high order. As both opponent and associate when

he was in practice or when before him as a Justice of both the Superior and of this Court, I have too often been impressed by them, but the longer my experience at the bar, the more I am convinced that *patience, fairness and sound sense such as he possessed in marked degree* are outstanding among the characteristics which make outstanding judges. Justice Tompkins was that type of judge who never forgot that judicial decisions determine the rights not of some supposititious persons but of real men and women, living people of our State, and that the principles established by such decisions will affect the rights of other men and women far into the future.

While he was always mindful of the principle of *stare decisis,* that the function of the judge is not to legislate and thus make new law to accomplish his personal conception of the desirable result in the case then at bar, he also understood the basic aim of our jurisprudence—that fairness prevail over unfairness, justice over injustice. He realized as well as any lawyer or judge I have known that too often the lawyer who seeks to use an established legal principle to effect an unjust result has either failed to grasp the real basis of that principle, and thus errs in the application which he advocates, or fails to recognize that if the reason for a rule has long since ceased the rule itself has become obsolete. Otherwise the common law would be static not growing, dead not living.

Judge Tompkins was a true son of Aroostook. He was born in that county, received his preliminary education there, taught there, practiced there and died there.

He served Houlton, his adopted town, in the House of Representatives three years, 1931, 1933, and 1935, being Speaker the last year and was in the State Senate from Aroostook in 1939 and in 1941, again closing his service in that body as its presiding officer. Everyone who happened to be in or about the Legislature in those years knows the

respect and affection in which he was held by the members of both parties and the fairness and ability with which he presided over both bodies. He was appointed to the Superior Court in 1941 and to the Supreme Court in 1945. Just as his outstanding service as Speaker of the House brought about his election as President of the Senate, his service on the Superior Court resulted in his appointment to the Supreme.

A few years after Justice Tompkins' appointment to this Court, I happened to be discussing with Justice Thaxter, then and now your senior Associate, the characteristics of different Justices whom he and I had known. Entirely unsolicited by me, he said, "Than Tompkins' good judgment, common sense and innate fairness make him one *of the most useful* members of the Court."

Because of my regard for the judgment of Justice Thaxter, I have always remembered that conversation, and before preparing these remarks I obtained his permission to quote him. I sincerely believe the description "useful" which he applied to the judicial service of his friend and associate is among the highest which any man can hope to earn.

Whatever our religious beliefs may be we must all recognize that a man who has so discharged his duties, so met his responsibilities, that an associate, of outstanding ability and long experience, applies the phrase "one of the most useful" to his service on this Court has served well the purpose for which he and we all came into this world. No man at the close of his career could wish a better accolade than that his service on the Supreme Court of his State be so characterized by one of those best qualified to appraise it.

I am sure that I speak not only for the Aroostook Bar but for that of the whole State in paying tribute to the personal character and the public service of Justice Tompkins.

LEONARD A. PIERCE

Response for the Court by Chief Justice Edward F. Merrill:

The Court willingly accedes to the request of the President of the Aroostook Bar Association. At the close of this term of the Court sitting as a Court of Law we gratefully receive the respective tributes of affection and respect in memory of those two honored and beloved former members of this Court, Honorable Charles Putnam Barnes, former Associate Justice and later Chief Justice of this Court, and Honorable Nathaniel Tompkins, former Associate Justice.

It is most fitting that members of the County Bar Association of which both of these Justices were long members should seek to honor their memories by presenting suitable resolutions of respect and memorial addresses setting forth their virtues and accomplishments, that the same may be included in the permanent records of this Court of which they were honorable and honored members.

While we regret that occasion for this action by the Court has arisen, yet it is a pleasant duty to see to it that the virtues, accomplishments, and character of these honored former members of this Court be spread upon its records as permanent memorials to their memories.

It was my good fortune to know both of these men before their elevation to the bench.

Chief Justice Barnes I first met when he was a member of the House of Representatives at Augusta at the session of the 78th Legislature in 1917. I there became impressed with his brilliant and scintillating mind, his earnest devotion to the accomplishment of those things which he believed to be right, and his unquestioned integrity.

His choice as Speaker of the House was a tribute by his fellow legislators to his ability, his keen and immediate grasp of legislative problems, and his fairness and integrity.

In addition to the foregoing characteristics he had a keen legal mind and a sound knowledge of the law. These things being recognized by all it was but natural that his elevation to the bench of this Court soon followed.

His service upon the bench of the Supreme Judicial Court from April 8, 1924 to November 21, 1939 as an Associate Justice, and from November 21, 1939 to July 31, 1940 as Chief Justice was a distinguished one.

As a presiding Justice at nisi prius, for the Supreme Court was on circuit from the time of his appointment until 1930, he is well remembered by the older members of the bar. His keen grasp of affairs and his knowledge of human nature was such that he easily detected sham and attempts to pervert the course of justice. In presiding over the terms at *nisi prius* he was no mere moderator. He was imbued with the spirit that justice under the law should prevail and woe to the attorney who attempted obstructive or dilatory tactics. On the other hand, with rare kindness he could see to it that the young and inexperienced attorney, with manifest justice on his side, did not suffer at the hands of his more experienced and perhaps ruthless opponent.

His work upon the Law Court was painstaking and thorough. It was but natural that upon the unexpected death of Chief Justice Dunn, upon the eve of Judge Barnes' contemplated retirement from the Court, he was honored by being appointed Chief Justice so that he could finish his distinguished career as the presiding Justice over this Court. Of the present Court but one of our members, Mr. Justice Thaxter, had the pleasure of serving with and under him. Of him and his service the latter speaks with highest commendation.

Chief Justice Barnes was essentially a man of simple tastes and great humanity. With these characteristics, and being endowed with a brilliant and trained mind and having

a willingness to work, the honors which he received were well deserved.

He resigned from the Court after sixteen years of service and spent the remaining years of his life surrounded by his family and friends, honored and respected by all with whom he came in contact.

It was my good fortune to become acquainted with Justice Tompkins when he was an undergraduate at Colby College and I an undergraduate in neighboring Bowdoin College. We were intimate friends in law school. That friendship begun more than fifty years ago continued to the date of his death. In passing, I would note that he and Justice Thaxter were classmates in law school.

"Than" Tompkins, as his intimates always called him, was a rugged individualist. The success which he achieved was due to his own efforts, his hard work, his impeccable honesty and the resulting trust which he inspired in his fellowmen. He had an honored career at the bar in his native County of Aroostook. He was the sound adviser of many clients. He was elected to the Legislature and in 1935 was Speaker of the Maine House of Representatives. Later he was elected to the Maine Senate and was its President in 1941. While President of the Senate he was appointed a Justice of the Superior Court on October 9, 1941. He continued in this position until he was appointed an Associate Justice of this Court on August 23, 1945. As heretofore stated, he died in office on April 22, 1949.

On the Superior Court his sound legal training and legal attainments, his broad knowledge of business affairs, his understanding of human nature, his instinctive sense of justice and his essential humanity made him an ideal presiding Justice. He thoroughly enjoyed his work at *nisi prius* and had his health permitted him to continue on the circuit, it is extremely doubtful whether he would have accepted the proffered appointment to this Court.

On the Supreme Judicial Court Judge Tompkins was a valued member in council and his views carried great weight with his fellow members of the Court. His opinions were well reasoned and sound. They were always fortified by the citation of carefully chosen authorities. To him stability of law was of prime importance. His years of practice spent as an adviser of clients had impressed upon his mind the necessity of adhering to the declared principles of law that they might serve as guiding stars to contemplated conduct. Of him it could well be said he was conservative without being reactionary, and progressive without being radical. He was a true lawyer and judge of the old school. He always acted in accordance with the best traditions of his profession and his office.

As a companion he was unequaled. His dry wit and fund of anecdotes were not only entertaining but often relieved the tension of disagreement.

Although we his associates realized that his health was not of the best, his passing was wholly unexpected and the news thereof came to us as a great shock.

He had just returned to Houlton from a conference of the Justices which he had attended in Bangor, and in which he took his full part. The end came in the Court House as he was returning to his chambers after lunch at the hotel across the street. He surely was faithful even unto the end.

Thus do we record the passing of these two distinguished former members of this Court. These memorials, we believe, are as our brothers would wish them to be, simple, straightforward and without fulsome eulogy, yet expressive of our sincere appreciation of their virtues and their accomplishments and our sense of loss in their passing.

Truly these two stalwarts from the north were men in the best sense of the word. The town and county in which they lived and worked, the bar of which they were mem-

bers, and the courts upon which they served have all suffered great loss in their passing. The death of these citizens, Chief Justice Barnes and Associate Justice Tompkins, was a distinct loss to the State of Maine. However, it must be remembered that death eventually must come to us all. However great the loss to the State and to those of us who remain, caused by their passing, it is more than offset by the great good of their accomplishments. Their influence will endure as long as the opinions of this Court which they have written are read, and it will extend to untold generations which will follow.

The resolutions and remarks are gratefully accepted by the Court and as a mark of our affection and esteem, and as a memorial to the deceased, Chief Justice Barnes and Associate Justice Tompkins, they are ordered to be recorded upon the permanent records of this Court. In further token of respect the Court will now be adjourned.

Ordered that the foregoing report be recorded in the Maine Reports.

SUPREME JUDICIAL COURT

by EDWARD F. MERRILL

Chief Justice

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taking before him for the first time the merits of a demurrer to a warrant and ruling thereon.

A warrant charging defendant "did sell a . . . quantity of intoxicating liquors . . . the said (defendant) not having then and there a license therefor issued by the State Liquor Commission as provided by the laws of the State of Maine, . . ." is a sufficient allegation under P. L., 1951, Chap. 137, which states in part "any person . . . who sells liquor . . . without a license shall be punished . . ."

It is not necessary for a warrant to contain a negative allegation that defendant was not a "physician, surgeon, osteopath . . . etc." since the words "against the peace of the State, and contrary to the form of the statute in such case made and provided" are equivalent to an allegation that the act was unlawfully done.

State v. *Shumacher*, 298.

See *State* v. *Hamilton*, 218.

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BRIBERY

That portion of the Statutes, R. S., 1944, Chap. 122, Sec. 5, prohibiting bribery of an executive officer which states "with intent to influence his action, vote, opinion or judgment *in any matter pending or that may come legally before him* in his official capacity" when pertaining to the Governor means *everything pertaining to the executive department* since the Governor as head of the executive department under the Constitution has the duty to "take care that the laws be faithfully executed."

CONSTITUTIONAL LAW

CONTRACTS

COUNSEL FEES

COURTS

The Superior Court has original concurrent jurisdiction with Municipal Courts and trial justices over prosecutions for the offense of operating under the influence of intoxicating liquor.

The limitation to prosecutions under R. S., 1944, Chap. 19, Sec. 121 is 6 years.

The fact that the State may have permitted a period of 11 days to elapse between the date of the alleged offense and the arrest of respondent under an indictment does not amount to a deprivation of respondent's right under the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, Secs. 1 and 6 of the Constitution of the State of Maine on the assertion that such delay made it impossible for respondent to avail himself of a blood test under R. S., 1944, Chap. 19, Sec. 121.

In interpreting Article I, Sec. 6 of the Constitution of Maine "law of the land" means the same as "due process" under the Constitution of the United States.

The "blood test statute" gives a respondent no "privilege."

State v. *Demerritt*, 380.

CRIMINAL LAW

A respondent in a criminal case cannot render a complaining witness incompetent by marrying her after his indictment and before trial.

On appeal from the denial of a motion for a new trial in felony cases the single question before the Law Court is whether in view of all the testimony the jury were warranted in believing and finding beyond a reasonable doubt that respondent was guilty as charged, subject however to the exception that the Law of the case may be examined where and only where manifest error in law has occurred and injustice would otherwise inevitably result.

The correctness of a charge by a presiding justice is not to be determined from mere isolated statements extracted from it.

State v. *Morin*, 279.

DISTRAINT

DISTRIBUTION

DIVORCE

A presiding justice who sees the parties and is acquainted with the facts concerning the custody of a child and what is for its welfare can be overruled only if he abuses his discretion.

Lovelett v. *Michael*, 73.

When the custody of a minor child is granted to the mother on divorce from the father, and the father is ordered to contribute to the mother for support of the child, his common law obligation to support the child ceases and the obligation under the decree is substituted therefor.

The effect upon the common law duty of support is the same whether the decree be one awarding temporary custody or whether it be a decree in an action for divorce.

Mahaney v. *Crocker*, 76.

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 exceptant is aggrieved thereby and that he excepts thereto is sufficient.

Where a court has jurisdiction of the subject matter but has not obtained personal jurisdiction over a party because of irregularity in the summons or notice, he may waive objections by appearing and taking *any other part in the proceeding* than making objections thereto.

Bryant v. *Bryant*, 276.

DOGS

DUE PROCESS

EMPLOYER - EMPLOYEE

EQUAL PROTECTION

EQUITY

The notice referred to in R. S., 1944, Chap. 154, Sec. 18 means actual or constructive notice.

Where an intending purchaser has actual notice of any fact sufficient to put him on inquiry as to the existence of *some right or title in conflict with that which he is about to purchase* he stands charged with notice of that which inquiry would have revealed by the exercise of ordinary diligence.

Equity acts *in personam* and not *in rem*.

ERROR

ESTOPPEL

EVIDENCE

It has long been recognized in Maine that a child of tender years capable of distinguishing between good and evil, may in the discretion of the court be examined on oath.

The question of competency of a child to testify is addressed largely to the discretion of the presiding justice, but it is *judicial discretion.*

The doctrine of *res gestae* (things done) or "verbal act doctrine" is, that whenever evidence of the act is admissible, statements made at the time of the act, having a tendency to elucidate or give character to the act, are also admissible.

There is practical unanimity of opinion that the fact that a complaint was made is always admissible is part of the state's evidence in chief, if the prosecutrix takes the stand, in corroboration of her evidence but not the details of the complaint.
State v. *Ranger*, 52.

EXCEPTIONS

R. S., 1944, Chap. 94, Sec. 14 controls the presentation of exceptions which may be presented during the 30 days of the term next following the action complained of, excepting only that if the term does not continue for 30 days the exceptions will be received only if filed and allowed before final adjournment of the term.

Exceptions are not finally allowed until the extended bill is filed and allowed.

Extensions of time beyond the statutory limits for filing extended bills must be allowed during the term and with the consent of the parties.

By waiver and consent the parties may permit the same Justice for good cause to further enlarge the time for filing extended bills of exceptions.

Another Justice at another term has no authority to further enlarge an extension of time for the filing of an extended bill of exceptions.

The unqualified allowance of an extended bill of exceptions by the Justice who presided at the term creates a *conclusive presumption* that they were regularly and properly filed and allowed. Such decision by the Justice is not reviewable.

EXECUTIVE

EXECUTORS AND ADMINISTRATORS

Suit against a resident of Maine upon an alleged implied contract to pay for funeral services rendered in Quebec is governed by the law of Quebec.

In testing the validity of a verdict directed for the defendant the evidence and the inferences reasonably to be drawn therefrom must be viewed in the light most favorable to the plaintiff.

At common law there is a presumption that funeral expenses are incurred upon the credit of decedent's estate.

The facts that defendant, a niece of decedent, selected the casket, approved the funeral arrangements and represented decedent's family is not sufficient to overcome the common law presumption so as to render defendant primarily liable for funeral expenses.

Giguere v. *Webber*, 12.

A devise of land to executors to sell gives a power coupled with an interest. In such case legal title vests in the executors and it may be exercised by those qualifying. This is true at common law and under the statute of 21 Henry VIII, c. 4.

A devise directing executors to sell confers a power without interest, or a naked power. In such case the fee vests in the devisees or the heirs according to the remaining terms and provisions of the will, subject to being divested upon execution of the power.

Statute of 21 Henry VIII, c. 4 (providing that where lands are willed to be sold by executors, and part of them refused to be executors, all sales by the executors that accept administration shall be as valid as if all had joined) is a part of the common law of this state.

Except in cases where a power of sale under a will amounts to a personal confidence reposed in the discretion of executors personally, the liberality of modern times would induce the courts to hold that in almost every case, where the power is given to executors, as the office survives so may the power.

A will authorizing executors "hereafter named, as soon as they deem it advisable in the settlement of my estate" to sell certain real estate is not, without more, a sufficient indication that the testator intended to confer the power of sale as a personal confidence that must be exercised by all executors named.

Davis v. *Scavone*, 189.

At common law, a *party* to the record in a civil suit could not be a witness. This rule has been changed by statute except where one of the parties has deceased.

Where the defendant has died and his personal representative has not taken the witness stand the plaintiff's mouth is closed.

Declarations by the deceased in his lifetime against his interest are always admissible.

Statements by the living party to the party now deceased and the statements of the deceased party to the now living would not be hearsay that is prohibited and, if self serving, would not for that reason be inadmissible if the whole conversation of both parties was admitted.

Evidence that a deceased defendant sought to have a physician examine plaintiff is not necessarily proof that deceased defendant was conscious that he had injured plaintiff and exclusion of such evidence is discretionary with the court.

Tobey v. *Quick*, 306.

An action of assumpsit cannot be maintained against an estate where plaintiff as a condition precedent has not presented to the executor in writing, or filed in the Registry of Probate, supported by an affidavit anything in support of the claim under R. S., 1944, Chap. 152, Sec. 15.

Berube v. *Girard*, 338.

EXTRADITION

A respondent in extradition proceedings has no constitutional right to a hearing on the question of rendition before the Governor.

An alleged exception is insufficient where there is no statement either in the bill of exceptions or in the record that petitioner (for habeas corpus) excepts to any of the rulings or that he is aggrieved thereby or that he prays that his exceptions thereto may be allowed.

It is only when in the opinion of the Law Court that the "ends of justice require" that a remand for correction of errors of procedure may be allowed. (See R. S., 1944, Chap. 91, Sec. 14.)

Randall v. *Pinkham*, 320.

FERRIES

A ferry is a liberty, or a right, to have a boat for passage across a body of water in order to carry passengers or freight for reasonable toll. It is a continuation of a highway.

There is no proprietorship in a ferry in this state except by franchise conferred by statute.

The power to establish ferries is not exercised by the Federal Government but lies within the scope of those undelegated powers reserved to the States.

The grant of a ferry franchise, unless it is limited by a general law, or restricted in the grant itself, is exclusive to the extent of the privilege conferred; but it is not exclusive unless expressly so stated, or the conclusion necessarily arises by implication.

A license from the United States to carry passengers for hire on navigable waters is not a license to operate a ferry.

Whenever a legal right is wholly created by statute, and a legal remedy for its violation is also given by the same statute, a court of equity has no authority to interfere with its reliefs even though the statutory remedy is difficult, uncertain, and incomplete.

Beals v. *Beal*, 19.

INDICTMENTS

An indictment charging negligent shooting in the language of the statute (i.e. "Whoever while on a hunting trip, or in pursuit of wild game or game birds, negligently or carelessly shoots and wounds x x x any human being shall be punished x x x") is sufficient.

R. S., 1944, Chap. 33, Sec. 125, quoted above fully sets out facts which constitute the offense.

A general allegation that the act, to wit, the shooting, was negligently and carelessly done without specific allegation as to what constituted the negligence is sufficient notwithstanding the rule in civil cases which makes such general allegations insufficient.

If a presiding justice feels that further particulars are necessary for a respondent to prepare his defense and that justice so demands he can order the state to more fully state its claims.

State v. *Euart*, 26.

See Bribery, *State* v. *Simon*, 256.

INJUNCTIONS

See Ferries, *Beals* v. *Beal*, 19.

INSURANCE

It is well settled that a conviction in a criminal case, as such, is not evidence in a civil case against the convicted person to establish the facts on which it is rendered. Even though such conviction is admissible in an action *against the party convicted* when based upon a plea of guilty, it is the admission by the plea, not the fact of the conviction which is evidence.

Criminal convictions of several of plaintiff's employees even though based upon pleas of guilty to larceny of plaintiff's poultry are not competent evidence of "loss x x x caused by the x x x theft x x x of an employee" under an insurance policy.

In a suit by an employer against his insurer for loss occasioned by theft of his employees, criminal proceedings against his employees are *res inter alios acta* so that neither the conviction nor admissions of the employees are admissible against the insurer to prove the loss.

The rule which permits the reception of evidence *de bene esse* should be limited to cases wherein the objection to the testimony relates mainly to its relevancy to the issue, and does not extend to cases in which the objection is to its legal incompetency to prove the fact.

Before a decision will be disturbed for the erroneous reception of evidence it must appear that the objecting party was prejudiced thereby.

When a case is heard by the *Court* without the intervention of a jury, a party is not aggrieved by the reception of inadmissible testimony if there be legal testimony to authorize or require the court to render the decision made.

Referees are not the court.

There is no presumption that a referee has decided a case upon so much of the testimony as is legally admissible.

In determining whether the reception of evidence by a referee is prejudicial the same principles should be applied as in jury trials and new trials should be granted when evidence in addition to being irrelevant is of such a character as to be liable to mislead, confuse, or improperly influence the trier of facts, unless it clearly appears that the referee *did not* base his decision at least in part on the inadmissible testimony.

Lipman Bros. v. *Hartford Accident and Indemnity Co.*, 199.

Perjury and subordination of perjury are defined in R. S., 1944, Chapter 122, Section 1.

It is an essential element of subordination of perjury that both the suborner and suborned know the testimony to be false and the former must be aware that the latter so knows it.

It is essential to the crime of subornation of perjury that the suborner procured another to give testimony known by him and such other to be false and that such false testimony was in fact given.

To constitute misconduct on the part of an attorney he must *at least* act corruptly and either know of the falsity of the testimony or other facts evidencing his bad faith in procuring the testimony to be given.

By inducement, colloquium and innuendo a plaintiff may show that words innocent in and of themselves interpreted in the light of the circumstances *under which and in reference to which* they were uttered or written, constitute an accusation of crime or misconduct in his profession.

Unless the words standing alone in and of themselves, if true, are sufficient to charge the plaintiff with the commission of a crime *and* unless they are necessarily inconsistent with the plaintiff's innocence of the crime alleged to have been charged thereby, the words are not actionable *per se* as charging the plaintiff with such crime. This principle applies to allegations of misconduct in relation to a particular trade, profession or vocation so that words are not actionable *per se* unless in and of themselves they impute some matter which would render one unworthy of employment *and* unless, if true, they are necessarily inconsistent with innocence.

The colloquium of a declaration is sometime framed in the limited sense of an "averment that the words were used concerning the plaintiff"; however, whenever words have a slanderous meaning only by reason of the existence of some extraneous fact, which fact must be averred in traversable form in the inducement, the colloquium must be employed in the broader sense and aver that the slanderous words were spoken of and concerning this fact.

Where the slander consists in the false accusation of a crime *eo nomine*, the declaration need not set out the words charging the crime although a defendant on motion is entitled to a specification of the words used and such upon being specified becomes part of the declaration. If the words alone are specified and they are *per se* insufficient to import the commission of the crime charged, the declaration is demurrable. Such words are made sufficient only by appropriate inducement *and* colloquium.

Niehoff v. *Sahagian*, 396, 410.

Whether radio broadcast (read from script or not) constitutes libel, slander, or a special form of defamation is not decided.

See *Niehoff* v. *Sahagian*, *supra*, at p. 396 and p. 410.

If the defamatory words taken in their natural and ordinary signification fairly import a criminal charge it is sufficient to render them actionable although the court cannot upon demurrer pronounce them actionable unless they can be interpreted as such with at least a reasonable certainty.

Niehoff v. *Congress Square Hotel Co.*, 412.

LIENS

Exceptions that a referee's report is (1) against the law, (2) against the evidence and (3) against the weight of the evidence are too general and cannot be considered.

Questions of fact once settled by referees, if their findings are supported by any evidence, are finally decided.

The remedies of lien by distraint under R. S., 1944, Chap. 165, Secs. 11-19 inclusive, and the common law action of trespass are mutually exclusive.

The abandonment of a lien by distraint and the commencement of an action of trespass results in a loss of the lien by distraint from its inception and such lien cannot thereafter justify the first taking.

To justify a taking under R. S., 1944, Chap. 165, Secs. 11-19 inclusive, a defendant must show full compliance with the statute. If he does not he becomes a trespasser *ab initio*.

It is unnecessary to prove in trover that the conversion occurred on the date alleged in the writ if the proof discloses a conversion prior to suit and within the Statute of Limitations.

Bickford v. *Bragdon*, 324.

See Taxation, *Perry* v. *Lincolnville*, 173.

LIFE ESTATE

See Real Actions, *Huard* v. *Pion*, 67.

See Wills, *Strout, Trustee* v. *Little River Bank and Trust Co.*, 181.

LIMITATIONS

See Courts, *State* v. *Demerritt*, 380.

LIQUOR

See Appeal, *State* v. *Schumacher*, 298.

MALUM IN SE

See Manslaughter, *State* v. *Hamilton*, 218.

MALUM PROHIBITUM

See Manslaughter, *State* v. *Hamilton*, 218.

MANSLAUGHTER

The principal objective symptoms of being under the influence of liquor are so well known that witnesses have always been permitted to express their opinion as to the inebriety of a person. Such is regarded as a conclusion of fact to which his judgment, observation, and common knowledge have led him.

As a general rule, any fact which would convince or tend to convince a person of ordinary judgment in carrying on his every day affairs, as to the identity of a person, will be received. The evidence will be permitted to take a wide range.

To warrant a conviction upon circumstantial evidence, facts and circumstances proved must be sufficient to establish guilt of the accused to a moral certainty and to exclude every other reasonable hypothesis.

The ordering of a mistrial is discretionary with the Presiding Justice and no exceptions lie to his refusal unless that discretion is abused.

To convict of manslaughter based upon the fact that death was caused involuntarily while the respondent was in the performance of an unlawful act, it must be shown that the unlawful act was *malum in se*, or if *malum prohibitum*, that it was the proximate cause of the homicide.

It is within the province of the jury to weigh and resolve conflicting evidence.

obscured so he cannot stop within the distance illuminated by his own headlights is guilty of contributory negligence.

Dietz v. *Morris*, 9.

Whether a pedestrian is guilty of contributory negligence under R. S., 1944, Chap. 19, Sec. 118-A and P. L., 1949, Chap. 143 in walking during a snowstorm along the right hand side of the road involves questions of facts which, in the instant case, should have been submitted to a jury.

Hamilton v. *Littlefield*, 48.

The burden of establishing his own freedom from contributory negligence is upon the plaintiff. This burden is an affirmative one. Unless the plaintiff affirmatively shows that his conduct was such that no lack of due care on his part was one of the proximate causes of the accident he cannot recover.

Whether a certain speed under the surrounding circumstances is one which is negligent, and if so, in the event of the occurrence of an accident is the proximate cause of the same is ordinarily a question of fact for the jury.

Compare *Esponette* v. *Wiseman*, 130 Me. 297.

Feely v. *Norton*, 119.

R. S., 1944, Chap. 19, Sec. 118-A presents questions of fact.

The question whether "sidewalks are provided and their use practicable" is a question of fact to be decided by a jury under R. S., 1944, Chap. 19, Sec. 118-A.

One violating R. S., 1944, Chap. 19, Sec. 118-A is not necessarily guilty of contributory negligence as a matter of law. There still remains the question whether the violation was the proximate cause of the accident.

The party who brings a case forward to the Law Court has the burden of submitting a sufficient and complete record. If a decision of the trial court rests upon evidence of "heres" and "theres" (drawn upon a blackboard not before the Law Court) exceptions would necessarily be overruled.

Stearns v. *Smith*, 127.

The plaintiff in a negligence action has the burden of affirmatively proving due care.

Where the proofs are silent as to the conduct of a plaintiff passenger in the rear seat of an automobile, it is error to direct a verdict against the plaintiff when the jury may fairly conclude that all other facts and circumstances are inconsistent with possible contributory negligence of the plaintiff.

When a jury could fairly find that no warning by a plaintiff passenger could have averted an automobile accident, a plaintiff need not establish affirmatively that there was no lack of due care in failing to give an effective warning.

Where there is no suggestion by defendants that plaintiff passenger interfered with defendant driver, a plaintiff need not establish affirmatively his non-interference.

The suggested direction of route by a passenger taken alone does not amount to the control of or an attempt to control the immediate operation of a car.

Where a finding of due care on the plaintiff's part could be made upon the facts adduced and would not be product of unreasonable minds it is error to direct a verdict for failure to prove due care.

Irish v. *Clark*, 152.

PROBATE COURT

Erroneous decrees of the Probate Court upon matters within its jurisdiction, when not appealed from, may be conclusive; such decrees are in the nature of judgments and cannot be impeached collaterally.

The Probate Court has the power, upon subsequent petition, to vacate or annul a prior decree, clearly shown to be without legal foundation and in derogation of legal right, such as for fraud, perjury, forgery, discovery of a later will, etc.

Under R. S., 1944, Chap. 143, Sec. 21 the Probate Court determines who the individuals are to whom the testator gave the remainder of his property. The matter of identity of persons named under the statute is not a question of *cy pres*. There may be misnomer. (R. S., 1944, Chap. 140, Sec. 9.)

There are by virtue of two statutes two different courts, one a Probate Court, the other an equity court of special and limited authority (R. S., 1944, Chap. 140, Sec. 2; R. S., 1944, Chap. 143, Sec. 21).

The intention of the testator must be gathered from the language of the will.

When an executor or administrator has paid as required by decree, he may file an account, which may be a final discharge. There is no statutory obligation to file a distribution account.

There is no appeal from the Supreme Court of Probate. The case must go to the Law Court on exceptions.

A bill of exceptions must state the grounds of exception and cannot be construed like a coastal dragnet to be pulled over and through the record in the vain hope that the court may find some error caught therein.

Fraud must be shown by clear and convincing proof in order to justify the reopening of probate decrees.

Knapp, Aplt., 130.

See Executors and Administrators, *Giguere* v. *Webber*, 12.

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Stearns v. *Smith*, 127.

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See Libel and Slander, *Niehoff v. Congress Square Hotel Co.*, 412.

RAILROADS

See Taxation, *Dead River Co.* v. *Houlton*, 349.

REAL ACTIONS

Judgment in a real action against a plaintiff life tenant is no bar to a subsequent action by a remainder man who was neither a party nor in privity with a party to the original action.

There is no privity between a life tenant and his remainderman.

"Privity" denotes mutual or successive relationship to the *same right* of property.

Generally, if a life estate and a remainder, reversion, or the like become united in the same person, the life estate is merged.

Huard v. *Pion*, 67.

REFEREES

See Insurance, *Lipman Bros.* v. *Hartford Accident and Indemnity Co.*, 199.

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See Divorce, *Mahaney* v. *Crocker*, 76.

SURVIVORSHIP

See Executors and Administrators, *Davis* v. *Scavone*, 189.

TAXATION

The Sardine Tax Law, requiring the assessment of a tax upon processed cases of "15-ounce oval cans," (P. L., 1951, Chap. 2) cannot be avoided by putting an extra ounce into the contents of each can, since it was intended by the Legislature to place the tax upon "cans built for, and capable of containing approximately one pound."

The labels placed upon the cans are not controlling; the legislative will cannot be thwarted by legerdemain.

In construing a statute, technical or trade expressions should be given a meaning understood by the trade or profession.

State v. *Vogl*, 99.

If a resident taxpayer's property is overvalued his only remedy is by abatement.

The statutory provisions relating to abatement of taxes are exclusive. R. S., 1944, Chap. 81, Secs. 39-46. Neither the Supreme Judicial nor Superior Court sitting in equity has authority to abate taxes.

A town meeting held in April, rather than in March as required by R. S., 1944, Chap. 80, Sec. 12, is not illegal where there is no design or fraud and its calling was occasioned by the illegality of the March meeting because of inadvertent errors in the call thereof.

The failure of assessors to give notice to bring in a true and perfect list of polls as required by R. S., 1944, Chap. 81, Sec. 35 does not render the assessment invalid.

A description of land contained in a lien and notice as "said real estate being bounded and described as follows: recorded in Book 402, Page 448 at Waldo County Registry of Deeds, Belfast Maine" is sufficient even if the notice referred for a description of the land on which the lien is claimed to the record of a deed between strangers; nevertheless the record referred to must otherwise contain a description of the real estate sufficient to identify it.

Perry v. *Lincolnville*, 173.

It has been almost universally held that where one files a list or otherwise gives information to assessors upon inquiry, at least in the absence of fraud, accident or mistake, the taxpayer is estopped to deny its ownership or such other basic and essential facts upon which the assessors relied in making their assessment.

Under R. S., 1944, Chap. 81, Sec. 12 as amended, personal property is assessable to the owner in the town of his residence unless it falls within stated exceptions.

"Timber," "logs," "pulpwood" and "railroad ties" have no fixed definition in the law.

WORDS AND PHRASES

WORKMEN'S COMPENSATION