MAINE REPORTS

150

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

FEBRUARY 1, 1954 to APRIL 30, 1955

MILTON A. NIXON

REPORTER

AUGUSTA, MAINE
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HAROLD I. GOSS
SECRETARY OF STATE OF MAINE

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AUGUSTA, MAINE

JUSTICES
OF THE
SUPREME JUDICIAL COURT
DURING THE TIME OF THESE REPORTS

---

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

[2] HON. RAYMOND FELLOWS, *Chief Justice*

[3] HON. SIDNEY ST. FELIX THAXTER

HON. ROBERT B. WILLIAMSON

HON. FRANK A. TIRRELL, JR.

HON. DONALD W. WEBBER

[4] HON. ALBERT BELIVEAU

[5] HON. WALTER M. TAPLEY, JR.

1 Retired April 7, 1954
2 Qualified as Chief Justice April 7, 1954
3 Retired as Associate Justice February 28, 1954
Qualified as Active Retired Justice March 3, 1954
4 Qualified as Associate Justice March 3, 1954
5 Qualified as Associate Justice May 5, 1954

HON. LESLIE E. NORWOOD, *Clerk*

HON. HAROLD C. FULLER, *Clerk*

ACTIVE RETIRED JUSTICES
OF THE
SUPREME JUDICIAL COURT

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HON. SIDNEY ST. FELIX THAXTER

JUSTICES OF THE SUPERIOR COURT

[1] HON. ALBERT BELIVEAU

HON. PERCY T. CLARKE

HON. FRANCIS W. SULLIVAN

HON. GRANVILLE C. GRAY

HON. HAROLD C. MARDEN

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HON. CECIL J. SIDDALL

HON. LEONARD F. WILLIAMS

[2] HON. WALTER M. TAPLEY, JR.

[3] HON. ABRAHAM M. RUDMAN

1 Qualified Justice Supreme Judicial Court, March 3, 1954
2 Qualified Associate Justice Superior Court, March 3, 1954
Qualified Justice Supreme Judicial Court, May 5, 1954
3 Qualified Associate Justice Superior Court, June 9, 1954

ACTIVE RETIRED JUSTICES
OF THE
SUPERIOR COURT

HON. WILLIAM H. FISHER

Attorneys General

HON. ALEXANDER A. LAFLEUR
HON. FRANK G. HARDING

Reporter of Decisions

MILTON A. NIXON

TABLE OF CASES REPORTED

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

YORK BEACH VILLAGE CORPORATION

vs.

INHABITANTS OF THE TOWN OF YORK

York. Opinion, February 3, 1954.

Bills and Notes. Checks. Conditions. Taxation. Excise Taxes.

The cashing of a check by a village corporation bearing the notation "appropriation 1952 in full" does not preclude its rights to further payment from the town even though the village assessors knew of the town's intent, since the town could not place a condition upon its statutory obligation to make payment.

In computing an appropriation payable by a town to a village corporation, a charter provision requiring a deduction of the village "*corporation's proportional part, based on valuation and poll tax assessment of the whole annual town levy . . . for state, county and school taxes, salary of town officers* (etc.) . . . *and any and all other town charges,*" requires a deduction of the "proportional part" of listed or common town expenses and not merely a deduction of the village property and poll taxes assessed.

See R. S., 1944, Chap. 19, Sec. 45.

ON REPORT.

This is an action upon an account annexed for an alleged balance due upon an appropriation.

Judgment for defendant.

Myron D. Rust,
Chaplin, Burkett & Knudsen, for plaintiff.

James S. Erwin,
Sanborn & Sanborn,
Ralph W. Hawkes, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, WEBBER, JJ. TIRRELL, J. did not sit.

WILLIAMSON, J. On report upon an agreed statement of facts. This is an action upon an account annexed by the York Beach Village Corporation (the Village) against the Inhabitants of the Town of York (the Town) to recover the balance allegedly due from the Town on or before July 1, 1952 under the provisions of the charter of the Village (P. & S. L., 1923, Chap. 3, Sec. 4) and the statute relating to apportionment of the motor vehicle excise tax (R. S., Chap. 19, Sec. 45).

The Village contends there is due from the town the sum of $47,127.51, less a payment of $23,492.92, or a balance, apart from interest, of $23,634.59. The Town pleads the general issue and in a brief statement of special matter of defense sets forth accord and satisfaction and payment of the full amount due.

The facts are not in dispute. The controversy centers primarily around the construction of section 4 of the Village charter. Before proceeding to this issue we will dis-

pose of the Town's contention that the claim has been settled by the payment from the Town to the Village.

On March 3, 1952 the Town at its annual meeting voted to pay the Village the sum of $23,492.92 pursuant to an article in the warrant "to see if the Town will vote to appropriate the sum of $44,430.06" in compliance with the Village charter.

The sum of $44,430.06 was the amount claimed by the Village. The amount appropriated was recommended by the selectmen "and was an amount larger than the amount claimed by said selectmen to be due to said Village Corporation under said section; said figure of $23,492.92 being arrived at by the selectmen resolving all doubts in favor of the Village Corporation, as they understood its charter, so far as individual items in the town appropriation were concerned, in order to grant the Village Corporation as much funds as possible for carrying out its duties under its charter, and said amount being intended by said selectmen and Town to be the full obligation of the Town to said Village Corporation for said year." On March 18, 1952 at the annual meeting of the Village it was voted to authorize the board of assessors to institute legal proceedings to secure an interpretation and clarification of the charter, and enforcement of the rights of the Village.

The Town paid the treasurer of the Village $23,492.92 by check dated June 14, 1952, with the notation on its face "for Beach-Village Corp. appropriation 1952 in full for year 1952." The check was cashed and "used and expended unconditionally by said Village Corporation assessors, knowing that said payment was sent by the Town as payment in full for its appropriation for the year 1952, for the benefit of said plaintiff corporation and the conduct of its affairs for the year 1952."

In our view the Village accepted the sum appropriated by the Town without losing any claim to further payment by reason either of the notation on the check or of the knowledge of the assessors of the intent of the Town in making the payment. The money paid to the Village represented the tax revenue of the Village as determined by the Town meeting. Without this revenue, the treasury of the Village would have no current income with which to meet its municipal expenses. We hold the Town could not place a condition of "payment in full" upon the payment of the sum appropriated and paid pursuant to the statute. There must of necessity be authority at some point for at least reasonable adjustments under the statutes before us. Whatever, however, may be the authority of assessors of the Village, or of the Village Corporation itself to compromise and settle the liability under the statutes of the Town to the Village, we find here no action by such authority. See *Frankfort* v. *Waldo Lumber Co.*, 128 Me. 1, 145 A. 241.

We come then to the decisive issue of how and in what manner is the amount payable by the Town to the Village to be determined under the charter and the motor vehicle excise tax statute.

The pertinent parts of the statutes are:

The Village charter

"**Sec. 4. Amount to be paid to corporation by town of York increased to 75%.** On or before the first day of July annually, beginning in nineteen hundred seventeen, the town of York shall appropriate and pay over to the York Beach Village Corporation a sum of money computed as follows: From the annual appropriation raised by the town taxation on the estates and polls within said York Beach Village Corporation for the preceding year shall be deducted said corporation's proportional part, based on valuation and poll tax assessment of the whole annual town levy for said preceding

year for state, county and school taxes, salary of the town officers, reduction of town debt, interest on town charges, appropriations for roads, poor, incidentals, and any and all other town charges, and seventy-five per centum of the sum thus determined, after deducting the corporation's proportion of town obligations for hydrants and street lights, shall be said sum to be annually paid over to said corporation as herein provided. Said sum shall be expended by said corporation for its corporate purposes and duties, and payment thereof to the corporation shall relieve said town of all town charges within said corporation except for street lighting, hydrant service, public schools, public health, maintenance of poor, and such new construction of drains and sewers as the town may vote to build, and repair of town sewers. All the authority and duties of the selectmen or road commissioner within said corporation shall be exercised by said assessors; or they may appoint an agent to perform the duties of road commissioner." **P. & S. L., 1923, Chap. 3.**

Motor vehicle excise tax (including aircraft)

"All moneys collected in accordance with the provisions of Sections 38 to 47, inclusive, (motor vehicle excise tax) shall be apportioned between such town, city, and any village corporation, sewer district, fire district, or other public municipal corporation, in the same manner as the moneys now collected for taxes assessed on property located within such town or city. In case the manner of apportionment between any public municipal corporations has not been otherwise determined, it shall be made by the assessors of such city or town for any year and the assessors of the other public municipal corporation concerned in such apportionment for that year."

R. S., Chap. 19, Sec. 45.

It is not necessary to discuss in detail the Village Corporation. It is a corporation of a type not unfamiliar in our State, designed to perform certain specified functions with-

in a municipality and deriving its support from an apportionment or division of the tax collections. It was originally chartered in 1901. In 1917 its duties and functions were greatly increased. The present formula in Section 4 was first introduced in 1917, and has since remained unchanged, except for an alteration in percentage from 55% to 75%. *P. & S. L., 1901, Chap. 455; 1905, Chap. 305; 1917, Chap. 129; 1923, Chap. 3; 1939, Chap. 16 and 17.*

We are concerned, it will be noted, not with the apportionment of tax dollars collected in 1952. Our problem is to ascertain by application of a formula to tax dollars and levy or expenses for the year 1951, the sum which in 1952 was payable by the Town to the Village for the latter's particular municipal purposes. In other words, the Village operates not upon tax dollars raised in 1952 but upon dollars paid by the Town based on 1951 figures. Of course in the final analysis the dollars are tax dollars, and whether we are dividing this year's tax collections or paying a sum based on last year's figures is not of consequence in arriving at a solution.

Agreed figures from 1951 for use in whatever formula may be adopted include:

Assessed valuation of the estates—real and personal property—		
	Town	$4,459,266.00
	Village	1,384,281.00
taxable polls —	Town	1,003
	Village	211
excise tax —	Town	$ 23,001.42
	Village	4,456.63
tax rate —		68 mills
poll tax —		$ 3.00
Village proportion — hydrants		$ 2,340.00
— street lights		2,310.88

We now seek to ascertain and apply the formula set forth in Section 4 of the charter. (1) The Town shall appropriate and pay over to the Village "a sum of money computed as follows." (2) "From the annual appropriation raised by the town taxation on the estates and polls" within the Village "for the preceding year." Both Town and Village agree the amount is .068 x $1,384,281 + 211 x $3 = $94,764.11. There is a further factor — the excise tax — to be considered at this stage.

In 1929 (Laws 1929, Chap. 305) the Legislature substituted an excise tax for the customary property tax on motor vehicles. It was necessary to provide for division of this new source of revenue among the governmental units losing the property tax. The statute requires apportionment "in the same manner as the moneys now collected for taxes assessed on property located within such town or city." Thus in the instant case the apportionment is covered by Section 4 of the Village charter. Strictly the tax money for 1951 for example is not apportioned. The tax figures of 1951 with other data are used in computing a sum payable in 1952 by the Town to the Village from 1952 tax revenues. In substance, however, the payment to the Village results from an apportionment or division of tax moneys and we so consider it.

The Legislature intended, as we read the statutes, that the excise tax should be added to the property and poll taxes of both Town and Village in reaching the amount due the Town. Accordingly, we add the Village excise tax of $4,456 to the Village property and poll taxes of $94,764, making a total Village tax (or in terms of the charter "annual appropriation") of $99,220. (3) The Village's "proportional part, based on valuation and poll tax assessment."

We conclude that 30% is the "proportional part" of the Village. Both Town and Village agree on 31%. The dif-

ference comes from inclusion of the excise tax in computing the "proportional part." The various methods follow:

Plan	Town	Village
Town—valuation	$4,459,266	$1,384,281
poll tax	3,009	633
Total	$4,462,275	$1,384,914
proportional part	100%	31%
Village—property tax	$ 303,227	$ 94,131
poll tax	3,009	633
Total	$ 306,236	$ 94,764
proportional part	100%	31%

The Village more properly includes the property tax assessment in place of the assessed valuation.

Court—property tax	$303,227	$94,131
poll tax	3,009	633
excise tax	23,001	4,456
Total	$329,237	$99,220
proportional part	100%	30%

In treating the excise tax in this manner, we have, in our view, satisfactorily met the requirement of apportionment "in the same manner as the moneys now collected for taxes assessed on property. . ." Both the Town and the Village compute the payment to the Village from the excise tax apart from the payment from property and poll taxes. Under the Village theory $2,692, or 60% of the Village excise tax is returned to the Village. The Town on its part contends that $1,150, or 5% of the Town excise tax is the correct amount. The basis of each theory later appears in a comparative tabulation of the Town and Village proposals and the plan approved by the court. (4) "shall be deducted"

the Village's "proportional part" . . . "of the whole annual town levy for said preceding year for state, county and school taxes," and other items listed.

Here we find the basic conflict between the Town and the Village, setting aside for the moment all questions relating to the excise tax.

The amount to be deducted is, on the Village theory, the "proportional part" of the Village property and poll taxes, and on the Town theory, the "proportional part" of the "state, county and school taxes" and other listed items.

In figures the results are:

Village — 31% x $ 97,764 or $29,320

Town — 31% x $214,000 or $66,515

The Town correctly seeks the "proportional part" of the expenses listed in the charter. It is understandable and surely reasonable that the Village pay its full share of the state, county and school taxes. Without going further we see that these are items of expense common to both Town and Village and are to be shared proportionately between the Town and the Village. There are, however, in the list of the Town appropriations which make the sum of $306,-236, certain expenses not common to both Village and Town and not within the list in Section 4.

The Legislature sought to provide that the Village pay its *share* of the listed expenses, and that from the balance of the amount raised the Town return 75% to the Village for its particular purposes, with adjustment for hydrants and street lights. The Legislature considered the expenses of the Village in three classifications: (1) the expenses listed and common in nature to Town and Village, (2) hydrant and street lights, and (3) particular uses of the Village. It is plain that the share of the Village in the non-common expense differs, for example, from its "proportional part" of the school expense.

To what expense does the "proportional part" apply? The Town reaches a total of $214,566.89 from the following:

State tax	$32,475.65
County tax	8,883.75
School tax	102,392.92
Officer's salaries	11,500.00
Debt reduction and interest	5,000.00
Road	34,189.57
Poor	10,000.00
Incidental	5,800.00
All other town charges: health, York Hospital, Public Health, Misc.	4,325.00
	$214,566.89

The Town places the amount of the deduction at 31% of $214,566.89, or $66,515 against the Village's figure of $29,320.

The Town would deduct the "proportional part" of the listed or common Town expenses; the Village would deduct the "proportional part" of the taxes assessed. It is this difference in principle that raises the important question in the case.

The items of expense listed by the Town are, in our view, within the types of levy or expense set forth in Section 4 of the charter. We do not indicate that other items could not properly have been added thereto, thus increasing the "common expense" total. For example, it does not appear why the library appropriation of $2200 should not have been borne proportionately by Town and Village. Our task is not, however, to determine whether each item of Town expense in 1951 fell within or without the expenses listed in Section 4. For our purposes it is sufficient to say that the items set forth are properly included in the base for application of the "proportional part" rule.

Referring again to the Village theory, it appears that 31% of the state, county and school tax alone would amount

to .31 x $143,750, or approximately $44,500, or $15,000 more than the total proportional share of $29,320 computed by the Village.

Obviously the less the "proportional part" to be deducted from the Village taxes, the greater will be the amount retained by the Town under the 25%-75% division of the balance. We do not consider, however, that the Legislature intended to make the retention of the fair share of the common or listed expenses dependent upon the operation of a 25%-75% division of a balance remaining after deduction of an amount plainly insufficient to meet the proper share of the Village.

There are no problems in completing the computations and in deducting the agreed amounts for street lights and hydrants.

In the attached schedule we compare the Town and Village proposals with the plan approved by the court. Percentages and figures throughout the opinion are approximate. Differences arising from more complete computations would not alter the result.

Under the plan outlined for finding the amount to be paid the Village by the Town, the Village will share, as it should, in the expenses set forth in the charter, and it will be relieved of contributing to the remaining Town expense in part and to this extent will acquire funds for its own purposes.

It appears that there is no balance due the Village from the Town. The Village has failed to establish a case.

Judgment for defendant.

SCHEDULE

	TOWN Property and poll taxes	VILLAGE Property and poll taxes	Excise tax	COURT Property, poll and excise tax
(1) Village taxes	$94,764	$94,764	$ 4,456	$99,220
(2) less "proportional part" of expenses				
Town—31% x $214,566	66,515			
Village—31% x $94,764		$29,320	864 (Note 1)	
Court—30% x $214,566				64,369
(3) Balance	$28,249	$65,444	$ 3,592	$34,851
(4) 75% of line 3	$21,186	$49,083	$ 2,694	$26,138
(5) less hydrants $2,340 lights $2,310	4,650	4,650		4,650
(6) due Village	$16,536	$44,433		$21,488
(7) excise tax due Village	1,150 (Note 2)	2,694		—
(8) total due Village	$17,686	$47,127		$21,488
(9) paid by Town to Village	23,492	23,492		23,492
(10) Balance due Village	None	$23,635		None

NOTE 1: Total Town excise tax 100% $23,001
Village excise tax (19.4%) 4,456

19.4% x $4,456 = $ 864

NOTE 2: Total Town property and poll tax 100% $306,239
Returned to Village 5% 16,536
5% x $23,001 (excise tax) = 1,150

LENA BLANCHE SHERMAN
vs.
SAMUEL B. GRAY

Knox. Opinion, February 3, 1954.

Trespass. Report. Cemeteries. Licenses. Monuments.

The Law Court will not decide a case upon report and agreed statement where insufficient facts are reported and the case does not present questions of law of sufficient importance to justify reporting the same.

Trespass quare clausum may be maintained for the unauthorized invasion of a cemetery lot.

Permission to bury a body in the cemetery lot of another when exercised constitutes an irrevocable license in the licensee for at least so long as the premises continue to be used as a cemetery.

The right of sepulture in a burial lot carries with it the right to erect suitable monuments, markers, or memorial tablets at the graves of those buried therein.

ON REPORT.

This is an action of trespass before the Law Court upon report and agreed statement. Report discharged. Case remitted to the Superior Court.

Jerome C. Burrowes, for plaintiff.

George W. Wood, Jr., for defendant.

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

MERRILL, C. J. On report. This is an action of *trespass quare clausum* reported to this court by a Justice of the Superior Court on an agreed statement of facts. The

alleged trespass is the erection and maintenance by the defendant of a granite monument on cemetery lot numbered 323, which lot is alleged to be the close of the plaintiff. The agreed statement of facts is as follows:

> "1. Asenath Achorn during her lifetime was the owner in fee simple and in possession of the premises described in the above entitled writ.
>
> 2. In the year 1937 Alice L. Gray, wife of Samuel Gray the defendant, died and Asenath Achorn gave oral permission to Samuel Gray to bury the remains of his said wife on said lot.
>
> 3. On July 30, 1943, Asenath Achorn made and executed her last will and testament which included the following clause:
>
> 'I give, bequeath and devise to my niece, Lena Blanche Sherman, of said Rockland, so much of the cemetery lot, hereinbefore mentioned, as remains unoccupied, after my remains have been buried in said lot, approximately one third thereof, and request her, as said executrix, to see that the date of my death is properly cut on the stone marking my last resting place.'
>
> 4. Asenath Achorn died on December 4, 1950, and her will, was proved and allowed at the February term 1951 of the Knox County Probate Court, Rockland, Maine.
>
> 5. In the fall of 1951, Samuel Gray, without permission or authority from Lena Blanche Sherman, erected on said lot a monument (not a headstone) bearing his name and the name of his deceased wife."

For the unauthorized invasion of a cemetery lot the owner thereof in possession may maintain *trespass quare clausum. Pulsifer* v. *Douglass,* 94 Me. 556.

Permission to bury a body in the cemetery lot of another when exercised constitutes an irrevocable license in the li-

censee for at least so long as the premises continue to be used as a cemetery.

The right of sepulture in a burial lot as a general rule carries with it the right to erect suitable monuments, markers or memorial tablets at the graves of those buried therein. In determining whether or not the monuments so erected on a lot of another are suitable, due regard must be paid to the rights of the owner of the lot, the size of the lot, the other graves, memorials and erections thereon, and all of the circumstances of the particular place.

For the general principles governing the right of sepulture see 10 Am. Jur. 508, Sec. 31, 14 C. J. S. 92, Sec. 33, 11 C. J. 62, Sec. 28, and cases cited therein. See *Durell* v. *Hayward,* 9 Gray, 248, 249; *Dwenger* v. *Geary,* 113 Ind. 106, 14 N. E. 903; *Mitchell* v. *Thorne,* 134 N. Y. 536, 32 N. E. 10; *Gardner* v. *Swan Point Cemetery,* 20 R. I. 646, 40 Atl. 871; *Anderson* v. *Acheson,* 132 Iowa, 744, 9 L. R. A. N. S. 217; *Brown* v. *Hill,* 284 Ill. 286, 119 N. E. 977; *Donahue* v. *Fitzsimmons,* 95 N. J. Eq. 125, 122 Atl. 617; *Mansker* v. *Astoria,* 100 Or. 435, 198 Pac. 199; *Oatka Cemetery Asso., Inc.* v. *Cazeau,* 275 N. Y. S. 355, and *Slifer* v. *Greenmount Cemetery Co.,* 67 Atl. (2nd) (Pa.) 584.

The case of *Thompson* v. *Deeds,* 61 N. W. (Iowa) 842 is of particular interest. In that case it was held that the right of one who had been granted the privilege of sepulture for a deceased spouse in the burial lot of another is not confined in the choice of a memorial to a mere headstone or marker and that the presence of the name of the surviving spouse on the monument is not in excess of her right to erect the same.

Bearing in mind the foregoing general principles of law, the agreed statement of facts in the instant case is wholly insufficient to enable the court to make decision of the rights of the parties.

First, it does not appear that the monument of which complaint is made was erected on that portion of the lot in the possession of the plaintiff or to which the plaintiff has title.

Second, it does not definitely appear that defendant buried the remains of his wife in the lot in question.

Third, there is nothing in the statement of facts that shows the size of the monument erected, or any facts from which it can be determined whether or not the same is a suitable monument to be erected on the lot in question under the circumstances surrounding the same.

Fourth, the only statement of fact with relation to the nature of the monument erected is that it is a monument as disinguished from a headstone and that the same bears the defendant's name as well as that of his deceased wife.

From these facts it is impossible to determine whether or not the monument is suitable or whether the defendant in any way exceeded his license in erecting the same.

Finally, if facts sufficient to determine these questions were included in the agreed statement, the case would not present a question of law of sufficient importance to justify reporting the same to this court for decision. Entry must be

Report discharged.

Case remitted to the Superior Court.

CITY OF BELFAST, IN EQ.

vs.

GOODWILL FARM
BELFAST HOME FOR AGED WOMEN
GIRLS HOME ET AL.

Waldo. Opinion, February 9, 1954.

Trust. Acceptance. Disclaimer. Charity. Towns. Failure. Cy Pres. Perpetuities.

It is too late for a town to disclaim a trust after it has made a valid acceptance thereof and received the trust property. See R. S., Chap. 80, Sec. 103.

Equity does not hesitate to appoint a new trustee to carry out a trust.

A general charitable intent is an essential element in the application of *cy pres.*

Cy pres is not applicable where there is a specific alternative gift effective on failure of the primary charitable gift.

It is the intention of the testator which must prevail in the construction of a will.

The rule against perpetuities is not applicable to a gift over from charity to charity.

ON REPORT.

This is a bill in equity by the City of Belfast. The case is before the Law Court upon report and agreed statement. The Attorney General after intervention disclaimed further interest. R. S., 1944, Chap. 17, Sec. 4. Bill sustained.

Decree in accordance with opinion.

Clyde R. Chapman, for City of Belfast.

McLean, Southard & Hunt, for Executor.

Lorimer K. Eaton, for Ivan Bartlett, Virgie Knapp, Stewart Kingsbury and Lamont Kingsbury

Butler, Merrill & Bilodeau, for Goodwill Farm, Children's Aid Society of Maine, alias and Belfast Home for Aged Women.

Ralph I. Morse, for Belfast Home for Aged Women.

SITTING: THAXTER, FELLOWS, WILLIAMSON, WEBBER, JJ. MERRILL, C. J., and TIRRELL, J., did not sit.

WILLIAMSON, J. On report in equity. The City of Belfast seeks a decree relieving the City of a trust under the will of F. Louis Bartlett and instructing the City to whom and in what manner the property held by it should be distributed. The named defendants are Goodwill Farm, Belfast Home for Aged Women, Girls Home, the heirs of F. Louis Bartlett, and the executor under the will of F. Louis Bartlett. The case is before us on bill, answers of the several defendants, and agreed facts. Subsequent to the bringing of the bill, the Attorney General sought and received permission to intervene as a party defendant and thereafter disclaimed any further interest in the case. See R. S., Chap. 17, Sec. 4.

The controversy arises over the disposition of the residue of the estate under the fourth clause of the will, reading:

> "I give, bequeath and devise to the City of Belfast, Maine, forever, all the rest, residue and remainder of my estate, real, personal and mixed, wherever situated and however and whenever acquired, conditioned, however, that the City of Belfast, Maine shall maintain a home for aged men on my homestead farm, said home to be named "Bag-

> ley Home for Aged Men". Said City of Belfast to have the right to make such charges as an entrance fee to each individual or applicant in the same manner and under like circumstances as is done by the Belfast Home for Aged Women located in said Belfast, Maine, in other words, it is not my purpose to request the City of Belfast to maintain a poor farm. It is also my wish that all of my books and furniture found in said buildings at the time of my decease, in so far as is practicable, shall be used to furnish said home and be kept for the use and occupancy of the residents of said home for aged men. In the event, however, the City of Belfast, Maine, refuse to accept this legacy and devise, I give, bequeath and devise the same to the Girls Home and Belfast Home for Aged Women, both located in Belfast, Maine, and the Good Will Farm located in Fairfield, Maine, to share and share alike."

The testator, F. Louis Bartlett, late of Belfast, died November 12, 1950. Under his will dated August 4, 1949, and allowed December 12, 1950, he gave $100 each to two individuals, $400 to the City of Belfast for perpetual care of his cemetery lot, and the residue in the fourth clause above. In the fifth clause he directed his executor to deliver certain articles and personal property listed in a black book to the persons named therein.

On July 16, 1951, the City Council of Belfast voted to accept the trust. The City thereafter received from the executor property valued at $28,721.65 in the first and final account of the executor allowed in the Probate Court in March 1952. The homestead farm devised under the will was appraised at $5350. The City sold at auction items of personal property not deemed essential to the operation of the homestead farm as a home for aged men. The City announced in the local press that it was ready to receive applications for admission to the "Bagley Home for Aged

Men." No applications, however, were received from such announcement.

On August 13, 1952, the City Council, to use the words of the bill "having become convinced that there were no candidates for admission to such home as contemplated by the will, and that the sum of approximately $25,000 left by the above will to the trustees would be insufficient to equip the above homestead farm as a home for aged men and to support and maintain in the future aged men likely to desire admission, the said city council voted to instruct its City Colicitor to commence this bill in equity to determine to whom the assets of said trust should be delivered, in order to terminate completely and for all time any connection of the said City of Belfast with said trust."

The City, the heirs, and the several institutions all agree that the City of Belfast should be relieved from any further obligation as Trustee and that the continuance of the trust for the benefit of a home for aged men will serve no useful purpose. In brief, they agree the gift for the Bagley Home for Aged Men has failed. The Attorney General, who, as we have seen, has disclaimed any interest in the case, has entered no objection to this view of the matter.

We start the discussion of the case with these facts accepted, namely, that the City should be relieved as Trustee and that the gift for the Bagley Home for Aged Men has failed.

The questions for decision are:

(1) Does the residue go
   (a) *cy pres* under a plan to be framed by the court, or
   (b) to the heirs, or
   (c) to the named institutions?

(2) If the residue goes to the named institutions, does the Children's Aid Society of Maine take under the name of Girls Home, or does this share go to the heirs?

It is strongly urged that the City refused to accept the gift, and hence under the will the institutions took the residue. We are not called upon to meet this issue. The fact is the City did not refuse—it accepted the gift. Whether the acceptance was completed by the Council vote of 1951 need not be determined. It is plain that by the 1951 vote and the receipt of the trust property, taken together, the trust with its responsibilities was accepted by the City. Thereafter it was too late for the City to refuse the gift. "The vote of the town was a valid acceptance of the trust. It could not thereafter disclaim. *American Academy of Arts & Sciences* v. *Harvard College,* 12 Gray 582, 595; *Drury* v. *Natick,* 10 Allen 169, 183; Am. Law Inst. Restatement: Trusts, Sec. 102(2)." *City Bank Farmers Trust Co.* v. *Carpenter,* 319 Mass. 78, 64 N. E. (2nd) 636, 637. 14 C. J. S. 462, Charities, Sec. 28. On acceptance of devise or bequest by town see R. S., Chap. 80, Sec. 103.

The claim of the institutions cannot rest upon a refusal of the City to accept the gift. It must therefore be based upon the failure of the gift for the purposes stated in the will. The difficulty it may be noted lies not with the Trustee, but with the size of the fund and the purposes of the gift. Equity does not hesitate to appoint a new trustee to carry out a trust, but such an appointment would not solve the present problem. *Manufacturers National Bank* v. *Woodward,* 138 Me. 70, 21 A. (2nd) 705.

The trust property cannot be applied under the principle of *cy pres* for relief of the aged men of Belfast for three reasons.

First: The testator expressed no general charitable intent to aid aged men. There is thus lacking an essential

element in the application of *cy pres*. The testator made the gift for maintenance of a home on his homestead farm. "But, if the charitable purpose is limited to a particular object, or to a particular institution, and there is no general charitable intent, then, if it becomes impossible to carry out the object, or the institution ceases to exist before the gift has taken effect, and possibly in some cases after it has taken effect, the doctrine of *cy pres* does not apply, and in the absence of any limitation over or other provision, the legacy lapses." *Teele* v. *Bishop of Derry et al.*, 168 Mass. 341, 47 N. E. 422, 38 L. R. A. 629, 60 Am. St. Rep. 401.

The case is not unlike *Gilman* v. *Burnett*, 116 Me. 382, 102 A. 108, L. R. A. 1918A, 794, in which the testatrix gave her farm and wood lot in Augusta to be used as a home for unmarried women who had been employed in the straw industry in Massachusetts. The court found only a special gift without a general charitable intent and rejected the application of the *cy pres* doctrine.

Without question, the gifts under the fourth clause of the will were for public charitable purposes. The aged men, however, became beneficiaries only under the operation of a particular plan, which in the event cannot be carried out. The trust may not pass *cy pres* to other purposes linked with aged men of Belfast.

Second: Assuming *cy pres* were applicable and the court could properly frame a scheme for the trust, it is obvious that no one of the institutions could take the property. The very names of the institutions indicate purposes quite different from the purpose of the proposed Bagley Home for Aged Men. The Home for Aged Women, the Girls Home, and Goodwill Farm do not further the interests of aged men.

Third: There is a further and compelling reason why equity will not invoke the rule of "approximation" in this

instance. *Cy pres* is not applicable where there is a specific alternative gift effective on failure of the primary charitable gift. This principle, in our view, operates here to the advantage of the institutions.

We must find and give effect to the intention of the testator. The well established rule was stated by Justice Thaxter in *Cassidy, Guardian* v. *Murray, Trustee,* 144 Me. 326, 328, 68 A. (2nd) 390, in these words:

> "It is the intention of the testator which must prevail in the construction of a will. But that intention must be found from the language of the will read as a whole illumined in cases of doubt by the light of the circumstances surrounding its making."

Among the recent cases in which the rule has been applied are: *Knapp, Aplt. from Decree Judge of Probate,* 149 Me. 130, 99 A. (2nd) 331; *Strout, Trustee* v. *Little River Bank and Trust Co., Adm.,* 149 Me. 181, 99 A. (2nd) 342; *First Universalist Soc. of Bath* v. *Swett, et al.,* 148 Me. 142, 90 A. (2nd) 812; *Mellen, Jr., et al., Trustees* v. *Mellen, Jr., et al.,* 148 Me. 153, 90 A. (2nd) 818; *Dow* v. *Bailey,* 146 Me. 45, 77 A. (2nd) 567.

The testator intended, in our view, that on failure of the proposed "Bagley Home for Aged Men," the property should go to the named institutions for public charitable purposes. As we have seen, we need not decide whether a refusal by the City to accept the gift would necessarily have made the gifts over effective. We are here concerned not with refusal by the City, but with acceptance by the City followed by a failure of the principal gift. There is no reason to believe the testator intended that by its acceptance the City thereby destroyed the contingent gifts over to charity.

There is not the slightest indication that the testator desired under any circumstances to benefit his heirs. We conclude the testator in making gifts over for charity covered the possibility of a failure of the gift in the uncertain future. We conclude it was the testator's intention to make the institutions the beneficiaries upon the failure of the proposed home for aged men.

Accordingly, there becomes no occasion for the application of the doctrine of *cy pres,* assuming the gift for the proposed home for aged men revealed a general charitable intent.

In *Pennsylvania Co., Etc.* v. *Board of Governors,* 79 R. I. 74, 83 A. (2nd) 881, the Rhode Island Court in holding testamentary gifts to certain English hospitals failed upon nationalization of the hospitals, said at page 888:

> "However, in Section XI of his will the testator named the respondent churches as his residuary legatees saying: 'so that in case any of my preceding gifts, specially my gifts to Public purposes should fail * * * my property shall surely go, in such event, to the work of establishing the Knowledge & following of Jesus Christ among our American People.' Such provision in effect obviates the application of that doctrine (cy pres) since the testator himself shows clearly his own intent and the alternative disposition of his property in the event of the failure of the gifts referred to.
>
> "In the circumstances we see no reason why the above-expressed intent of the testator should not be carried out. It is generally held that when a testator makes a specific alternative bequest to take effect if a primary charitable one fails, the doctrine of *cy pres* is not applied, but the estate is distributed in accordance with the testator's express direction. * * * It may be noted that in the present instance there is other specific disposition and the alternate beneficiaries are also charities."

"Cy pres will not be applied where the settlor has made an express provision for an alternative disposition of his property, if the charity as he planned it proves impossible, inexpedient, or impractical. He may prevent the need for the application of cy pres by making a gift over in such case to a private donee or to another charity." 2A *Bogert on Trusts and Trustees,* Sec. 431, pg. 318. *Rhode Island Hospital Trust Co.* v. *American Nat. Red Cross,* 50 R. I. 461, 149 A. 581; *White's Estate,* 174 Pa. 642, 34 A. 321; *Board of Regents of State University* v. *Wilson,* 54 Colo. 510, 131 Pac. 422; 14 C. J. S. 516, Charities, Sec. 52(c); 10 Am. Jur. 676, Charities, Sec. 124; 169 A. L. R. 276; 2 Restatement, Trusts, Sec. 413(b); 3 Scott on Trusts, Secs. 399.2, 401.5. "If testator makes a specific gift over in the event that the legacy or devise in question is renounced or otherwise fails full effect will be given to such intention." 4 *Page on Wills* 156, Sec. 1412.

There is no objection to the gifts to the named institutions on the score of the rule against perpetuities. The rule is not applicable to a gift over from charity to charity. *Jones* v. *Habersham,* 107 U. S. 174, 185; 2 Restatement, Trusts, Sec. 401(f); 10 Am. Jur. 597, Charities, Sec. 18.

We hold, therefore, that the three named institutions take the residue. We must now determine what institutions in fact are named in the will.

The final point is whether the gift over to the Girls Home goes to the Children's Aid Society of Maine, or the heirs. No question arises about the Goodwill Home Association taking under the name of Goodwill Farm. The Children's Aid Society of Maine was organized in Maine in 1893 (P. & S. L. 1893, Chap. 459) "with full power to establish and maintain a home, or homes in Maine for friendless, destitute and needy children and for furnishing them with relief and assistance together with suitable mental and moral

training." From 1895 until September 1950 at Belfast and not elsewhere the Society maintained a home in accordance with its charter, and for a great many years "has been commonly known as the Girls Home, located in Belfast, Maine." If the Society had maintained its home for girls in Belfast, as was the case until September 1950, no question would have arisen. The Children's Aid Society of Maine is but the formal and legal name of the well-known Girls Home.

In 1951 the Society was authorized by the Legislature to sell "free from all claims of the state, the buildings and land at the girls' home in Belfast, * * * and to use the proceeds toward the construction of a substitute building on land owned by the Sweetser Children's Home in the city of Saco, county of York, for continuation of the work of the Children's Aid Society of Maine." *P. & S. L., 1951, Chap. 26.*

In the emergency preamble to the Act the Legislature said that "(the Society) cannot continue such (public charitable) purposes in its present location and with its present facilities" and that "it is desirable that its corporate purposes be continued without interruption."

The "substitute building," known as the "Belfast Cottage," was erected on land leased for a term of 50 years with the privilege of renewal for a like period. The building has always remained the property of the defendant Society. "Pursuant to an agreement and working arrangement with said Sweetser Children's Home, (the defendant Society) has paid over and continues to pay to said Sweetser Children's Home, certain sums of money out of its annual income, to maintain a home or homes in Maine for friendless, destitute and needy children and for furnishing them with relief and assistance together with suitable mental and moral training."

Reduced to its essentials we have a Society commonly known as the "Girls Home," ceasing to operate a girls' home

in Belfast, and shortly thereafter resuming operations in the "Belfast Cottage" owned by it and under the immediate management of the Sweetser Children's Home in Saco. Its charitable work was temporarily suspended, but not terminated. The Girls Home had not been limited to the assistance of girls from Belfast or vicinity. It was a state-wide home operated at Belfast. It is now a state-wide home operated at Saco. It is the same Society. *Knapp, Aplt. from Decree Judge of Probate, supra.*

In our view the physical location of the home for girls in Belfast was not a controlling factor in the testator's gift. We find no adequate reason for depriving the "friendless, destitute and needy children," to quote from the charter, of the benefits of the testator's generosity. We hold the gift was to the defendant Society.

A decree may be entered below providing (1) for the payment of reasonable counsel fees and expenses to be paid out of the trust property and allowed the City in its probate account; (2) for the transfer of the balance of the assets of the trust, both real and personal, to the defendants Belfast Home for Aged Women, Good Will Home Association, and Children's Aid Society of Maine, in equal shares; (3) for the filing by the City of Belfast of a final account in the Probate Court upon the allowance of which the City shall be discharged from further responsibility as trustee under the will. The entry will be,

Bill sustained.

Decree in accordance with opinion.

STATE OF MAINE
vs.
P. EDWARD DeBERY, APPLT.

Sagadahoc. Opinion, February 24, 1954.

Automobile. Licenses. Revocation. Driving Under Influence. Intoxication. Exceptions. Appeal.

The Secretary of State may not summarily revoke an automobile operator's license under R. S., 1944, Chap. 19, Sec. 121, as amended (notwithstanding a jury verdict and sentence) while the case is still pending before the Law Court upon exceptions since a person is not "convicted" within the meaning of the statute until the case has reached such a stage that no issue of law or fact determinative of guilt remains to be decided.

Where the statutory conditions upon which the Secretary of State is authorized to summarily revoke an operator's license have not occurred, an attempted revocation is void.

ON REPORT.

This is a criminal action charging defendant with a violation of R. S., 1944, Chap. 19, Sec. 132 as amended. The case is before the Law Court upon report and agreed statement. Case remanded to court below. Judgment to be entered in accord with this opinion. Defendant to be discharged.

Harold J. Rubin, for State.

Blaisdell & Blaisdell, for Defendant.

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

MERRILL, C. J. On report. This case is reported on an agreed statement of facts. The defendant is charged with a violation of R. S. (1944), Chap. 19, Sec. 132, as amended,

to wit, operating a motor vehicle on a highway in Maine "after his right to operate motor vehicles had been revoked by the Secretary of State."

The defendant had been tried in the Superior Court for the County of Sagadahoc, at the June 1952 Term thereof, on a charge of operating a motor vehicle while under the influence of intoxicating liquor. At the close of the evidence he moved for a directed verdict of not guilty and, upon its refusal, noted exceptions thereto. After verdict of guilty and sentence, he perfected his exceptions which were filed and allowed and are now pending before this court.

On July 1, 1952, and while said exceptions were pending, an attested copy of the record of his conviction having been certified to the Secretary of State, the Deputy Secretary of State, without notice or hearing, summarily revoked his right to operate motor vehicles in the State of Maine and revoked his license numbered 96578 issued on the first day of January, 1952. On the same date, to wit, July 1, 1952, notice of this action by the Deputy Secretary of State was mailed to the defendant. On the fourth day of September, 1952 the defendant operated a motor vehicle on a highway in the State of Maine. At the time of such operation he had not received the notice of the claimed revocation of his "license and right to operate motor vehicles," the letter containing the notice not having been delivered to him.

It is for the operation of his automobile on September 4, 1952 after the aforesaid alleged revocation of his license and right to operate motor vehicles on the highways of this State that the defendant is here being prosecuted.

The Secretary of State assumed to revoke the defendant's right to operate motor vehicles under the following clause of R. S. (1944), Chap. 19, Sec. 121, as amended, which reads as follows: "The license or right to operate motor

vehicles of any person *convicted* of violating the provisions of this section shall be *revoked immediately* by the Secretary of State upon receipt of an attested copy of the court records, *without further hearing.*" Emphasis ours.

It is for violation of R. S. (1944), Chap. 19, Sec. 132 that the defendant is now being prosecuted. That section provides "No person shall operate a motor vehicle after his license or right to operate has been suspended or revoked,". The complaint alleges operation after *revocation.*

Unless the license or right to operate motor vehicles by the defendant had been *legally* revoked by the Secretary of State as directed in this section of the statute he is not guilty of the offense charged. The revocation of the license or right to operate is one of the essential facts which must be proved to establish the commission of the crime with which the defendant is here charged.

The right of the Secretary of State to summarily revoke the defendant's license or right to operate was dependent upon his *conviction* of violating the provisions of Section 121 of said chapter, which is the section making it an offense to operate a motor vehicle "when intoxicated or at all under the influence of intoxicating liquor."

The meaning of the word "convicted" or the word "conviction" when used in a criminal statute varies with the context of the particular statute in which it is used. *Donnell* v. *Board of Registration,* 128 Me. 523. In a case such as this, the defendant is not deemed to have been convicted so that the Secretary of State may summarily revoke his license until the case has reached such a stage that no issue of law or fact determinative of his guilt remains to be decided. The end of a criminal case has not been reached if exceptions to the refusal to direct a verdict for the defendant are still pending in the Law Court. Such case is pend-

ing notwithstanding verdict and sentence. See R. S. (1944), Chap. 135, Sec. 29.

> "They (such cases) shall be marked 'law' on the docket of the county where they are pending, and there continued until their determination is certified by the clerk of the law court to the clerk of courts of the county, etc." R. S., (1944) c. 91, § 14.

It goes without saying that the determination of the Law Court may not end a criminal case which is before it on exceptions. The exceptions may be sustained and a new trial granted. The complaint or indictment in that event remains, and the defendant must still answer thereto. The case is unfinished and still pending until finally disposed of by plea, trial, or otherwise. On the other hand, if the Law Court overrules the exceptions judgment is to be entered of record. In fine, there is no conviction in the sense in which we are now using the term until the guilt of the defendant has been legally and finally determined and adjudicated. However, once the guilt of the defendant has been finally determined, for the purposes of R. S. (1944), Chap. 19, Sec. 121, he is deemed to have been convicted "whether or not he was placed on probation without sentence or under a suspended sentence or the case was placed on file or on special docket." R. S. (1944), Chap. 19, Sec. 122.

A statute authorizing revocation of the license "of a person convicted" of crime does not authorize the revocation thereof while the validity of the alleged conviction is subject to the determination of this court on exceptions in the same cause. For a full collection of the authorities see *Donnell* v. *Board of Registration,* 128 Me. 523, and extensive note 113 A. L. R. 1180, et seq.

In the *Donnell* case it was held that a physician who had been found guilty by a jury of a crime committed in the course of his profession and who had been sentenced there-

for, as long as the cause was pending before this court, had not been convicted of such crime within the meaning of the statute allowing revocation of his license upon conviction thereof. It further held that revocation of his license at a time when the criminal case was pending in this court could not be sustained on the ground that he had been convicted of such crime, and that such attempted revocation was void. That case is determinative of the issue before us in the present case.

Inasmuch as the condition upon which the Secretary of State was authorized to summarily revoke the defendant's license or right to operate motor vehicles, to wit, conviction of violating R. S. (1944), Chap. 19, Sec. 121, had not occurred, the attempted revocation of the defendant's license was *void.*

Upon the agreed statement of facts we hold that the defendant's license or right to operate motor vehicles had not been legally revoked. He therefore cannot be convicted of operating a motor vehicle after his license or right to operate motor vehicles had been revoked. See *State* v. *Lamos,* 26 Me. 258. As this issue is determinative of the case we need not consider other issues raised by the defendant. By failing to do so, however, we do not in any way intimate our opinion thereon.

In accordance with the agreement of the parties and the terms of the report the defendant is adjudged not guilty and is to be discharged.

Case remanded to court below.

Judgment to be entered in accord with this opinion.

Defendant to be discharged.

GEORGE D. CARLISLE ET AL.

vs.

BANGOR RECREATION CENTER

Penobscot. Opinion, February 27, 1954.

Recreation Districts. Debt Limit. Bonds. Public Purpose. Constitutional Law. Taxation.

Taxes may be imposed for public purposes only.

The erection of an auditorium by the Bangor Recreation Center created under P. & S. L., 1951, Chap. 90, is a public not private purpose.

The Bangor Recreation Center is a quasi municipal corporation, the available borrowing capacity of which is not limited by the constitutional debt limit of the City of Bangor. *Me. Const., Art. IX, Sec. 15.*

ON REPORT.

This is a Bill in Equity before the Law Court upon report and agreed statement. R. S., 1944, Chap. 95, Sec. 4, Par. XIII. Bill dismissed.

B. W. Blanchard, for plaintiff.

Allan Woodcock, Jr., for defendant.

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

WILLIAMSON, J. On report. This is a bill in equity brought by ten taxable inhabitants of the City of Bangor and of the Bangor Recreation Center under R. S., Chap. 95, Sec. 4, Par. XIII (1944) against the Bangor Recreation Center and its trustees to restrain the trustees (1) "from

issuing and selling general obligation bonds of the Bangor Recreation Center in the aggregate principal amount of $1,120,000, as voted by said Trustees," and (2) "from proceeding to construct an auditorium, as voted by said Trustees." The case is before us on bill, answers, replications and agreed statement of facts. Under the terms of the report the court shall "render such final decision as law and equity require."

The Bangor Recreation Center was created under P. & S. L., 1951, Chap. 90, and accepted 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."

Trustees appointed by the city council of Bangor manage its affairs. Under Section 4 the trustees determine what sums are needed to meet debt payments, interest, and other necessary expenses. Before April first in each year the trustees issue their warrant to the assessors of the City of Bangor "requiring that they assess the total sum so determined upon the taxable polls and estates within said district and to commit their assessment to the collector of said city of Bangor, who shall have all authority and powers to

collect said taxes as is vested by law to collect state, county and municipal taxes."

The trustees have voted:

(1) to authorize "the construction, original equipping and furnishing of an auditorium to be located on the Bass Park area leased by this Recreation Center from the City of Bangor, said auditorium to be of steel and brick construction, to have a seating capacity of approximately 7,500, to contain facilities for basketball games, for an indoor skating rink, for exhibitions and for other indoor events . . .," and

(2) to issue and sell bonds of the Bangor Recreation Center in the sum of $1,120,000 for the purpose of financing the construction of the auditorium.

The trustees are proceeding to offer the bonds for sale and will sell them unless restrained by the court. The available borrowing capacity of the City of Bangor under the constitutional debt limit of five percent of the last regular valuation is presently $35,198. *Me. Const., Art. IX, Sec. 15.*

Two issues are presented relating, first, to the private or public purposes of the auditorium, and, second, to the validity of the bond issue in light of the debt limit applicable to the City of Bangor.

Unless the proposed auditorium will serve public purposes, it cannot be financed or maintained through taxation. Taxes may be imposed for public purposes only. *Hamilton* v. *District,* 120 Me. 15, 112 A. 836 (1921) and cases cited. It is plain that the funds required in this instance in large measure must be raised by taxes.

The plaintiffs say that the purpose of the auditorium is private, not public. With this view we are unable to agree. In *City of Bangor, In Eq.* v. *Merrill Trust Co.,* 149 Me. 160,

99 A. (2nd) 298 (1953), we held the city could lease land in Bass Park to the Bangor Recreation Center for the location and erection of a recreation building with adequate parking facilities. In reaching our decision we necessarily considered the intended use was public in nature.

We said "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." The cases cited illustrate the broad scope of uses public in nature. What is here termed an "auditorium" was in the *Bangor* case called a "recreation building." The difference in description is not material. The proposed use by the Bangor Recreation Center has not changed.

Turning to the second issue, we hold the proposed bond issue of the Bangor Recreation Center will not be a debt of the city, and hence will not be in any way affected by the constitutional debt limit applicable to the city. The importance of the point is obvious in view of the fact that the proposed bond issue exceeds the limited borrowing capacity of the city.

In *Kelley* v. *School District et al.*, 134 Me. 414, 187 A. 703 (1936), it was expressly decided that a school district could properly be established with the same geographical boundaries as a municipality. No sound objection can here be made, therefore, on the ground that the City of Bangor and the Bangor Recreation Center cover precisely the same area.

The two corporations, the City of Bangor and the Bangor Recreation Center, are separate and distinct. The Bangor Recreation Center is not made a part or agency of the city because the territory of each is the same, or the machinery for assessment and collection of the taxes within the "dis-

trict," to use the term of the charter, is furnished by the city.

In the *Bangor* case, *supra,* we said:

> "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."

See also *Baxter* v. *Waterville Sewerage District,* 146 Me. 211, 79 A. (2nd) 585 (1951); *Opinion of Justices,* 144 Me. 417, 66 A (2nd) 376 (1949); *Hamilton* v. *District, supra.*

Whether the policy of creating districts for special purposes is wise is not for us to consider. The rule was well stated by Chief Justice Dunn in *Kelley* v. *School District et al., supra,* at 421:

> "A statute cannot be invalidated because it seems to the court to inaugurate an inexpedient policy. All questions as to the expediency of a statute are for the Legislature. This is a line of inquiry which courts cannot pursue in determining the validity of a law."

The trustees may lawfully proceed to perform the acts which the taxpayers here seek to enjoin. An injunction will not issue. The entry will be

Bill dismissed

STATE OF MAINE
vs.
P. EDWARD DeBERY, APPLT.

Sagadahoc. Opinion, March 2, 1954

Criminal Law. Intoxicating Liquor. Evidence.

To justify a conviction on circumstantial evidence alone, the circumstances must point to respondent's guilt and be inconsistent with any other reasonable hypothesis.

The rule that a party cannot impeach his own witness does not prevent him from showing that a hostile witness testified falsely.

False statements and false explanations of what took place made by a prisoner after his apprehension are a strong indication of guilt.

ON EXCEPTIONS.

This is a criminal proceeding for driving a motor vehicle while under the influence of intoxicating liquor. R. S., 1944, Chap. 19, Sec. 121 as amended. The case is before the Law Court on exceptions to the refusal of Presiding Justice to direct a verdict for defendant. Exceptions overruled. Judgment for the State.

Harold J. Rubin, for State.

Blaisdell & Blaisdell, for Defendant.

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

MERRILL, C. J. On exceptions. The defendant was charged with driving a motor vehicle while under the influence of intoxicating liquor in violation of R. S. (1944), Chap. 19, Sec. 121, as amended. He was tried at the June 1952 Term of the Superior Court in Sagadahoc County. At the close of the evidence he filed a motion for a directed

verdict of not guilty on the alleged ground that the State had not "proved by evidence beyond a reasonable doubt that he was under the influence of intoxicating liquor at the time of the alleged operation of the motor vehicle." The motion was denied, exceptions noted and a verdict of guilty returned. It is upon the exceptions to this denial of the motion for a directed verdict that the case is now before this court.

The defendant was found by the arresting officer slumped over the wheel of his truck which was entirely outside the wrought part of the highway and stuck in a snowbank. Although on a curve the wrought part of the highway was dry and free from snow and ice. The windows of the truck were open and the radiator was still warm although it was a cold night. The defendant was not only under the influence of intoxicating liquor when so found by the arresting officer, but he was under the influence to such an extent that he was drunk. He was abusive and resisted being taken into custody by the officer.

At the time he was found the defendant stated to the officer that he had had four beers. At the trial, offering himself as a witness, he denied that he had drunk any beer or that he told the officer that he had done so. He admitted driving the truck when it left the road. He stated that he drove the truck into the snowbank to avoid a collision with an oncoming car on his, the defendant's, side of the road. His defense was that he had not partaken of any liquor whatsoever prior to the time his truck left the road and that his condition was wholly due to gin which his companion had given him after the truck left the highway. This story was clearly inconsistent with his original statement made at the scene of the arrest, that he had been drinking beer. Not only this, it also contained inconsistencies as to the length of time spent drinking gin after he left the highway and the amount of gin which he consumed. In this

respect his story was also inconsistent with that of his companion. Without further recital of details the defendant's story was inconsistent with itself and with that of his companion. The same may be said of the story related by the companion. Furthermore, though not impossible, the defendant's story is highly improbable.

Ordinarily, men who are perfectly sober and who have had no intoxicating liquor whatever to drink do not proceed to get drunk at the scene of an accident while waiting for someone to come and get their vehicle back into the highway. It is a natural and logical inference and one entirely consistent with fact that the driver of a vehicle stuck in a snowbank outside the wrought part of the highway who is found in the vehicle slumped over the wheel in a drunken condition was under the influence of intoxicating liquor while operating the vehicle. While such inference is logical and entirely consistent with the facts, on those facts standing alone it is not, however, conclusive.

To justify a conviction on circumstantial evidence alone, the circumstances must point to the respondent's guilt and be inconsistent with any other reasonable hypothesis. *State* v. *Merry,* 136 Me. 243. The principal facts in a criminal case must be consistent with each other. They must point to the guilt of the accused and they must be inconsistent with his innocence. Guesswork is not the moral certainty of guilt that the law requires. Conjecture, surmise, and suspicion do not constitute proof beyond a reasonable doubt. *State* v. *Morton,* 142 Me. 254.

This case, however, does not rest entirely upon circumstantial evidence. The defendant saw fit to set up affirmatively and to prove by his own testimony that he became intoxicated after he ceased to drive his truck and after it had left the highway. Having admitted that he drove the truck, and it having been established beyond a reasonable

doubt that he was intoxicated when found in the truck, his only possible defense was that he became intoxicated after ceasing to operate the same. The truth of this defense was known only to himself and his companion.

The jury were justified in viewing the testimony of the defendant critically and even with suspicion. True it is that his testimony is not directly denied. On the question as to when the defendant became intoxicated we can say as we said in *State* v. *Ward,* 119 Me. 482 at 485:

> "the testimony of the respondent can be regarded as of very little value except as it is corroborated by circumstances, probabilities and other evidence, which tend to give it probative force. When the respondent takes the stand in his own behalf, however guilty he may be, he always denies the truth of the offense with which he is charged and asserts his innocence. Otherwise there would be no trial."

True it is that in this case the testimony of the defendant is corroborated by the spoken word of his companion. His companion, however, produced as a witness by the State to meet the necessity of proving operation of the vehicle by the defendant, was a hostile witness and clearly found to be such by the trial court. In weighing the testimony of the defendant and that of his companion as well, the jury were well justified in giving weight to slight discrepancies in their stories and to test the truth of the same in the light of the reasonableness and unreasonableness of the details related by them. True it is the State cannot impeach, in the strict legal sense of that term, the testimony of its own hostile witness. The rule that a party cannot impeach his own witness does not prevent him from showing that a hostile witness testified falsely. Such falsehood may be established by means of inherent inconsistencies contained in the testimony of the witness himself as given in court. In evaluating the testimony of the defendant and his companion the jury were well justified in giving weight

to discrepancies and inconsistencies, not only those contained in the story related by each of the witnesses but between their stories as well. It was the right and duty of the jury to test the truth of these stories in the light of the reasonableness and unreasonableness of the details related by the witnesses.

The jury saw and observed the witnesses. They gave no credence to the story related by the defendant. Otherwise their verdict must have been not guilty. Having rejected the defendant's story that he became intoxicated under the circumstances related by him, they were justified in finding that he told the same impelled so to do by a consciousness of guilt and to escape the consequences thereof. The fact that he raised this defense by relating that which the jury found was not true implies a realization upon the part of the defendant that the inference sought to be drawn from the established facts by the State, to wit, that he was under the influence of intoxicating liquor when he operated his truck and when the same left the highway, is the true one.

From time immemorial false statements and false explanations of what took place made by a prisoner after his apprehension is a strong indication of guilt. As said by this court in *State* v. *Ward,* 119 Me. 482 at 494:

> "When a person is in custodia legis charged with the commission of a criminal offense, a false statement by him as to a material circumstance, is taken heavily against him."

As said in *State* v. *Benner,* 64 Me. 267 at 289:

> "Crime is ordinarily proved by circumstantial evidence. Truth is the reliance of innocence. Falsehood is the resort of crime. All true facts are consistent with each other. If the prisoner was innocent, there was no reason for the withholding a true fact. Still less was there for uttering a

> falsehood. Falsehood is evidence of crime. Every falsehood uttered by way of exculpation becomes an article of circumstantial evidence of greater or less inculpatory force."

This is especially true when the respondent utters the falsehoods from the stand when he appears as a witness in his own behalf.

The jury had the advantage of seeing, observing and hearing the defendant and his companion as witnesses. Even as recorded in the printed case, when read as a whole, their testimony does not convince us of its truthfulness. We cannot say that the jury erred in rejecting the same. Having rejected as untrue the defendant's offered explanation of his condition when found by the officer, the jury were justified in finding that the evidence as a whole convinced them beyond a reasonable doubt of the fact that the defendant was under the influence of intoxicating liquor when he operated his truck.

Exceptions overruled.

Judgment for the State.

STATE OF MAINE
vs.
PHILIP OUELLETTE, APLT.

Aroostook. Opinion, March 5, 1954.

Liquor.

A statute providing "that liquor may be sold on January 1st of any year from midnight to 2 A. M. . ." controls the hours of sale *by a licensee* and does not authorize a sale in 1953 upon a 1952 license.

ON EXCEPTIONS.

This is a criminal proceeding for violation of the liquor laws. The case is before the Law Court upon exceptions following a jury verdict of guilty. Exceptions overruled. Judgment for the State.

Melvin E. Anderson, for State.

Alfred E. LaBonty, Jr.,
David Solman, for Defendant.

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

WILLIAMSON, J. On exceptions. A jury found the respondent guilty of the illegal sale of malt liquor between midnight and 2:00 A. M. on January 1, 1953, without a license. The respondent had a license to sell for the year 1952, but not for 1953. Under the local option law in the September election of 1952 the town voted that licenses of the type held by the respondent should not be granted. The case is before us on exceptions to the following extract from the charge of the presiding justice:

> "Now this statute being the statute that it is, the good faith of respondent, his lack of intent to vio-

> late the law, if you find he had no intent, is of no consequence. The sole question is whether you are convinced beyond a reasonable doubt that a sale was made. And for the purpose of this case, I instruct you that a license to sell liquor between midnight of December 31st, and 2 A.M. of January 1, 1953, is an incident to a 1953 license; that a sale of liquor within that period is not an incident to a 1952 license; that for a sale of liquor between those times and during those hours to be legal, if you find a sale occurred, would have to be done under a 1953 license, which admittedly this respondent did not have."

The sole question is whether the respondent's license for 1952 covered the period until 2:00 A. M. on January 1, 1953. The respondent says that such was the intention of the Legislature.

We are not concerned with the intention of the respondent for "intent is not an essential element of the offense charged." *State* v. *Koliche,* 143 Me. 281, 61 A. (2nd) 115 (1948).

We comment below on the pertinent statutes:

(1) **License to sell**—"All full-year licenses shall be issued for the license year and on a calendar year basis. . ." R. S., c. 57, § 22-F (1944) (enacted P. L., 1949, c. 85), as amended by P. L., 1951, c. 356, § 6.

(2) **Local option**—R. S., c. 57, § 2 (1944), as amended by P. L., 1949, c. 349, § 97, and P. L., 1951, c. 356, §§ 16, 17. On a negative vote by the town licenses shall not be issued for the two calendar years next following.

(3) **Hours of sale**—"No liquor shall be sold in this State on Sundays or on the day of holding a general election or state-wide primary, and no licensee by himself, clerk, servant or agent shall between the hours of midnight and 6 A. M. sell or deliver any liquors, except no liquors shall be

sold or delivered on Saturdays after 11:45 P. M.; **provided, however, that liquor may be sold on January 1st of any year from midnight to 2 A. M., unless January 1st falls on Sunday; . . .**" R. S., c. 57, § 22-C (1944) (enacted P. L., 1949, c. 349, § 102), as amended by P. L., 1951, c. 252. The clause emphasized was added in 1951.

We find no ambiguity or inconsistency in the statutes. The "hours of sale" statute controls the hours of sale by a licensee. It has no bearing upon the period covered by the license to sell. It is plain that the license for the calendar year 1952 ended with the old year and carried no privilege of sale into the new year. The presiding justice clearly stated the law. The entry will be:

Exceptions overruled.

Judgment for the State

STATE OF MAINE
vs.
NICHOLAS PAPALOS
ALSO KNOWN AS
NICK PAPALOS

Kennebec. Opinion, March 10, 1954.

Perjury. Pleading. Indictments.
R. S., 1944, Chap. 122, Sec. 4.
Constitutional Law.

The essentials of an indictment, even though set forth in prescribed form by the Legislature, must comply with constitutional limitations and contain every averment that is necessary to inform the defendant of the particular circumstances of the charge against him. (R. S., 1944, Chap. 122, Sec. 4.)

An indictment for perjury, relating to a proceeding adversary in character, which fails to designate and identify a specific particular

proceeding *by naming the parties* thereto would be fatally defective not only at *common law*, but even under the statute.

The allegation in an indictment for perjury that the Grand Jury was "then and there engaged in hearing testimony relative to the commission of crime in the County of Kennebec" does not identify the particular proceeding or inquiry by which the materiality of the testimony may be adjudged.

In a perjury indictment the purpose of identification must be fulfilled and cannot be dispensed with when statutory form is adapted to cover a proceeding which is not adversary in nature and which lacks parties such as a Grand Jury inquiry.

The possibility of materiality of the alleged false testimony must be apparent *from the face of the indictment* alone; although the indictment need not specify the manner in which the testimony becomes actually material.

ON EXCEPTIONS.

This is an indictment for perjury before the Law Court upon exceptions to the overruling of a demurrer to the indictment. Exceptions sustained. Demurrer sustained.

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

Berman, Berman & Wernick,
Benjamin L. Berman, for Defendant.

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

TIRRELL, J. This case comes before this court on respondent's exception to decision of the Presiding Justice below which overruled respondent's demurrer to the indictment.

Respondent was indicted at the October 1952 term by the Grand Jury of the County of Kennebec. The indictment

purports to charge perjury by the respondent allegedly committed before the Grand Jury itself. The indictment is as follows:

"State of Maine

Kennebec, ss.

At the SUPERIOR COURT, begun and holden at Augusta within and for the County of Kennebec, on the first Tuesday of October in the year of our Lord one thousand nine hundred and fifty-two.

THE JURORS FOR SAID STATE upon their oath present that NICHOLAS POPOLOS, also known as NICK POPOLOS, of Portland in the County of Cumberland and State of Maine, on the 15th day of October, in the year of our Lord one thousand nine hundred and fifty-two, at Augusta in said County of Kennebec, appeared as a witness before the Grand Jury of said County of Kennebec, the said Grand Jury being then and there a competent court and tribunal of competent jurisdiction, and being then and there engaged in hearing testimony relative to the commission of crime in said County of Kennebec and the said Nick Popolos having been then and there sworn according to law, and being required to tell the truth on oath lawfully administered did then and there commit the crime of perjury by testifying as follows; to wit: That at the time he, the said Nick Popolos, was away from the state the Supreme Wine Company would include in their check to his brother, Fred, the amount due him, the said Nick Popolos, and pay it to his brother Fred, who would give to said Nick Popolos his check for the amount due Nick Popolos from Supreme Wine Company. That a check of $133.33 given by Fred Popolos to said Nick Popolos was for commission due Nick Popolos from Supreme Wine Company, that a check of $282.47 given by Fred Popolos to said Nick Popolos was for commissions due said Nick Popolos from Supreme Wine Company, when in truth and in fact said testimony was false and un-

true, all of which the said Nick Popolos then and there well knew to be false and untrue, which said testimony was material to the issue and inquiry then and there pending before said Grand Jury, against the peace of said State, and contrary to the form of the statute in such case made and provided.

A true Bill.

William Niehoff
Special Assistant Attorney General

Donald F. Reeck
Foreman"

The language of the indictment which is brought into question in the present case reads as follows:

"That Nicholas Popolos . . . appeared as a witness before the Grand Jury of said County of Kennebec, the said Grand Jury being then and there a competent court and tribunal of competent jurisdiction, and *being then and there engaged in hearing testimony relative to the commission of crime in said County of Kennebec . . .*"

This is the only language in the indictment which purports to indicate to the respondent, in any manner, the issue, inquiry or subject pending before the Grand Jury to which his allegedly false testimony is claimed to be material.

For this reason, on the 17th day of October 1952 term the respondent filed a demurrer to the indictment. At the time the written demurrer was filed, and on the same page thereof, the respondent expressly reserved the right to plead over in the event the demurrer should be overruled. The Presiding Justice overruled the demurrer and explicitly granted the respondent leave to plead over. As to demurrers in criminal cases see *State* v. *Rogers,* 149 Me. 32, 98 A. (2nd) 655; *State* v. *Schumacher,* 149 Me. 298, 101 A. (2nd) 196.

The respondent excepted to the decision of the Presiding Justice overruling his demurrer and now prosecutes his exception before this court. The respondent's contention is that an indictment for prejury is defective when it does no more, to designate the proceeding in which allegedly false testimony has been presented, than to state that the testimony was given

> "before the Grand Jury of said County of Kennebec . . . then and there engaged in hearing testimony relative to the commission of crime in said County of Kennebec."

This indictment is defective at common law as an indictment for perjury. In *State* v. *Corson,* 59 Me. 137 (1871) this court said:

> "The respondent demurs to the indictment against him for perjury. It is very clear that the indictment is bad in many particulars, if considered under the old rules of the common law, or of our former practice and decisions. Indeed, the criminal pleader found great difficulty in so framing an indictment for perjury, that it could stand the searching examination and technical objections thereupon raised by astute counsel. And the records in all the States show that it had become extremely difficult to pursue a perjurer to final judgment and sentence, however clear his guilt, or however atrocious his crime."

The present indictment must rely, for its salvation, on the provisions of R. S., 1944, Chap. 122, Sec. 4, which sanctions the streamlining of perjury indictments provided that certain fundamentals are *substantially* observed.

The essentials of an indictment for *perjury* in this State are set forth in a prescribed form by the legislature. But such a form is subject to constitutional restrictions and must be in compliance therewith. The statutes prescribing forms of indictment have removed many of the niceties of

technical pleading and the indictment is made little more than a simple statement of the offense couched in ordinary language and with due regard for the rights of the accused. But they cannot change the requirements that the indictment must, as at common law, contain every averment that is necessary to inform the defendant of the particular circumstances of the charge against him.

However, the statute, as specifically worded, is not applicable to a grand jury proceeding because of the secrecy of such proceeding. In its literal form the statute contemplates a proceeding which is adversary in nature—in which party is arrayed against party. The statute says:

> "appeared as a witness in a proceeding *in which C.D. and E.F.* were parties, then and there being heard before a tribunal of competent jurisdiction . . ." (italics ours)

The real issue of the present case thus emerges as follows. Where an indictment purporting to allege perjury, committed before a grand jury, undertakes to substitute the language,

> "before the grand jury of said County of Kennebec . . . then and there engaged in hearing testimony relative to the commission of crime in said County of Kennebec."

for the literal statutory language, "in a proceeding in which C.D. and E.F. were parties," is such adaptation sufficient to accomplish "substantially" the same kind of specification intended by the naming of parties which is required in situations involving adversary proceedings?

We turn, therefore, to discern the purpose of the language of the statute "in a proceeding in which C.D. and E.F. were parties," since this will furnish the key clue to the present problem. Clearly, by the language "in which C.D. and E.F. were parties," the statute is demanding that

the indictment shall set forth a specific, particular proceeding. The statute is requiring that this *particular* proceeding shall be identified, *in its individuality,* from among the multitude of proceedings heard or adjudicated by the competent tribunal involved. It is for this reason that the statute requires that the names of the parties be set forth, since, in an adversary proceeding, such is the generally accepted and prevailing method by which an individual and particular case is identified.

Indeed, the fact that the statute thus requires the designation and identification of the specific particular proceeding, or case, to which the perjury allegedly relates, was an important factor in the sustaining of the constitutionality of the streamlined statutory form. In *State* v. *Corson,* 59 Me. 137 (1871) which upheld the constitutionality of the statutory form, this court emphasized at least twice during the course of the opinion the fact that the indictment is required by the statute to refer "to a matter between two parties named."

It seems manifest, therefore, that an indictment for perjury relating to a proceeding adversary in character, which fails to designate and identify a specific, particular proceeding by naming the parties thereto would be fatally defective, not only at common law, but even under the statute.

The attempted adaptation in the present indictment is defective for the reason that it fails entirely to particularize and identify a specific matter or subject of criminal investigation by the Grand Jury of Kennebec County to which the alleged perjury relates. The "investigation of crime" is the most generic possible description of the function of a grand jury. It has no tendency to identify or particularize. Just as a court hears cases or proceedings, so a grand jury investigates or inquires into a crime or crimes. When an indictment speaks of a witness who appeared before a grand jury, and says no more about the proceeding than

that the grand jury was "then and there engaged in hearing testimony relative to the commission of crime in Kennebec County," it accomplishes no more than that the respondent appeared as a witness before the Kennebec County Grand Jury "then and there engaged in hearing testimony relative to the commission of crime in the County of Kennebec." Such allegation does not identify the *particular* proceeding, or inquiry, by which the materiality of the testimony may be adjudged; it does little more than to indicate the jurisdiction of the tribunal. There is thus a complete failure of such indictment to identify the particular subject matter from amongst the mass of material, within the jurisdiction of the tribunal, which was under study or in process of administration.

It is such individuality of subject which it is the clear purpose of the statute to require. That is why the statute insists that the parties to proceedings must be named. *This purpose of identification must be fulfilled,* and cannot be dispensed with when statutory form is adapted to cover a proceeding which is not adversary in nature and which lacks parties, such as a grand jury inquiry. In such case individualized identification of the particular subject matter included in the diversity of matters within the grand jury's jurisdiction to investigate, and in terms of which the materiality of the testimony may be assessed, must be accomplished by substituting other language which *substantially* fulfills the same purpose of identifying the subject matter. If not a particular crime, then at least some particular class of crimes, as distinguished from crime in general, embracing every possible crime that can be imagined must be specified. Otherwise it becomes impossible for the respondent to have any reasonable basis of information by which to assess whether the testimony set forth in the indictment, and alleged to be false, has any reasonable possibility of being material.

Thus, even in the cases which the state has previously cited, in which demurrers to indictments were overruled, the indictments were more specific than the present one. They attempted, at least, to specify a particular classification of crime rather than crime in general, — thereby to present some issue, *on the face of the indictment,* by which the question of materiality could be adjudged.

In *Blake* v. *Commonwealth,* 183 Ky. 493, 209 S.W. 516 (1919) the indictment alleged inquiry into the violation of the *liquor laws.*

In *Smith* v. *State,* 163 Ark. 233, 259 S. W. 404 (1924) the allegation was

> "In an inquiry or investigation . . . as to the unlawful and felonious manufacture, sale, storing, having, and giving away of alcohol and intoxicating liquors, in said county and state . . ."

In *Thomas* v. *State,* 13 Ala. App. 421, 69 So. 413 (1915) the language was

> "under a charge of violating the prohibition law."

In *State* v. *Schill,* 27 Ia. 263 (1869) the indictment said:

> "in a criminal investigation then pending before the Grand Jury of said county, wherein one William Meyer, a Justice of the Peace of said county, was charged with oppression in office,"

In contrast with the specificity of such indictments the indictment in the case at bar, mentioning only the commission of crime in general in Kennebec County, is as vague and uncertain an allegation as could be conceived. It identifies nothing of the subject matter of the inquiry to furnish a basis for the evaluation of materiality; it merely states the territorial jurisdiction of the grand jury and gives no clue to the identity of any particular proceeding embraced within that general jurisdiction.

The need for some particularized identification of subject matter, as a basis to assess possible materiality, is demonstrated by the case of *State* v. *Ela,* 91 Me. 309. The decision in *State* v. *Ela* establishes that a respondent is entitled to have an adjudication by the court, *from the face of the indictment alone,* regarding whether the allegedly false testimony has any reasonable possibility of being material. If such *possibility* of materiality appears, the indictment need not specify the manner in which the testimony becomes *actually* material; it is sufficient, according to the statutory form, once the possibility of materiality is shown, to allege actual materiality in general terms. If, however, the face of the indictment shows that the testimony required by the statute to be recited has no reasonable possibility of materiality, then according to *State* v. *Ela* a demurrer should be sustained, regardless of the general allegation of actual materiality.

A respondent, or a court, cannot judge the reasonable possibility of the materiality of the testimony unless the indictment, on its face, identifies some specific issue, or subject matter, in relation to which the question of materiality is raised. Thus, the decision in *State* v. *Ela* reveals at least one reason for the requirement in the statutory form of identifying the proceeding by naming the parties thereto. The purpose is to allow for the formulation or identification of some issue, or inquiry, or subject matter in terms of which an initial judgment can be made regarding the *possible materiality* of the allegedly false testimony recited in the indictment. It is to enable the court, by inspection of the indictment alone, to conclude whether the testimony set forth and claimed to be false can have any reasonable possibility of materiality. If the indictment on its face does not sufficiently identify the particular proceeding to which it is claimed the materiality of the alleged testimony relates, defendant is deprived of a most important right to which, under *State* v. *Ela,* he is entitled.

The general consensus of authority in the country sustains respondent's contentions and analysis as herein presented.

The leading case, and one squarely in point, is *State* v. *Webber*, 78 Vt. 463, 62 Atl. 1018. In Vermont there is, as in Maine, a streamlined statutory form of indictment in perjury cases. In support of the demurrer to the indictment it was argued to the court

> "that the indictment is fatally defective because neither count specified the subject matter of the investigation then being pursued by the Grand Jury."

The Vermont court upheld the demurrer and ruled that the indictment was fatally defective in spite of the statutory form. The court said:

> "Is it necessary . . . to sufficiently inform this respondent of the cause and nature of the charge, to specify the matter then under consideration by the Grand Jury. We think it is.
>
> The highest degree of certainty is not required, but the charge must be set forth with such accuracy of circumstances as will apprise him with reasonable certainty of the nature of the same, that he may intelligently prepare to meet it, and, if convicted, successfully plead his conviction in a subsequent prosecution therefor."

Under the Constitution of the United States and by provision of the Constitution of Maine the accused is entitled to be informed of the nature and cause of the accusation against him. These provisions are based on the presumption of innocence and require such certainty in indictments as will enable an innocent man to prepare for trial. But no greater particularity of allegation that may be of service to the accused in understanding the charge and preparing his defense is necessary. However, all the elements or facts necessary to the crime charged must be set out fully

and clearly. It is not, however, necessary to allege matters in the nature of evidence.

It is within the power of legislatures to prescribe the form of indictments and such forms may omit averments regarded as necessary at common law. *But the legislature, while it may simplify the form of indictment, cannot dispense with the necessity of placing therein a distinct presentation* of the offense containing allegations of all of its elements.

See Constitution of the United States, Article VI, amendments; Constitution of Maine, Article I, Sec. 6.

See also *U. S.* v. *Wilcox,* Fed. Cas. No. 16,692, *Commonwealth* v. *Pickering* (Va.), 8 Gratten 628, 56 Am. Dec. 158; *Commonwealth* v. *Taylor,* 96 Ky. 394, 29 S. W. 138; *People* v. *Gillette,* 111 N. Y. Supp. 133; *People* v. *Morrison,* 164 N. Y. Supp. 712; *State* v. *McCormick,* 52 Ind. 169; *Triece* v. *People,* 96 Colo. 32; 40 Pac. (2) 233; also, 41 *Am. Jur.* 25, Sec. 42; 70 *C. J. S.* 502, Sec. 36.

It is thus clear that an indictment for perjury, even under a streamlined statutory form, *must contain some designation or identification of the particular matter being investigated, or heard,* by the tribunal involved. Such identification is entirely lacking in the present indictment. The prosecutor has done no more than to show, in the most generic terms possible, that the grand jury was acting on a multitude of matters within its jurisdiction. In no manner has he undertaken to inform the respondent of any particularized or identifiable subject matter, within that general jurisdiction, by which the respondent or the court can evaluate, initially, the possibility of the materiality of respondent's allegedly false testimony, or to give him information to prepare his defense. Neither can we comprehend how a respondent could plead former jeopardy under such a general allegation.

The assistant attorney general who argued the case for the State admitted in oral argument that during his search of cases of this nature he was unable to find any case analogous to this one which would support or favor this form of indictment.

Exceptions sustained.

Demurrer sustained.

JOSEPHINE MCCAFFREY ET AL.
vs.
JOHN W. SILK, JR.

Hancock. Opinion, March 12, 1954.

Negligence. Non-suit.

If upon the evidence and under the rules of law, a jury could properly find for a plaintiff, it is error to grant a non-suit for defendant.

ON EXCEPTIONS.

This is a tort action before the Law Court upon plaintiff's exceptions to the granting of a non-suit for defendant. Exceptions sustained.

Ralph E. Masterman, for Plaintiff.

Smith & Fenton, for Defendant.

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

WILLIAMSON, J. This is a tort action against a plumber for damages allegedly caused by negligence in the performance of his work. The case is before us on exceptions to the granting of defendant's motion for a non-suit. The only

issue is defendant's negligence. We are not here concerned with plaintiffs' due care, or damages. Our duty "is simply to determine whether, upon the evidence, under the rules of law, the jury could properly have found for the plaintiff." *Johnson* v. *New York, New Haven & Hartford R.R.*, 111 Me. 263, 88 A. 988 (1913); *Glazier* v. *Tetrault*, 148 Me. 127, 90 A. (2nd) 809 (1952).

From the record a jury could find the situation here set forth briefly and not in detail.

In May 1949 the plaintiffs employed the defendant to make alterations in the plumbing in "Rockhurst Cottage," a tourist home, for the purpose of improving the water service on the third floor. The system was changed from low to high pressure. The municipal water pressure of about eighty pounds was reduced by a pressure reducing valve to between forty-five and fifty pounds.

In the kitchen suspended from the ceiling was a hot water tank or boiler at least thirty-five years old built "for a low pressure tank . . . any plumber could tell." The water was heated ordinarily by the kitchen range and also when needed by a "booster" heater in the basement.

The system operated without incident until the plaintiffs for the first time caused the "booster" heater to be put into use on July 17th. Within a few hours Mrs. McCaffrey, a plaintiff, noticed a small leak in the tank, and then three or four leaks . . . "it kept getting worse in seconds. . . ." At her urgent request the defendant sent two employees to the cottage, who warned Mrs. McCaffrey and her daughter to get away from the tank, shut off the water and opened faucets. "Just then there was a terrific noise and I (Mrs. McCaffrey) thought there was dynamite or something exploded, and the boiler folded right up. . . ."

The basic claim of negligence in the declaration is that the defendant in changing the system from an open or low

pressure to a closed or high pressure system "failed to install a relief valve in the proper place above said boiler, but instead installed the relief valve for said boiler in the basement of said house under said boiler." There was no such valve above the boiler.

Mr. Graham, a plumber, testified as follows:

"Q. Referring to the plan up on the board, in accordance with this Code (State Plumbing Code in evidence) where should the temperature relief valve be placed?

A. It should be in the tank or on the hot circulating line.

Q. Now, Mr. Graham, referring to the plan that is on the board, with the pressure reducing valve here and the relief valve here as indicated, was there any protection to excessive heating for this boiler?

A. None whatsoever until the boiler became to a danger point—way above a danger point.

Q. Then what would happen?

A. If somebody relieved the pressure quick enough, you would have a case of dynamite or something like that go off in your kitchen."

A jury could reasonably reach the following conclusions:

(1) The leaks in the hot water tank were caused by the overheating of the water in the high pressure system through use of the "booster." To say, as does the defendant in substance, that the tank may have given way simply from old age and because of its condition fails to give justifiable weight to evidence that the difficulty came when the "booster" was first used after the change from low to high pressure.

(2) The tank "burst" within the fair meaning of the declaration.

(3) The tank "collapsed" from the action of defendant's employees taken to prevent the possibility at least of an explosion.

(4) A temperature relief valve installed where indicated in the State Plumbing Code and by Mr. Graham would have protected the plaintiffs against the dangers inherent in control of hot water under pressure.

Under these circumstances, a plumber could not complain should a jury find he did not exercise due care under the circumstances. The plaintiffs were entitled on this record to go to the jury. The non-suit should not have been granted.

On a second trial counsel should endeavor, particularly if either believes the case will again reach this court, to make a record that is complete and clear. References to a plan drawn upon the board, and to points "here" and "there" on the plan useful as they are to the fact-finders, are often of little or doubtful value to those who must rely upon the record. Care must be taken in the trial court to preserve the vital points in the record, to the end that the appellate court may fairly understand the meaning, intent, and value of the evidence. In brief, in presenting a "live" case to a jury or court, counsel must keep in mind the necessity of a record for the Law Court. The entry will be

Exceptions sustained.

PETER P. CAREY
vs.
BOURQUE-LANIGAN POST NO. 5,
THE AMERICAN LEGION
BOURQUE-LANIGAN POST NO. 5,
THE AMERICAN LEGION BUILDING CORPORATION
AND TRUSTEES

Kennebec. Opinion, March 13, 1954.

Exceptions. Estoppel. Res Judicata.

When a verdict is directed and exceptions taken, all of the evidence necessarily becomes a part of the case on exceptions, whether it is mentioned in the Bill of Exceptions or not.

The burden is upon the excepting party to show that the verdict is erroneous and that he is aggrieved.

Failure to include evidence requisite to show error is not cured by the granting of permission by the Trial Court to omit such evidence.

A party is estopped by the application of the doctrine of *res judicata* from further proceeding where the final result of two previous actions effectively resolved the issues of the case.

ON EXCEPTIONS.

This is an action of assumpsit to recover the value of services rendered by way of *quantum meruit.* The case is before the Law Court upon exceptions to the directing of a verdict for defendants. Exceptions overruled.

Jerome G. Daviau, for Plaintiff.

Thomas N. Weeks, for Bourque-Lanigan Post No. 5, The American Legion Bldg. Corp.

Eaton & Eaton, for Bourque-Lanigan Post and American Legion Bldg. Corp.

Cyril Joly, Jr., for Bourque-Lanigan Post.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, TIRRELL, J., WEBBER, JJ. WILLIAMSON, J., did not sit.

WEBBER, J. The plaintiff is a building contractor. The two principal defendants are for the purposes of this case one entity as their rights and obligations are identical. The parties entered into a single, entire, written contract for the erection of an American Legion building at an agreed price of $129,978. Final payment was conditioned on issuance of a certificate of completion and acceptance by the architect named in the contract. The work was to be substantially completed on or before June 30, 1949 "if possible." Several months after that, defendants discharged the contractor alleging unexcused non-completion and numerous and substantial breaches of the contract. The contractor next brought a bill in equity to enforce a lien for labor and materials. Defendants responded with an action at law for damages for the breach. In equity plaintiff was awarded a lien for $118,000 less credit for what had already been paid the plaintiff. At law these defendants recovered from this plaintiff damages in the sum of $10,000. Now in yet another action at law, plaintiff seeks to recover the value of services rendered by way of *quantum meruit.* At the close of the evidence, the presiding justice directed a verdict for defendants and the matter is here upon exceptions thereto.

In directing a verdict for defendants, the presiding justice indicated that he relied primarily upon the doctrine of *res judicata* as applicable here. In so ruling, he had before him in the form of exhibits the written contract, the bill, answers, findings and decrees in the lien action, and the writ and plea in the action at law together with the mandate and rescript which were filed when we reviewed the latter action in *Bourque-Lanigan Post No. 5, The American Legion* v. *Peter P. Carey,* 148 Me. 114. The plaintiff has not seen fit to bring up or make a part of his bill of exceptions the several exhibits (except the contract) upon which the presiding justice obviously relied in directing a verdict. If the

exhibits demonstrated that the subject matter in controversy here was brought directly in question by the issues in the prior proceedings which terminated in the form of judgments, such evidence would estop the plaintiff here. *Bourque-Lanigan Post No. 5, The American Legion* v. *Peter P. Carey, supra; Buck* v. *Collins,* 69 Me. 445; *Susi* v. *Davis, et al.,* 133 Me. 354. The presiding justice, with the exhibits before him in evidence, properly determined as a matter of law that the estoppel was created. We see no way in which any error in such a ruling could be demonstrated to us without bringing up those exhibits and making them a part of the bill of exceptions. The applicable rule was well stated in *Medical Co.* v. *Stahl,* 117 Me. 190 at 191:

> "We have recently and frequently held that when a verdict is directed, and exceptions are taken, all of the evidence necessarily becomes a part of the case on exceptions, whether it is mentioned in the bill of exceptions or not. Such a ruling is based upon the entire evidence and will stand unless it is shown to be erroneous. The burden is on the excepting party to show that it is erroneous and that he is aggrieved. And it cannot be determined without an examination of all the evidence for it may be that the errors complained of are cured, or the omission supplied, by the evidence omitted in making up the case. *Peoples National Bank* v. *Nickerson,* 108 Me. 341; *Austin* v. *Baker,* 112 Me. 267. For this reason we should be amply justified in overruling the exceptions."

To the same effect, *Gross* v. *Martin,* 128 Me. 445; *Sawyer* v. *Hillgrove,* 128 Me. 230; *Bouchles* v. *Tibbetts,* 117 Me. 192; and *Willey* v. *Maine Central R.R. Co.,* 137 Me. 223.

We note also in this case that it was not through mere inadvertence that the excepting party failed to bring up the necessary evidence. He applied to the presiding justice and received from him permission to refrain from printing the exhibits or making them a part of his case upon review

of his exceptions. Such a defect or omission to include evidence requisite to show any error, however, is not cured or remedied by the granting of permission by the trial court to omit such evidence.

There is no necessity in this case to remand to the court below in order that the missing evidence might be supplied to satisfy the requirements of justice. It is apparent that no other result could have been reached than the one to which exceptions have been taken. We have before us all the other evidence in the case and the oral arguments and briefs of counsel. From them we glean that in the lien action, the court below, despite plaintiff's breach and nonperformance of his contract, found a substantial benefit to defendants, and under equitable principles awarded a lien for the contract price less the cost of completion. We are not required here to say whether plaintiff was entitled to so much, or even to anything. We say merely that it is apparent that he received in equity all that the most liberal view of the lien law would permit after failure to perform fully an express contract. *M. J. Daly & Sons* v. *New Haven Hotel Co.*, 91 Conn. 280, 99 A. 853; See *Brown* v. *Home Dev. Co.*, 129 N. J. Eq. 172, 18 A. (2nd) 742; See *King* v. *Hoadley*, 112 Vt. 394, 26 A. (2nd) 103.

A further subtraction would have been proper for harm and damage caused the owner by the contractor's breaches up to the point where the latter's operations ceased, but apparently it was agreed that such damages would be considered in the action at law and not used as a factor in the lien action. This decision was no doubt aided by the fact that the justice before whom the lien action was pending was at the same time the referee chosen by agreement of the parties to hear and determine the action at law. In any event, the owner was awarded damages in the action at law and that award, reviewed by us upon exceptions, was sus-

tained in *Bourque-Lanigan Post No. 5, The American Legion* v. *Peter P. Carey, supra.*

The final results in these two actions together effectively resolved the issues sought to be raised in the action now before us and determined all of the rights, obligations, and liabilities of the parties arising out of this building contract and its partial performance by the plaintiff. The combined result of the two previous actions gave the plaintiff, having in mind his unexcused non-performance and breaches of contract, all that the law would allow on the most favorable view of the equities of his position. He was given the contract price less the cost of completion, less the amount actually paid him, less the harm and damage caused by his non-performance and prior breaches. See Restatement Law of Contracts, Chap. 12, Sec. 357, and especially Illustration No. 3 on page 628.

In view of our holding that the plaintiff was estopped by the application of the doctrine of *res judicata* to seek an additional recovery by way of *quantum meruit,* it is unnecessary for us to determine here the exact circumstances under which one may seek recovery by way of *quantum meruit* after breach of an express contract. For a discussion of some of the limitations upon such recovery, however, see *Levine* v. *Reynolds,* 143 Me. 15; *Thurston* v. *Nutter,* 125 Me. 411; *Veazie* v. *Bangor,* 51 Me. 509; *Holden Steam Mill* v. *Westervelt,* 67 Me. 446; and *Hub Construction Co.* v. *Dudley Wood Works Co.,* 274 Mass. 493, 175 N. E. 48.

We find no error in the action of the presiding justice in directing a verdict for the defendants.

The entry will be,

Exceptions overruled.

MAUDE VERREAULT
vs.
CITY OF LEWISTON

Androscoggin. Opinion, March 16, 1954.

Negligence.
Municipal Corporation. Sidewalks. Highways. Defects.
Snow and Ice. Class Legislation. Nuisance.

Whatever may be the character of a ridge of ice or snow in a roadway, as distinguished from a sidewalk, as a defect therein, if the same be created by act of those having charge of the streets and allowed to remain therein, the statute relieves a municipality from liability to an action for damages to any person on foot, on account of snow or ice, on any sidewalk or crosswalk. (R. S., 1944, Chap. 84, Sec. 91.)

Independent of the statutes there is no liability whatever on the part of municipalities for injuries caused by defective highways.

R. S., 1944, Chap. 81, Sec. 91 cannot be avoided even if the snow or ice on the sidewalk constitutes a public nuisance. R. S., 1944, Chap. 128, Sec. 16.

R. S., 1944, Chap. 84, Sec. 91 is not unconstitutional as being in violation of Sec. 1 of the Fourteenth Amendment to the Constitution of the United States nor Article I, Sec. 1 of the Constitution of Maine.

The denial of recovery to persons on foot for injuries caused by snow and ice or the slippery condition of sidewalks or crosswalks is not an arbitrary discrimination between those persons on foot using sidewalks and crosswalks and those persons on foot using other parts of the highway.

ON REPORT.

This is an action for personal injuries. The case is before the Law Court upon report and agreed statement. Judgment for defendant without costs.

Armand A. Dufresne, Jr., for Plaintiff.

Irving Friedman, for Defendant.

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

MERRILL, C. J. On report. This is an action against the city of Lewiston to recover for personal injuries received by the plaintiff occasioned by a fall which she suffered while proceeding on foot on the sidewalk at the corner of Cedar and Lincoln Streets in said city. The plaintiff fell in attempting to step over a substantial ridge or accumulation of snow located *on the sidewalk* near the curb where said sidewalk and one end of the cross-walk over which she had travelled joined. The defendant, through its agents, in plowing the streets about a week before had pushed a large quantity of snow onto the sidewalk adjacent to the cross-walk. This snow hardened and made a substantial ridge or accumulation of snow over which pedestrians who desired to enter the sidewalk from said crosswalk had to travel.

The declaration contained two counts. By the first count the plaintiff sought to recover under the provisions of R. S. (1944) Chap. 84, Sec. 88 on the ground that she received bodily injury through a defect in the highway, to wit, the sidewalk. This count was founded on the theory that the ridge of snow on the sidewalk constituted a defect in the sidewalk. In the agreed statement of facts the statutory requirements as to notice under said section are not questioned and are not in issue. The second count in the declaration is based on the claim that the ridge of snow constituted a public nuisance within the meaning of R. S. (1944), Chap. 128, Sec. 7 and that, if so, she was entitled to recover under Section 16 of said Chapter 128.

The defendant says that even if said ridge of snow constituted a defect in the highway or if it constituted a public nuisance, it has a valid defense to this action by virtue of R. S. (1944), Chap. 84, Sec. 91 which reads as follows: "No town is liable to an action for damages to any person

on foot, on account of snow or ice, on any sidewalk or cross-walk, nor on account of the slippery condition of any sidewalk or cross-walk."

The plaintiff's declaration and the agreed statement of facts clearly disclose that the plaintiff's only claim of liability on the part of the defendant is because she was injured by a ridge of snow on the sidewalk. The plaintiff although admitting that she was injured by the ridge of snow contends that said Section 91 "does not apply to an artificial accumulation of snow placed in the way by the municipality, but only applies where the injuries are caused from a natural accumulation of snow and ice on sidewalk and cross-walk."

Section 91 is plain, clear, and unambiguous. It says "No town is liable to an action for damages to any person on foot, on account of snow or ice, on any sidewalk or cross-walk,". The plaintiff, however, quotes a statement by Judge Walton in *Smyth* v. *Bangor*, 72 Me. 249, at pages 250 and 251 when he said:

> "A block of ice may constitute a defect the same as a block of wood or stone. So a ridge or hummock of ice, or snow, may constitute a defect the same as a pile of lime, or sand, or mortar, upon the sidewalk would."

This statement by Judge Walton is from an opinion in an action to recover for *injuries received* and in an *action commenced prior* to the enactment of the original law which is now R. S. (1944), Chap. 84, Sec. 91. The injuries suffered in *Smyth* v. *Bangor* were received on December 9, 1878 and the writ to recover therefor was dated February 7, 1879. Section 91 of Chapter 84 of the Revised Statutes as originally enacted is Section 2 of Chapter 156 of the Public Laws of 1879, approved March 3, 1879. This date is subsequent both to the date of the accident and the date of the writ in *Smyth* v. *Bangor*. The effect of the statute was

neither in issue in the case nor was it under discussion in that opinion.

Whatever may be the character of a ridge of ice or snow in a roadway, as distinguished from a sidewalk, as a defect therein, if the same be created by act of those having charge of the streets and allowed to remain therein, R. S. (1944), Chap. 84, Sec. 91 relieves a municipality from liability to an action for damages to any person on foot, on account of snow or ice, on any sidewalk or cross-walk. This exemption is unrestricted, is absolute and there is no exception contained therein or thereto. We are unable to discover any case in our reports, prior to the instant case, where anyone has even sued a *town* or *city* to recover damages for injuries on account of snow or ice on a sidewalk or cross-walk since the original enactment of the provisions of this statute in 1879. While not conclusive, such absence even of attempts to recover therefor is persuasive of the practical construction which has been given to this statute through the years. The absence of such claim while not conclusive is strong evidence against any such right as the plaintiff sets up in this case. See *Bean and Land Co.* v. *Power Co.*, 133 Me. 9 at 24, and *Fuller* v. *Chicopee Mfg. Co.*, 16 Gray 43.

The rights of the travelling public and the liability of the municipality with respect to injuries caused by defects in highways are limited by the scope of the statute. Independent of the statute there is no liability whatever on the part of municipalities for injuries caused by defective highways. The liability is a creature of the statute, and it does not extend beyond the express provisions. *Wells* v. *Augusta*, 135 Me. 314, *McCarthy* v. *Leeds*, 116 Me. 275, *Huntington* v. *Calais*, 105 Me. 144.

It being true that there is no right of action for injuries caused by a defect in a highway unless the same be granted by statute, it is axiomatic and needs no citation of authorities to demonstrate that there can be no right of action

under circumstances where the statute expressly denies the same. Such is the case here.

Neither can the plaintiff predicate liability on the part of the defendant city under R. S. (1944), Chap. 128, Sec. 16, on the theory that the ridge of snow constituted a public nuisance from which she suffered special injury.

The provisions of R. S. (1944), Chap. 84, Sec. 91 are, "No town is liable to an action for damages to any person on foot, on account of snow or ice, on any sidewalk or crosswalk,". As heretofore stated, this provision of the statute is all inclusive. It contains no exceptions. Its effect cannot be avoided even if the snow or ice on a sidewalk constitutes a public nuisance. This statute affords an absolute defense to the plaintiff's action to recover for injuries caused by the ridge of snow on the sidewalk, whether the same constituted a defect or a nuisance or both.

The plaintiff, however, urges one further ground upon which she seeks to escape the effect of Section 91. It is her contention that R. S. (1944), Chap. 84, Sec. 91, if applicable, is unconstitutional. She alleges that it denies to her equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and the guaranties under Section 1 of Article I of the Constitution of this State. Neither of these contentions can be sustained.

The rules and authorities governing permissible discrimination under Section 1 of Article I of the Constitution of this State and Section 1 of the Fourteenth Amendment to the Constitution of the United States have recently been examined and declared by this court in *State of Maine* v. *King*, 135 Me. 5. In the opinion in that case are to be found many applicable quotations not only from the decisions by this court but also from those by the Supreme Court of the United States. See *State of Maine* v. *King*, 135 Me.

5, Pages 16 to 19, both inclusive. To repeat them in detail would serve no useful purpose. Of the cases cited and quoted we would call attention to the following as setting forth the law applicable to this case. In *State of Maine* v. *Latham,* 115 Me. 176 at 178 we said:

> "It (meaning the Fourteenth Amendment) forbids what is called class legislation. * * * In a word, discrimination as to legal rights and duties is forbidden. All men under the same conditions have the same rights. Diversity in legislation to meet diversities in conditions is permissible. But if in legislative regulations for different localities, classes and conditions are made to differ, in order to be valid, 'these differentiations or classifications must be reasonable and based upon real differences in the situation, condition or tendencies of things. Arbitrary classification of such matters is forbidden by the Constitution. If there be no real difference between the localities, or business, or occupation, or property, the State cannot make one in order to favor some person over others.' "

As said by the Supreme Court of the United States in *City and County of Denver et als.* v. *New York Trust Co. et al.,* 229 U. S. 123, 33 S. Ct. 657, 666, 57 L. Ed. 1101, 1124: "The equal protection clause is directed only against arbitrary discrimination; that is, such as is without any reasonable basis." Furthermore, the burden of showing that a law is unconstitutional is upon him who asserts it. This burden extends to showing that a classification is arbitrary. See *Borden's Farm Products Co., Inc.* v. *Baldwin, Comm.,* 293 U. S. 194, 209, 210, 79 L. Ed. 281, 288, 289, *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152, 63 L. Ed. 527.

The plaintiff contends that because, as she says, persons on foot have the right to travel the highways either on the sidewalks or in the roadway, Section 91 discriminates arbitrarily between persons on foot using the sidewalks and those on foot using the roadway. This distinction between

those on foot using sidewalks and cross-walks and those on foot using the roadway is not arbitrary. It is referable to the differences necessarily encountered in maintaining sidewalks and cross-walks as distinguished from the roadway of highways. The physical management and handling of the maintenance problems with respect to snow and ice on sidewalks and cross-walks as distinguished from that portion of the wrought portion of the highway which we may for convenience call the roadway are entirely different.

Even though the roadway may, subject to some limitations, be used by persons on foot (see R. S. (1944) Chap. 19, Sec. 118 A; P. L. 1949, Chap. 143), that which might be a defect in a sidewalk intended principally for the use of persons on foot might not constitute a defect in the roadway intended principally for vehicular traffic. The denial of recovery to persons on foot for injuries caused by snow and ice or the slippery condition of sidewalks or cross-walks is not an arbitrary discrimination between those persons on foot using sidewalks and cross-walks and those persons on foot using other parts of the highway. It is a distinction based upon the nature of the problems of maintenance of the different portions of the way due to the principal and primary use thereof.

Under R. S. (1944), Chap. 84, Secs. 88 and 91 the right of every person on foot to recover for defects in sidewalks and cross-walks maintained by the city or town is exactly the same as that of every other person on foot using such portions of the highway. The same is true of the denial of the right of recovery for damages caused by snow and ice on sidewalks and cross-walks. There is entire equality between all persons on foot using sidewalks and cross-walks. There is equality between them in their right to recover for defects, and there is equality between them in the denial of said rights.

As we have seen, at common law there was no right of action against a town or city for injuries caused by defects in highways. The State in granting a right of recovery for defects in highways can make the right granted as broad or as narrow as it sees fit. It can restrict its grant of such right of recovery with respect to the nature of the defects, the portion of the highway in which the defects may be found for which liability is granted, or the class of travellers to which the right of recovery is given. The only limitation thereon is that the limitation must not be arbitrary and that there must be equality of right to all persons similarly situated. Tested by this rule, as we have heretofore seen, this statute measures up to the standard of equality before the law which is required by the Constitutions of this State and of the United States.

In accord with the terms of the report judgment must be for the defendant without costs. The entry will be,

Judgment for the defendant without costs.

CAROL R. LEWIS
BY NEXT FRIEND
vs.
KENNETH M. MAINS

RAYMOND F. LEWIS
vs.
KENNETH M. MAINS

Cumberland. Opinion, March 16, 1954.

Trespass. Pleading. Children. Invitees. Licensees. Trespassers. Attractive Nuisance.

Negligence rests upon duty. It is not enough to aver that a duty exists. There must be an allegation of facts sufficient to create the duty.

No implied invitation will arise without some mutuality of interest.

Where one enters a part of premises reserved for use of the occupant and his employees and to which there was no express or implied invitation to go, there can be no recovery for resulting injury, even though he is an invitee to other parts of the premises.

There is no obligation of due care on the part of a property owner to protect a trespasser, even though the trespasser is a child of tender years.

The legal duty of restraining children from going into unsafe places is imposed by law upon their parents and those who stand in *loco parentis*, and is not imposed upon strangers.

The "attractive nuisance" doctrine has been repudiated by Maine Courts.

ON EXCEPTION.

These are actions of trespass on the case for injuries suffered by a child. The cases are before the Law Court upon exceptions to the overruling of a demurrer in each case.

Exceptions sustained.

Richard S. Chapman, for Plaintiff.

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

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

WEBBER, J. These two matters are considered together for convenience. One is a suit by a minor plaintiff for injuries. The other is a suit by her father for her medical expenses. In each, demurrer was filed to the declaration and overruled. Defendant's exceptions are before us.

The declarations allege in substance that the father was an employee in defendant's sawmill. Defendant invited the father to come upon his land and erect a home for himself and his family, which he did. No deed, lease, or any definition of land area to go with the house is shown. On the same land of defendant was located his sawmill, and, about 200 feet from the house, a sawdust pile an acre in extent and reaching a height about equal to that of certain electric wires running to the mill at the crest of the pile. The minor climbed the pile along a well defined path, came in contact with the wires, and was injured. The plaintiffs contend that the declarations sufficiently allege that defendant violated a duty of care owed to the minor child as an invitee.

Negligence rests upon duty. It is not enough to aver that a duty exists. There must be an allegation of facts sufficient to create the duty. *Hone* v. *Presque Isle Water Co.,* 104 Me. 217; *Willey* v. *Maine Central R. R. Co.,* 137 Me. 223. A duty such as the plaintiff contends was owed to the child here would arise only if she were on the sawdust pile by express or implied invitation of the defendant. *Patten* v. *Bartlett,* 111 Me. 409. The duty then would be to use reasonable, ordinary, or due care to keep the premises in a rea-

sonably safe condition for her use. The owner would not in any event be held to insure the safety of the invitee while on his premises. *Lander* v. *Sears, Roebuck & Co.,* 141 Me. 422. No such duty would arise if the plaintiff were a trespasser or a mere licensee. *Robitaille* v. *Maine Central R. R.* Co., 147 Me. 269. Even where plaintiff is a child. *Nelson* v. *Burnham & Morrill Co.,* 114 Me. 213.

It is neither alleged nor contended that there was any direct invitation or permission given by the owner to the child to go or play upon the pile, and it is recognized that no implied invitation will arise without some mutuality of interest as between the visitor and the owner. *Stanwood* v. *Clancey,* 106 Me. 72. The only invitation to be imported from the declarations was addressed to the father to come upon the land and erect a home to be lived in by himself and his family. The declarations say no more. Whether we are considering an implied invitation to the child or the interpretation and scope of an express invitation to the father and the members of the family makes no difference when we consider where it is alleged that the child was at the moment of injury. She was neither in the home nor on one of its approaches. She was not even in what might reasonably be deemed the yard in immediate proximity to the home. Rather was she in an area which was some distance from the home and obviously devoted to the commercial uses of his land by the owner. One would hardly suggest that there was any invitation, express or implied, or even a permission or license to the child to go into the sawmill. Her father's right to enter the mill as an employee would not extend to her. Yet the disposition of waste product into a sawdust pile was a natural and reasonable part of the sawmill operation. The owner had identified at least that portion of his premises as a portion set aside for his sole use in commercial operations. "Where one enters a part of premises reserved for the use of the occupant and

his employees and to which there was no express or implied invitation to go, there can be no recovery for resulting injury, even though he is an invitee to other parts of the premises." 38 Am. Jur. 761; *Wilson* v. *Dowtin,* 215 N. C. 547, 2 S. E. (2nd) 576. We therefore conclude that upon the facts alleged, the child was as much a trespasser upon the pile as she would have been in the mill. The declarations do not aver such wanton, wilful or reckless acts of negligence as would be required to create liability to a trespasser. *Robitaille* v. *Maine Central R. R. Co., supra; Foley* v. *H. F. Farnham Co.,* 135 Me. 29.

Sympathy is quickly aroused by the injuries of a child, and that emotion is both natural and proper. In such a mood, courts have sometimes substituted moral or sentimental obligations for legal obligations. In so doing they tend to curtail unreasonably the proper use of property by an owner in order to confer protection upon a person wrongfully thereon. We have never imposed upon a property owner the obligation of due care to protect a trespasser even though the trespasser was a child of tender years. *Nelson* v. *Burnham & Morrill Co., supra.* Upon whom then does the duty devolve to protect small children from dangers which they may encounter while trespassing? Surely upon their most natural custodians and protectors, the parents. "Temptation is not always invitation. As the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit it, or hold property-owners bound to contemplate the infraction of property rights because the temptation to untrained minds to infringe them might have been foreseen. *Holbrook* v. *Aldrich,* 168 Mass. 15, 16, 46 N. E. 115. The legal duty of restraining children from going into unsafe places is imposed by law upon their parents and those who stand in *loco parentis,* and is not imposed upon strangers. The natural instinct to help the helpless would induce any-

one, in a position properly to do so, to restrain a child from exposing itself to danger; but to impose the duty of exercising such restraint as a legal duty upon all strangers, or upon a particular class of strangers such as the occupants of all tenements that might seem to the childish mind attractive, would prove impracticable and intolerable. The parental duty of restraint implies the parental power of correction, or of the use of preventive force." *Wilmot* v. *McPadden*, 79 Conn. 367, 65 A. 157. To the same effect, *Riggle* v. *Lens*, 71 Or. 125, 142 P. 346; *Tomlinson* v. *Vicksburg R. Co.*, 143 La. 641, 79 So. 174; *Branan* v. *Wimsatt*, 298 Fed. 833.

Even if the declarations alleged enough to imply a *permission* to play upon the sawdust pile, which we do not think they do, plaintiff would fare no better. As a mere licensee, the child would go upon the pile at her own risk and be bound to take the premises as she found them. *Stanwood* v. *Clancey, supra.*

We see no way, then, in which these declarations could be said to state a cause of action unless under some adaptation of the doctrine of *"attractive nuisance"*. This doctrine we have expressly repudiated. *Soule* v. *Texas Co.*, 124 Me. 424; *Nelson* v. *Burnham & Morrill Co., supra.*

Plaintiff places great reliance on the case of *Chickering* v. *Power Co.*, 118 Me. 414, but the holding of that case goes no further than its facts. The minor plaintiff in that case was climbing a tree *in his own yard* where he had a right to be. The opinion cited other cases where recovery was allowed to children climbing trees *in the public highway*, but pointed out that in none of these cases was the child *a trespasser on the property of the defendant.* The Chickering case offers no support for the position of the plaintiff here.

The declarations are not saved by the allegation that "the plaintiff walked up said sawdust pile on a well defined path

which then and there existed on said sawdust pile." The presence of such a path is not sufficient to imply an invitation. The path might be used by a trespasser or a mere licensee and their status would not be improved by such use. *Kapernaros* v. *Boston & Maine R. R. Co.*, 115 Me. 467; *Willey* v. *Maine Central R. R. Co., supra.* This is not a case of one "pursuing the ordinary, customary and natural route which would be pursued by one so coming on the premises" to which he has impliedly been invited, as was the case in *Patten* v. *Bartlett, supra.*

The declarations having failed to assert a cause of action against the defendant, in each case the entry must be,

Exceptions sustained.

INHABITANTS OF THE TOWN OF BEALS
vs.
URIAH BEAL

Washington. Opinion, March 18, 1954.

Constitutional Law. Debt. Ferries. Franchises.

All ferries in Maine are governed by general or special statute, and the Legislature has the right to grant an exclusive franchise.

A franchise is an incorporeal hereditament.

The rights, powers, liabilities, duties and boundaries of Municipal Corporations are within legislative control.

The granting of a ferry franchise to a town with authority to "employ such persons as may be necessary for . . . the operation of the ferry" or "to lease the right to operate the ferry . . . to . . . residents" of the town is not constitutionally objectionable as an improper delegation of power to the town nor as being discriminatory legislation.

ON EXCEPTIONS.

This is an action of debt to recover a penal sum under P. and S. L., 1951, Chap. 135 for violation thereof. The case is before the Law Court upon defendant's exceptions to the overruling of a special demurrer. Exceptions overruled. Case remanded to Superior Court for assessment of damages in accordance with stipulation of counsel on file.

Blaisdell & Blaisdell, for Plaintiff.

Richard S. Chapman,
Dunbar & Vose, for Defendant.

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

FELLOWS, J. This is an action of debt to recover a penal sum under Chapter 135 of the Private and Special Laws of Maine 1951 because of the alleged acts of the defendant in carrying passengers for hire between the Town of Beals and the Town of Jonesport in the County of Washington. The alleged claim is for 634 trips at $4 making a total of $2,536.00. The plaintiff's writ is dated July 18, 1952, returnable to the October Term 1952 of the Superior Court for Washington County. At the October Term 1953 the plaintiff filed an amended declaration which was allowed, and at the same term the defendant filed a special demurrer which was overruled by the justice presiding, to which ruling the defendant excepted. The case is now before the Law Court on the defendant's exceptions.

The action is brought under the Private and Special Laws of Maine for 1951, Chapter 135, which chapter authorizes the plaintiff Town of Beals to maintain and operate a ferry between Beals and Jonesport. The material parts of Chapter 135, in controversy here, are as follows:

"Sec. 1. The town of Beals is authorized to establish and maintain a ferry between the town of Beals and Jonesport, and to make use of suitable landing places in either or both towns, and the town shall make such rules and regulations as it deems advisable for the safe operation of the ferry.

The town of Beals is authorized to employ such persons as may be necessary for the efficient and safe operation of the ferry or to lease the right to operate the same to any responsible person or persons who shall be legal residents of Beals.

Said ferry shall be operated each day, when ice and weather permits, at such hours between 5 A.M. and 10 P.M. and upon such schedules, as the town deems necessary for reasonable accommodation of the residents of the towns of Beals and Jonesport and other persons upon or in the pursuit of lawful business in said Beals."

"Sec. 5. 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."

"Sec. 6. The town of Beals is expressly authorized to purchase or otherwise acquire boats, equipment, apparatus and edifices necessary to the operation of the ferry.

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."

The defendant has made substantial investments in equipment and has been operating boats carrying passengers for hire on the body of navigable tidewater known as "Moose-a-bec Reach" lying between Beals and Jonesport since May

15, 1953, under safety license from the United States Coast Guard to carry passengers. The defendant, however, is without authorization from the State or the Town of Beals.

The parties to this action have previously been before this court with relation to ferry between Beals and Jonesport in a bill in equity. See *Inhabitants of Town of Beals* v. *Beal* 149 Me. 19, 98 Atl. (2nd) 552, holding that the power to establish ferries lies with the Legislature, and that a safety license from the United States is not a license to operate a ferry.

The defendant in his special demurrer states the three following causes why the plaintiffs declaration is insufficient:

1. That the said statute in such case made and provided is in violation of the Constitution of the State of Maine in that said statute discriminates between citizens of the State of Maine as to who may operate a ferry between the Town of Beals and the Town of Jonesport in the County of Washington; also

2. That the said statute is in violation of the Constitution of the State of Maine in that said statute is an unlawful delegation by the Legislature of legislative power to the Town of Beals of the power to license and determine, without guide, standard or restriction provided therein, who shall operate a ferry between the Town of Beals and the Town of Jonesport in said County of Washington; also

3. That said statute is in violation of the Constitution of the State of Maine in that said statute gives the Town of Beals the exclusive right to determine who shall operate a ferry between the Town of Beals and the Town of Jonesport in said County of Washington and thereby deprives the Town of Jonesport of the right to determine who shall operate a ferry between the said Town of Beals and said Town of Jonesport in said County of Washington.

All acts of the Legislature are presumed to be Constitutional, and this is "a presumption of great strength." *Baxter* v. *Waterville Sewerage District,* 146 Me. 211.

The power to establish a ferry is not exercised by the Federal Government but lies within the scope of those undelegated powers reserved to the states. All ferries in Maine are governed by general or special statute, and the Legislature has the right to grant an exclusive franchise. A ferry is "a continuation of a highway." See *Inhabitants of Beals* v. *Beal,* 149 Me. 19, and cases there cited. See also *Waukeag Ferry* v. *Arey et als.,* 128 Me. 108, 146 A. 10, *Ferry Company* v. *Casco Bay Lines,* 121 Me. 108, *Peru* v. *Barrett,* 100 Me. 213, *Attorney General* v. *Boston,* 123 Mass. 460. For the general statute giving authority to County Commissioners see Revised Statutes 1944, Chapter 79, Sections 77-89.

The franchise of a ferry is an incorporeal hereditament. It may be leased, sold or assigned with the consent of the Legislature. It is subject to legislative regulation for the enforcement and protection of public rights and interests. Bouviers Law Dictionary 3rd Revision, "Ferry" and cases cited; *Gas Light* v. *United Gas,* 85 Me. 532, cited with approval in *Hodges* v. *So. Berwick Water Co.,* 139 Me. 40, 45; *Waukeag Ferry* v. *Arey et als.,* 128 Me. 108; *Peru* v. *Barrett,* 100 Me. 213; *Day* v. *Stetson,* 8 Me. 365. "Ferries" 22 Am. Jur. 558, 562. See generally "Franchises," 22 Am. Jur. 722.

The rights, powers, liabilities, duties and boundaries of Municipal Corporations are within legislative control. *Sawyer* v. *Gilmore,* 109 Me. 169; *Kelley* v. *School District,* 134 Me. 414; *Bayville Corporation* v. *Boothbay,* 110 Me. 46.

Chapter 135 of the Private and Special Laws of 1951 granting the ferry franchise to the Town of Beals authorized the town "to employ such persons as may be necessary

for the efficient and safe operation of the ferry." There is no discrimination as to individuals who actually do the "operating." Any person or persons from anywhere may be employed if qualified to make the ferry "efficient" and "safe." If the town does not operate, the act permits the town "to lease the right to operate the same to any responsible person or persons who shall be legal residents of Beals." If leased, the lessee is not compelled to discriminate as to employees, unless in some manner restricted by vote of the town.

The town is now operating the ferry as it was authorized to do, or at any event there is no allegation in the declaration that the town has leased the right to operate, and no claim, on the part of the defendant, that the ferry rights have been leased. If they are not leased they may never be leased, from all that appears in the record.

There is no doubt as to the authority of the Legislature to grant to the Town of Beals, as a Municipal Corporation, the right to establish, operate and maintain a ferry. The decided cases recognize this authority, and no case has been called to our attention holding otherwise. *Peru* v. *Barrett,* 100 Me. 213.

A ferry is the continuation of a highway and it is clearly within the power of the Legislature to grant authority over a highway or over a ferry to a Municipal Corporation even if not within the original boundaries of the town. The special act by implication extends the original boundaries, or gives authority beyond the original boundaries directly or by implication.

The defendant claims that this Chapter 135 of the Private and Special Laws of 1951 does not give exclusive ferry rights to the Town of Beals, and that there is no provision prohibiting the operation of ferries by other persons. There may be no direct prohibition but Section 5 provides that

"any person who operates a ferry between Beals and Jonesport without authorization of the Town of Beals forfeits $4," and such a provision is valid. *Peru* v. *Barrett,* 100 Me. 213.

The defendant further says that Section 5 is an attempt by the Legislature to confer an arbitrary discretionary power on the plaintiff town which is unconstitutional. We do not agree with this contention. The "authorization" mentioned in Section 5 refers to the leasing in Section 1 which may or may not happen in any year. The "authorization" within the power of the town is the authority to operate or to lease the right to operate. It has the consent of the Legislature to lease. See *Gas Light* v. *United Gas,* 85 Me. 532.

The defendant by his statement of causes of demurrer, and his brief, contends that because Section 1 of Chapter 135 of the Private and Special Laws of 1951 gives to the town of Beals the right to lease to a resident of Beals the duty to operate the ferry, the Legislature has exceeded its authority and the act discriminates against other citizens of the state. The defendant says: "Section 5 is an attempt by the Legislature to confer upon the plaintiff an arbitrary, discretionary power to authorize or refuse to authorize, to license or to refuse to license, only residents of the town of Beals, to operate boats for hire over waters beyond its territorial limits, and without providing rules to guide or govern in the determination of whether to approve or reject."

The defendant cites many cases such as *State* v. *Butler,* 105 Me. 91; *State* v. *Vino Medical Co.,* 121 Me. 438; *State* v. *King,* 135 Me. 5; *State* v. *Cohen,* 133 Me. 293; *Dirken* v. *Great Northern Paper Co.,* 110 Me. 374; *State* v. *Montgomery,* 94 Me. 192; *State* v. *Mitchell,* 97 Me. 66, to the effect that certain legislative powers cannot be delegated

and that unjust and improper discrimination is unconstitutional, and further that a law that invests any board or body of officials with a discretion that is purely arbitrary is invalid.

We cannot agree to or with the contentions of the defendant. The cases cited state the law under the circumstances of the case then pending but they are not applicable to the situation presented here, and the act under present consideration does not involve a licensing board, a commission or a committee. It is a town. It is a Municipal Corporation. It is a town that, because of its geographical position, necessarily requires a ferry for its citizens to reach, and to do business with, the main land. The Legislature has determined that public convenience and necessity demands that the town of Beals have a ferry for commercial purposes, as well as for the protection of the safety, health, happiness and well being of its citizens.

Acts relating to water, light, heat, health, highways, schools and other public purposes, in a Municipal Corporation, have uniformly been held constitutional. *Laughlin* v. *Portland,* 111 Me. 486; *State* v. *Phillips,* 107 Me. 249; *Greaves* v. *Houlton Water Co.,* 143 Me. 207; *Elec. R. R. Appellants,* 96 Me. 110, *State* v. *Robb,* 100 Me. 180.

The police power extends to the "lives, limbs, health, comfort and quiet of all persons." *Baxter* v. *Waterville Sewerage District,* 146 Me. 211.

The town as a town may operate the ferry, or the town at a town meeting may vote to lease to one or more of its responsible citizens the right and duty to operate under such terms as the town may vote, not inconsistent with the act. See *Biddeford* v. *Yates,* 104 Me. 506.

Under Section 6 of the act the selectmen of the town have general supervision of the ferry and its management. The

lease, if or when leased, would contain such terms and conditions as voted by the town in order to carry out the provisions of the act regarding supervision, rates, regularity, hours of operation, safety, etc.

We have carefully examined the claims and contentions of each of the parties to this action. The briefs of counsel show much study and preparation and are very comprehensive. The members of the court do not fully agree with the claims of either party, and are constrained to hold that none of the provisions of the act appear to offend the requirements of the State or Federal Constitution under the circumstances relating to this Municipal Corporation and to this ferry. No applicable authority that we have found, and no applicable case has been called to our attention, that holds otherwise. The strong presumption of constitutionality is not overcome by the claims and contentions of the parties under the terms and conditions of this act. It is certainly not unconstitutional "beyond a reasonable doubt." *Baxter* v. *Waterville Sewerage District,* 146 Me. 211.

Exceptions overruled.

Case remanded to Superior Court for assessment of damages in accordance with stipulation of counsel on file.

BERTRON L. CARD
vs.
ELMER NICKERSON

Androscoggin. Opinion, March 19, 1954.

Water Courses. Evidence. Estoppel. Nuisance. Damages.

There is a public or natural right in and to a water course which belongs to all persons whose lands are benefited by it, and it cannot be stopped up, or diverted, to the injury of other proprietors.

To constitute a water course it must appear that the water in it usually flows in a particular direction by a regular channel having a bed with banks and sides, and usually discharging itself into some other body or stream of water.

It is an established principle that parol evidence is inadmissible to explain, enlarge, vary or control a written instrument.

The doctrine of equitable estoppel is recognized in Maine in instances where one knowingly suffers another to purchase and expend money on land under an erroneous opinion of title without making known his claim.

To create an estoppel, the conduct, misrepresentation, or silence of the person claimed to be estopped must be made to or in the presence of a person who had no knowledge of the true state of facts, and who did not have the same means of ascertaining the truth as did the other party.

Permanent damages to real estate cannot be recovered in an action on the case for the obstruction of a water course where the cause of damage may be abated or removed.

ON EXCEPTIONS.

There is an action on the case for damages caused by the obstruction of a water course. The case is before the Law Court on defendant's exceptions. Exceptions sustained.

John G. Marshall, for Plaintiff.

Frank W. Linnell, for Defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, WILLIAMSON, TIRRELL, JJ. WEBBER, J., did not sit.

FELLOWS, J. This is an action on the case brought in the Superior Court for Androscoggin County, for damages caused by the obstruction by defendant of a water course, where water flowed from the plaintiff's property in Auburn to and through the adjoining property of the defendant and thence by pond and brook into the Little Androscoggin River. The case comes to the Law Court on defendant's exceptions.

The record shows, and the jury might properly find, that the plaintiff Bertron L. Card acquired his property in 1919, and that the defendant Elmer Nickerson purchased a portion of his premises in 1937, and then purchased of the plaintiff the remainder in 1949.

The purchase of the lot by the defendant of the plaintiff was made by exchange of deeds. The defendant at the same time sold to the plaintiff (or exchanged), another lot in another location. The defendant testified that he bought the land from plaintiff "to straighten out my line." The deed was made by the attorney for the defendant.

The natural water course existed on plaintiff's and defendant's land wherein the water flowed in a particular direction by a regular channel, having a bed with banks and sides. It had a well defined and substantial existence from within the plaintiff's property through the defendant's property and was rarely, if ever dry. It discharged itself into other bodies of water on its way to the river.

On that portion of the defendant's property which he had purchased from the plaintiff, the defendant constructed a long dam or fill. This dike or obstruction was started by defendant in 1951 and (according to the defendant's testimony) intended to be permanent. It is 132 feet long and

is of rock, telephone poles, gravel and loam. It is about 6 feet high and has at one point a twelve inch drain pipe through it to permit the passing of water, although the drain pipe proved to be very inadequate.

This dam or fill constructed by the defendant causes the water to back up and to overflow the plaintiff's land, which land is slightly higher than the defendant's land. The resulting damage was injury to a natural fresh water spring on the plaintiff's property. Water also covered plaintiff's cess pool, which cess pool was connected with plaintiff's cellar, and water was forced into the plaintiff's cellar, with a total loss of valuable personal property stored in the cellar.

The jury had the benefit of a view, and were instructed that if the verdict was for the plaintiff, the verdict should state whether or not an award was made on the basis of temporary injury or a permanent injury to the plaintiff's property. The verdict stated that the finding was for a permanent injury and assessed damages in the sum of $1500.

During the trial the defendant took exceptions to the above portion of the charge and to certain rulings by the presiding justice, and the case is before the Law Court on these exceptions.

There is a public or natural right in and to a water course which belongs to all persons whose lands are benefited by it, and it cannot be stopped up, or diverted, to the injury of other proprietors. To constitute a water course as defined by the law, it must appear that the water in it usually flows in a particular direction by a regular channel having a bed with banks and sides, and usually discharging itself into some other body or stream of water. It must have a well defined and substantial existence but need not flow continuously or never be dry. *Goodwin and Stewart* v. *Texas*

Company, 133 Me. 260; *Goodwin and Stewart* v. *Texas Company,* 134 Me. 266; *Morrison* v. *Bucksport-Bangor,* 67 Me. 353: 56 Am. Jurisprudence, "Waters," 495, Sec. 6. See also for discussion of rules regarding riparian rights, *Water District* v. *Turnpike Authority,* 145 Me. 35, 71 Atl. (2nd) 520; *S. C.,* 147 Me. 149, 84 Atl. (2nd) 433. See also Opinions of the Justices, 118 Me. 503. Equity may enjoin obstruction in proper case. *Lockwood Co.* v. *Lawrence,* 77 Me. 297; *Wilson & Son* v. *Harrisburg,* 107 Me. 207; *Warren* v. *Westbrook Mfg. Co.,* 88 Me. 58.

In the second case above cited, of *Goodwin and Stewart* v. *Texas Company,* 134 Me. 266, it is held that there can be no recovery for permanent damage in an action on the case for the obstruction of a water course, because successive suits may be brought. Evidence of permanent injury is not admissible. Damages are recoverable only to the date of the writ. See also *C. and O. Canal* v. *Hitchings,* 65 Me. 140, and *Caron* v. *Margolin,* 128 Me. 339. 147 A. 419 where many cases are cited.

Where the description in a deed of the premises intended to be conveyed is clear and free from ambiguity, it cannot be varied, controlled or contradicted by parol or extrinsic evidence. In such a case, the deed must be held to be conclusive evidence as to what land and what rights in and to land are intended by the grantor to be conveyed, the quantity of land, and the intention of the grantor to include or exclude from the instrument particular land or particular rights in land. *Lincoln* v. *Avery,* 10 Me. 418; *Bartlett* v. *Corliss,* 63 Me. 287; *Wilmington* v. *Murdough,* 41 Me. 281; *Lothrop* v. *Foster,* 51 Me. 367; *Pelletier* v. *Langlois,* 130 Me. 486. See *Chandler* v. *McCard,* 38 Me. 564, holding that acts and declarations of the parties "are not sufficient to destroy or vary their legal rights as exhibited by the deed."

It is an established principle, that parol evidence is inadmissible to explain, enlarge, vary or control a written

instrument. Every one must be sensible of the danger of controlling written evidence, which is immutable, by that which depends upon memory, and which may be materially varied by the addition, omission, or even transposition of a single word. This principle is applicable to all written contracts, but especially to those by which real estate is conveyed.

If the defendant could avail himself of parol evidence, he could prove title, not by deed or any instrument in writing, but by parol; and if he could hold a particular tract by parol, he might hold any other tract, directly in the teeth of the statutes, that direct the mode of transferring real estate by deed. The admission of such evidence to explain and vary the deed, and establish title, would shake the security of all the real property in the State, and overturn a sound principle of evidence. *Lincoln* v. *Avery,* 10 Me. 418.

In an action at law parol evidence is not admissible to show that a deed was intended to be a mortgage. *Reed* v. *Reed,* 71 Me. 156. See *Brown* v. *Thurston,* 56 Me. 126, holding that at common law parol reservation of crops inadmissible. "If the agreement was before the execution and delivery of the deed it is merged in the final determination as evidenced by the deed."

Brown v. *Allen,* 43 Me. 590. "Where a tract of land is granted in clear and unmistakable terms, the grantor, and those claiming under him, are estopped to say in a court of law, that the land thus described in the deed was inserted by mistake, and parol evidence is inadmissible to show that another piece of land was intended to be conveyed." Which case also holds that mistakes or errors can be corrected if at all only in a Court of Equity.

Where a written contract is complete in its terms, parol evidence is not admissible to show conversations before the contract was signed, to vary its terms, *Bassett* v. *Breen,* 118 Me. 279.

EXCEPTIONS

During the trial of the case at bar, the defendant Nickerson introduced in evidence the warranty deed that he had received of the plaintiff Card which clearly described the parcel. The deed contained only the usual covenants. There was no reference of any kind to any rights to flow water back upon the plaintiff's adjoining land. The counsel for defendant declared, in an offer of proof, his intention to show by the testimony of the defendant Nickerson that *prior* to the execution of the deed that the plaintiff Card was told by the defendant of the purpose to which he intended to put the land described, and that he intended to fill it and to obstruct the drainage through the low area of land. The defendant claimed that this evidence would create an equitable estoppel and that the plaintiff could not complain of any damage he might sustain. This evidence was excluded by the presiding justice and exception taken.

The evidence was properly excluded in this action. It would tend to vary the terms of the deed which was later executed. There was no claim of any conduct in the nature of fraud. The deed was prepared by the defendant's own counsel. The deed contained all the agreement because the complete terms of the agreement were "merged" in it. The dam, or obstruction, was built by the defendant on his own land which he had purchased of the plaintiff. The defendant had a right to build any structure on his own land provided he made no unlawful use, or did no injury to the rights or property of others. The plaintiff could not complain if it was a proper and lawful use. The lot purchased by and belonging to defendant was clearly described, but the "flowage" claim he now makes, if it were valid, might, through obstruction of the water course, give additional land, or rights in other land, not described and never intended by either of the parties. No fraud is claimed. The deed is not ambiguous. There was no breach of covenant.

The defendant in his testimony indicated that he purchased the land described in the deed for the purpose of "straightening" his line, and that he received all the property that the deed called for.

The doctrine of equitable estoppel is recognized in Maine in instances where one knowingly suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his claim. "It would be an act of fraud and injustice and his conscience is bound by this equitable estoppel." It should appear that there was either actual fraud, or action equivalent to fraud, in relation to land, or that he was silent when the circumstances would impel an honest man to speak. The facts must be peculiarly within his own knowledge. If the other party has knowledge also, there is no estoppel. See *Martin* v. *Maine Central Railroad,* 83 Me. 100; *Gordon* v. *Hutchins,* 118 Me. 6.

In order to create an estoppel, the conduct, misrepresentations, or silence of the person claimed to be estopped must be made to or in the presence of a person who had no knowledge of the true state of facts, and who did not have the same means of ascertaining the truth as did the other party. *Rogers* v. *Street Railway,* 100 Me. 86. It is a doctrine calculated to suppress fraud and oppression. *Stubbs* v. *Pratt,* 85 Me. 429.

We do not find in this record or in the offer of proof the facts and circumstances necessary to create an estoppel. The presiding justice was correct in excluding the evidence offered.

During the trial the plaintiff was permitted to testify, over objections by the defendant, as to the fair market value of his property before and after the erection by the defendant of the obstruction in the water course. This was error. Our court has many times passed upon the question

of damages in cases of nuisance. The continuance or repetition of the nuisance gives rise to a new cause of action as long as the nuisance lasts. Permanent damage to real estate cannot be recovered, in this form of action, where the cause of damage may be abated or removed. Damages cannot be estimated or allowed that occur or will occur after the date of the writ. There is a distinction between stopping the flow of a stream, with consequent flooding of property of another, and waste committed on real estate. This exception must be sustained. *Goodwin and Stewart* v. *The Texas Co.*, 134 Me. 266. For the same reasons the instruction of the presiding justice that the jury might find permanent damage was erroneous, and this exception must also be sustained.

It is not necessary to consider the other exceptions of the defendant. The entry must be

Exceptions sustained.

J. CLIFTON GRAY
vs.
ELIZABETH HUTCHINS

Hancock. Opinion, March 23, 1954.

Forcible Entry. Title. Tax Liens. Wills. Probate. Burden of Proof.

The filing of a Tax Lien Certificate under R. S., 1944, Chap. 81, Sec. 98, creates a mortgage to the town which under P. L., 1945, Chap. 274 shall be *prima facie* evidence in all proceedings by and against the town its successors and assigns of the truth of the statements therein.

In an action of forcible entry and detainer, where defendant pleads title, the title is the only issue, and the burden is on the defendant.

Under R. S., 1944, Chap. 155, Sec. 15 wills do not become operative or "effectual to pass real or personal estate" until proved and allowed in the Probate Court.

The title of a devisee dates from the date of a testator's death only after a will has been proved and allowed, and an assessment against decedent's heirs is valid when made prior to the proof and allowance of a will. To hold otherwise would permit one to escape taxation by failure to file a will or complete probate proceedings.

Reference to buildings is not demanded in a lien certificate under R. S., 1944, Chap. 81, Secs. 37 and 97.

ON REPORT.

This is an action of forcible entry and detainer removed to the Superior Court upon a plea of title. The case is before the Law Court on report. Judgment for plaintiff.

Blaisdell & Blaisdell, for Plaintiff.

William S. Silsby,
W. S. Conary, for Defendant.

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

FELLOWS, J. This is an action of forcible entry and detainer brought by J. Clifton Gray as plaintiff against Elizabeth Hutchins as defendant for possession of certain land and buildings in Orland, Maine. The writ was returnable to the Ellsworth Municipal Court on June 30, 1952. On the return day the defendant appeared and filed a plea of the general issue with brief statement of title. The plaintiff made written statement that the brief statement was frivolous and intended for delay. The Municipal Court decided otherwise, and ordered defendant to recognize to plaintiff claimant in the sum of $150 and ordered the plaintiff claimant to recognize to the defendant in the sum of $150. The

case was removed to the Superior Court. At the September Term 1952 of the Superior Court for Hancock County the evidence was by agrement taken out before the presiding justice, and the case now comes to the Law Court on the report of this evidence for final decision.

The plaintiff claims title by quit claim deed from the Inhabitants of the Town of Orland, which town obtained title, if at all, under and by virtue of tax liens. The defendant Elizabeth Hutchins claims title as residuary devisee under the will of Ernest L. Bennett late of Orland deceased testate. Ernest L. Bennett was the original title holder through whom both parties necessarily claim.

Ernest L. Bennett, in his life time, owned the premises in question. Various tax liens have been recorded against the premises, one lien during Bennett's lifetime, and three liens after the date of his decease. Bennett died on August 9, 1946. The will of Ernest L. Bennett was filed August 20, 1946, but was not proved and allowed until January 22, 1952.

The title of the Inhabitants of the Town of Orland, claimant's grantor, is based on the following Collector's Tax Liens, all of which were recorded in the Registry of Deeds for Hancock County:

1. Lien for 1944 taxes assessed against Ernest L. Bennett, certificate recorded August 2, 1945.

2. Lien for 1946 taxes assessed against Ernest L. Bennett, certificate recorded April 17, 1947.

3. Lien for 1947 taxes assessed against Ernest L. Bennett, heirs of, certificate recorded April 15, 1948.

4. Lien for 1948 taxes assessed against Ernest L. Bennett, heirs of, certificate recorded April 15, 1949.

No discharge of any of these liens appears of record. The fourth parcel of land described in the deed from the town

and in each of these certificates is the property declared on in the writ.

The question presented is title. The defendant contends (1) that taxes for the years 1947 and 1948 were improperly assessed, being assessed to Ernest L. Bennett, Heirs: (2) that all of the tax liens are fatally defective in that the certificates do not sufficiently describe the real estate on which the tax was assessed, because no reference is made to buildings in the tax lien certificate.

The plaintiff claimant contends (1) that under the pleadings in the case, the burden is on the defendant to establish her title: (2) that the period of redemption having expired, the lien certificates are prima facie evidence of the title of the Town of Orland to the real estate therein described and of the regularity and validity of all proceedings: (3) that the recitals in the lien certificate show compliance with all statutory requirements for enforcement of the lien: (4) that the 1947 and 1948 taxes were properly assessed to the heirs of Ernest L. Bennett; the will of Ernest L. Bennett not having then been allowed: (5) that the real estate taxed is sufficiently described, both in the inventory and in the lien certificates: (6) that if any one of the tax liens (1944, 1946, 1947 or 1948) was sufficiently perfected, then title to the real estate is now in the claimant by virtue of his deed from the Inhabitants of the Town of Orland.

Chapter 81, Section 97, Revised Statutes of Maine (1944) provides for enforcement of liens for taxes on real estate by giving notice to the person to whom assessed and by recording a certificate in the registry of deeds, and "in the inventory and valuation upon which the assessment is made there shall be a description of the real estate sufficiently accurate to identify it."

The filing of the certificate creates a mortgage to the town under the provisions of Chapter 81, Section 98, Re-

vised Statutes (1944). See Warren v. Norwood, 138 Me. 180. By the amendment to Section 98 passed by the Legislature in 1945 as Chapter 274 of Public Laws of 1945 it was provided "The mortgage shall be prima facie evidence in all courts in all proceedings by and against the town, its successors and assigns, of the truth of the statements therein and after the period of redemption has expired, of the title of the town to the real estate therein described, and of the regularity and validity of all proceedings with reference to the acquisition of title by such mortgage and the foreclosure thereof."

In an action of forcible entry and detainer, where defendant pleads title, the title is the only issue, and the burden of proof is on the defendant. *Reed* v. *Reed,* 115 Me. 441.

It seems to be understood by the parties that if any one of the foregoing liens for any one of the taxable years 1944, 1946, 1947, 1948 are valid, that judgment must be for the plaintiff. The court must so hold, because the statutory time limit for redemption in each instance has of course expired.

The claim is made by the defendant that the evidence shows that 1944 was paid or partially paid. The objection made by the defendant as to the other liens is the question of description, because she says the description is not sufficiently accurate, that buildings on the land are not mentioned, and she claims that "buildings are the most distinctive aspect of the premises," and that the omission of the buildings renders the description inaccurate. The objection of the defendant to the later liens is also that Ernest L. Bennett left a will and that the tax was assessed against the heirs, when it should have been taxed to devisees. Furthermore, the defendant says "the tax collector sent the statutory ten-day notices to the wrong parties in that they

were sent to the heirs of Ernest L. Bennett when in fact there was a will * * * devising the real estate to the defendant."

The court considers in the first instance the last tax lien, to recover the tax assessed in 1948, where certificate was recorded in 1949. If this, or any other of the liens, is valid under the statute, the judgment must be for the plaintiff.

This lien certificate describes the property as follows: "real estate in said town of Orland, and assessed against Ernest L. Bennett, Heirs of Orland, Maine, as owner thereof said real estate being bounded and described as follows: Land bounded on the north by land of C. Wardwell, East by Range Line, South by land of I. F. Dorr, and land of Paul and Marda Saunders, West by Highway leading to Upper Falls socalled as recorded in Hancock Registry Book 672, Page 368." The certificate further certifies "that a demand for payment of said tax has been made of the said Ernest L. Bennett, Heirs of, by me by my sending by registered mail to Heirs last known place of abode at Orland, Maine, on the 1st day of April 1949" * * * "in accordance with the provisions of Chapter 81 Sections 97 and 98 of the Revised Statutes of Maine for 1944 as amended."

Wills do not become operative or "effectual to pass real or personal estate" until proved and allowed in the Probate Court. Revised Statutes 1944, Chapter 155, Section 15. Until a will is established in that forum it has no life. It may not be a legal will. It may not be a duly executed will. It may be a forgery. The testator may not have been of sound mind. There may have been undue influence. *Cousens* v. *Advent Church,* 93 Me. 292. It is only after a will has been proved and allowed in the Probate Court that it relates back to the time of the death of the testator, and title of a devisee then dates from the death of testator and not from the time of probate. *Spring* v. *Parkman,* 12 Me. 127;

Wright v. *Williamson,* 67 Me. 524; *Green* v. *Alden,* 92 Me. 177. When it appears of record in the Probate Court that the real estate of a deceased person has become vested in a devisee, *under a will duly probated and allowed,* the tax cannot properly be assessed to the heirs. *Tobin* v. *Gillespie,* 152 Mass. 219. Where the owners of land taxed are devisees under a valid will, an assessment against the "Estate of" the deceased testator is invalid. *Talbot* v. *Wesley,* 116 Me. 208. After a will has been proved and allowed, as in *Elliott* v. *Spinney,* 69 Me. 31, the real estate must be taxed to devisees.

The will of Ernest L. Bennett was not probated until January 22, 1952. It was filed more than five years before, but for some unexplained reason (such as possibly a threatened contest over validity) no evidence to prove the will was presented and, so far as this record shows, no hearing had. The records of the Probate Court showed that no will had been allowed prior to January 22, 1952. It was not determined that there was a will from 1946 to 1952. If there was no will, or no instrument determined to be a will, during this long period, the assessors would certainly not be expected to decide that the defendant was the devisee under a will. Its validity was not determined by proof, and allowed by the Probate Court. The statute permitted an assessment against the heirs of Ernest L. Bennett, or against his devisees. It is true that an assessment might have been made against one in possession, but the correct determination of whether a person is in possession of real estate is sometimes a difficult, if not impossible, task. The assessment was made against the heirs, and all statutory notices given to the heirs, and we think properly, for there was no will determined to be a will, that transferred title to this defendant as devisee. The record title was in the heirs unless and until a will was probated. To hold otherwise would permit a person to escape taxation for a period

of years by a continuance of a pending petition in the Probate Court (as in this case), or by failure to promptly file a will.

The inventory and valuation must contain a description of the real estate "sufficiently accurate to identify it" and the lien certificate must contain such a description of the real estate. Revised Statutes 1944, Chapter 81, Section 97.

The description must be such as to enable a person to identify the real estate and to apply the description to the face of the earth. The description of the real estate must be certain or refer to that by which it can be made certain. *Warren* v. *Norwood,* 138 Me. 180, 187; *Hunt* v. *Latham,* 121 Me. 303; *Perry* v. *Lincolnville,* 149 Me. 173, 177; 99 Atl. (2nd) 294.

Although the land must be valued separately from the buildings, reference to buildings is not demanded by the statute in the lien certificate, Revised Statutes 1944, Chapter 81, Sections 37 and 97. Buildings pass with the land without any mention or description, *Wheeler* v. *Wheeler,* 33 Me. 347; *Grover* v. *Drummond,* 25 Me. 185.

It appears to the court that the description of the land in question is sufficiently accurate. It identifies the real estate, by the bounds of abutting owners, range line, and a highway. Such a description will enable any person to locate the property, and no claim is made that these bounds do not exist. A witness, who was a surveyor and who had been an assessor and who had once lived on the disputed property, stated that the description was accurate. It was not necessary to mention buildings on the property. A mention or description of a building is not necessary in a tax lien certificate or in a deed. The buildings if not mentioned pass with the land. The real estate description was sufficiently accurate in the assessors inventory, and valuation, in the lien certificate, and in the deed from the town, to identify

it. The same real estate description was in the assessors books, in the lien certificate and in the deed from the town. The tax for the year 1948 on this real estate was properly assessed, the land was valued and the buildings valued separately in the assessors inventory and valuation, and it does not appear that any statutory requirement was not legally followed. See *Warren* v. *Norwood,* 138 Me. 180.

When the defendant raised the question of title the burden was upon her to show a better title than that of the plaintiff. This she has not done. Further than this, the evidence in the case did not in any degree overcome the prima facie effect of the recorded lien certificate. The plaintiff showed a better title.

Judgment for the plaintiff.

EVERETT L. GILES
vs.
MARY A. PUTNAM
(Formerly Mary A. Nicholson)
JOHN G. COPE
TRUSTEE

Cumberland. Opinion, March 27, 1954.

Bills and Notes. Blanks. R. S., 174, Sec. 14
Words and Phrases.

Under Sec. 14, Chap. 174, R. S., 1944, the person in possession of a negotiable instrument, when such instrument is wanting in any material particular he, the person in possession, has a *prima facie* authority to complete it by filling up the blanks.

Reasonable time under R. S., 1944, Chap. 174, Sec. 14, is a mixed question of law and fact.

Prima facie imports that the evidence produces for the time being a certain result, but that result may be repelled.

A jury verdict based on evidence on both sides should not be disturbed, unless so manifestly erroneous as to make it apparent that it was produced by prejudice, bias, or mistake of law or fact.

ON EXCEPTIONS AND MOTION.

This is an action on a promissory note. The plea was the general issue. Trial was had before Superior Court and the jury returned a verdict for the defendant. The case is before the Law Court upon plaintiff's exceptions to the refusal to direct a verdict and plaintiff's exceptions to refusal to grant a general motion for a new trial. Exceptions overruled. Motion denied. Judgment for the defendant with costs to be taxed by the Clerk of the Superior Court for the County of Cumberland.

Basil A. Latty, for Plaintiff.

Richard S. Chapman,
Paul L. Powers, for Defendant.

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

TIRRELL, J. This is an action brought by the plaintiff against the defendant on a demand promissory note dated August 4, 1947 in the principal amount of $3,000 in which the defendant was a co-signer with her then husband, Norman Nicholson. The writ contained three counts, the first setting forth the note, the second count being a money count, and the third count setting forth an account annexed. The plaintiff sought to recover the principal sum together with interest thereon at the legal rate.

The defendant filed an affidavit of belief that the signature of the defendant on the note was not genuine or

authorized, but later at the trial, acknowledged that the signature was hers.

The case went to trial on the defendant's plea of general issue. Trial was had before a jury at the March 1953 term of Cumberland County Superior Court and the jury returned a verdict for the defendant.

At the close of all the evidence, plaintiff moved for a directed verdict on the ground that his prima facie case had not been rebutted by any evidence introduced by defendant. To the ruling of the judge denying this motion plaintiff objected and based his bill of exceptions thereon.

The evidence revealed that the defendant and her then husband signed a demand promissory note identified as Plaintiff's Exhibit 1, in the sum of $3,000, dated August 4, 1947.

At the time the note was signed by defendant the payee's name had not been filled in. There is a dispute as to whether the date and amount had been filled in before defendant signed, she having testified that it was blank as to these items and her former husband having testified that the note was complete, except for the payee's name, when defendant signed.

In any event the plaintiff received the note dated August 4, 1947 and filled in his own name as payee. On August 5, 1947 plaintiff drew his check in the amount of $3,000 to the order of defendant's husband.

The funds were used by defendant's husband in the conduct of his cleaning business and were never repaid. In June 1948 defendant's husband filed a voluntary petition in bankruptcy. Defendant and her husband were divorced in March 1951.

The uniform negotiable instrument act was first passed by the legislature, Chap. 257, P. L., 1917, and is entitled

"An Act to Make Uniform the Law of Negotiable Instruments."

The issue is to be determined by the language of Chap. 174, Sec. 14, of the Revised Statutes of Maine, 1944, as follows:

> "Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a *reasonable time.* But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time." (emphasis ours)

There were questions of fact in issue for the jury to decide, namely when the note in question was delivered to the plaintiff and by whom it was delivered.

It is true that under Sec. 14, Chap. 174, R. S., 1944 the person in possession of the instrument, when such instrument is wanting in any material particular, he, the person in possession, has a *prima facie* authority to complete it by filling up the blanks therein.

The words *prima facie* are —

> "Latin words which have, by long usage, become a part of the English language, and the meaning of which is readily understood by a person of common understanding. They are words of very com-

> mon use in the courts and in newspaper reports of judicial decisions, and they import that the evidence produces for the time being a certain result, but that the result may be repelled. They have been defined as meaning apparent. They have further been defined as meaning as it first appears; at first sight; at first view; on its face; on the face of it; on the first appearance; presumably; so far as can be judged by the first disclosure." (C. J. S. 72, Sec. 55)

What is a reasonable time is a mixed question of law and fact. When the facts are in dispute it is for the jury to decide what the facts are and apply the law relative thereto as instructed by the court.

The fact of the date of delivery of the note in question is in controversy and is one question of fact for the jury to decide. Also, a question of fact for decision by the jury was when the blanks were *filled up,* for the statute reads that such blanks must be filled up within a *reasonable time.* It is therefore important for the jury to know at what time the note came into possession of the plaintiff so as to enable him to fill up the blanks within a reasonable time.

In reading the transcript we note that plaintiff claims delivery of the note on August 5, 1947 at the home of defendant but defendant denies any knowledge of delivery at such place or date.

We note with interest that at the time the defendant's former husband had a bankruptcy petition prepared by an attorney an investigation was made by this attorney to learn something of any indebtedness of the petitioner to the plaintiff in this case. We quote direct from the record a part of the testimony given under oath by the attorney who was preparing the bankruptcy schedules and attempting to learn the true facts of any indebtedness between his then client and this plaintiff, in May 1948.

"A. Mr. Giles came into my office, I had known him for some time, and said that Mr. Nicholson and his wife had suggested that he come in and talk about the money which *Mr.* Nicholson owed him. I had, previous to that occasion, learned about the $3,000-*loan* to Mr. Nicholson. Mr. Giles told me at that time that they had suggested to him that if he were interested in putting more money into Mr. Nicholson's business and become either a partner or stockholder in it, he might, by doing that, salvage or save his $3,000. And I asked him what he had to show for the $3,000. He said: *'All I have is my cancelled check.'* I expressed my amazement to him and said: 'You mean you have nothing beyond that to show for the loan?' He said; 'Nothing.' And I said: 'I don't understand how you could take the chance.' And he told me he had been a friend of the family for several years, lived with Mr. Nicholson's mother, that he had done it as a friend to Norman Nicholson and that he had decided not to put any more money into it, but rather to suffer the loss, which seemed apparent to him at the time." (Emphasis ours)

Surely all of this testimony was within the province of the jury to weigh in its endeavor to find the truth and the true situation.

This court said in *Hill* v. *Hobart,* 16 Me. 164, 168, 169:

"Where the facts are clearly established, or are undisputed, or admitted, reasonable time is a question of law. But where what is a reasonable time depends upon certain other controversial points, or where the motives of the party enter into the question, the whole is necessarily to be submitted to a jury, before any judgment can be formed, whether the time was or was not reasonable."

Also in *Greene* v. *Dingley,* 24 Me. 131, 137:

"Another ground of exception is, that the question, whether the tender and demand of the steers were

made in a reasonable time, was left to the jury. This was a question of law upon the facts, of which facts the jury were the judges. It often happens, that facts are in dispute, and *what is reasonable time,* is a mixed question of law and fact."

Lucius R. Williams v. *Frederick A. Sweet,* 121 Me. 118, 120:

"The province of a jury is to decide debatable questions of fact. Where, from all the facts, it is manifest that a single conclusion only would be consistently sustainable, the canon of the law imports the duty that the sitting Justice shall instruct the returning of a verdict proper to the circumstances. The reason is in the principle that prevention is better than cure. *Heath* v. *Jaquith,* 68 Maine, 433; *Jewell* v. *Gagne,* 82 Maine, 430; *Coleman* v. *Lord,* 96 Maine, 192; *Reed* v. *Reed,* 113 Maine, 522; *Royal* v. *Bar Harbor Water Company,* 114 Maine, 220."

Royal v. *Bar Harbor and Union River Power Company,* 114 Me. 220, 221:

"It is well settled that in considering exceptions to the direction of a verdict, the only question is whether the jury would have been warranted by the evidence to find a verdict contrary to the one ordered. If a verdict to the contrary could not be sustained, it is the duty of the presiding Justice to direct the verdict. If such a verdict would be sustainable, the issue of fact should be submitted to the jury. *Horigan* v. *Chalmers Co.,* 111 Maine, 111; *Johnson* v. *N.Y., N. H. & H. R.R.,* 111 Maine, 263; *Shackford* v. *N. E. Tel. & Tel. Co.,* 112 Maine, 204."

The presiding justice ruled correctly in refusing to direct a verdict for the plaintiff, and plaintiff's exceptions to the refusal to direct a verdict for plaintiff avail him nothing.

What has been said above refers not only to the exception to the refusal to direct a verdict but applies as well to

the plaintiff's "general motion for a new trial." The jury passed on all questions of fact under proper legal instructions given it by the justice presiding and returned into court a verdict for the defendant. That a jury verdict based on evidence on both sides should not be disturbed, unless so manifestly erroneous as to make it apparent that it was produced by prejudice, bias, or mistake of law or fact, has been so universally held by this court that citations are unnecessary.

We therefore conclude that the exceptions of the plaintiff as to the refusal of the presiding justice to direct a verdict for the plaintiff are overruled and the plaintiff's motion for a new trial is denied.

The entry will be

Exceptions overruled.

Motion denied.

Judgment for the defendant with costs to be taxed by the Clerk of the Superior Court for the County of Cumberland.

INHABITANTS OF THE TOWN OF OWL'S HEAD

vs.

JOHN E. DODGE, JR.

Knox. Opinion, March 24, 1954.

PER CURIAM.

On report. This is *an action of debt for taxes* reported to this court by a Justice of the Superior Court on an agreed statement of facts as provided for by R. S., 1944, Chap. 91, Sec. 14.

The period for which taxes are alleged to be due is from January 1, 1949 through December 31, 1953. During this time the City of Rockland was the owner of real estate known as the Rockland Municipal Airport. This real estate is located in the Town of Owl's Head and consists of approximately three hundred and ninety acres, upon which there are three landing strips and about nineteen buildings. During all of this period the defendant was the tenant in possession of the Rockland Municipal Airport under lease from the City of Rockland.

The agreed statement of facts now before us especially fails to show sufficient facts to enable this court to make a decision on the rights of the parties and to render judgment thereon.

Specifically the agreed statement of facts fails to show the assessed valuation of each individual building located on said property or the amount of tax claimed by the town to be due on each building, nor does it show with sufficient detail in many instances the use to which each building is and has been put during each taxable year.

In no manner do we intend to indicate that final decision of this case is to be based on the information as to the facts

above referred to, but upon all factual information essential to a final disposition of the case together with the law applicable to such facts.

Report discharged.

Case remitted to the Superior Court.

Domenic Cuccinello, for Plaintiff.

Frank F. Harding, for Defendant.

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

INHABITANTS OF THE TOWN OF LINCOLNVILLE
vs.
CHARLES A. PERRY

Waldo. Opinion, April 1, 1954.

Tax Liens. Evidence. Injunctions. Restraining Orders. Equity of Redemption. Decrees. Estoppel.

Equity Rule 28.

A Tax Lien Certificate under R. S., 1944, Chap. 81, Secs. 97 and 98, as amended, is *prima facie* evidence of title, therefore it is unnecessary for one asserting such title to lay a foundation for introduction into evidence of the certificate by first proving the proper steps in the tax procedure. (P. L., 1945, Chap. 274, Sec. 1.)

An injunction has been well described as a judicial process whereby a party is required to do or refrain from doing a particular thing.

A restraining order is a form of injunction issued *ex parte* for the purpose of restraining the defendant, for what should be a very brief period pending notice and hearing on application for a temporary injunction.

An *ex parte* restraining order issued during the redemption period of a tax lien foreclosure restraining the town and its officers from "acquiring title, conveying or alienating said property" and later vacated, cannot operate to toll the statutory period of redemption.

Injunction and restraining orders operate *in personam.*

Where a valid legislative act has determined the conditions on which rights shall vest or be forfeited, and there has been no fraud in conducting the legal measures, no court can interpose conditions or qualifications in violation of the statute.

Estoppel cannot be raised against a town in the exercise of its taxing power.

A judgment of a court having jurisdiction, no fraud or collusion appearing, cannot, at the instance of a party to it, be impeached collaterally by proof of errors.

A decree in accordance with the decision and certificate of the Law Court, which effectuates its mandate is sufficient. (Equity Rule 28.)

ON EXCEPTIONS.

This is a Writ of Entry before the Law Court upon exceptions to the direction of a verdict for plaintiff. Exceptions overruled.

Harmon & Nichols, for Plaintiff.

Frank F. Harding,
C. A. Perry, for Defendant.

SITTING: MERRILL, C. J., THAXTER, WILLIAMSON, TIRRELL, WEBBER, JJ. FELLOWS, J., did not sit.

WEBBER, J. This was a writ of entry to try title in real estate claimed by plaintiff, Town of Lincolnville, by virtue of its foreclosure of a statutory tax lien mortgage under the provisions of R. S., 1944, Chap. 81, Secs. 97 and 98 as amended. On May 16, 1951, a date which was more than eight months and less than one year after the tax was com-

mitted to the tax collector, that officer filed and caused to be duly recorded the tax lien certificate in the manner prescribed by statute. Unless sooner redeemed, the mortgage thereby created would ripen into title by virtue of automatic statutory foreclosure on November 16, 1952, eighteen months after recording. *Town of Warren* v. *Norwood,* 138 Me. 180. See *Scavone* v. *Davis,* 142 Me. 45. In July, 1952, however, defendant taxpayer brought a bill in equity against plaintiff town and its selectmen, in essence attacking the validity of this tax lien. (Other matters raised by the bill are not here involved.) As a preliminary to the permanent relief sought, the taxpayer asked and received an *ex parte* restraining order on July 25, 1952, which continued in force until dissolved by the court September 4, 1953. The restraining order was as follows:

> "And it is further ordered that in the meantime, until further order of this court, that said defendants, its agents, employees, attorneys, Malcolm E. Joy, Allen M. Morton, and Raymond Miller, in their official capacity as aforesaid be restrained from acquiring title, conveying or alienating said property as prayed for in plaintiff's bill."

On the date of the restraining order, July 25, 1952, the redemption period had yet to run for three months and twenty-two days before expiration. On September 10, 1953, immediately after final determination of the cause in equity, plaintiff brought this action at law. At the trial, plaintiff town introduced over objection the original tax lien certificate. Defendant stipulated and agreed that the writing offered was a tax mortgage lien certificate, that it had been duly signed by the collector and recorded by him on the date and in the book and page which the writing recited. Defendant objected to the admission of the document solely on the ground that plaintiff was first required to lay a foundation by proving the proper steps in the tax procedure. Upon an adverse ruling, defendant noted his

exception. This exception is readily disposed of by reference to P. L., 1945, Chap. 274, Sec. 1 (amending R. S., 1944, Chap. 81, Sec. 98), which provides in part:

> "The mortgage shall be prima facie evidence in all courts in all proceedings by and against the town, its successors and assigns, of the truth of the statements therein and after the period of redemption has expired, of the title of the town to the real estate therein described, and of the regularity and validity of all proceedings with reference to the acquisition of title by such mortgage and the foreclosure thereof."

The authenticity and materiality of the certificate were shown by the document itself and the stipulations of defendant concerning it. It may be noted in passing that the validity of the tax lien had been sustained by us in *Perry et al.* v. *Inhabs. of Lincolnville,* 149 Me. 173. The ground advanced for its exclusion was without merit and defendant takes nothing by this exception.

Defendant places primary reliance, however, upon the effect of the restraining order upon the redemption period. He argues in substance that the restraining order tolled the statute providing for a redemption period of eighteen months, interrupted the operation of foreclosure, with the result that on September 10, 1953, when this action was brought, foreclosure was not complete and defendant still had a period of over three months during which he might redeem. In directing a verdict for the plaintiff, the presiding justice necessarily held otherwise, and defendant's exceptions raise the issue.

What then was the effect of the restraining order? An injunction has been well described as a judicial process whereby a party is required to do or refrain from doing a particular thing. Under our practice, a restraining order is a form of injunction issued *ex parte* for the purpose of restraining the defendant for what should be a very brief

period pending notice and hearing on an application for a temporary injunction. Whitehouse, Equity Practice (Ed. 1900), Chap. 27, Secs. 561 and 571. The purpose is to maintain the status quo until hearing may be had. Both injunction and restraining order necessarily operate only *in personam.* Pomeroy's Equity Jurisprudence (Fifth Ed.), Vol. 4, Page 974, Sec. 1360; Words & Phrases, Vol. 21, Page 394 (Injunction); 28 Am. Jur. 199, Sec. 4. One may, under proper circumstances, procure an order enjoining parties from proceeding with litigation, or in another case enjoining the enforcement of law. But in the first instance, it is the party litigant who is enjoined rather than the litigation, and in the second instance it is the enforcing officer who is enjoined rather than the law which he would enforce. But in the case before us, *no acts of persons* were involved after the restraining order issued. Once the tax mortgage had been duly filed and recorded, the period of redemption began inexorably to run and no further act of any town official was required to bring title to fruition. It was then for the defendant to act, rather than the town officers.

The law applicable to the statutory period of redemption of ordinary mortgages of real estate seems equally applicable here. In *McPherson* v. *Hayward,* 81 Me. 329, at 336, we said, ' "The duration of the mortgagor's right to redeem is clearly defined by law, and one the court cannot abridge, *or enlarge,* by a single day." ' (Emphasis supplied). The McPherson case was followed in *Carll* v. *Kerr,* 111 Me. 365, in which the question was asked and answered at page 369 in these words, "Has this court in equity power, under the circumstances in this case, to extend the time (for redemption) thus fixed by statute? We think not." In the Carll case, we cited with approval *Cameron* v. *Adams,* 31 Mich. 426, and quoted the following from that case at page 370 of our opinion, "Courts of equity have large powers for

relief against the consequences of inevitable accident in private dealings, and may doubtless control their own process and decrees to that end. But we think there is no such power to relieve against statutory forfeitures. Where a valid legislative act has determined the conditions on which rights shall vest or be forfeited, and there has been no fraud in conducting the legal measures, no court can interpose conditions or qualifications in violation of the statute. The parties have a right to stand upon the terms of the law. This principle has not been open to controversy, and is familiar and elementary." In *Fenderson* v. *Fenderson,* 116 Me. 362 at 366, it was again said, " 'The time in which a mortgage may be redeemed is clearly fixed by statute and the court cannot enlarge it.' That is now the well nigh universal rule and this court has not varied in following it." We further pointed out that while the court cannot enlarge the time for redemption, the parties may do so; or a party may by acts or words amounting to fraud be estopped to deny that he has enlarged the time. But such an issue is not presented here. We are dealing not with the acts of parties or their failures to act, but only with the effect of a restraining order issued by the court. Nor could an estoppel be raised against a town in the exercise of its taxing power in any event. *Dolloff* v. *Gardiner,* 148 Me. 176.

As we read the language of the restraining order, which sounds *"in personam,"* we find no indication that the court sought or intended to toll the statute fixing the redemption period for tax lien mortgages, but in any event the restraining order did not have the effect of suspending the operation of the statute or of enlarging the redemption period by a single day. It was open to the defendant to pay under protest in redemption of the mortgage and then await the outcome of his action, then pending, testing the validity of the tax lien. By permitting the foreclosure to ripen into title, defendant was left without defense to the present ac-

tion. "The time had gone. On the theory of the statute, the town was now owner, absolutely." *Inhabs. of Canton* v. *Trust Co.*, 136 Me. 103; *Dolloff* v. *Gardiner, supra.*

Defendant argues that there has been thus far no proper decree finally disposing of the cause in equity which was before us in *Perry et al.* v. *Inhabs. of Lincolnville, supra.* When our mandate was filed, it provided, "Ordered: Appeal dismissed, decree below affirmed, remanded to court below for decree dismissing bill." Thereafter (and defendant asserts without notice to him), a final decree below was signed and filed providing, "This cause came on to be heard this day and thereupon upon consideration thereof it is ordered, adjudged and decreed, that the plaintiff's bill be dismissed with costs to the defendants and without extended record. Execution for costs to issue." Defendant complains first as to the alleged lack of notice to him, and second as to an omission *in the decree* to "affirm the decree below." We have examined the record carefully and we find therein no support for the assertion by defendant that no notice was given of the filing of final decree. Moreover, it is not open to the defendant here to attack the decree collaterally in this proceeding. "A judgment of a court having jurisdiction, no fraud or collusion appearing, cannot, at the instance of a party to it, be impeached collaterally by proof of errors." *Harvey* v. *Roberts,* 123 Me. 174. " 'If the court in which the proceedings took place had jurisdiction to render the judgment which it did, no error in its proceedings which did not affect the jurisdiction will render the proceedings void, nor can such error be considered when the judgment is brought collaterally into question.' " *Crockett* v. *Borgerson,* 129 Me. 395.

It may be noted, however, that the application of the rules which insist upon an affirmative demonstration of error apparent upon the record and which prevent such a collateral attack upon a final decree as is attempted here,

works no hardship on this defendant. If he had taken exceptions seasonably, such exceptions would have been limited to the *form* of the decree by the express provisions of the third paragraph of Equity Rule 28. "Is its form in accordance with the decision and certificate of the Law Court? Does it effectuate the mandate? If so, it is sufficient." *Fenderson* v. *Power Co.*, 121 Me. 213. Here the form did effectuate the mandate and was sufficient. Exceptions, if taken, would have availed defendant nothing. It would have been a meaningless absurdity for the decree to have contained the words "Decree below affirmed." That was the language of the Law Court to be obeyed, not meaninglessly parroted. The "decree below" which was affirmed was a *decree dismissing the bill. Perry et al.* v. *Inhabs. of Lincolnville, supra.* The final decree pursuant to our mandate stands, and as it stands, it effectively dissolved the restraining order.

Defendant also argues that the tax mortgage statutes in question are unconstitutional. It is enough to say that they were declared constitutional as to resident tax payers in *Town of Warren* v. *Norwood, supra.*

Other points argued by defendant are not pertinent to any issues raised by the record before us and require no discussion here. There is no evidence before us which tends to contradict the plaintiff's proof of title declared upon in its writ. Viewing the evidence in the light most favorable to defendant, only one verdict was possible. "A presiding justice at *nisi prius* is authorized to direct a verdict for either party in any civil case when a contrary verdict could not be sustained by the evidence." *Johnson* v. *Terminal Co.*, 131 Me. 311; *Lander* v. *Sears, Roebuck & Co.*, 141 Me. 422.

Exceptions overruled.

FELLOWS, J., did not participate in the opinion.

DOUGLAS F. LEWIS, PETITIONER
vs.
ALLAN L. ROBBINS, WARDEN
MAINE STATE PRISON

Knox. Opinion, April 5, 1954.

Habeas Corpus. Sentences.
R. S., 1944, Chap. 136, Secs. 22, 23.

It is a well known rule of law that, unless otherwise ordered, one or more sentences imposed at the same time, run concurrently.

It is unnecessary for the court to specify that a new sentence imposed for the commission of crime while at large on parole shall commence to run at the expiration of the first sentence since R. S., 1944, Chap. 136, Sec. 23 provides "Any prisoner committing a crime while at large on parole . . . shall serve a second sentence, to commence from the date of the termination of the first sentence . . ." This is true notwithstanding that Sec. 22 provides that a prisoner on violation of parole and issuance of a warrant shall "be treated as an escaped prisoner."

ON EXCEPTIONS.

This is a petition for writ of Habeas Corpus before the Law Court upon exceptions to the denial of the writ. Exceptions overruled.

Seth May & John W. May, for Petitioner.

Roger A. Putnam, Asst. Atty. General, for State.

SITTING: MERRILL, C. J., FELLOWS, WILLIAMSON, WEBBER, BELIVEAU, JJ. TIRRELL, J., did not sit.

BELIVEAU, J. On exceptions. This is a petition for a writ of Habeas Corpus. Hearing was had before a Justice of the Supreme Judicial Court who denied the writ. To his ruling exceptions were duly taken and the case is before this court on these exceptions.

There is no dispute about the facts, which show that on May 19, 1948, the prisoner was sentenced in the Superior Court for Lincoln County to serve not less than three nor more than six years in the State Prison. On November 25, 1950, he was conditionally paroled and released from prison. This parole was revoked on June 20, 1951 and a warrant issued for his return. On January 7, 1952 the petitioner pleaded guilty in the Superior Court for Cumberland County to a charge of breaking and entering committed December 5, 1951 while he was still at large. On this charge he was sentenced to serve a term of not less than one nor more than two years in the State Prison. On December 11, 1952, the petitioner having completed the sentence imposed in Lincoln County, and on which he was paroled, was duly notified that the sentence imposed in Cumberland County would begin on that date.

The position of the petitioner is that the sentences should run concurrently and the court in its interpretation of Sections 22 and 23, Chapter 136 of the Revised Statutes, should so rule.

Section 23 provides that "Any prisoner committing a crime while at large upon parole or conditional release and being convicted and sentenced therefor shall serve the 2nd sentence, to commence from the date of the termination of the 1st sentence, whether such sentence is served or annulled."

Section 22 provides that one who has violated the terms of his parole and for whose return a warrant has been issued shall "be treated as an escaped prisoner owing service to the state."

Was he an escaped prisoner or at large on parole for the purpose of sentence?

An escaped prisoner supposes the escape of a prisoner who is confined to a penal institution or in custody of an

officer. Here the petitioner did not "escape." He was given his freedom conditionally by the State and his liberty from confinement was enjoyed by virtue and because of the permission given him to go at large with the hope he would mend his ways and become a law abiding citizen. The violation of his parole and the commission of another crime did not affect his status in this respect. He was, in fact, free until apprehended on the Warden's warrant. To hold otherwise would make it possible for a parolee who has violated the terms of his parole, to avoid service of the maximum sentence by committing another crime before he was taken in custody on the Warden's warrant if, as here, the justice imposing the new sentence failed to specify that execution thereof was to commence upon expiration of the first sentence. The contention of the petitioner, if true, would violate the purpose and intent of Section 23 with respect to sentence. The purpose of Section 23 is to prevent simultaneous execution of the first and subsequent sentence and to make it mandatory that the second sentence begin at the expiration of the first sentence when the second sentence is imposed upon a prisoner for a crime committed by him while enlarged upon parole. The contention of the petitioner is that for crimes committed by a prisoner who has been enlarged on parole simultaneous service of the old and new sentences is possible if the parole has been revoked, but if not revoked consecutive service of the sentences is mandatory. An interpretation that would permit this result would not only be absurd but it would violate the very purpose and spirit of the statute. No such result, in our opinion, was intended by the Legislature, and there can be no such interpretation of the two sections involved here.

It is a well known rule of law that, unless otherwise ordered, one or more sentences imposed at the same time, shall run concurrently. The statute in this case, Section 23 of Chapter 136, R. S. (1944), is direct, positive and manda-

tory and no action by the court can change or vary its provisions.

If a precedent is needed *Mercer* v. *Fenton,* 120 Neb. 191, 231 N. W. 807, is in point. The statute interpreted in that case reads, almost word for word, like the statute under consideration, and its purpose is to bring about the same results. The facts are similar to those in this case.

We adopt the language used by the Supreme Court of New Jersey in *State* v. *Link et al.,* 102 Atl. (2nd) (N. J.) 609, 613, having to do with interpretation of a criminal statute. The court said:

> "A statute will not be construed contrary to the over-all purpose envisioned by the Legislature as it is discerned from the context of the entire mandate, and restrictions or limitations not specifically contained therein will not be added by judicial interpretation, especially if they are prejudicial to the public good."

We hold there is no conflict between Sections 22 and 23 and that the sentences did not run concurrently.

Exceptions overruled.

PEARL E. CHIZMAR
vs.
ANN ELLIS

Somerset. Opinion, June 7, 1954.

Assault. Damages. New Trial.

The court has no right to substitute its judgment for that of the jury in matters of disputed questions of fact.

There is no law in Maine requiring a split verdict as to damages allocating an amount as compensatory and another amount as to punitive damages. A verdict which fails to so allocate is not defective as a matter of law, especially where the record does not disclose special findings were requested.

It is the duty of the court in case of excessive or inadequate damages to set aside the verdict if the jury disregards the evidence, or acts from passion or prejudice.

ON MOTION FOR NEW TRIAL.

This is an action of trespass before the Law Court after jury verdict upon general motion for a new trial. If the plaintiff within sixty days after the certificate of decision is received by the clerk, shall remit all of the verdict in excess of $500.00, motion overruled; otherwise, motion sustained.

Merrill & Merrill, for plaintiff.

Eames & Eames,
W. Philip Hamilton, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

TAPLEY, J. This is an action in plea of trespass alleging that the defendant, on the fourteenth day of May, A. D. 1953, committed an assault upon the plaintiff. The plea is

the general issue. The *ad damnum* of the writ is in the sum of $1,000. The action was tried before a jury at the September Term, A. D. 1953 at Skowhegan, in the County of Somerset. The jury returned a verdict for the plaintiff and assessed damages for the plaintiff in the sum of $1,000. The defendant seasonably filed a general motion for a new trial addressed to the Supreme Judicial Court sitting as a Law Court, the motion being in proper form.

LIABILITY

It appears from the evidence that the plaintiff, Pearl E. Chizmar, was married to one John Chizmar and that because of domestic trouble plaintiff left her husband and went to the home of a friend in Madison. She later returned to her home in Anson to obtain some clothing and there plaintiff encountered Ann Ellis, the defendant in this action. When the plaintiff attempted to enter the building, plaintiff claimed she was accosted by Ann Ellis and after some argument about plaintiff's right to go upstairs to her home, Ann Ellis assaulted her, which assault became the basis of this action. The defendant Ellis claimed that she was not the aggressor but that the plaintiff Chizmar was the aggressor and upon this issue, which was one of fact, the jury made its determination.

The jury on the question of liability was in possession of all the facts and determined from the evidence submitted that the defendant was guilty of the acts as charged in plaintiff's declaration. This determination on the part of the jury as to liability should not be disturbed as it was one of fact and wholly within the province of the jury.

On the issue of liability, the court stated in *Eaton* v. *Marcelle, 139 Me. 256 at 257:*

> "The jury heard the evidence and determined the facts. ***** Where there is sufficient evidence

> upon which reasonable men may differ in their conclusions, the Court has no right to substitute its own judgment for that of the jury."

DAMAGES

The defendant further argues that the verdict should be set aside and a new trial granted for the reason that the verdict was not divided as to the amount found as compensatory damages and the amount found as exemplary damages and, in addition, that the amount of damages was excessive. The record does not disclose defendant requested special findings as to compensatory and exemplary damages. The Presiding Justice properly charged the jury as to the matter of damages. There is no law in Maine requiring a split verdict as to damages allocating an amount as compensatory and another amount as punitive damages. The defendant, as a matter of law, has no valid contention in this respect. *53 Am. Jur., Page 730:*

> "But where the issues of actual and exemplary damages are not separately submitted to the jury, a verdict need not specify whether it is for actual or exemplary damages, if no request for such a specification was made."

The defendant by her motion brings up the consideration of whether or not the damages in view of the evidence are excessive. It appears that the plaintiff had no medical or other special damages. Her injuries consisted of superficial cuts and bruises about the head and legs, with the attendant discomforts which these injuries would cause. An element of damage of injured feelings, embarrassment and humiliation could have been present.

The jury found damages for the plaintiff in the sum of $1,000 which amount, in accordance with the charge of the Presiding Justice, could have included both compensatory

and exemplary damages. The record, taken in its most favorable light from the standpoint of the plaintiff, indicates to an unprejudiced and unbiased mind that these damages are excessive. *Johnson, et al.* v. *Kreuzer, 147 Me. 211:*

> "It is the duty of the court, in the case of excessive or inadequate damages, to set aside the verdict if the jury disregards the evidence, or acts from passion or prejudice."

The verdict for damages was manifestly excessive and we must order a new trial unless the plaintiff remits all of the verdict in excess of $500, and the order is

> *If the plaintiff, within sixty days after the certificate of decision is received by the clerk, shall remit all of the verdict in excess of $500, motion overruled; otherwise, motion sustained.*

PERLEY MCPHERSON
vs.
CITY OF PRESQUE ISLE, MAINE
AND
HOME INDEMNITY COMPANY

Aroostook. Opinion, June 8, 1954.

Workmen's Compensation. Accident.

The findings of the Industrial Accident Commission that the necessary elements of accident are not present, namely "unusual, unexpected and sudden event," are final if supported by competent and credible evidence.

ON APPEAL.

This is an appeal from a *pro forma* decree sustaining the findings of the Industrial Accident Commission. Appeal dismissed. Decree affirmed.

Albert M. Stevens, for plaintiff.

Clyde M. Wheeler, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

BELIVEAU, J. On appeal. This is an appeal from a *pro forma* decree in which the court approves the findings of the Industrial Accident Commission and orders that the petition for award of compensation be dismissed.

The facts show that on November 22, 1952 the petitioner, while in the employ of the City of Presque Isle, claims to have received personal injuries by accident "arising out of, and in the course of my employment."

On that day, and probably a day or two before, his work consisted of loading snow fence onto a truck assisted by

another employee. These rolls of fence weighed between 50 and 75 pounds and were handled by the two men—each taking one end of the roll and placing it on the truck where it was placed in position by another employee.

It is the claim of the petitioner that sometime later in the afternoon of the day mentioned, and while loading the fence, he became short of breath and felt weak all over. He continued to do the same work until the end of the working day.

Dr. Osborne, who testified for the petitioner, stated "the chances are about evenly balanced that it was the work as against the normal progress of the disease." The doctor felt that the petitioner had some background of underlying degenerative process in his arteries at the time of the alleged accident which undoubtedly had been progressing over a period of years.

Dr. Wilbur Manter, a qualified heart specialist, gave it as his opinion, that the condition which the petitioner complained of, could not have been caused by the work he was engaged in on November 22, 1952.

In the lengthy opinion in which the facts and the law are thoroughly discussed and analyzed the Commission found that the necessary elements of accident were not present, namely, "unusual, unexpected and sudden event."

In *Robitaille's* case 140 Me. 121 the court restated the well known rule of law "That the Commission is made the trier of the facts and its findings thereof whether for or against the claimant are final."

Not only was there competent and credible evidence on which the Commission based its findings but it seems to this court that, on the evidence heard by the Commission, no other finding could be made.

Appeal dismissed.
Decree affirmed.

STANLEY THIRKELL, EX'R.

vs.

ERNEST H. JOHNSON, STATE TAX ASSESSOR

York. Opinion, June 11, 1954.

Inheritance Taxes. Exemptions. Statutory Construction. Burden of Proof. Fraternal Lodges.

The burden of proving an exemption from tax under the inheritance tax law is upon the claimant even though the exemption statute be liberally construed.

Construction of a statute and burden of proof are not one and the same.

A fraternal lodge is not entitled under the Inheritance Tax Law to exemption from tax upon a gift which may be used for general expenses of the lodge on the ground that it is a charitable or benevolent institution (R. S., 1944, Chap. 142, Sec. 2, Subsec. II as amended P. L. 1949, Chap. 86, Secs. 3 and 4).

The conditions of a gift cannot be altered by the beneficiary so as to turn an otherwise taxable into an exempted gift.

ON REPORT.

This is a petition for abatement of inheritance taxes before the Law Court on report from the Probate Court upon agreed statement under R. S., 1944, Chap. 142, Sec. 30, as amended by P. L., 1947, Chap. 354, Sec. 14. Case remanded to Probate Court for decree in accordance with the opinion.

Thomas Walker, for plaintiff.

Alexander A. LaFleur, Attorney General,
David B. Soule,
Boyd L. Bailey, Assistant Attorneys General for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

WILLIAMSON, J. This petition in equity by the executor of the will of John S. Peabody for abatement of inheritance tax is before us on report from the Probate Court upon an agreed statement of facts. R. S., Chap. 142, Sec. 30 (1944), as amended by P. L., 1947, Chap. 354, Sec. 14.

The issue is whether an unconditional gift by will to a Masonic lodge is exempt from the inheritance tax under R. S., Chap. 142, Sec. 2 (1944), as amended.

The will reads:

> "All the rest, residue and remainder of my estate of every name and nature . . . I give, bequeath and devise to Arundel Lodge No. 76 Ancient Free and Accepted Masons of Kennebunkport, to have and to hold forever."

A tax of $1,609.48 was assessed upon the residuary bequest valued at $16,594.90. Neither valuation nor computation is in dispute.

The executor's main contentions are: first, that Arundel Lodge is a corporation engaged in or devoted to charitable or benevolent work; and second, if not, that the bequest is in trust for or to be devoted to a charitable or benevolent purpose.

Arundel Lodge is a Masonic lodge subject to the Masonic discipline of the Grand Lodge of the State of Maine.

The record includes:

(1) The Masonic charter issued in 1854 by the Grand Lodge of Maine, which is similar to that set forth in *MacDonald, Ex'r.* v. *Stubbs*, 142 Me. 235, 49 A. (2nd) 765 (1946).

(2) The corporate charter with the following purposes: "To create and desseminate the principals of friendship and charity and for that purpose to own, lease, buy sell or mortgage real estate or personal property; to accept and receive

gifts and legacies of real estate or personal property," granted in 1928 under R. S., Chap. 62 (1916) (presently R. S., Chap. 50) (1944) entitled "Corporations Without Capital Stock," and providing for the incorporation of Masonic lodges.

(3) The by-laws of Arundel Lodge, and in particular the following:

> "All moneys given or bequeathed to this lodge, not otherwise appropriated by the donor, together with all moneys received from initiates over and above the dues to the Grand Lodge and the expenses account, shall from time to time be paid over to the Board of Trustees to constitute a permanent Charity Fund, to be by said Trustees invested as they may consider most advantageous to the Institution."

(4) The "Constitution and Standing Regulations of the Grand Lodge of Ancient Free and Accepted Masons of the State of Maine."

The nature and purposes of a Masonic lodge have been fully set forth in the *MacDonald* case, *supra,* and it is unnecessary, in our view, to repeat here what may readily be found in that opinion. See also *Bangor* v. *Masonic Lodge,* 73 Me. 428 (1882). A Masonic lodge clearly is both a fraternal and a charitable and benevolent organization. Pecuniary profit is neither an object nor a purpose of its existence.

Arundel Lodge owns a building used exclusively for Masonic purposes. No part of the building is or has been rented. In this respect the case differs from the *MacDonald* case, in which it appeared that the income of the lodge came in part from the rental of a portion of the lodge building.

The testator was admitted to the Arundel Lodge in 1907, was a member in good standing at the time of his death in 1952, was active in the affairs of the lodge during the

entire period of his membership, signed the by-laws when admitted, and was familiar with them.

The exempting statute, R. S., Chap. 142, Sec. 2, Subsec. II (1944), as amended by P. L., 1949, Chap. 86, reads in part as follows:

". . .

"All property which shall pass to or for the use of

1) "societies, corporations, and institutions now or hereafter exempted by law from taxation, or to

2) "a public corporation, or to

3) "any society, corporation, institution, or association of persons engaged in or devoted to any charitable, religious, benevolent, educational, public, or other like work, pecuniary profit not being its object or purpose, or to

4) "any person, society, corporation, institution or association of persons in trust for or to be devoted to any charitable, benevolent, educational, or public purpose, or the care or maintenance of cemeteries, cemetery lots, or structures therein or thereon, by reason whereof any such person or corporation shall become beneficially entitled, in possession or expectancy to any such property or the income thereof,

"shall be exempted;. . . ."

For convenience in reference we have numbered the clauses.

The executor concedes that Arundel Lodge is neither a corporation "exempted by law from taxation," nor a "public corporation," under the first or second clauses of the statute. The case turns, therefore, upon the meaning and application of the third and fourth clauses.

Before turning to the claimed grounds of exemption, we consider the argument of the executor that the burden of

proof is upon the tax assessor to establish that the bequest was taxable and not upon the executor to show exemption. In the *MacDonald* case, *supra,* at Page 239, the rule is found in clear unmistakable language.

> "The very word 'exemption' indicates a freedom from duties and charges to which others are subject. The burden of proving that a particular legacy is exempt is on the one who claims that it is free from the usual obligation. 'Taxation is the rule and exemption the exception.' *Auburn* v. Y.M.C.A., 86 Me. 244, 247, 29 A. 992, 993; *Park Association* v. *Saco,* 127 Me. 136, 142 A. 65; *Camp Associates* v. *Inhabitants of Lyman,* 132 Me. 67, 70, 166 A. 59."

The executor points out that the cases cited in the *MacDonald* case involved exemption from the general property tax and not from the inheritance tax. He directs our attention to the rule of liberal construction of the statute relating to inheritance tax exemption found in *Estate of Lena A. Clark,* 131 Me. 105, 159 A. 500 (1932).

Our court there held that a municipality may be regarded as a charitable institution within the meaning of the then inheritance tax statute granting exemption to charitable institutions for the purpose of receiving and administering a bequest to be expended in the erection of a town hall. Chief Justice Pattangall, speaking for the court in the *Clark* case, *supra,* said at page 113:

> "In so holding we are but giving a reasonable interpretation of the obvious intent and spirit of the statute, designed as it was to encourage liberality on the part of those testators whose means permit them to indulge their generosity in the line of promoting the public good by contributing to the cause of religion, education, benevolence and charity."

We find no conflict between the *Clark* and the *MacDonald* cases. The construction of a statute calls for decision upon

its meaning as a rule of law. The burden of proof relates to the finding of facts. Granted that the exemption statute be liberally construed, it does not follow that the burden of proving exemption from tax is lifted from the one who would benefit therefrom.

To hold in construing a statute that under certain conditions a gift is exempt from tax, does not alter the burden upon the claimant of proving the existence of the operative conditions. Construction of a statute and burden of proof are not one and the same.

Returning to the question of exemption under the third or fourth clauses of the statute, *supra,* we find in essence the case at bar is an extension of the *MacDonald* case. There the gift was in trust for specified purposes; here it is outright without conditions. In the *MacDonald* case the testator gave the residue of a trust estate "to Lafayette Lodge . . . to be held in trust and the annual income from said funds to be used by said Lodge to pay their annual dues to the Grand Lodge of the State of Maine; and any of said income which may not be required for said purpose to be used for the maintenance of the building or buildings which they may occupy." Lafayette Lodge owned the building which it occupied and derived its income from portions of the building and dues of members and "this income is expended for maintenance of building, the general expenses of the fraternal order, the annual dues to the Grand Lodge, and for relief of poor and distressed members or their widows and children."

There is no substantial difference in the nature of the income and expenses of Arundel Lodge and the Lafayette Lodge in the *MacDonald* case. In each instance the income is from dues and possibly other sources, and the expenses are the general expenses of a fraternal order, the annual dues to the Grand Lodge, and expenses for relief and charity. Lafayette Lodge also had both income and expense

from the rented portion of its building. In the *MacDonald* case the court stated that it was not necessary to decide whether the Lafayette Lodge was a charitable corporation "because it (the court) feels that regardless of the corporate status, the purpose of this particular trust is not charitable, and that it is subject to tax." The court further said: "It would not appear to be within legislative intent to say that a corporation might take moneys free of inheritance taxation for the declared purpose of maintaining property subject to taxation, or to relieve individuals of payment of dues incidental to membership."

In the instant case no restrictions whatsoever are placed in the testator's will upon expenditure of the bequest to Arundel Lodge. It may be spent for all proper corporate purposes, including payment of dues to the Grand Lodge and the maintenance of any property which the lodge may own or acquire for its own use or for rental. In brief, Arundel Lodge may spend, insofar as the testator's wishes expressed in his will are concerned, the bequest for precisely the same purposes for which the trust income in the *MacDonald* case may be used. Since the gift to the lodge in trust in the *MacDonald* case was not for charitable purposes, it follows that the gift to Arundel Lodge is likewise not for charitable purposes. Surely the Legislature did not intend that a Masonic lodge could take property outright for purposes not charitable without tax under the third clause of the statute and yet hold a gift in trust for like purposes taxable under the fourth clause.

We are of the view, therefore, that a Masonic lodge is not entitled to exemption from tax upon a gift which may be used for the general expenses of the lodge on the ground that it is a charitable or benevolent institution.

The executor's second contention is that under the fourth clause the gift is in trust for or to be devoted to a charitable or benevolent purpose for the reason that under the by-law

of the Arundel Lodge quoted above it shall become part of a permanent charity fund. The question is whether an unrestricted gift under a will becomes a trust fund for charitable or benevolent purposes by reason of a by-law of the beneficiary organization. Did the testator make this particular by-law, which was known to him and was in force at the time he made his will and at the time he died, a condition of the gift to the lodge? We think not. Whether such a by-law exists depends upon the will of the lodge and not upon the will of the donor.

In our view this by-law has no effect upon the gift insofar as the inheritance tax statute is concerned. The conditions of the gift were established by the testator. They cannot be altered by the beneficiary. In *Levey* v. *Smith*, 103 F. (2nd) 643 (7th C. C. A. 1939), a federal estate tax case, the court said, in words equally applicable to a case under our state inheritance tax statute, at page 646:

> "The right to a deduction depends upon what a testator has willed respecting the use of a legacy and not upon the use which a legatee is willing to make of it."

See also *Delaney* v. *Gardner*, 204 F. (2nd) 855 (1st Cir. 1953).

The difficulties involved in determining the nature and extent of an estate for inheritance tax purposes from the acts of the donee and not from the acts of the donor are readily apparent. In every case it would be necessary to go beyond the purposes of an organization receiving a gift to determine whether or not the gift was charitable or benevolent in nature, and to examine the action of the donee with respect to each gift.

We neither consider nor determine to what extent conditions must be imposed by the donor to give exemption from the inheritance tax. It is sufficient for our purposes that

the donee cannot turn an otherwise taxable into an exempted gift.

The unrestricted gift to the Arundel Lodge is subject to the inheritance tax. The abatement should be denied and petition dismissed.

Case remanded to Probate Court for decree in accordance with this opinion.

ELIZABETH M. OLSEN
vs.
PORTLAND WATER DISTRICT

Cumberland. Opinion, June 24, 1954

Negligence. Directed Verdict.

A verdict should be directed when, giving the evidence introduced full probative force, it is plain that a contrary verdict could not be sustained.

One who steps backward without paying attention to where she is stepping is not in the exercise of due and reasonable care as a matter of law.

ON EXCEPTIONS.

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

George H. Hinckley, for plaintiff.

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

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

FELLOWS, C. J. This is an action for alleged negligence brought by Elizabeth M. Olsen to recover for injuries sustained, as she claims, when she stepped backwards against a manhole cover owned by the Portland Water District. At the close of the evidence the justice presiding in the Superior Court for Cumberland County directed a verdict for the defendant. The case comes to the Law Court on the plaintiff's exceptions.

Briefly, the facts appear to be that the plaintiff was a Girl Scout leader 58 years of age. On the thirtieth day of April, 1952 she was engaged in directing the movements of a troop of Girl Scouts, which troop was in front of the "girl scout home" in Cape Elizabeth, Maine. The yard where the troop was moving back and forward in front of the home was a cleared gravelled surface. Beyond, or at the side of this gravelled yard and near the highway, is rough ground where there is a telephone pole, and near the telephone pole is a manhole of the defendant. This manhole contained meters, and was covered by an iron cover that was nearly two feet square. The manhole and telephone pole were surrounded by a small parcel of unimproved land, at or near the junction of two ways, with some grass and small bushes on it.

The plaintiff was familiar with the location of the girl scout building, the yard in front of the building, and the adjoining ground in the neighborhood of the telephone pole and manhole cover. She had been a frequent visitor for ten years, although this was the first Spring visit. She was active in girl scout work, and trained girl scouts in the building and on the gravelled land in front, and elsewhere.

The plaintiff testified as follows:

"Q. Now just before this accident what were you doing?

A. Well, I was teaching them the scouts' pace, then I lined up three lines of girls for compe-

tition; we were going to pick out the best group in the scouts' pace, so we lined them up and I blew my whistle for them to start and I stepped back and went over backwards.

Q. Stepped back one or two steps or what?
A. Just one step.

Q. And your heel struck something?
A. Yes.

Q. Did you notice what you tripped over?
A. Well, I feel, and after I got up I saw it was—you know—

Q. What?
A. First I could see just the iron, couldn't see anything else.

Q. You saw this iron that you had fallen over?
A. I was wondering what had happened.

Q. Did you notice what the condition was, after you fell, of the iron?
A. Well, I was in quite a lot of pain. I am afraid I don't know.

Q. You don't know very much about what the condition was?
A. No.

Q. Where did you fall, or how did you fall?
A. Directly backwards.

Q. And what did you strike on?
A. The iron, I imagine.

Q. And what part of your body?
A. The elbow."

The plaintiff also testified that she was in that spot outdoors with the troop for a quarter to half an hour before her accident; that she did not know the manhole cover was there; that she paid no particular attention to the land near the telephone pole where she was standing, just "looked around in general," and noticed nothing "wrong."

"Q. And then as you blew the whistle you stepped backward, did you?

A. Just took one step back.

Q. Had you stepped backward earlier that day?

A. I don't remember.

Q. But at the moment when you stepped back you didn't know what was behind you? Is that correct?

A. Yes, I didn't know what was behind me.

Q. Had you noticed that manhole cover on previous occasions?

A. Never knew it was there.

Q. You have been in that yard many times?

A. Over ten years.

Q. And whenever you go out with your girls you usually go out in the front of the yard?

A. Yes, we have laid trails and done a lot of things out there.

Q. And you have no memory of ever having noticed it before?

A. No.

Q. Do you have any memory now as to how high above the earth it projected?

A. I don't know how high, but I know it was up.

Q. Do you remember looking at it after the accident?

A. Well, I looked to see what I fell over."

Assistant Superintendent Bodge of the defendant District was called by the plaintiff as her first witness, and testified that he examined the manhole two days after the accident, and that it was then about four inches above the surrounding ground. It consisted of a plank lined vault, five feet deep and 22 x 20 inches on top, covered by an iron frame rectangular in shape with a round cover set in the rectangular frame. Inside the vault were water meters,

read every three months by a District meter reader. One meter was for the girl scout building and one for a nearby residence. When the Assistant Superintendent made his examination he found that the top of the wooden lining of the vault, consisting of horizontal hemlock planks, had rotted away and had been repaired by taking the iron top off, and the old plank replaced by oak plank such as was not used by the District. Whoever made the repairs had laid the oak plank even with the ground, and the iron frame, four inches deep, was above ground. The plaintiff's witness did not know who made the repairs; that the defendant District had not ordered them; that it was his duty to order all repairs made; that no complaint about this manhole had come to him; that he could not say if frost was responsible for this four inch height; that the cover of the vault was clearly visible, and there was no accumulation of grass to hide it.

James Whitten the meter reader for the defendant, who had been employed as meter reader for thirteen years, testified that he examined this manhole and read the meters on the twenty-first of March, and that on that day the manhole cover was even with the surface of the ground although there were new plank inside. Whitten did not know what happened if anything after he read the meter and before the date of the accident on April 30th.

The plaintiff claims that she was in the exercise of due care; that with the cover four inches above the ground, she says it was a "concealed danger," although at that time in the Spring there was little or no grass, and no grass would grow on an iron cover in any season. The cover could be plainly seen and the plaintiff says she saw it after she fell. She did not look to see where she was stepping before she stepped back and fell. She said she struck on "the iron I imagine." She did not know and did not say she knew what caused her to fall. She reasoned after the fall

and after she looked at the manhole frame and cover, that it was the frame and cover that caused her injury.

The plaintiff claims in her writ that the defendant District was negligent in that it did not maintain a manhole and manhole cover in proper condition because the cover was four inches above the ground "creating a hazard and causing an obstruction over which said plaintiff tripped and fell."

A verdict should be directed when, giving the evidence introduced full probative value, it is plain that a contrary verdict could not be sustained. *Weed* v. *Clark,* 118 Me. 466; *Johnson* v. *Portland Terminal Co.,* 131 Me. 311, 312; *Heath* v. *Jaquith,* 68 Me. 433, 436.

Ordinary care requires that one give attention to where he is walking, even on a city sidewalk. *Witham* v. *Portland,* 72 Me. 539; *Raymond* v. *City of Lowell,* 6 Cush. (Mass.) 524, 533; *McClain* v. *Caribou, Natl. Bank,* 100 Me. 437.

One who steps backward without paying attention to where she is stepping is not in the exercise of due and reasonable care, as a matter of law. See *Crocker* v. *Orono,* 112 Me. 116, 119. "Thoughtless inattention spells negligence." *Callahan* v. *Bridges Sons,* 128 Me. 346; *Tasker* v. *Farmingdale,* 85 Me. 523.

When it is sought to establish a case upon inferences drawn from facts, it must be from facts proven. Inferences based on mere conjecture or probabilities will not support a verdict. Where verdict directed for defendant, the evidence must be viewed in the light most favorable to the plaintiff. *Bernstein* v. *Carmichael,* 146 Me. 446; *Alden* v. *Maine Central R. R. Co.,* 112 Me. 515; *Mahan* v. *Hines,* 120 Me. 371.

The burden of proof in an action for negligence is upon the plaintiff, not only to show the negligence of the defend-

ant but to show that no want of due care on his part contributed to the injury. *Rouse* v. *Scott,* 132 Me. 22.

There is contributory negligence as a matter of law where that is the only inference that can reasonably be drawn from the facts shown. "Had he been using ordinary care at the time, had he not been at fault, he would have escaped injury entirely." *Rogers* v. *Forgione Co.,* 126 Me. 354, 357.

The rules given in the following cases which are cited in the plaintiff's brief, are not at variance with the rules given in the foregoing named authorities. In *Sylvia* v. *Etscovitz,* 135 Me. 80, a car suddenly and without apparent cause leaves the road. Care and negligence questions of fact, if different conclusions may be drawn. Res Ipsa doctrine also applied. In *Howe* v. *Houde,* 137 Me. 119, the action was by passenger against auto driver, "different conclusions may be drawn from the evidence." In *Gould* v. *Transportation Co.,* 136 Me. 83, a substance came through open window of bus into passenger's eye. Negligence of company was question for jury. So also there were questions for the jury in *Frye* v. *Kenney,* 136 Me. 112, auto accident; *Gerrish* v. *Ferris,* 138 Me. 213, pedestrian struck on highway; *Searles* v. *Ross,* 134 Me. 77, mowing machine cut a boy who was asked to "touch up horses;" *White* v. *Michaud,* 131 Me. 124, where collision of automobile and motor cycle.

There is no proof of facts that show breach of duty on the part of the defendant District toward this plaintiff. It does not appear that this cover was in the limits of the highway, or that pedestrians might be expected to walk there. The manhole was placed to contain meters, one of which was for the girl scout building. The manhole had been repaired with new plank inside, but when and by whom does not appear. It does not appear whether frost, or some unknown person, raised the frame and cover four inches above the ground level, nor is it shown that any

knowledge of any unusual condition of the manhole and manhole cover (if it was unusual) ever came to the knowledge of the defendant at any time before the accident. The fact that the manhole frame and cover was four inches above the surrounding rough ground, in that place and under the conditions, was not shown to be due to negligent construction, or that it was due to lack of proper maintenance. No facts were shown to indicate that it was necessary at that place to have the cover even with the ground, except that the plaintiff claims she backed into it.

The testimony of the plaintiff, however, shows that she was directing the Girl Scout Troop for at least a quarter of an hour from where she stood near the telephone pole on the uneven ground. If she tripped over the manhole cover or some rock, root, or other obstruction, she was so close to the manhole that she hit it when she fell. If she had but glanced she would have seen. She looked about her at no time with eyes that saw anything except the girls in the troop of scouts. She failed to look about beforehand, and she did not look at the time she took the backward step. Had there been a depression she would have fallen into it. During ten years of training girl scouts in and about this building, or on the adjoining grounds, she says she had never seen the manhole cover. Mrs. Cole, one of the plaintiff's witnesses who was with the plaintiff as her assistant, admitted that the cover was more plainly to be seen because "raised up," but "we didn't see it. We were watching the girls."

If the defendant in this case can be considered negligent towards this plaintiff, the plaintiff's negligence certainly contributed to her injury. There is no other inference to be drawn from her own testimony. She is not entitled to recover. She saw the manhole and the cover, or she is guilty of negligence if she did not see. It was in the day time. It was not concealed because she said she saw it after she fell.

She says she did not know it was there before. She did not look at the time, as due care required.

The presiding justice was correct in directing a verdict for the defendant. No other verdict could be sustained. *Crocker* v. *Inhabitants of Orono,* 112 Me. 116, 119.

Exceptions overruled.

STATE OF MAINE
vs.
EDMUND S. HISCOCK

Lincoln. Opinion, June 24, 1954.

Sales Taxes.

The Sales and Use Tax Law, P. L., 1951, Chap. 250, Sec. 1, as amended, places a tax upon the retailer, the incidence of which falls upon the consumer.

W. S. Libbey Co. v. *Johnson,* 148 Me. 410 affirmed.

ON EXCEPTIONS.

This is an action by the State of Maine for the recovery of taxes under P. L., 1951, Chap. 250 as amended. The case is before the Law Court on exceptions to a *pro forma* ruling of a justice of the Superior Court sustaining the constitutionality of the tax law.

Exceptions overruled.

Alexander A. LaFleur, Attorney General,
Boyd Bailey,
Miles P. Frye, Assistant Attorneys General for plaintiff.

Israel Alpren,
Philip M. Isaacson, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

WEBBER, J. This matter comes before us on a brief statement of facts and defendant's exceptions to a *pro forma* ruling of a justice of the Superior Court sustaining the constitutionality of the Maine Sales and Use Tax Law so-called which was enacted as P. L., 1951, Chap. 250, Sec. 1 and acts amendatory thereof and which appears as R. S., 1944, Chap. 14-A.

The defendant is engaged in the business of making such retail sales as are covered by the law and admittedly, if the law be constitutional, he owes an unpaid tax which, with interest thereon, amounts to $492.21 as awarded by the court below.

Defendant addresses his entire argument, both oral and written, to the proposition that the law imposes a tax upon the consumer rather than the retailer, and that it violates constitutional principles by imposing upon the retailer the duty of collecting the tax without compensation therefor. Counsel for defendant readily concede that their arguments as to constitutionality have no force if the law imposes the tax directly upon the retailer, and we are urged to reconsider and overrule *W. S. Libbey Co.* v. *Johnson,* 148 Me. 410, in which we held that that was its effect. In the *Libbey* case we carefully examined the wording of the law in question and its legislative history and determined that it was the retailer and not the consumer who was intended to be taxed, and that the retailer was vested with a limited right to pass the tax applicable to each particular sale along to the consumer. We carefully distinguished the "incidence of the tax" which in express terms is made to fall on the consumer to enable him properly to claim deductions therefor when computing his Federal income tax. We are not impelled by any reasoning advanced by the defendant in

this case to overrule the holding in the *Libbey* case. Counsel for defendant do not pretend to cite any case holding that such a tax, when imposed upon the retailer, violates any constitutional principle whatever or any fundamental principle of taxation. We do not believe that any such case exists. It is unnecessary here to discuss in detail cases relating to laws which in terms imposed the tax upon the consumer, although we note that even there, there is an overwhelming weight of authority sustaining the constitutionality of such laws.

The entry will be,

Exceptions overruled.

LUCILLE R. JORDAN

vs.

PORTLAND COACH CO.

Cumberland. Opinion, July 13, 1954.

Negligence. Directed Verdict. Evidence.

In order to justify submission to a jury, plaintiff's right to recovery must be supported by more than a mere scintilla of evidence.

When it is sought to establish a case upon inferences drawn from facts, it must be from facts proven. A jury is entitled to draw only inferences that are reasonable and proper from the evidence.

ON EXCEPTIONS.

This is a negligence action before the Law Court upon defendant's exceptions to the refusal of the trial court to direct a verdict. Exceptions sustained.

Basil Latty, for plaintiff.

Berman, Berman & Wernick, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

WEBBER, J. Plaintiff makes claim for personal injuries alleged to have been caused when she was struck by defendant's bus from which she had just alighted as a passenger. At the close of the evidence defendant's motion for a directed verdict was denied and exceptions thereto are before us.

We view the evidence in the light most favorable to the plaintiff to determine whether the matter was properly submitted to the jury to determine controverted facts and to draw any reasonable and legal inferences therefrom. *Greene, Admr.* v. *Willey,* 147 Me. 227. A verdict is properly directed for a defendant when the evidence tending to support a verdict for the plaintiff is not such as reasonable minds are warranted in believing, as when it is incredible, or unreasonable, or inconsistent with the proved circumstances of the case, or when the evidence contrary to the plaintiff's position is so overweighing and so overwhelming as to make it appear that the jury could not reasonably and rationally find a verdict in favor of the plaintiff. *Garmong* v. *Henderson,* 114 Me. 75. In such cases prevention by direction of the verdict is better than the cure. *Sylvia* v. *Etscovitz,* 135 Me. 80; *Weed* v. *Clark,* 118 Me. 466.

In order to justify submission to a jury, plaintiff's right to recovery must be supported by more than a mere scintilla of evidence. "That a scintilla of evidence will not support a verdict was long since declared in this court, in decisions still of authoritative force." *Bernstein* v. *Carmichael,* 146 Me. 446 at 450. " 'It is not enough to say there was *some* evidence. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury. There must be evidence on which

the jury might reasonably and properly conclude that there was negligence.' " *Beaulieu* v. *Portland Co.*, 48 Me. 291, at 296. Mere surmise or conjecture will not warrant submission of a plaintiff's claim to a jury. When it is sought to establish a case upon inferences drawn from facts, it must be from facts proven. A jury is entitled to draw all inferences that are reasonable and proper from such evidence. That they are limited to such inferences is undoubted. Inferences based on mere conjecture or probabilities will not support a verdict. *Bernstein* v. *Carmichael, supra.*

The mere fact that a plaintiff may have offered some testimony in support of his claim will not in every case warrant submission of the cause to a jury. The language used at page 90 of *Garmong* v. *Henderson, supra,* only slightly paraphrased, has application here. "We have examined the record from the viewpoint of the plaintiff's testimony, to see if it is sufficiently credible to sustain the verdict, when weighed in connection with the circumstances of the case, which we think should be regarded as proved. We do not say that there is no evidence to sustain (a verdict for the plaintiff), for the plaintiff has testified. But we do say that upon the whole record, giving to the plaintiff such degree of credibility as her own statements entitle her to, her practically unsupported testimony is so overborne by proved circumstances, * * * * * by the testimony, contradictory to hers, of witnesses apparently reputable, disinterested and credible, and by the probabilities of the case inconsistent with her claim, as to induce the belief (that a verdict for plaintiff could not be supported)." In *Raymond* v. *Eldred,* 127 Me. 11 at 13, our court said: "The testimony of interested parties, contrary to facts otherwise conclusively established and contrary to all reasonable inferences to be deduced from the situation disclosed by the evidence, does not raise a conflict even requir-

ing a finding by the jury." And in *Moulton* v. *Railway Co.*, 99 Me. 508 at 509, we said: "But a conflict of testimony cannot be said to arise simply because one witness testifies contrary to another. If it was so held hardly a verdict could ever be set aside. It would be difficult to imagine a case that had been dignified with the verdict of a jury that would not present some conflict of testimony. Besides if such were the rule it would only be necessary to secure the evidence of a witness, however false, to hold a verdict once obtained. The rule cannot be so construed. It means that there must be substantial evidence in support of the verdict,—evidence that is reasonable and coherent and so consistent with the circumstances and probabilities in the case as to raise a fair presumption of its truth when weighed against the opposing evidence. When it is overwhelmed by the opposing evidence a verdict cannot stand."

As to the circumstances of this accident, the plaintiff is the only witness in her own behalf. Arrayed against her are the driver of the bus whose interest in the case is recognized, and three passengers who, as far as the record shows, are completely disinterested witnesses. Plaintiff boarded defendant's bus on a midwinter evening and rode for some distance along city streets as a passenger. By her own admission she had spent the previous two hours in cocktail lounges drinking with her father. She acknowledges having had three cocktails during that period. Her condition as to sobriety and her unsteadiness on her feet were obvious to the driver and to the passenger witnesses both when she boarded the bus and when she alighted. She pulled the cord to stop the bus when she was still approximately two miles from her destination in the mistaken belief that she had arrived at her destination. The driver drew over somewhat nearer to the right hand side of the street and brought the bus to a stop in such a position that the exit door, located on the right side of the bus at the

front, was at or near the location of the regular bus stop. The plaintiff walked to the front of the bus, paid her fare and alighted. She walked directly away from the door of the bus toward the sidewalk and then turned and stood, as she testified, waiting for the bus to move past her and intending to go behind it and cross the street after it had moved on. The driver obviously had a duty not to start the bus until his passenger had safely alighted and had moved far enough away from the bus toward a position of safety so that he could safely proceed past her, and he had a further duty not to steer the bus so sharply to its right that it would move toward the position taken up by the plaintiff and strike her. He had a further duty not to apply the power carelessly and improperly to the rear wheels in such manner as negligently to induce a skid of the bus to its right and toward the position taken up by the passenger. The driver, however, in the exercise of ordinary care, having observed the plaintiff move away from his bus toward the sidewalk to a place of apparent safety, had a right to anticipate that the plaintiff would not thereafter, while the bus was in the act of passing her, abandon her safe position for one perilously close to the moving bus. He had a right to assume that the plaintiff, who had just left his bus and was well aware of its immediate proximity, would exercise ordinary and reasonable care for her own safety while the bus was being started and moved ahead.

On the other hand, the plaintiff, having alighted and become a pedestrian in the street, owed a duty of care for her own protection. Knowing that the bus might be expected to start and move past her, she owed a duty after alighting to move away from the bus and its course of travel and to leave a sufficiently safe distance between herself and the bus to permit the bus to start and pass her without danger to herself. The record is devoid of any evidence that at the outset either the plaintiff or the defendant's driver failed in

any of these duties. The plaintiff moved toward the sidewalk from the bus door to what she obviously considered was a safe distance, and there is no suggestion that the bus was started until she had taken up a position several feet from the door. The plaintiff herself did not attempt to estimate this distance, but the shortest distance estimated by any witness who observed her was three feet, which obviously would provide an adequate margin of clearance. The driver then closed the doors and started the bus ahead slowly. There is no evidence of any sudden or unnecessary excess application of power such as might induce a skid or, in fact, of any skidding whatsoever. The bus was then proceeding on Woodfords Street and its regular route would require that it continue straight ahead along Woodfords Street from the point where it was stopped. It would reasonably be expected that the bus would be following nearly a straight course along Woodfords Street as it passed the waiting plaintiff or, if deviating at all from a straight course, that it might be veering slightly to the left to enter the regular course of traffic along its right side of Woodfords Street. All of the credible evidence points conclusively to the fact that this is exactly what took place. Any sudden and unusual veering of the bus either sharply to the right or to the left would have taken the bus away from the direction of its intended route and would have been most unnecessary and uncalled for. Moreover, such an unexpected deviation from the course of travel would have been noted by the passengers, but the passengers noted nothing unusual or irregular as the bus started and pulled slowly past the plaintiff, who was still observed by the passenger witnesses standing and waiting as the bus went by.

Upon the evidence in the record, as to what happened thereafter we can only surmise and conjecture. The bus had only proceeded approximately once and a half its own length along Woodfords Street when passengers in the

rear of the bus observed that the plaintiff was lying in the street. The bus was immediately stopped and the driver returned to find the plaintiff lying unconscious in the street. Testimony by the driver that the track marks of the bus ran practically straight from the point where the bus was started is entirely consistent with the testimony of the disinterested passengers as to its course of travel and as to its location on Woodfords Street where it stopped after the plaintiff had fallen. The plaintiff herself is unable to suggest any reasonable explanation as to how the bus could strike her if, as she maintains, she remained in her position of apparent safety until the bus had completely passed. She testified as follows:

"Q. Now, as the bus started up what did you see?
A. It started to go by and I saw it sway towards me and then I screeched.
Q. Then what happened?
A. I don't know what happened after that.
Q. You were rendered unconscious?
A. Unconscious, yes.
Q. Do you know what rendered you unconscious?
A. I suppose when the bus hit I went down."

This last answer on request was ordered stricken by the court and we refer to it only because it indicates that even the plaintiff could only conjecture what might have happened.

And later:

"Q. You say as the bus started up you saw it approaching you? The side of the bus was it?
A. Yes.
Q. What did you do then?
A. I screeched.
Q. What happened after that?
A. All I can remember is a big cold blast of wind.

Q. You say you screeched and you saw the bus, the side of the bus approaching you, getting close to you?
A. That is right.

Q. About the side of the bus, what did you next feel or see?
A. I just felt a gust of wind, the impact.

Q. Do you recall being knocked down?
A. All I can remember the last of it was that impact and then I felt myself falling and it is all I can remember."

Plaintiff described her injuries as a big lump on the back of her head and a broken ankle. Other testimony of the plaintiff adduced nothing helpful in further explanation of what actually occurred.

Upon this, the evidence most favorable to the plaintiff, it is possible to formulate several theories as to what might have occurred, but all of them fall within the realm of conjecture and surmise, which is insufficient to sustain the plaintiff's burden of proof. The theory most favorable to the plaintiff would be that the driver suddenly and quite irrationally turned the bus sharply to the right toward the sidewalk and away from its regular course of travel, but there is no suggestion that any part of the bus entered upon or crossed the sidewalk or otherwise left the limits of Woodfords Street, and such a theory would not accord with all the other evidence in the case. It is so palpably improbable and incredible that it cannot be accepted. "The admitted facts, together with the physical evidence, become, therefore, of great importance and should be analyzed with care to determine, if possible, where the truth lies." *Raymond* v. *Eldred, supra,* at page 14.

Counsel for plaintiff advances still another theory. He suggests that the driver must have turned to his left as he started the bus and sufficiently so that the rear righthand

corner of the bus swayed to the right sufficiently to strike the plaintiff. Such a theory is not only surmise but verges on the impossible. In the first place, a sudden and extreme left hand turn at that point would likewise have been irrational and unnecessary, and all the evidence conclusively shows that no such extreme left turn was made. Moreover, such a theory appears highly unlikely and improbable when viewed in relation to natural laws. When the front wheels of a vehicle are turned to the left, as the vehicle moves ahead, the rear wheels pursue a path somewhat to the left of that pursued by the front wheels, and in any event never to the right and outside the arc of travel of the front wheels. The extent of variation will depend on the degree of turn. This natural phenomenon has been recognized judicially. In *Masaracchia* v. *Inter-City Express Lines*, 162 So. (La.) 221 at 224, the court said, "When a vehicle makes a turn either to the right or to the left, unless the rear portion is wider than the front portion or unless the rear portion slips or skids across the roadway, the arc described by the rear wheels cannot be outside the arc previously described by the front wheels." See also *Pierre* v. *Templeman Bros.*, 164 So. (La.) 259. It is likewise equally true that if the body overhang in the rear of the rear wheels is approximately equal to the body overhang in front of the front wheels, the right rear corner of the body will not travel outside the arc described by the right front corner of the body. The plaintiff descended at the right front corner and practically upon the location of such an arc, and then moved some distance outside the arc. In the absence of any evidence, it was not proper to allow the jury to guess, speculate or conjecture that this bus was of such uncommon and unusual design as to have a rear overhang so much longer than the front overhang as to thrust the right rear corner outward on a left turn to an arc at least three feet outside the arc described by the right front corner. Thus natural laws control what would have had to be

the design of defendant's bus in order to lend any support whatever to plaintiff's theory. Uncontroverted and undisputed physical facts may completely override the uncorroborated oral testimony of an interested witness which is completely inconsistent with those physical facts, and natural and physical laws have universal application and may not be disregarded. "An appellate court must recognize that certain facts are controlled by immutable physical laws; and it cannot permit a jury verdict to change such facts, because to do so would, in effect, destroy the intelligence of the court." Huddy Encyc. Automobile Law 9th Ed., Vol. 17-18, page 94, sec. 65.

Still other and equally plausible theories present themselves upon this evidence. There was snow upon the ground and it is fair to assume that the pavement may have been slippery under foot. Either while the bus was passing or after it had passed, the plaintiff may have slipped and fallen. The fall may have been toward and into the side of the bus before it completely passed or it may have been to the pavement after the bus had passed. Or again, the plaintiff may have misjudged the timing with respect to the passing of the bus and may have stepped forward from her position of safety too soon. Or again, having in mind her apparent condition as to sobriety, the plaintiff may have become dizzy or have swayed or staggered or stepped into or toward the bus before it completely passed. It may or may not be significant that the sensation which she described that the bus swayed toward her would probably equally be her sensation if she in fact swayed toward the bus.

The important thing is that each one of these theories, however appealing, rests entirely upon conjecture and surmise, and the evidence is entirely without selective application as to any of them. Even though the condition of sobriety of the plaintiff may tend to make the last of these

theories seem more probable and likely than the others, even that hypothesis falls far short of the required proof, and we are left at the end without any proven explanation as to how this unfortunate accident occurred. It is not every misfortune that is compensable, and in this case the plaintiff, having failed completely to show any negligent conduct on the part of the defendant's driver which might be the proximate cause of her injuries, did not make out a case which required submission to the jury.

Exceptions sustained.

ARTHUR G. OUELETTE
AND
MARY R. OUELETTE
vs.
JOSEPH ALBERT PAGEAU
AND
PEPPERELL TRUST COMPANY, TRUSTEE

York. Opinion, July 13, 1954.

Exceptions. Court Cases. Certification. Words and Phrases. Evidence. Shopbook Rule. Auditors. New Trial.

With relation to exceptions in a case before a presiding justice without a jury, the statute does not provide for the procedure.

It is a rule of practice in Maine that where a cause is tried by a presiding justice without the intervention of a jury, under R. S., 1944, Chap. 94, Sec. 17, exceptions to the judge's rulings in matters of law do not lie, unless there has been an express reservation of the right to except.

The certification of a presiding justice that exceptions are allowed is conclusive even though (1) the certificate states that they are "allowed, if allowable" (2) though the docket shows no reservation of the right to except and (3) even though plaintiff objected on the ground of no reservation.

Allowable means "not forbidden," "not unlawful," "not improper."

A record account book copied from day to day from motel registration cards is properly admitted into evidence under R. S., 1944, Chap. 100, Sec. 133 where the presiding justice could properly find that the entries were made in good faith in the regular course of business and before suit.

An auditor's report is *prima facie* evidence which may be impeached, controlled, or disproved by competent evidence.

An auditor is part of the court itself. He has the power to pass upon the facts in controversy.

The exclusion of evidence of total costs and expenses offered to show the improbability that defendant entered into a certain agreement was discretionary.

A motion for new trial cannot be considered in a case heard by the presiding justice without a jury.

ON EXCEPTIONS AND MOTION.

This is an action on a contract heard by a presiding justice without a jury. The case is before the Law Court upon exceptions. Exceptions overruled.

Simon Spill,
Charles Smith, for plaintiff.

Lausier & Donahue, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

FELLOWS, C. J. This action on a contract was brought in the Superior Court for York County, and was heard by the presiding justice at the October Term, 1953, without a jury. After some testimony had been taken, the court appointed an auditor and adjourned to December 8, 1953. The auditor heard the parties and reported to the court that, if entitled to recover, the plaintiffs were entitled to

$2022. Hearing was resumed before the presiding justice on December 8, 1953 and the auditor's report put in evidence, and the presiding justice gave judgment to the plaintiffs for the amount stated in the auditor's report. The case comes before the Law Court on defendant's exceptions. The motion for a new trial, also filed by defendant, is not, and cannot be, considered.

Briefly, the facts show that the plaintiffs Arthur G. and Mary R. Ouellette (husband and wife) were engaged by the defendant Joseph A. Pageau, owner of a motel at Old Orchard, to carry on the motel and apartments from May 7, 1953 to the end of the summer season in September 1953. The amount to be paid was testified to by plaintiff Mary Ouelette as $200 a month payable monthly plus a commission of ten percent on gross receipts. The commission was to be payable at the end of the season. The defendant Pageau denied this testimony relative to the amount per month and denied the commission, and claimed certain payments.

The plaintiff husband and wife carried on the defendant's motel business from May to August 25th when they were discharged after a "word skirmish" but without cause, as the plaintiffs claim. They carried on all the work alone. The defendant had other interests in Canada and was away practically all season except for occasional visits. The plaintiffs' work was 24-hour service, if necessary. The plaintiff Mary Ouellette assigned guests to their apartments, cared for and kept apartments cleaned and beds in order, had guests sign a registration card containing motel number and rate, the plaintiff herself signed each card with her own initials. These cards, with money collected by her from the guests, were given to or sent to the defendant Pageau. Before giving the registration cards to the defendant Pageau, the plaintiff made a copy in an account book of the facts stated on the cards and showing the amounts col-

lected by her for rentals. This record was the only account kept, and it was made by plaintiff Mary Ouellette from the cards that she herself made or filled out and that she and the guests had signed. She made the account day by day from these cards before she gave the cards, with the money received, to the defendant. The defendant had the cards with him in Canada. Her purpose in making this account was to keep a record of the gross receipts and the money that she sent to the defendant.

After a portion of the case had been tried, the presiding justice saw the necessity for an audtior (Revised Statutes, 1944, Chapter 100, Section 90) and appointed an auditor. The case was continued to await the auditor's report. After the auditor had heard the testimony of the parties, had investigated the accounts, and examined the many vouchers, he filed his report which was admitted in evidence at the adjourned hearing. Judgment was rendered for the plaintiffs.

Various questions have been raised in this case which we consider as follows:

EXCEPTIONS

With relation to exceptions in a case before a presiding justice without a jury, the statute does not provide for the procedure. The statute authorizing the hearing without a jury is Revised Statutes 1944, Chapter 94, Section 17 which provides: "The justice presiding at a term of the superior court shall decide any cause without the aid of a jury, when the parties enter upon the docket an agreement authorizing it."

The design of the Legislature was, that where the parties agreed that the presiding justice should hear the case, this decision was final. There was no provision for exceptions. The only way that parties were permitted to take excep-

tions to any ruling of law was by reserving the right to except by express stipulation. *Roxbury* v. *Huston,* 39 Me. 312. This reservation should be on the docket. See *Graffam* v. *Casco Bank,* 137 Me. 148 for history of the statute, and the reason for necessity of reservation of right to except.

It is, therefore, the rule of practice in Maine that where a cause is tried by a presiding justice without the intervention of a jury, in accordance with statute, exceptions to the judge's rulings in matters of law do not lie, unless there has been an express reservation of the right to except.

If there has been no express reservation and a bill of exceptions is presented to the justice for his signature and the justice is prepared to sign, the opposing party may object to the allowance, and call attention to the docket omission. *Graffam* v. *Casco Bank,* 137 Me. 148. If the judge, however, signs the bill of exceptions, the certification that exceptions are allowed is conclusive, provided there is nothing in the bill of exceptions itself or in the certificate of the judge to show the contrary. *Graffam* v. *Casco Bank,* 137 Me. 148; *State* v. *Intox. Liquors,* 102 Me. 385; *Dunn* v. *Motor Co.,* 92 Me. 165; *Waterville Realty* v. *Eastport,* 136 Me. 309, 312; *Poland* v. *McDowell,* 114 Me. 511.

In a case heard by a presiding justice without a jury, exceptions lie, to his rulings, if exceptions are reserved. The *right* to except must be reserved. *Stern* v. *Fraser Paper Co.,* 138 Me. 98. The Law Court, however, has no jurisdiction of a motion for a new trial where a case is heard by the single justice. *Espeargnette* v. *Merrill,* 107 Me. 304, 305; *Levee* v. *Mardin,* 126 Me. 133; *Public Loan Corp.* v. *Bodwell-Leighton Co.,* 148 Me. 93, 94; *Sears Roebuck* v. *Portland,* 144 Me. 250, 256.

In this pending case, heard before the presiding justice without a jury, the docket shows no reservation of the right to except, but the record shows that both sides took several

exceptions and that exceptions were granted to both. The docket shows "transcript of testimony ordered to be filed on or before March 1, 1954 and the extended bill of exceptions by March 15, 1954." The docket also shows "Extended bill of exceptions filed March 10, 1954. Objections to the allowance of the bill of exceptions filed March 10, 1954 by plaintiffs. Bill of exceptions allowed March 15, 1954."

The certificate of the presiding justice was as follows:

> The foregoing exceptions having been presented within the time required, and due notice thereof having been given to the adverse party through his attorneys, and being found to be true are allowed, if allowable, the adverse party's objections to their allowance having been filed and considered by the Court.

The only objection to the allowance is the statement filed by the plaintiff that the docket showed no reservation of the right to claim exceptions. The presiding justice allowed the exceptions "if allowable." "Allowable" means "not forbidden," "not unlawful," "not improper." Webster's New International Dictionary. The presiding justice had the right to allow the exceptions and did allow them although he may not have been obliged to do so. In fact both of the parties had taken exceptions, and the court recognized the right to take exceptions, in many instances during the course of the trial. The presiding justice allowed them. In any event, the Law Court cannot look beyond the bill of exceptions. The bill of exceptions is complete, and the bill is allowed. The certification is conclusive. *Graffam* v. *Casco Bank*, 137 Me. 148 and cases *supra*. See also *Carey* v. *Bourque-Lanigan Post*, 149 Me. 390, 102 Atl. (2nd) 860.

FIRST EXCEPTION: The defendant objected to the introduction in evidence of a record book kept by plaintiff Mary Ouelette, copied by her from day to day from the cards

that she made or filled out showing registration of guests, the number of the motel or apartment, the rate, and the total amounts paid by guests. The cards were initialed by plaintiff and given by the plaintiff to the defendant motel owner, together with the money received by her. The plaintiff testified to the account book as made by her from the original cards made or filled out by her and the total amount of cash or checks paid by the guests. The total amount of cash received by the plaintiff as shown by the account was $18,645. The account book was offered and admitted in evidence. The defendant's attorney objected to its admission because "not the original record. The original record are the cards." The presiding justice said he admitted the account "because it is an original record which she made simultaneously from the cards. If it is incorrect, of course it is open to cross examination and you may introduce the cards to compare with the original. I am going to admit it and give you an exception." The presiding justice was correct. The plaintiff Mary Ouelette made and had personal knowledge of the original cards or slips, and she had full and complete personal knowledge of the transactions as to each and all of the various items that she entered in the account. She was examined and cross examined on almost all of the items. The presiding justice could well find that the entries were made in good faith in the regular course of business and before suit. The account here differs in form only from the usual account of a grocer who makes his account from slips in the regular course of business, which slips were made by himself, and others in his employ. The defendant takes nothing by this exception. Revised Statutes 1944, Chapter 100, Section 133. *Hunter* v. *Totman,* 146 Me. 265.

SECOND EXCEPTION: The second exception relied on by the defendant is to the admission of the auditor's report at the continued hearing, when the report was submitted and

offered in evidence. The objections to the report of the auditor were stated to be (1) failure of auditor to correct entries in the account, (2) failure to consider withholdings from income taxes and social security, (3) disregard of defendant's testimony that he only received $900 in May, and not $1864, appearing in the account, (4) failure of auditor to determine the "take" of each motel for whole season May 15th to September 15th, (5) failure of auditor to properly weigh testimony regarding a check for $150 given by defendant on August 25, 1953, (6) that the auditor's report was based primarily on the plaintiff's account book.

We see no merit in this exception. An auditor's report may be used as evidence by either party and is prima facie evidence, but it may be impeached, controlled or disproved by competent evidence. It is sufficient to warrant a verdict unless impeached or disproved. *Howard* v. *Kimball,* 65 Me. 308. Revised Statutes 1944, Chapter 100, Section 92.

An auditor has the power to pass upon the facts in controversy and settle them to ascertain correctness of debits and credits. *Smith* v. *Minnick,* 88 Me. 484. An auditor is part of the court itself. *Payne* v. *Insurance Co.,* 69 Me. 568. See also *King* v. *Thompson,* 116 Me. 316; *Phipsburg* v. *Dickinson,* 78 Me. 457.

In this case the defendant did not impeach the auditor's report. He apparently relied on evidence already in the case, or before the auditor, and evidence later introduced. The "failure" of the auditor to believe the defendant and his evidence and to "properly weigh the testimony" were matters for the auditor, and so far as appears, he did weigh it. Withholdings for income taxes and social security were immaterial under the circumstances. A possible breach of Federal law might be material for another case. The total "take" might not be material because plaintiffs were dis-

charged in August. If the evidence of the plaintiff was believed, as undoubtedly it was, the auditor and the presiding justice could well think that these cards sent to the defendant in Canada, if not lost entirely, might possibly have been altered in "form and figure" when they came back to this country. The record shows differences between the auditor's report, the testimony of the plaintiffs, and evidence offered by the defendant, which differences the defendant claims sustain his objections, but the auditor as well as the presiding justice had the right to believe what they thought was true. *Richardson* v. *Richardson,* 146 Me. 145; *D'Aoust, Applt.,* 146 Me. 443. The auditor's report was not impeached or disproved in the mind of the presiding justice. It was based on competent evidence. The presiding justice could properly accept the report and base his findings thereon.

THIRD EXCEPTION: The defendant offered to prove the total costs and expenses for running his motel for the entire season, as bearing on the improbability that defendant contracted to pay 10% of gross receipts as the plaintiffs claimed. This evidence was excluded subject to defendant's exception. The exclusion was a matter of judicial discretion as being irrelevant or immaterial. We fail to see that discretion was abused, and we fail to see that the defendant was harmed by its exclusion. This was a trial before a presiding justice. There was no jury.

The Law Court cannot consider the motion for a new trial in this case. The case was heard by a presiding justice without a jury. *Sears Roebuck & Co.* v. *Portland,* 144 Me. 250. At all events, there was credible and competent evidence on which the presiding justice could base his decision. *Edwards* v. *Goodall,* 126 Me. 254. The entry must, therefore, be

Exceptions overruled.

ELMIRA ROBICHAUD
vs.
NAPOLEON ST. CYR

Kennebec. Opinion, July 13, 1954.

Amendments. Ad Damnum. Directed Verdict.

The granting during trial of an amendment to increase the *ad damnum* of the writ is discretionary.

A verdict should be directed only when no other verdict could be sustained.

ON MOTION AND EXCEPTIONS.

This is a negligence action before the Law Court upon defendant's exceptions to the refusal to direct a verdict, motion for a new trial, and defendant's exceptions to allowance by the presiding justice of a motion to increase the *ad damnum* of the writ. Exceptions overruled. Motion overruled.

John A. Platz, for plaintiff.

Locke, Campbell, Reid & Hebert, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

FELLOWS, C. J. This is an action for alleged negligence brought by the plaintiff Elmira Robichaud a passenger in a car driven by the defendant Napoleon St. Cyr. The case was heard in the Superior Court for Kennebec County and verdict was for the plaintiff in the sum of $14,250. It comes to the Law Court on defendant's exceptions to the refusal to direct a verdict, motion for new trial, and defendant's exceptions to allowance by the presiding justice of plaintiff's motion to increase the *ad damnum* of the writ.

On November 9, 1952, the plaintiff was riding with the defendant in an automobile on a State highway near Mechanic Falls, and was severely injured as the result of a collision between the defendant's automobile in which she was riding and another automobile coming from the opposite direction.

Before the trial of the pending case, the plaintiff had received the sum of $4250 from the driver of the second vehicle in return for a covenant not to sue. This payment was set up by brief statement of the defendant in the pending case, and the presiding justice instructed the jury that its verdict in the pending case, if for the plaintiff, would be subject to a credit for the sum of $4250.

The evidence shows that the defendant was following a State Police car along the highway and on his right side of the road. At a point in the road on a curve, the second car coming in the opposite direction, passed the police car which was stopping on the right shoulder of the road. The highway was wet in some places, and at other places snow covered and slippery. The police car was about 100 yards ahead of the defendant St. Cyr's car. Before the second car passed the police car, it started to skid and the police car stopped, or nearly stopped, on the right shoulder to permit it to pass. The second car went by the police car and, according to a witness, was skidding from side to side on the slippery way. The defendant continued at his previous speed of about 30 miles an hour. The second car at a speed of about 40 miles an hour, went over the center line of the highway and crashed into the defendant's car. During the time that the second car started out of control, as it was about to pass or was passing the police car, until the time it crossed the center line and against the defendant's car, the plaintiff passenger warned the defendant driver several times of impending danger from the skidding and approaching car, but the defendant driver did not stop, and

continued as before on his right side of the road and at about the same speed.

Before the close of the trial the plaintiff moved to increase the *ad damnum* of her writ from $10,000 to $14,250 which was granted, subject to objection and exceptions by defendant. No continuance was asked for. At the close of the testimony the defendant moved for a directed verdict which was denied. The defendant took exceptions. The verdict was a substantial one, but the defendant raises in argument no question that it was excessive. The injuries were severe and the expenses large.

The allowance of an amendment to the *ad damnum* of a writ has long been considered as within the judicial discretion of the presiding justice, under such terms, if any, as the court may order. It might of course be possible, under some circumstances, for such an unreasonable amendment to be allowed that discretion could be considered as abused. The defendant should have a continuance, if a continuance is asked for and conditions require. We see here no abuse, and no continuance was requested. True, the defendant objected to the allowance but no reasons are stated in the record. See *Merrill* v. *Curtis,* 57 Me. 152; *Hare* v. *Dean,* 90 Me. 308; *McLellan* v. *Crofton,* 6 Me. 307; *Bartlett* v. *Chisholm,* 147 Me. 265; *Collin* v. *Sherman,* 147 Me. 317; *Bolster* v. *China,* 67 Me. 551, 553; *Topsham* v. *Lisbon,* 65 Me. 449, 461; Revised Statutes 1944, Chapter 100, Section 11; Rule 3 of Court Rules, 147 Me. 465; Rule 4 of Court Rules, 147 Me. 465. See generally 71 C. J. S. "Pleading," page 666, Sec. 293.

With regard to the exception for failure to direct a verdict. The rule of law is familiar that a verdict should be directed only when no other verdict could be sustained. *Irish* v. *Clark,* 149 Me. 152; *Bernstein* v. *Carmichael,* 146 Me. 446. Where, however, the evidence and inferences to be drawn therefrom present issues for jury consideration,

a verdict should not be directed. *Haskell* v. *Herbert,* 142 Me. 133; *Crockett* v. *Staples,* 148 Me. 55; *Young* v. *Chandler,* 102 Me. 251; *Tomlinson* v. *Clement Bros.,* 130 Me. 189.

Under the circumstances of this case a jury should answer the question as to whether or not the plaintiff passenger was in the exercise of due care. Was she observant? Did she warn of possible danger? If she warned, should she have warned, or was her warning such a disturbing factor that in fact she was negligent, in whatever she did? Was the defendant driver in the exercise of due care under the circumstances? Did the defendant see the skidding car, if it was skidding? Was the road slippery? Was the speed of the defendant's car excessive at the time and under the conditions? Should the defendant have reduced his speed? Should the defendant have stopped, and pulled off the highway as did the police car ahead? Should the defendant have attempted to avoid the oncoming car? Was the oncoming car apparent to the defendant as out of control? If out of control, what should defendant have done that he failed to do, or what should he have ceased to do, whatever he may have been doing? These and many other questions were questions that presented issues for jury consideration.

The refusal to direct a verdict was proper.

Exceptions overruled.

Motion overruled.

STATE OF MAINE
vs.
TOIVO JOHNSON

Hancock. Opinion, July 19, 1954.

Criminal Law. Exceptions.

A bill of exceptions must be presented to the presiding justice in accordance with R. S., 1944, Chap. 94, Sec. 14.

ON EXCEPTIONS.

This is a criminal action before the Law Court upon defendant's exceptions to the refusal of the presiding justice of the Superior Court (1) to direct a verdict and (2) grant a motion in arrest of judgment.

Exceptions dismissed.

W. Atherton Fuller, County Attorney, for State.

W. S. Silsbury, Jr.,
Blaisdell & Blaisdell, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

BELIVEAU, J. On exceptions. The respondent on February 4, 1953 was arrested on a warrant issued by the Western Hancock Municipal Court of Bucksport charging that he

> "did disturb and hinder Reginald Van de Vere in his free exercise of his right of suffrage at the June 16th, 1952 primary election held at said Dedham, he, the said Reginald Van de Vere being a duly registered voter in said town of Dedham."

On the same day he appeared before the judge of that court, waived hearing, was sentenced to pay a fine of $25

and appealed to the April Term of the Superior Court. At this term he was tried before a jury, found "guilty" and sentenced to pay a fine of $100.

In the Superior Court the defense rested after the State had presented its case and moved for a directed verdict. This motion was denied and an exception taken.

Another exception was taken to the denial of respondent's motion in arrest of judgment.

From the record it appears that nothing else was done until the 25th day of July 1953 when the respondent left with the Clerk of the Superior Court for Hancock County what is claimed to be a bill of exceptions. This bill of exceptions was not presented to the presiding justice during the April Term 1953 or later.

The parties in this court, argued pro and con the matters set up in the bill of exceptions. It was then noticed the bill had not been presented to the presiding justice as required by Section 14, Chapter 94 of the Revised Statutes. It seems that nothing was done by the respondent but to leave the bill with the clerk nearly three months after his conviction and of course quite some time after adjournment of the April Term.

Section 14 of Chapter 94, heretofore referred to, sets out in detail the procedure to be followed by a party aggrieved.

In addition to that, this court, in an opinion by Chief Justice Fellows, *Bradford* v. *Davis, et al.*, 143 Me. 124, discusses at some length and in detail the procedure to be followed by the exceptant in cases such as this. The law is so well established by the several decisions that a discussion would be but a repetition of what the court said in *Bradford* v. *Davis et al.*

We adopt as decisive of this case the language used in *Maine* v. *Johnson,* 145 Me. 30, where the issue is similar in every respect to the one involved here.

The court said:

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

Exceptions dismissed.

WILBUR J. MORSE
vs.
FERDINAND A. MORSE

Knox. Opinion, July 19, 1954.

Exceptions. Partition. Commissioners Report.

A bill of exceptions is insufficient which merely states that the court was in error as a matter of law.

The action of commissioners in partition will not be set aside on the ground of unequal allotments except in extreme cases.

The Legislature has placed in the commissioners and not in the court, the responsibility for deciding questions relating to the valuation and division of real estate.

The court may confirm, recommit, or set aside, but may not alter or change a commissioners report.

Commissioners must follow the warrant, and failure so to do is good ground for objection to the confirmation of the report. There must be no irregularities of procedure.

The court in considering objections to a commissioners report is limited to a consideration of the evidence as may be introduced upon the issues raised by the objections. In such proceedings the

evidence before the commissioners is not presented to the court and the evidence heard by the court upon the interlocutory judgment not considered by the commissioners.

If the commissioners reach their result through bias or prejudice, or gross error clearly and unmistakably shown, the report should be set aside or recommitted.

ON EXCEPTIONS.

This is a petition for partition.

Following an interlocutory decree and commissioners report the case is before the Law Court upon exceptions to the confirmation of the report. Exceptions overruled.

Allan L. Bird,
Samuel W. Collins, Jr., for plaintiff.

Jerome C. Burrows, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

WILLIAMSON, J. This petition for partition is before us on exceptions to the confirmation of the report of the commissioners. R. S., Chap. 162 (1944). The presiding justice, after hearing without a jury, found: (1) that the petitioner had a two-ninths (2/9) interest, and the respondent a seven-ninths (7/9) interest, in common and undivided in certain land in Cushing, with a substantial shore frontage and with a farm house and barns; (2) that a cottage, well, and part of a driveway near the shore were owned by the petitioner and were not to be valued by the commissioners in making the partition; (3) that a certain driveway should be used in common by the parties. He then entered judgment for partition, sometimes called the interlocutory judgment, in substance: (1) that the property be partitioned in accordance with the findings; (2) that certain persons be

appointed commissioners; (3) that a court surveyor be appointed, and (4) that the "part of the premises set off to (the petitioner) be taken from the area where his said cottage is located."

No objection whatsoever is made to the judgment for partition. The court thereby settled and determined the interests of the petitioner and respondent in the property. *Allen* v. *Hall,* 50 Me. 253 (1861); *Ham* v. *Ham,* 39 Me. 216 (1855). After making a partition in accordance with the warrant directed to them, the commissioners filed their report to which the respondent entered written objections.

In the bill of exceptions the respondent charges that the presiding justice erred as a matter of law in "allowing," or to use the statutory language, "confirming" the report. The entire record, including petition, pleadings, docket entries, testimony and exhibits are made a part of the bill, and in addition the respondent says:

"1. Testimony showed that the most desirable part of the land to be divided was the shore line.

2. Plaintiff (petitioner) was given more than two-ninths of the whole shore line.

3. Plaintiff was given much more than two-ninths of the best part of the shore line.

4. Plaintiff had not had exclusive use of all the area of the shore line that was given to him.

5. Commissioners should have given plaintiff a larger area to the east of the cottage erected by the plaintiff rather than a larger area north and south on the shore line."

The testimony and exhibits to which the respondent refers formed the evidence taken at the hearing upon the petition for partition. They were not part of the case before the commissioners, except that a certain plan entered as an exhibit before the court and referred to in the judgment for

partition, was unquestionably before the commissioners and the court surveyor. The record does not disclose that any evidence was offered in court at the hearing upon the commissioners' report.

The five points noted above may fairly be said to have been included within the more numerous written objections to the report in the court below. These grounds or objections, and no others, are before us for consideration.

The error of law complained of must be set forth in the bill of exceptions. A general statement that the court was in error as a matter of law is not sufficient to raise a question before us. *Heath et al., Applts.*, 146 Me. 229, 233, 79 A. (2nd) 810 (1951); *Bronson, Applt.*, 136 Me. 401, 11 A. (2nd) 613 (1940). The issue therefore is whether, with reference only to the five objections noted, the presiding justice erred as a matter of law in confirming the report.

> "The well-settled rule is that the action of commissioners in partition will not be set aside on the ground of unequal allotments except in extreme cases, as where the partition appears to have been made upon wrong principles, or where it is shown by very clear and decided preponderance of evidence that the partition is grossly unequal."
>
> 40 Am. Jur. 68, Partition, § 80.

See Note, 46 A. L. R. 348, at 350; 68 C. J. S. 267, Partition, Sections 160, 161; 47 C. J. 509, 510, Partition, Sections 613, 614; Note 41 Am. St. Rep. 140, 149; *Hall* v. *Hall*, 152 Mass. 136, 25 N. E. 84 (1890).

We may safely presume that the court will appoint men of experience and ability to be commissioners "to make partition and set off to each his share." R. S., Chap. 162, Sec. 13 (1944). We find substantially the same method employed since 1821, when the statute called for the appointment of "freeholders." Laws of 1821, Chap. 37, Sec. 2. The

Legislature has placed in the commissioners, and not in the court, the responsibility for deciding questions relating to the valuation and division of real estate.

It is significant that the court may confirm, recommit, or set aside, but may not alter or change the report. The final decision upon the partition must come from the commissioners. We are not here concerned, it may be noted, with the sale of an entire property under decree of the court in equity where a physical division would impair value. *Burpee* v. *Burpee,* 118 Me. 1, 105 A. 289 (1919); *Williams* v. *Coombs,* 88 Me. 183, 33 A. 1073 (1895).

The report is not, however, final. Commissioners must follow the warrant, and failure so to do is good ground for objection to the confirmation of the report. There must be no irregularities in procedure. Examples are: lack of proper notice by the commissioners, *Ware* v. *Hunnewell,* 20 Me. 291 (1841); the report not showing equal division as to value, *Dyer* v. *Lowell,* 30 Me. 217 (1849), and the appraisal of a building by commissioners when the duty to appraise was not included in the judgment for partition, *Parsons* v. *Copeland,* 38 Me. 537 (1854).

The issue here cuts deeper—to the weight to be given the judgment of commissioners upon the valuation and precise division of real estate.

Partition proceedings differ from a referred case or a jury trial, and so we may expect to find different governing principles. At the hearing on the commissioners' report evidence may be introduced upon the issues raised by the objections. There is no record of the evidence before the commissioners upon valuation and division presented to the court. The report stands alone. In this respect partition cases differ markedly from the referred case or a jury trial. The reviewing court in the latter types of cases passes upon the sufficiency of the evidence heard by referee

or jury. By the nature of the proceedings the court cannot so proceed in a hearing upon the report of commissioners. Accordingly, neither the "any evidence" rule in cases submitted to reference set forth in *Staples* v. *Littlefield*, 132 Me. 91, 167 A. 171 (1933), nor the familiar rules relating to new trials are here applicable. There is no record from the commissioners to be tested by such rules.

In the instant case no evidence whatsoever, as we have indicated, was heard by the court at the hearing upon the report. The exceptions must find their strength within the interlocutory judgment for partition and the report.

The court cannot turn to the evidence heard on the petition for partition on which the interlocutory judgment was founded to sustain objections to the report. Such evidence was not considered by the commissioners. Nor can the court turn to the evidence before the commissioners on valuation and division, for the view by commissioners and the lack of a record make such a course impossible.

Under the rule stated, the court has important corrective powers to recommit and to set aside without being a forum for a second trial or hearing on valuation and division. The rule is adapted to the furtherance of justice in a field where differences of opinion may be wide.

On examination of the five objections in the bill of exceptions, it is apparent that there has been no error of law. In the first three the respondent complains that, assuming the "shore line" was the most desirable part, the commissioners set aside to the petitioner "more than two-ninths of the whole shore line" and "much more than two-ninths of the best part of the shore line." There is no evidence before the court at the hearing on the report to establish the relative values of any particular parts of the "shore line." There is a total lack of evidence showing gross error on the part of the commissioners. Their judgment cannot successfully

be attacked by the mere statement of objections. Proof is required, and it does not here exist.

The fourth objection does not, in our view, show any failure on the part of the commissioners to carry out the terms of the judgment for partition. The commissioners were instructed "that that part of the premises set off to the (petitioner) be taken from the area where his said cottage is located." There is no suggestion that the share need be limited to the area exclusively used by the petitioner. The purpose of the instruction was to provide that the petitioner acquire at least the real estate on which his cottage is located. The court did not, indeed it could not, value or divide the real estate in entering the interlocutory judgment.

The fifth objection is no more than an expression of disagreement by the petitioner with the commissioners. It is of the same nature as the first three.

If the commissioners reached their result through bias or prejudice, or gross error clearly and unmistakably shown, then justice would require the recommittal or setting aside of the report. Here the respondent has failed to show any error on the part of the commissioners or court within the rule. He is not satisfied with the division. This is the extent of his complaint.

Exceptions overruled.

SEARS, ROEBUCK & COMPANY

vs.

INHABITANTS OF THE CITY OF PRESQUE ISLE AND JOHN E. HENCHEY, MILTON A. WILSON, EDMUND G. BEAULIEU, ASSESSORS

Aroostook. Opinion, July 21, 1954.

Taxation. Assessors. Valuation. Constitutional Law.

A petitioner for an abatement of taxes must prove his case. He must show that his property is overrated, that valuation with relation to just values is manifestly wrong, or that an unjust discrimination exists. He must establish that he is aggrieved.

The value of real estate and personal property for taxation purposes, the Legislature has declared, must be fixed by the individuals who have been elected as assessors. It is their opinion and their judgment that controls.

It was proper for the assessors to determine value by taking the information of values in 1940 as a starting point and by adding 25% as the amount that the assessors decided was the increase in value in the year 1953, then with adjustments for applicable or known facts (such as depreciation) that might affect value, to make an assessment.

The law requires equality and that real estate and tangible personal property be valued "according to the just value thereof," and that a percentage of true value taken for tax purposes, be uniform and equal on all real and tangible property. Article XXXVI, Article IX, Section 8, Constitution of Maine, XIV Amend. Const. U. S.

ON APPEAL.

This is a claim for tax abatement. The case is before the Law Court upon report, agreed statement of facts and so much of the evidence taken before a Justice of the Superior Court as is legally admissible. Appeal from the assessors to Superior Court dismissed.

Jacobson & Jacobson,
Berman, Berman and Wernick, for plaintiffs.

James A. Bishop,
Hutchinson, Pierce, Atwood & Scribner, for defendants.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

FELLOWS, C. J. This claim for abatement of tax comes to the Law Court on report.

It appears that on the first day of April 1953 the plaintiff Sears, Roebuck & Company was operating a store in the City of Presque Isle, Maine. On April 16, 1953, in accordance with notice from John E. Henchey, Milton A. Wilson and Edmund G. Beaulieu, Assessors for the city, Sears, Roebuck & Co. made out and sent to the assessors a schedule showing stock in trade $302,900, furniture and fixtures $18,350, a total of $321,250. This list made by the plaintiff company represented the year's monthly average of stock in trade from March 26, 1952, to March 26, 1953. Sears Roebuck later received from the city a tax bill for 1953 in the sum of $10,687.47 which, at the tax rate of 41 mills, shows an assessment of $260,670 or approximately 80% of the amount stated by the company.

On October 9, 1953, Sears Company sent to the Tax Collector a check for $6191 for its tax, which amount represents about 47% of the amount stated in the schedule instead of the 80%. The claim of Sears, Roebuck & Company being, that real estate in Presque Isle was assessed at only 47% of its value, and that an assessment at 80% on this personal property operated unequally and unfairly, that the assessors "did in fact deliberately, systematically and with design to operate inequitably and unequally upon said Sears, Roebuck & Co., did assess for the year 1953 real

estate in the same locality, belonging to other tax payers in accordance with the general scheme of equal apportionment to wit: on a valuation based upon real estate values which is approximately 47% of the true value thereof, but that said general scheme of apportionment was not followed in the assessment of personal property of said Sears, Roebuck & Co. This the plaintiff alleges is illegal, disproportionate, unjust and violates Article XXXVI, Article IX, Section 8, of the Constitution of the State of Maine and the Fourteenth Amendment to the Constitution of the United States of America, and said plaintiff thereby has been deprived of equal protection under the law with other tax payers." The City of Presque Isle gave credit to Sears Company, on account of the 1953 tax, the amount of the check for $6191.

The Sears Company filed its petition for abatement with the assessors of the City of Presque Isle on November 12, 1953. At a meeting of the Board of Assessors November 24, 1953, the petition for abatement was denied. The petitioner then appealed to the Superior Court for Aroostook County. The evidence was taken out before a Justice of the Superior Court at the February Term 1954, and by agreement of parties, and by order of court the case was reported to the Law Court, which court "shall, upon so much of the evidence as is legally admissible, render such final decision as the rights of the parties require."

All questions relating to election of assessors, the formal proceedings before them, the filing of petition for abatement, its denial, and the appeal to the Superior Court are admitted by both parties as taken in accordance with statutory requirements.

The case was well and fully tried by most capable counsel on both sides. The record is long and contains much contradictory testimony. The briefs are very comprehensive and fully show the claims and contentions of the parties.

The applicable law presents little complication, and but little disagreement between the parties. The facts presented to the court, however, for determination, and the applicability of the facts to the law are difficult. The evidence is a collection of opinions from experts and non-experts, with varying opinions of values and percentages, and varying opinions as to local economic conditions and the effect of the potato market, an air base, and other circumstances, together with the changes past and present, and possibilities of the future.

It is altogether the picture that confronts assessors in many towns and cities in Maine. How can assessments be made that are just and equitable under the law? "Equality is equity," but on the practical side, assessors are ordinarily men of little experience. A majority of a newly elected board are often men who never had any experience in valuation of any kind of property, and men who are not expected to be "full time" and are not paid to be. Popularity and not ability often elects many municipal officers. Necessarily, most assessors must get their facts on which to base their opinion as to property values from opinions of owners, and from incomplete, improper or prejudiced hearsay, with only an incomplete examination of the property itself. There are not hours enough in his term of office for an assessor to examine or to see every building from cellar to attic, nor to see anything of stock in trade beyond a few packages of hardware or groceries. These facts are well known to everyone who knows anything of local assessments. These facts were known by the people when the constitution and when its amendments were by them adopted. These facts are known to a great majority of the members of every Legislature because most legislators have been at some time town or city officials.

Taxation must be practical. It must bring results. The gross amount that is necessary to raise for governmental

purposes, depends on the price necessary to pay for the public demands for the protection and benefits of our civilization. The practical methods and results of honest, though inexperienced assessors, who live in the town or city, are much more valuable, and as likely to be correct, as are the theoretical contentions of expert political economists. See *Nicol* v. *Ames,* 173 U. S. 509, 516.

Article IX, Section 8 of the Constitution of the State of Maine, as amended in 1875 and 1913, now reads as follows:

"All taxes upon real and personal estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof; but the Legislature shall have power to levy a tax upon intangible personal property at such rate as it deems wise and equitable without regard to the rate applied to other classes of property." These words are plain. There is no ambiguity. Our court has recognized their meaning, although no decision has expressly decided the question here in issue. In *Brewer Brick Co.* v. *Brewer,* 62 Me. 62 (decided in 1873), the court say "the very idea of taxation implies an equal apportionment and assessment upon all property, real and personal, according to its just value." The court has recognized in the past, and now recognizes and decides, that all property should be considered and treated for purposes of taxation on an equal basis, and according to just value. See *Sawyer* v. *Gilmore,* 109 Me. 171; *Hamilton* v. *Portland Pier District,* 120 Me. 15; *Opinion of the Justices,* 97 Me. 595, 597.

Assessors of taxes, chosen by a city or town, are public officers. There is no relation of principal and agent between them and the municipality. When they act officially the inhabitants have no control over them. *Rockland* v. *Farnsworth,* 93 Me. 178, 183; *McKay Radio & Telegraph Co.* v. *Cushing,* 131 Me. 333; *Knight* v. *Thomas,* 93 Me. 494; *Sweet* v. *Auburn,* 134 Me. 28. See *Shawmut Mfg. Co.* v. *Benton,* 123 Me. 121.

The petitioner for an abatement of taxes must prove his case. He must show that his property is overrated. He must show that the valuation with relation to just value is manifestly wrong or that an unjust discrimination exists. He must establish that he is aggrieved. *Shawmut Mfg. Co.* v. *Benton,* 123 Me. 121; *Sweet* v. *Auburn,* 134 Me. 28.

The record in this case shows the manner in which these taxes were assessed in 1953. The assessors accepted an inventory or estimate of the owner of the stock in trade and assessed a value of approximately 80%. In regard to real estate, it appears that the City of Presque Isle in 1949 employed a firm of experts, Cole, Layer & Trumble, to make a complete and detailed valuation of all lots of land and of all buildings in the city. After investigation and study, this firm based its findings on 1940 values, and it was understood that the firm used, in part, reproduction costs less depreciation. The values for the year 1940 were taken for the reason that it was believed the values of that year could be gauged by the then conditions. In that year there was neither "the excesses of a boom" nor the "despair of a depression." *Sweet* v. *Auburn,* 134 Me. 28, 32. The information from Cole, Layer & Trumble was given on individual cards and these cards were used by the assessors for the succeeding years as a starting point for their valuations, with such changes as were indicated necessary in individual cases through sales, alterations, repairs, different opinions of different boards as to value, and the changes due to obsolescence, depreciation, location, use and the like, and changes due to economic conditions.

The assessors of 1953, according to the Chairman of the Board, who testified, taxed at 80% of $302,900 and that the assessors carried the furniture and fixtures of the petitioner in the office records at $45,865 which value of the fixtures was credited with 50% depreciation, and then taxed at 80% or $18,350. The chairman, and the two other members of

the Board, testified that all property, real and personal, was assessed in 1953 at 80% of what the Board determined was its value. The determination of the Board of Assessors as to each individual assessment was placed on the assessment rolls with the value of land and the value of buildings separate.

The assessors of 1953 took each card (made by the experts Cole, Layer & Trumble, who were employed by the city council in 1949) and finding the facts therein given, to be true, took it as a base for their valuation, and unless there was some determining factor to alter their decision, they decided that in 1953 the value in each instance had increased 25%. Adjustments were made for depreciation, new buildings, destruction of old buildings, use, etc., and assessment made at 80% of this value. The 1940 value was therefore approximately 80% of the 1953 values.

The appellant Sears Company offered much evidence, which, it claims, shows that for the year 1953 (and also for the years 1952, 1951 and 1950) the tax assessors for the city "systematically and with design, fixed the valuation of each tax payer's real estate in Presque Isle at that figure which represented the assessor's estimate of the value of the real estate in the year 1940" while "stock in trade was valued at 80% of its 1953 value." The appellant petitioner claims that the system employed was an improper and unlawful method and that "a variance of 1% would violate the constitutional requirement of uniformity and equality." In other words the Sears Company says it would be unconstitutional to value an owner's real estate at a figure which is 21% less than the 1953 value, and at the same time to value stock in trade at 20% less than its 1953 value.

The company evidently takes the position that an assessment value must be absolutely true value, and must be exact to the last dollar, that the amount of deduction from exact

value must be beyond question the same to 1% on each individual parcel of land and each individual building. The company expects and demands the impossible, because it says the impossible only is constitutional. What is "value," "just value," or "market value" of real estate? How can it be determined to the last cent? Where or how can the plaintiff appellant or the defendant city find a method for such determination? Surely not by the experts offered by the plaintiff company, one a political economist who was a college professor and had never been in Presque Isle to make examination or investigation, and gave no values of any particular piece of real estate there. He only gave his opinion as to trends or changes in values and the purchasing power of the dollar. Nor does another expert, with field experience in Federal Housing Loans on local real estate, give anything material beyond his opinion of varying increases in percentages as to farm and urban real estate, with some figures and charts. This expert stated that in his opinion real estate had been valued for tax purposes at substantially less than 80% of its fair value in 1953, whereas stock in trade was valued at 80% of its 1953 value. All the expert testimony, if it is correct, shows no certainty in exact figures as to any particular land or building. It is claimed by the petitioner however, that it proves to a certainty that the minimum increase in real estate values between 1940 and 1953 was 40% or more, and that "the petitioner is entitled to have its valuation reduced to at least 66% of its 1953 value," and that its tax should therefore be abated.

True and exact "market" or "just" values cannot be certain or made certain. It is a matter of judgment. It is the judgment of the assessors when considering valuation for tax purposes. A sale shows what is paid, not what is the exact value. A sale may represent sentimental value or value as an investment, possible future value, or it may

represent use, location, or any one or more of many things. *Sweet* v. *Auburn,* 134 Me. 28, 32, 33. 61 C. J. "Taxation" 638 Sec. 789, 84 C. J. S. "Taxation" 780 Sec. 410.

Value is usually proved by opinion of the owner, by opinions of experts, by price in sales of similar property in the neighborhood. The value of real estate and personal property for taxation purposes, the Legislature has declared, must be fixed by the individuals who have been elected as assessors. It is their opinion and their judgment that controls, unless so unreasonable in the light of the circumstances that the property is substantially overvalued and an injustice results, or that there is an unjust discrimination, or that the assessment was in some way fraudulent, dishonest or illegal. The contention of the plaintiff company is so impractical and impossible that no valid assessment could possibly be made. Neither the constitution nor the statutes expect that a Board of Assessors could make an assessment with all values so exact that no "expert" could disagree with them.

The court cannot believe, and would not be justified in believing on this record, that there was any unlawful or improper "scheme" on the part of the assessors as urged by the petitioning company. The scholarly briefs and argument of the counsel for the company are skillfully made and are within themselves "plausible and convincing." The evidence to support is not. The assessors determined the value of the petitioner's stock in trade upon the petitioner's own statement. They determined the value of each tax payer's real estate by taking the information of values in 1940 as a starting point, which information was purchased by the city itself, and by adding 25% as the amount that the assessors decided was the increase in value in the year 1953. Then with any other applicable and known facts, that might affect the value of the real estate, they made the assessment.

The City of Presque Isle, due to its location, is vitally affected by the potato market. Values of all property in the city fluctuate in some measure, as the price of a barrel of potatoes may change. Farm values change with potato prices, and the value of urban properties necessarily react. Then too, there is in Presque Isle an army air base that is today activated, with many soldiers needing housing, and tomorrow the base may be suddenly deactivated with the soldiers gone. It is common knowledge, to all Maine citizens, that Aroostook County and its prosperity depends to an abnormal extent on the market value of a potato, while with the varying defense ideas in Washington, the use of air fields, or their idleness, is to be continually expected. As one witness who was a member of the Board of Assessors testified, "1940 was a normal year," "all factors were normal," "a normal farming year," "there was no price support to give an inflated value," "twenty-five percent increase as between 1940 and 1953 was a fair estimate in my opinion of the maximum increase in real estate values in Presque Isle." "We were trying to assess and apportion taxes equally."

The law requires equality, and requires that each property owner pay his just proportion of taxes. The law requires that real estate and tangible personal property be valued on an equal basis "according to the just value thereof." The law requires that there be no favoritism nor discrimination. The law requires that when a percentage of the true value is taken for taxation purposes, the percentage be uniform and equal on all real estate and tangible property. The law expects that all assessors will be honest with themselves, fair with the public, and true to their oath of office, in their endeavor to reach an equality to the best of their ability. The law expects that assessors will be guided by the fixed star of equality, and so far as may be, under all conditions and circumstances, effect that equality which the law demands.

The case at bar differs materially from the case of *Bemis Bros.* v. *Claremont* (N. H.) 102 Atl. (2nd) 512 cited by the petitioner. In the New Hampshire case it was admitted that the city assessor assessed stock in at 100% of the market figure for the year 1951, and it was further admitted that land and water power was assessed at 80% of its value, and admitted that machinery was assessed at 60% of its value, and buildings at 55%. The New Hampshire Court say "we find no legal basis for assessing stock in trade at its full market value and real estate and other such property at varying percentages lower than its market value."

The evidence in this case at bar shows clearly that there was an honest effort on the part of the Board of Assessors of the City of Presque Isle in the year 1953 to perform its duty, and while perfection may not have been attained, there was no "scheme" proved to discriminate. In the unanimous opinion of the members of the court, the record shows that the valuation, having reference to just value, is not "manifestly wrong" nor that "an unjust discrimination denying the equal protection of the laws exists." It is not established by the petitioner's evidence that it is "aggrieved." *Shawmut Mfg. Co.* v. *Benton,* 123 Me. 121, 131; *Sweet* v. *Auburn,* 134 Me. 28; *Power Co.* v. *Hiram,* 125 Me. 138; *Spear* v. *Bath,* 125 Me. 27.

Appeal dismissed.

ROSARIO LEGAULT, APPELLANT
vs.
DECISION OF JUDGE OF PROBATE
BLANCHE LEVESQUE, APPELLEE

Oxford. Opinion, July 23, 1954.

Probate Courts. Jurisdiction. Guardianship.

The powers of the Probate Court are created by statute, and unless statutory authority is found to justify the action of that court or the Supreme Court of Probate, then its proceedings and decrees are null and void.

If the process on which the Probate Court seeks to act shows on its face a lack of jurisdiction, advantage may be taken at any stage of the proceedings.

Parties may not waive jurisdiction.

A probate petition alleging merely that there is "occasion" for the appointment of a guardian is insufficient under R. S., 1944, Chap. 145, Sec. 3.

ON EXCEPTIONS.

This is a probate petition for custody of a minor child before the Law Court upon exceptions to a decree of the Supreme Court of Probate. Exceptions sustained. Petition to be dismissed for want of jurisdiction and decree vacated.

Armand A. DuFresne, for appellant.

John A. Platz, for appellee.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

BELIVEAU, J. On exceptions. This case involves a petition by Blanche Levesque, maternal grandmother of Doris Legault, a child under 14 years of age, addressed to the

Probate Court for the County of Oxford, praying for the custody of the child.

The father and surviving parent, Rosario Legault, contested the petition and after adverse findings seasonably filed his appeal to the Supreme Court of Probate and alleged sixteen reasons why his appeal should be sustained. On this appeal a hearing was had before the Supreme Court of Probate in the County of Oxford, and after full hearing it was decreed that the petition of Blanche Levesque be granted, that the appeal be dismissed and that the said Blanche Levesque be appointed guardian of the said child, Doris Legault.

For the first time, in the Supreme Court of Probate, Rosario Legault raised the objection and made the point that the Probate Court had no jurisdiction because, as alleged by the appellant, the petition on which the court acted did not allege sufficient facts to give that court jurisdiction. It is the contention of the appellant that the petition should have contained allegations that the father was incompetent or that the welfare of the minor required custody in some other person.

At common law, the father is the natural guardian of his minor child and is prima facie entitled to his custody.

This is changed to some extent by Section 3, Chapter 145, Revised Statutes 1944 which declares "the care of the person and the education of the minor shall be jointly with the father and mother, if competent, or if one has deceased, with the survivor, if competent," and the justice hearing the case must, in addition, do what "he deems for the welfare of the child."

The powers of the Probate Court are created by statute, and unless statutory authority is found to justify the action of that court or the Supreme Court of Probate, then its proceedings and decrees are null and void. This has been de-

cided repeatedly by our court and is so well established that citation of decided cases is unnecessary. It is also a well known rule of law that if the process on which the court seeks to act shows on its face lack of jurisdiction, advantage of it may be taken at any stage of the proceedings. *Pinkham* v. *Jennings*, 123 Me. 343; *Powers* v. *Mitchell*, 75 Me. 364; *Cushman Co., et al.* v. *Macksey et al.*, 135 Me. 490 and *Hutchins* v. *Hutchins*, 136 Me. 513. The parties may not waive jurisdiction and if in law there is none, a final decree is of no effect.

Is the petition alleging there is "occasion" for the appointment of a guardian in this case sufficient in law and one on which the court may properly act and make a decree?

We rule that the allegation is not sufficient to give the court jurisdiction to act and was properly taken advantage of by the appellant in his motion praying that the petition be dismissed for want of jurisdiction.

In *The Overseers of the Poor of Fairfield* v. *Gulliver*, 49 Me. 360, the petition alleged, as a reason for the appointment of a guardian, that the person involved was "in his dotage." The court sustained a demurrer to the petition and said:

> "The record of the proceedings of such courts must show their jurisdiction. To place a citizen under guardianship, the records of the Court must show that he falls within that class of persons named in the statute, for whom a guardian may be appointed, and these facts must appear affirmatively, by distinct allegation, and not by implication, nor by way of inference from the facts."

To the same effect:

Taber vs. Douglass, 101 Me. 363
Paine vs. Folsom, 107 Me. 337

The petition, in the instant case, should allege the incompetency of the appellant in order to negative the provisions of Section 3, Chapter 145, R. S., 1944, not only to give the court jurisdiction but to inform the appellant of the issues raised by this petition.

The appellee relies on *Peacock* v. *Peacock*, 61 Me. 211, in which the petitioner "represents that it is *necessary* that a guardian should be appointed for Mary E. Peacock." In that case, the court ruled that the petition "is within every provision of the statute and was assumed as true by the presiding justice."

The controversy was, that no notice had been given to the parties interested and the only issue presented to the court for decision.

In other words, the ruling of the court that the petition was "within every provision of the statute" was correct as to the question of law raised in that case, to wit: want of notice. The court was not called upon to decide that the use of the word "necessary" was a sufficient allegation to give the court jurisdiction as to an award of physical care and custody of the infant. It was not raised and was not made an issue by the litigants. In other words, this was *obiter dictum* or "an assertion of law not necessary to the decision of the case." We refuse to accept this dictum as the law which governs the situation where the removal of the care and custody out of the control of the natural parents is at issue.

Exceptions sustained.

Petition to be dismissed for want of jurisdiction and decree vacated.

CLIFTON THOMPSON
vs.
MARY C. FRANCKUS

ANNA B. THOMPSON
vs.
MARY C. FRANCKUS

Androscoggin. Opinion, August 12, 1954.

Negligence. Landlord and Tenant. Invitees. Common Hallways. Lighting. Rule XVIII. R. S. 100, Sec. 105.

The general rule is that the failure of the landlord to light common passageways resulting in personal injuries to the tenant or others does not render the landlord liable unless liability is imposed by the statute or contract.

The general rule may vary, at least as to others rightfully upon said premises and not being tenants, if the landlord allows some dangerous condition to exist which is increased by the failure of light.

Where a jury has been given instructions which were plainly erroneous or which justified a belief that the jurors might have been misled as to the exact issue, or issues which were before them to be determined, Rule XVIII of the Rules of Court will not be applied. (Failure to note exceptions results in waiver—Rule XVIII.)

In the instant case the failure of the Presiding Justice to give any rule as to the duties of landlords with respect to common hallways justifies a belief that the jurors might have been misled.

ON MOTION FOR NEW TRIAL AND EXCEPTIONS.

These are negligence actions before the Law Court upon defendant's bill of exceptions and motion for new trial. Motion for new trial sustained and granted. New Trial ordered in each case.

Frank M. Coffin, for plaintiff.

Powers & Powers, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

TIRRELL, J. Plaintiffs, husband and wife, brought actions on the case for damages resulting from physical injuries to the wife caused by defendant's negligence. These actions were brought in the Superior Court, Androscoggin County, and tried before a jury at the September Term, 1953. At the end of the presentation of evidence, defendant requested certain instructions, which the court refused to give, and to which refusal defendant excepted. The jury returned verdicts for both plaintiffs. This case is now before this court on defendant's Bill of Exceptions and Motion for a New Trial.

The jury could have found from the testimony the facts to be as follows: At approximately seven-thirty in the evening of October 7, 1952 Mrs. Anna B. Thompson, plaintiff, visited Mrs. Rachel Rioux who lived at 22 Knox Street in the City of Lewiston, on the second floor of a four-story apartment house with the only means of ingress and egress being a common stairway to all apartments. This apartment house was owned by Mrs. Mary C. Franckus, defendant. Mrs. Thompson visited Mrs. Rioux on this occasion for the purpose of having her hair dressed. Mrs. Thompson gained access to Mrs. Rioux's apartment by a stairway which was used in common by all tenants of the building. Mrs. Rioux was learning to be a hairdresser and had agreed with Mrs. Thompson to dress her hair so that she could get some experience.

At approximately eight-thirty that evening Mrs. Thompson left Mrs. Rioux's apartment and Mrs. Rioux accompanied her to the head of the stairway. Mrs. Thompson reached for a hand rail and found that there was none. *There was no light burning on the first floor landing* and *the light on the second floor landing did not illuminate the*

stairway. At this point Mrs. Thompson paused while Mrs. Rioux started to return to her apartment in search of a match to aid Mrs. Thompson. While Mrs. Rioux was gone Mrs. Thompson found a matchbook in her pocketbook, lit a match, and then proceeded to descend the stairway. In taking a step, however, she tripped, and fell the length of the stairway. Testimony was presented to the jury as to the condition of the linoleum which was placed on the wooden tread of each stair. The jury could well have found from the testimony given that this linoleum covering on the treads was badly worn and contained holes of such nature as to create a hazard. The old linoleum coverings for the treads were not presented as exhibits but were described by a witness, namely Mrs. Rioux, the tenant, who removed them the day following the accident and replaced them with new rubber coverings.

As a result of this fall Mrs. Thompson was severely injured, and was hospitalized for approximately eight weeks. At the time of the trial she was still unable to perform her household duties and was unable to return to her work as a heel coverer for the Rock Maple Wood Heel Company.

The defendant requested in writing that the presiding justice then instruct the jury as follows:

1. Visitor of tenant in building owned by the defendant has no greater rights in use of premises than has tenant, to whom the defendant owes no duty except to maintain passageway structurally in the same or similar condition as at date of letting, or as it appeared to be at the beginning of tenancy.
2. There is no common law duty on the part of landlord to light common passageways or stairways at night except by contract express or implied.
3. Under all conditions and circumstances, men must use reasonable care, and if they fail to

> use reasonable care, and are hurt on account of their failure, then they must bear their injuries themselves regardless of who else might have been responsible.

The court refused to give these requested instructions and the defendant duly and seasonably excepted to the court's refusal. Examination of the plaintiff's writ reveals in several places that part of the claimed negligence of the defendant was the failure to provide adequate lighting for the common halls and stairways. During the trial of the case much testimony was introduced by both the plaintiff and the defendant relative to the lighting facilities and adequacy of the lighting of such part of the premises as was retained and controlled by the defendant as common halls and stairways for the use of her tenants and others rightfully thereon.

The plaintiff introduced a city ordinance which provided for the lighting of common stairways and halls in buildings erected after the year 1936 and relied upon the violation of this ordinance as one of the causes of the accident. The presiding justice, in his charge to the jury, instructed the jury that this ordinance did not apply to this particular case and the jury was instructed to disregard it. In examining the charge of the presiding justice we fail to find any mention of whether or not the defendant owed any duty to her tenants, or to those rightfully on said premises, to furnish adequate lighting in the common hallways and stairways. The subject of lighting, outside of instructing the jury to disregard the particular ordinance, was never mentioned in the charge of the presiding justice. *The jury was given no rule of law as to what duty the landlord owed to the tenant, or to one rightfully on said premises,* as to lighting, and therefore no rule of law could be applied by the jury to the facts as it found them to be.

The *general rule* is that the failure of the landlord to light common passageways resulting in personal injuries to the

tenant or others does not render the landlord liable unless liability is imposed by the statute or contract. 52 C. J. S., Sec. 417. Although this above is the general rule, such rule may vary, at least as to others rightfully upon said premises and not being tenants, if the landlord allows some dangerous condition to exist which is increased by the failure to light. This rule has been adopted in part, at least, as shown by cases cited under 25 *A. L. R.* (2) 512, Sec. 5. In particular we refer to *Hawes* v. *Chase,* 84 N. H. 170, 147 A. 748:

> ". . . . noting a *possible* qualification of the rule that a landlord is under no duty to maintain lights in common passageways, where the need of lighting is due to a faulty plan or defective method of construction, but holding that negligence under this qualification of the rule was not available to the plaintiff where it was not presented at the trial.
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> "But it was said in *Carey* v. *Klein* (1927) 259 Mass. 90, 155 N. E. 868, that, standing alone, the fact that the construction of the premises leaves halls and stairways unlighted does not place upon the landlord any obligation to light such common portions of the premises, since the *tenant* takes the premises as he finds them.
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> * * * * *
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> "In an action for personal injuries allegedly caused by the landlord's negligent failure to light common ways over which he has retained control, it is ordinarily a question for the jury as to whether the premises in question are of such peculiar construction or defective condition as to impose upon the landlord the duty of supplying lights. *Tauber* v. *Home Owners' Loan Corp.* (1943) 267 App. Div. 766, 45 NYS 2d 293.
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> "So, it has been held that the part of the premises retained in the landlord's control could be found to be of such construction or in such condition as to *peculiarly require lights.* . . . . ." (Emphasis supplied)

O'Neil v. *Noe,* 301 Ky. 472; 192 S. W. (2nd) 366.

For the purpose of deciding this case it is preferable that the *General Motion* for a *New Trial* be first considered.

Chap. 100 of the Revised Statutes, Sec. 105, reads as follows:

> "During a jury trial the *presiding justice shall rule and charge the jury, orally or in writing, upon all matters of law arising in the case,* but shall not, during the trial, including the charge, express an opinion upon issues of fact arising in the case, and such expression of opinion is sufficient cause for a new trial, if either party aggrieved thereby and interested desires it; and the same shall be ordered accordingly by the law court upon exceptions." (Emphasis supplied)

This court has said many times that practice at variance with Rule XVIII of the Rules of Court, which rule definitely states:

> "Exceptions to any opinion, direction or *omission* of the presiding justice in his charge to the jury must be noted before the jury, or all objections thereto will be regarded as waived."

should not be encouraged. There is, however, a rather definite exception to the application of the rule which has developed in instances where a jury has been given instructions which were plainly erroneous or which *justified* a belief that the jurors *might have been misled as to the exact issue, or issues which were before them to be determined.* See *Roberts* v. *Neil,* 138 Me. 105; *Davis* v. *Ingerson,* 148 Me. 335, at 344; *Cox* v. *Metropolitan Life Insurance Company,* 139 Me. 167, at 172.

In our opinion the failure of the presiding justice to instruct the jury specifically as to the duties of a landlord, who has retained and maintained common hallways and stairways, both as to the tenant and others lawfully upon

said property, should have been explained to the jury. In the instant case *no* rule was given, the only reference in the charge being upon the ordinary rule of negligence, without any further qualification.

For a complete discussion of the duties of and the liability of a landlord to his tenants and others lawfully using common passageway and stairways, see *25 A. L. R. (2nd)*, beginning at page 496 through page 576.

In *State of Maine* v. *Smith,* 140 Me. 255, at pages 284, 285, 286 the court said:

> "In Sec. 104 of Chap. 96, R. S. 1930 (now Chap. 100, Sec. 105), it is provided that 'During a jury trial the presiding justice shall rule and charge the jury, orally or in writing, upon all matters of law arising in the case.....' Yet an attorney has a duty in connection with such trials and ordinarily he cannot take advantage of such an omission unless before the jury retires he calls the attention of the Court to it. He cannot sit by, remain silent, and secure an advantage when, as an officer of the Court, he should call the Court's attention to such omission.
>
> > " 'If either party thinks any material matter has been misstated, or overstated, *or omitted,* he should ask for proper corrections before the jury are finally sent out. He ought not to be silent then, when corrections can be made, and complain afterwards, when corrections can not be made.' *Murchie* v. *Gates,* 78 Me., 300, 306, 4 A., 691, 701. (Italics ours.)"
>
> "Also see *State* v. *Fenlason,* 78 Me., 495, 501, 7 A., 385.
>
> "While the Court itself by such an omission would not comply fully with the statute (perhaps through inadvertence or diversion of mind), yet litigant (no exception being taken) cannot in this Appellate Court, except as hereinafter stated complain if his attorney is at fault in not then making

it possible for the jury to receive an omitted instruction.

"Rule of Court XVIII pertinently provides in part:

> " 'Exceptions to any opinion, direction or *omission* of the presiding justice in his charge to the jury must be noted before the jury, or all objections thereto will be regarded as waived.' (Italics ours.)

"In *Poland* v. *McDowell,* 114 Me., 511, our Court stated on page 512, 96 A., 834, 835:

> " 'This rule was declared in *McKown* v. *Powers,* 86 Me., 291, to be merely an affirmance of a long pre-existing rule of practice. It is true that this rule is not always enforced. Exceptions not reserved before the jury retires are sometimes allowed as a matter of grace, but not as a matter of right. The excepting party is not entitled to them as of right. The presiding Justice is not required to allow them.'

"In the instant case no exceptions were taken to such claimed omissions. However, this Court has in certain cases reviewed questions of law both on a motion for a new trial and on appeal, even though exceptions were not taken. *State* v. *Wright,* 128 Me., 404, 148, A., 141; *State of Maine* v. *Mosley,* 133 Me., 168, 175 A., 307; *Trenton* v. *Brewer,* 134 Me., 295, 186 A., 612; *Springer* v. *Barnes,* 137 Me., 17, 14 A., 2d, 503; *Megquier* v. *De Weaver,* 139 Me., 95, 27 A. (2d), 399; and *Cox* v. *Metropolitan Life Ins. Co.,* 139 Me. 167, 28 A (2d), 143."

"Such review, however, is not compatible with best practice, and although there be error in an instruction, when no exception is taken, a new trial either on appeal or motion should not be granted unless, as stated in the above cited cases, 'error in law ... was highly prejudicial ... and well calculated to result in injustice,' or 'injustice

> would otherwise inevitably result,' or 'the instruction was so plainly wrong and the point involved so vital . . . that the verdict must have been based upon a misconception of the law,' or '*When it is apparent from a review of all the record that a party has not had that impartial trial to which under the law he is entitled . . .*'. We consider the foregoing applicable as well to an omission as to an erroneous instruction where no exception is taken." (Emphasis supplied)

The defendant's motion for a new trial in each case is sustained and a new trial is ordered.

Having decided this case on the General Motion it becomes unnecessary to consider exceptions. This rule is so familiar it needs no citations. The entry therefore is

Motion for new trial sustained and granted.

New trial ordered in each case.

ARTHUR J. DUNTON, JUDGE OF PROBATE

vs.

MAINE BONDING AND CASUALTY COMPANY

successor by merger of Union Safe Deposit and Trust Company of Delaware, and Union Safe Deposit and Trust Company of Delaware.

ARTHUR J. DUNTON, JUDGE OF PROBATE

vs.

MAINE BONDING AND CASUALTY COMPANY

successor by merger of Union Safe Deposit and Trust Company of Delaware, and Union Safe Deposit and Trust Company of Delaware.

Sagadahoc. Opinion, August 30, 1954.

Executors and Administrators. Sureties. Bonds. Limitations. Contracts. Accounts.

Actions against sureties on administrator's or executor's bonds must be commenced within 6 years from the time of breach. It is only when the breach is fraudulently concealed that action may be commenced later; and then it must be commenced within 3 years from the date of discovery. (R. S., 1944, Chap. 151, Sec. 9.)

ON EXCEPTIONS.

These are actions to recover for alleged breaches of surety bonds. The cases are before the Law Court upon exceptions. Exceptions overruled.

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

William B. Mahoney, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, TAPLEY, JJ. TIRRELL, J., did not sit.

BELIVEAU, J. On exceptions. These actions are brought to recover for the alleged breaches of two bonds, one dated August 15, 1932 in the penal sum of $250,000 and the other November 1, 1932 for $50,000. The bonds were furnished by J. Houghton McLellan, as executor under the will of James S. Lowell with the defendants as sureties.

At the October 1952 Term of the Superior Court for Sagadahoc County the defendant filed a plea of general issue together with a brief statement. An amendment to this plea, in which the defendant claimed the actions were barred by Section 9, Chapter 151 of the Revised Statutes of Maine, was allowed at the June 1953 Term of that Court. A full hearing was had before the Superior Court and while many rulings were made by the presiding justice, the only one to which exception was perfected, and before this court for consideration and decision, is that the actions were barred by the aforesaid statute.

The alleged breaches on the bonds relate to the payment by J. Houghton McLellan, executor under the will of James S. Lowell, of the sum of $12,500 to William F. Dunham in compromise of a claim filed by Dunham against the estate of James S. Lowell.

Prior to his death, James S. Lowell, was Judge of Probate for the County of Sagadahoc and William F. Dunham was Register of Probate for that county.

On July 19, 1932 Dunham filed a proof of claim for $25,000 against the estate of James S. Lowell based on an alleged oral contract, by the terms of which Dunham agreed not to relinquish his office as Register of Probate while James S. Lowell retained his office as Judge of Probate for that county.

McLellan petitioned the Probate Court for permission to compromise this claim for the sum of $12,500 and the court gave the executor authority to make that settlement. Pay-

ment of $12,500 to William F. Dunham was made on August 23, 1932 and was approved in McLellan's first account. A second account was filed and an order obtained for distribution. This was filed and allowed.

McLellan died August 20, 1937. No claim was filed against his estate for the alleged breaches nor any action brought against his estate.

The plaintiff in his declarations and in his argument before this court claims that the alleged contract between Dunham and Lowell was not a valid one, that the payment of $12,500 in compromise was illegal and that the Probate Court had no authority to allow McLellan credit for the payment of that sum.

We are not concerned with the validity of the contract nor with the action of the Probate Court in its approval of the payment of the $12,500 nor with its action in allowing McLellan that sum in his accounts. We are concerned solely with the applicability of Section 9, Chapter 151.

Section 9, Chapter 151 of the Revised Statutes reads as follows:

> "Action on administrator's or executor's bond, limitation. R. S., c. 86, § 9. Every action against sureties on an administrator's or an executor's bond must be commenced within 6 years after such administrator or executor has been cited to appear to settle his account in the probate court where administration is granted on the estate, or, if not so cited, within 6 years from the time of the breach of his bond, unless such breach is fraudulently concealed by the administrator or executor from the heirs, legatees, or persons pecuniarily interested, who are parties to the suit, and in such case within 3 years from the time such breach is discovered."

The court below found that there was no fraudulent concealment of the so-called illegal payment of August 23, 1932

and for the purpose of this case, the ruling stands, with ample evidence to justify it. The statute states clearly that the action must be brought within six years from the time of the breach unless it is fraudulently concealed by the executor. The plaintiff's evidence is based almost wholly on documents in the Probate Court of Sagadahoc County, which have been available to the public. It was for that reason probably the court found there was no fraudulent concealment and with that ruling we agree. We also concur with its findings that the breach, if any, occurred on the date of payment by McLellan to Dunham, August 23, 1932. The plaintiff, in his brief, admits the illegality complained of, occurred in July and August 1932.

The plaintiff claims that the statute of limitation did not begin to operate until the alleged fraud had been discovered, and because the alleged discovery was not made until Ralph A. Gallagher was appointed administrator, the six-year limitation is not applicable and action can be brought within twenty years of the giving of the bonds.

We are unable to find any authority to substantiate that postion. Much reliance is placed on *Cook, Judge of Probate* v. *Titcomb,* 115 Me. 38 as the authority for the plaintiff's position. It gives, in our opinion, no comfort to the plaintiff and fails to support his position. There Lendall Titcomb took possession of the estate of Nancy W. Cushman, who died testate March 20, 1892, and retained management of the estate until the death of the beneficiary, April 22, 1908. Titcomb died April 23, 1908. The defendant, his wife, was the sole beneficiary and executrix of his will. As such executrix, in June 1909, she filed her testator's administration-account, showing a balance of $2,619.83. After a hearing, the Judge of Probate, on January 25, 1915, found the amount due was $6,643.27. On March 20, 1915 the administrator of the Cushman estate demanded of the defendant the amount so decreed and payment was refused.

The court found in this case that the breach occurred on the defendant's refusal to make payment of the amount due the Cushman estate.

There was no such problem as exists here. The court ruled that the liability of the executor and sureties continued after his death because the estate had not been settled or the duties of the executor fully completed. In that sense the court ruled, and properly so, we believe, that the liabilities of the sureties still continued even beyond the death of the executor.

We rule that the breach, if any, complained of by the plaintiff, occurred August 23, 1932 and that there was no fraudulent concealment of his actions by the Executor McLellan.

On the contrary, practically all of the facts offered by the plaintiff were spread on the records of the Probate Court for Sagadahoc County from the time the case was closed for all to see, inspect or examine to their heart's content. If the plaintiff's position was adopted by this court it would completely nullify the law and would make it possible for anyone to engage in similar litigation anytime within twenty years, claiming that fraud was discovered much later than six years or as in this case nearly twenty years. No estate could be considered as completely closed until twenty years had elapsed because of possible lawsuits involving alleged misconduct of the executor or administrator. The rights of those involved would, for all practical purposes, be jeopardized and the purpose sought to be accomplished by the six-year limitation completely nullified. We believe it to be the purpose of the statute to take such cases out of the twenty-year limitation statute.

Exception overruled.

SABIA DIMATTEA PROFENNO

vs.

THE COMMUNITY OIL COMPANY, INC.

Cumberland. Opinion, August 31, 1954.

Leases. Parol Evidence. Ambiguous Language. Exceptions. New Trial. Forcible Entry. Notice.

A bill of exceptions excepting to findings of a Presiding Justice that (1) a certain lease provision is not ambiguous, and (2) that parol evidence is inadmissible, do not properly present to the Law Court questions (a) whether defendant was a tenant at will (b) whether defendant is entitled to a new lease and (c) whether proper notice was given, since the latter questions have no possible bearing upon those presented by the bill of exceptions.

A bill of exception, to be available, must show clearly and distinctly that the ruling excepted to was upon a point of law, and not upon a question in which law and fact are so blended as to render it impossible to tell on which the adverse ruling was based.

A mere general exception to a judgment rendered by a justice at *nisi prius* is not sufficient.

Bill of exceptions compared to motion for new trial.

ON EXCEPTIONS.

This is an action of forcible entry and detainer before the Law Court upon exceptions. Exceptions overruled. Judgment for plaintiff.

Barnett I. Shur,
Herbert M. Sawyer, for plaintiff.

Edward Devine,
Bernard Devine, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

TIRRELL, J. This is an action of Forcible Entry and Detainer brought by Sabia DiMattea Profenno against the Community Oil Company, Inc.

A written thirty-day Notice to Quit in the usual form was served upon the defendant, requiring the defendant to quit and deliver up the possession of said premises. The defendant failed and refused to quit and deliver up possession of said premises and, accordingly, an action of forcible entry and detainer was brought against the defendant, returnable to the Portland Municipal Court on July 21, 1953. Both the Notice to Quit and the action of Forcible Entry and Detainer were instituted and brought by Sabia DiMattea Profenno who, under the terms of the allowed will of her late husband, was the owner of a life estate in said premises. After a hearing was held in the Portland Municipal Court judgment was entered for the plaintiff. The defendant appealed and the case was fully heard by the presiding justice, without jury, at the December 1953 Term of the Cumberland County Superior Court. After a full and complete hearing and trial the presiding justice found for the plaintiff, assessed damages at $1.00, and ordered a writ of possession to issue. The defendant now brings this case before this court purportedly on exceptions to certain rulings of the presiding justice.

On January 20, 1938 Sabia DiMattea Profenno was the owner of a life estate in said property located at 164-178 Brighton Avenue, 235-247 Dartmouth Street, and 581-593 St. John Street in Portland, Maine, under the terms of the allowed will of her late husband, Camillo Profenno. By the provisions of this will the life estate would be terminated not only upon the death of Sabia DiMattea Profenno, but also upon the event of her remarriage, and in either of such events, the property would go to all of their children. The existence of this life estate in Sabia DiMattea Profenno has been admitted by the defendant and is not in issue here.

On January 20, 1938 the said Sabia DiMattea Profenno executed a lease of the above described premises for a period of ten years with the Community Oil Company, Inc., as Lessee. Due to the fact that the interest of Sabia DiMattea Profenno was that of a life tenant, the following provision was included in the lease:

> "Inasmuch as the Lessor hereunder has only a life estate in said premises and upon her death or remarriage the life estate shall terminate and go to her children, the undersigned children of said Lessor join in this indenture for the purpose of confirming the estate herein granted, and to the extent that they may lawfully do so, for the purpose of joining in the covenants of the Lessor."

Said lease established a rental of One Hundred ($100.) Dollars a month, payable on the first day of each month for the preceding month, and contained a clause granting the Lessee the option of renewal for a term of five years and a further provision that at the termination of said five year extension (if such extension is made), the Lessee would *"be entitled to a new lease of the demised premises upon as favorable terms as the same may be leased or offered for lease to any other person."* (Emphasis supplied.)

On December 17, 1947, with the original ten-year lease period about to expire, the said parties executed an extension of said lease for a term of five years to take effect on January 20, 1948, which date was the expiration date of the lease then in effect and referred to above. While this extension was also between the life tenant, Sabia DiMattea Profenno, as Lessor and the Community Oil Company, Inc., as Lessee, it also contained the following language, similar in meaning and import to the language of the original ten-year lease:

> "Inasmuch as said Sabia DiMattea Profenno has only a life interest in said premises the undersigned children of said Lessor join in this Inden-

> ture for the purpose of confirming the estate herein granted, and to the extent that they may lawfully do so, for the purpose of joining in the covenants of the Lessor therein and herein stated and agreed to be performed."

This extension also contained exactly the same provision found in the original lease to the effect that the Lessee *"shall be entitled to a new lease of the demised premises upon as favorable terms as the same may be leased or offered for lease to any other person."* (Emphasis supplied.)

By registered letter dated November 25, 1952, the Lessor's attorney notified the Lessee that upon the expiration of the lease on January 20, 1953, no new lease would be offered to the said Community Oil Company, Inc., or to any other person as the Lessors did not intend to lease said premises to anyone, and requested that the Lessee should, therefore, quit and deliver up possession of the said premises upon the expiration of the then existing lease.

By letter under date of January 28, 1953 the attorney for the Lessor, plaintiff here, notified the Lessee that the Lessor would be willing to lease the said premises to the Community Oil Company, Inc., or to any other person, for a term of one year only, at the monthly rental of One Hundred Fifty ($150.) Dollars; that these were the most favorable terms that would be offered to anyone and that, in accordance with the provisions of the lease and extension thereof, the Community Oil Company, Inc., was being given the first opportunity to enter into such a lease.

The defendant corporation would not sign the offered lease, and thereupon the plaintiff caused the Notice to Quit to be served upon the defendant. When the defendant failed to vacate the premises in accordance with said notice, the present action of Forcible Entry and Detainer was brought against the defendant to secure possession of the premises.

The defendant is here upon two exceptions taken to certain rulings of the presiding justice. Both rulings referred to that clause in the said lease and extension thereof which provided that the Lessee would "be entitled to a new lease of the demised premises upon as favorable terms as the same may be leased or offered for lease to any other person." Counsel for the defendant contended that said clause was ambiguous and that parol evidence should be admitted to clarify the language contained therein. Upon the ruling by the presiding justice that the language contained in said clause was clear and explicit and not ambiguous and that, therefore, parol evidence relating to it was inadmissible, counsel for defendant excepted.

It will be noted, however, that the contentions of the defendant do not relate to the said rulings of the presiding justice relative to the question of ambiguity, but to the actual finding of the justice. The defendant complains that said finding is contrary to the law and the evidence in that:

(1) The defendant is not a tenant at will.

(2) The defendant is entitled to a new lease.

(3) The Notice to Quit was not signed by the life tenant or any of the remaindermen, notice having been signed by Barnett I. Shur, attorney, in behalf of the life tenant only and not in behalf of the life tenant and the remaindermen.

A bill of exceptions was filed wherein the only two exceptions as to rulings of law by the presiding justice were recited. *These exceptions are noted* in the record and relate to the following rulings by the presiding justice, namely

(1) That the language contained in the clause

> "shall be entitled to a new lease of the demised premises upon as favorable terms as

> the same may be leased or offered for lease to any other person"
>
> is *not ambiguous.*
>
> (2) That since the language is not ambiguous, *parol evidence is inadmissible.*

With the above rulings of the presiding justice, first, that the language contained in the questioned clause of the lease is not ambiguous, and second, that since the language is not ambiguous parol evidence is inadmissible, we are in perfect accord. *McCully* v. *Bessey,* 142 Me. 209, at 213; *Smith* v. *Blake,* 88 Me. 241; *Parkman* v. *Freeman,* 121 Me. 341; *Foster* v. *Foss,* 77 Me. 279; *Whitmore* v. *Brown,* 100 Me. 410, 413; *Woolen Co.* v. *Gas Co.,* 101 Me. 198, 213.

These were the only exceptions recited by the defendant in its bill of exceptions. However, the defendant does not come before this court contending these said rulings were erroneous as a matter of law, but, rather, submits that the presiding justice's finding is contrary to the law and the evidence in certain respects. It then ascribes the following as reasons for such contention:

(1) That the defendant is not a tenant at will.

(2) That the defendant is entitled to a new lease.

(3) The Notice to Quit should also have been signed by or in behalf of the remaindermen.

It is thus certainly evident that the defendant based its case on a bill of exceptions, purportedly excepting to two certain rulings as to the ambiguity of certain language contained in a lease and extension thereof. Certain questions as to whether or not the defendant was or was not a tenant at will, whether or not the defendant is entitled to a new lease, and whether or not proper notice was given, will not be considered herein, as they have no possible bearing upon the question of whether or not the language hereinbefore

mentioned was or was not ambiguous. Decisions in this and other jurisdictions on the subject matter and form of exceptions are legion. All indicate in clear language that the purpose of a bill of exceptions is to bring to the court's attention allegedly erroneous rulings of law by a presiding justice:

> "Exceptions lie to rulings upon questions of law only and not to findings upon questions of fact. And a bill of exceptions, to be available, must show clearly and distinctly that the ruling excepted to was upon a point of law, and not upon a question in which law and fact are so blended as to render it impossible to tell on which the adverse ruling was based." *Laroche* v. *Despeaux,* 90 Me. 178.

Hurley v. *Farnsworth,* 115 Me. 321; *Bowman* v. *Geyer,* 127 Me. 351.

The defendant has not in its bill of exceptions shown "clearly and distinctly that the ruling excepted to was upon a point of law." Since the reasons for the defendant's contention that the *finding* is against the law and evidence have no bearing whatever upon the rulings excepted to, we are left with the premise that the defendant merely excepts to the *finding* of the presiding justice.

The court treated this matter in unequivocal language in the case of *Helen H. Bronson, Appellant from Decree of Judge of Probate,* 136 Me. 401:

> "The presentation of a mere general exception to a judgment rendered by a justice at nisi prius is not sufficient under the statute. An exception to a judgment rendered in the Supreme Court of Probate is within the rule."

The defendant has actually excepted generally to the *finding* of the presiding justice rather than to his rulings of law during the course of the hearing. Had a jury considered the case, the defendant might properly have desired

to file a motion for a new trial. This was, of course, impossible since the cause was heard by a justice in the absence of a jury. While the defendant purports to use the vehicle of a Bill of Exceptions to reach this court, the bill of exceptions itself is faulty in that it imparts the flavor of a motion for a new trial. The bill relates not to the rulings of law excepted to but to three matters entirely separate and distinct from the two rulings of law excepted to.

A Bill of Exceptions must stand or fall on the sufficiency of information presented in it. The defendant's exceptions are overruled.

The entry must be

Exceptions overruled.

Judgment for plaintiff.

PHILLIS H. CROMMETT ET AL., IN EQ.

vs.

CITY OF PORTLAND ET AL.

Cumberland. Opinion, September 13, 1954.

Constitutional Law. Public Use. "Eminent Domain." Taxation. Slum Clearance. Redevelopment.

The provisions of our State Constitution are not of a broader scope than the 14th Amendment to Constitution of U. S. with respect to the scope of "public use."

The Legislature may entrust the power of eminent domain to instruments of its choosing, as here a public body corporate and politic exercising public and essential governmental functions.

Whether the public exigency requires the taking of private property for public uses is a legislative question. Whether the use for which such taking is authorized is a public use is a judicial question. Whether a given use of public moneys is public in nature is a judicial question.

There is a strong presumption that a statute is constitutional.

Slum clearance of blighted areas for the public health, morals, safety and welfare is a "public use" within the meaning of the constitution. (P. and S. L., 1951, Chap. 217.)

It is not necessary that an active use be contemplated in the taking by eminent domain. The use may be negative in character. The prevention of evil may constitute a use.

The constitutionality of P. and S. L., 1951, Chap. 217, Sec. 9 is not passed upon.

Taken alone, the redevelopment of a city is not a "public use" for which either taxation or taking by eminent domain may properly be utilized.

ON REPORT.

This is a Bill in Equity to test the constitutionality of the "Slum Clearance and Redevelopment Authority." P. and S. L., 1951, Chap. 217 under R. S., 1944, Chap. 95, Sec. 4, Par. XIII. Bill dismissed without costs.

Arthur A. Peabody, for plaintiff.

Barnett I. Shur, for defendant.

SITTING: FELLOWS, WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

WILLIAMSON, J. On report upon an agreed statement of facts. This is a bill in equity to test the constitutionality of the "Slum Clearance and Redevelopment Authority Law." P. & S. L., 1951, Chap. 217, sometimes hereinafter referred to as the "Act" or the "1951 Act."

The plaintiffs are ten taxable inhabitants of the City of Portland and bring the bill under R. S., Chap. 95, Sec. 4, Par. XIII (1944). The defendants are the City of Portland, the members of the City Council, the City Treasurer, and five persons "in their purported capacity as Commissioners of the Slum Clearance and Redevelopment Authority."

The plaintiffs in substance seek to restrain and enjoin:

(1) payment of $60,000 by the city to the Authority, and

(2) the "purported" commissioners from accepting payments from the city and from exercising any powers under the 1951 Act. Further, the plaintiffs pray that the court decree that the resolution of the City Council creating the Slum Clearance and Redevelopment Authority and the council order authorizing the $60,000 payment are "illegal and invalid and that (the 1951 Act) is unconstitutional and void and in violation of the Constitution of this State."

A temporary injunction issued and is now in effect. At the hearing on the bill as amended, answer, replication, and an agreed statement of facts, the justice presiding, with the consent of the parties, reported the case to the Law Court for hearing and decision.

The issues are set forth by the plaintiffs in their bill as follows:

> "FOURTEENTH: That Chapter 217 of the Private and Special Laws of Maine, 1951, is unconstitutional and void for the following reasons: (1) it authorizes the taking of private property for private use, in violation of Article I, Section 21 of the Constitution of the State of Maine and the Fourteenth Amendment to the Constitution of the United States; (2) it authorizes an unconstitutional delegation of legislative power, in violation of Article III, Sections 1 and 2, Article IV, Part First, Section 1, and Article IV, Part Third, Section 1, of the Constitution of the State of Maine; (3) it authorizes the loan of the credit of the State, in violation of Article IX, Section 14 of the Constitution of the State of Maine, and (4) it authorizes the expenditure of public funds for a private use contrary to the law of the State of Maine."

The pertinent constitutional provisions read:

> "Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it."
>
> Maine Const. Art. I, § 21.
>
> "The legislature . . . shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this state, not repugnant to this constitution, nor to that of the United States."
>
> Maine Const. Art. IV, Part Third, Section 1.
>
> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."
>
> U. S. Const. Amend. XIV.

In considering in detail the 1951 Act and the facts in the instant case, it will be helpful to keep in mind the basic purposes and methods of the slum clearance and redevelopment program well stated in the following words:

> "In essence, redevelopment contemplates the acquisition of a slum, blighted or deteriorating area selected in accordance with a general city or town plan, clearing, replanning and making the area available by sale or lease to private and public sources for redevelopment pursuant to a predetermined plan. Since the local agency will suffer a loss in acquiring, clearing and replanning the area for its new uses, federal grants are available to help meet the deficit, with the Federal Government absorbing two-thirds of the loss. As in the case of local annual contributions required under the United States Housing Act, the local contribution may be and undoubtedly will be in forms other than cash."

The Federal Government and Housing (1952) Wis. L. Rev. 581, 609.

We summarize the 1951 Act and set forth the provisions in which we are particularly interested.

"**Section 2. Findings and declaration of necessity.** It is hereby found and declared that there exist in the city of Portland slum and blighted areas (as herein defined) which constitute a serious and growing menace, injurious and inimical to the public health, safety, morals and welfare of the residents of said city of Portland; that the existence of such areas contributes substantially and increasingly to the spread of disease and crime, necessitating excessive and disproportionate expenditures of public funds for the preservation of the public health and safety, for crime prevention, correction, prosecution, punishment and the treatment of juvenile delinquency and for the maintenance of adequate police, fire and accident protection and other public services and facilities; that such areas constitute an economic and social liability, substantially impair or arrest the sound growth of said city of Portland; that this menace is beyond remedy and control solely by regulatory process in the exercise of the police power and can not be dealt with effectively by the ordinary operations of private enterprise without the aids herein provided; that the elimination of slum conditions or conditions of blight, the acquisition and preparation of land in or necessary to the development of slum or blighted areas and its sale or lease for development or redevelopment in accordance with the master plan and redevelopment plans of said city of Portland and any assistance which may be given by any state public body in connection therewith, are public uses and purposes for which public money may be expended and private property acquired; and that the necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination."

"**Section 3. Definitions.**

"(g) 'Blighted area' shall mean:

"1. An area in which there is a predominance of buildings or improvements which, by reason of dilapidation, deterioration, age or

obsolescence; or inadequate provision for ventilation, light, air, sanitation or open spaces; or high density of population and overcrowding; or the existence of conditions which endanger life or property by fire and other causes; or any combination of such factors, is conducive to ill health, or transmission of disease, or infant mortality, or juvenile delinquency and crime, and is detrimental to the public health, safety, morals or welfare.

"2. An area which, by reason of the predominance of defective or inadequate street layout; or faulty lot layout in relation to size, adequacy, accessibility or usefulness; or insanitary or unsafe conditions; or deterioration of site or other improvements; or diversity of ownership, tax or special assessment delinquency exceeding the fair value of the land, defective or unusual conditions of title; or improper subdivision or obsolete platting; or mixture of incompatible land uses; or the existence of conditions which endanger life or *proprety* by fire and other causes; or any combination of such factors, substantially impairs or arrests the sound growth of the municipality, or constitutes an economic or social liability and is a menace to the public health, safety, morals or welfare in its present condition and use.

"(h) 'Slum area' shall mean a blighted area in an extreme state of deterioration and decay.

"(i) 'Redevelopment project' shall mean any work or undertaking:

"(1) To acquire slum areas or blighted areas or portions thereof, including land, structures or improvements not in *themselved* deteriorated, the acquisition of which is necessary or incidental to the proper clearance, development or redevelopment of such slum or blighted areas or to the prevention of the spread or recurrence of slum conditions or conditions of blight;

"(2) To clear any such areas by demolition or removal of existing buildings, structures, streets, utilities or other improvements thereon, and to install, construct or reconstruct streets, utilities and site improvements essential to the preparation of sites for uses in accordance with a redevelopment plan.

"(3) To sell, lease or otherwise make available land in such areas for residential, recreational, commercial, industrial or other use or for public use, except for public housing, or to retain such land for public use, except for public housing, in accordance with a redevelopment plan. Public housing shall mean housing erected by a local housing authority in accordance with chapter 441 of the public laws of 1949.

"The term 'redevelopment project' may also include the preparation of a redevelopment plan, the planning, survey and other work incident to a redevelopment project and the preparation of all plans and arrangements for carrying out a redevelopment project."

"Section 4. Creation of slum clearance and redevelopment authority."

"Section 5. Powers of the Authority. The Authority shall constitute a public body corporate and politic, exercising public and essential governmental functions, and having all the powers necessary to carry out and effectuate the purposes and provisions of this law, including the following powers in addition to others herein granted:

"(d) . . . to enter into contracts with redevelopers of property containing *convenants,* restrictions and conditions regarding the use of such property for residential, commercial, industrial, recreational purposes or for public purposes in accordance with the redevelopment plan and such other covenants, restrictions, and conditions as the Authority may deem necessary to prevent a recur-

rence of slum or blighted areas or to effectuate the purposes of this law; . . .

"(i) To prepare plans and provide reasonable assistance for the relocation of families displaced from a redevelopment project area to permit the carrying out of the redevelopment project, to the extent essential for acquiring possession of and clearing such area or parts thereof."

"Section 6. Preparation and approval of redevelopment plans."

"Section 7. Disposal of property in redevelopment project.

"(a) The Authority may sell, lease, exchange or otherwise transfer real property or any interest therein in a redevelopment project area to any redeveloper for residential, recreational, commercial, industrial or other uses or for public use in accordance with the redevelopment plan, subject to such covenants, conditions and restrictions as it may deem to be in the public interest or to carry out the purposes of this law; provided that such sale, lease, exchange or other transfer, and any agreement relating thereto, may be made only after, or subject to, the approval of the redevelopment plan by the city council. Such real property shall be sold, leased or transferred at its fair value for uses in accordance with the redevelopment plan, notwithstanding such value may be less than the cost of acquiring and preparing such property for redevelopment. In determining the fair value of real property for uses in accordance with the redevelopment plan, the Authority shall take into account and give consideration to the uses and purposes required by such plan; the restrictions upon, and the covenants, conditions and obligations assumed by the redeveloper of such property; the objectives of the redevelopment plan for the prevention of the recurrence of slum or blighted areas; and such other matters as the Authority shall specify as being appropriate. In fixing rentals and selling prices, the Authority shall

give consideration to appraisals of the property for such uses made by land experts employed by the Authority."

"**Section 8. Eminent Domain.** The Authority shall have the right to acquire all or any part of the real property, or any interest therein, within the redevelopment project area, by the exercise of the power of eminent domain, whenever it shall be judged by the Authority that the acquisition of said real property or the interest therein is in the public interest and necessary for the public use.

"(a) The necessity for such acquisition shall be conclusively presumed upon the adoption by the Authority of a resolution declaring that the acquisition of the real property, or interest therein, described in such resolution is in the public interest and necessary for the public use and that such real property, or interest therein, is included in an approved redevelopment project under this law . . ."

"**Section 9. Acquisition and development of undeveloped vacant land.** Upon a determination by resolution of the city council that the acquisition and development of undeveloped vacant land, not within a slum or blighted area, is essential to the proper clearance or redevelopment of slum or blighted areas or a necessary part of the general slum clearance program of the city of Portland, the acquisition, planning, preparation for development or disposal of such land shall constitute a redevelopment project which may be undertaken by the Authority in the manner provided in the foregoing sections. The determination by the city council shall not be made until the city council finds that there is a shortage of decent, safe and sanitary housing in the city of Portland; that such undeveloped vacant land will be developed for predominantly residential uses; and that the provision of dwelling accommodations on such undeveloped vacant land is necessary to accomplish the relocation in decent, safe and sanitary housing in said city of families to be displaced from slum or blighted areas which are to be redeveloped."

"**Section 10. Issuance of bonds.**
"(b) . . . The bonds and other obligations of the Authority, and such bonds and obligations shall so state on their face, shall not be a debt of the city of Portland nor the state, and neither the city of Portland nor the state shall be liable thereon, nor in any event shall such bonds or obligations be payable out of any funds or properties other than those of said Authority acquired for the purposes of this law . . ."

Sections 11, 12, and 13 relate to bonds of the Authority.

"**Section 14. Conveyance to federal government on default.**"

"**Section 15. Property of Authority exempt from taxes and from levy and sale by virtue of an execution.**

"(b) . . . provided that with respect to any property in a redevelopment project, the tax exemption provided herein shall terminate when the Authority sells, leases or otherwise disposes of such property to a redeveloper for redevelopment."

"**Section 16. Cooperation by public bodies.**"

"**Section 17. Grant of funds by the city.** The city may grant funds to the Authority for the purpose of aiding the Authority in carrying out any of its powers and functions under this law. To obtain funds for this purpose, the city may levy taxes and may issue and sell its bonds . . ."

"**Section 18. Budget and annual report.**"

"**Section 19. Title of purchaser.**"

"**Section 20. Additional conferred powers.**"

Referendum clause.

From the agreed statement we find:

The 1951 Act was duly accepted by the voters of Portland in December 1951. The City Council in February 1952 de-

clared "that one or more slum or blighted areas exist . . . and that the redevelopment of such area or areas is necessary in the interest of the public health, safety, morals or welfare of the residents . . .", voted to authorize "a public body corporate and politic to be known as the Slum Clearance and Redevelopment Authority . . .", approved the exercise of the powers granted in the 1951 Act, and appointed commissioners of the Authority.

It is specifically agreed that "all of the steps required by (the 1951 Act) for the creation of the Slum Clearance and Redevelopment Authority and the entitlement of said Authority to transact business and exercise its powers have been taken and are completed."

Under the Housing Act of 1949 (42 U.S.C.A. § 1451 et seq.) the Federal Government may "to assist local communities in eliminating their slums and blighted areas and in providing maximum opportunity for the redevelopment of project areas by private enterprise . . ., make temporary and definitive loans to local public agencies for the undertaking of projects for the assembly, clearance, preparation, and sale and lease of land for redevelopment." Capital grants may also be made to enable the local "agencies to make land in project areas available for redevelopment at its fair value for the uses specified in the redevelopment plans: . . ."

The Federal Government has reserved $395,000 for capital grants in Portland, has advanced $14,787 used by the Authority in preparation of preliminary plans and surveys leading to the selection of a project area, designated as the Vine-Deer-Chatham Project Area, and has allocated to the Authority $14,427 for preparation of final plans and surveys of the project.

The capital grant, we read in the agreed statement, "will be in an amount not exceeding two-thirds of the net cost of redeveloping the project provided that the City of Portland

will provide the remaining one-third net cost by the provision of 'local grants-in-aid', which may be in the form of (1) cash grants, (2) donations of land and demolition or removal of site improvements, and (3) the provision of parks, playgrounds and public buildings or facilities necessary to support the new uses of the land in said project area in accordance with the redevelopment plan, and that in connection with said Vine-Deer-Chatham project the City of Portland will provide specific 'local grants-in-aid' in the form of cash, donation of land, and certain site improvements, and said City has appropriated a sum of Sixty Thousand ($60,000.00) Dollars as a local cash 'grants-in-aid.' "

After stating findings upon the physical characteristics of the project area "of 5.49 acres which is predominately residential but contains some commercial and industrial uses and some vacant land" disclosed in "recent extensive surveys," the agreement of facts continues with a comparison in recent periods of certain conditions within the area and within the entire city. The rate is given here for the area in terms of the city average: juvenile delinquency 4.2; tuberculosis 2.3; arrests for drunkenness 3.6; fires 4.4; social welfare contacts 1.5 to 2.7; active recipients of welfare from the city 5.25.

In October 1953 the Authority found, determined and declared the Vine-Deer-Chatham Project Area a blighted area within the 1951 Act.

"That it is the intention of the Slum Clearance and Redevelopment Authority and the City of Portland with the financial assistance of the United States of America to prepare and adopt or cause to be prepared and adopted a redevelopment plan for such project area and (1) to acquire by purchase or eminent domain all of the land, structures, and improvements in the Vine-Deer-Chatham Project Area, including structures and improvements not in themselves deteriorated, but excepting certain buildings whose present

use conforms to plans for the redevelopment of this area, (2) to clear said Project Area by demolition or removal of existing buildings, structures, streets, utilities and other improvements thereon, and to install, construct, and reconstruct streets, utilities, and site improvements considered essential to the preparation of sites for uses in accordance with a redevelopment plan, and (3) to sell, lease, and otherwise make available to individuals and private or public corporations the land in said project area for commercial, industrial, or other use."

The activities set forth above are necessary for the redevelopment of the project area as contemplated by the Authority and the city. The $60,000 authorized to be paid by the city will constitute a portion of the local grants-in-aid. Unless restrained, the City Treasurer will pay and the Authority will expend the authorized $60,000.

The issue on which the case hinges is whether clearance and redevelopment of the blighted area, known as the Vine-Deer-Chatham Project Area, under the 1951 Act is a *public use* within the meaning of our State constitution. If it is a public use, then the expenditure of public money and the taking by eminent domain are constitutional, otherwise not.

We may at the outset eliminate certain of the issues raised in the fourteenth paragraph of the bill, *supra.*

First: If the proposed action passes the hurdle of the State constitutional provision with respect to eminent domain, we need not consider the 14th Amendment to the Constitution of the United States. We may safely say that the provisions of our state constitution are not of a broader scope than the 14th Amendment. The judgment of the highest court of a state upon what should be deemed a "public use" is entitled to the highest respect. *Jones* v. *City of Portland,* 245 U. S. 217, 221 (1917).

Second: There is no unauthorized delegation of legislative power under the 1951 Act. Assuming the constitutional right in the State to expend public money and to exercise the right of eminent domain, the Legislature may entrust the power to instruments of its choosing, as here the City of Portland, a municipal corporation, and the Slum Clearance and Redevelopment Authority, "a public body corporate and politic, exercising public and essential governmental functions." Section 5 of 1951 Act. *Riche* v. *Bar Harbor Water Co.*, 75 Me. 91 (1883); *Ulmer* v. *Railroad Co.*, 98 Me. 579, 57 A. 1001, 66 L. R. A. 387 (1904); *Brown* v. *Gerald*, 100 Me. 351, 61 A. 785 (1905); *Hayford* v. *Bangor*, 102 Me. 340, 66 A. 731 (1907); *Bowden* v. *York Shore Water Co.*, 114 Me. 150, 95 A. 779 (1915); *Roberts* v. *Water District*, 124 Me. 63, 126 A. 162 (1924); *Smith* v. *Power Co.*, 125 Me. 238, 132 A. 740 (1926).

Third: The complaint that the 1951 Act authorizes the loan of the credit of the state is answered by the provision of the 1951 Act expressly stating otherwise. See Section 10 of 1951 Act, *supra.*

There are certain basic principles upon which all are agreed. First: Taxation must be for a public purpose or use, i.e., for the "benefit of the people," and a taking by eminent domain "for public uses." Maine Constitution, *supra.*

For our purposes it is unnecessary to distinguish "public use" in taxation from "public use" in eminent domain. The latter has been held to be much more restricted in meaning than the former. *Opinion of Justices*, 118 Me. 503, 513, 106 A. 865 (1919). It is apparent that without the right of eminent domain the purposes of the Act cannot be carried out. Accordingly, the constitutionality of the Act may be tested by reference only to the principles of the law of eminent domain. Without eminent domain the Act fails; with it, the public use or purpose of taxation is established.

Second: "Whether the public exigency requires the taking of private property for public uses is a legislative question, the determination of which by the legislature is final and conclusive. . . . Whether the use for which such taking is authorized is a public use is a judicial question for the determination of the court." *Kennebec Water District* v. *Waterville,* 96 Me. 234, 241, 52 A. 774, 777 (1902); *Ulmer* v. *Railroad Co., supra; Brown* v. *Gerald, supra.* Third: Whether a given use of public moneys is public in nature is a matter for determination by the courts. *Private use: Allen* v. *Inhabitants of Jay,* 60 Me. 124 (1871) (loan by town to manufacturing concern); *Brewer Brick Co.* v. *Brewer,* 62 Me. 62 (1873) (exemption of manufacturing plant from taxation). *Public use: Laughlin* v. *City of Portland,* 111 Me. 486, 90 A. 318 (1914) (Portland municipal fuel yard); *State of Maine* v. *Vahlsing, Inc.,* 147 Me. 417, 88 A. (2nd) 144 (1952) (potato tax). Fourth: There is a strong presumption that a statute is constitutional.

In discussing the power of the Legislature, Justice Thaxter said, in *State of Maine* v. *Vahlsing, supra,* at page 430:

> "Unless it has clearly exceeded its constitutional powers in so doing, its action must be sustained. All rational doubts as to the constitutionality of statutes must be resolved in favor of the constitutionality thereof. Although it is the duty of the court to declare acts which transcend the powers of the legislature void, this judicial duty is one of gravity and delicacy and it is only when there are no rational doubts which may be resolved in favor of the constitutionality of the statute that the inherent power of the court to declare statutes unconstitutional should be exercised."

In the words of justice, later Chief Justice Cornish, in the *Laughlin* case, *supra,* at page 489:

> "The court is bound to assume that, in the passage of any law, the Legislature acted with full knowledge of all constitutional restrictions and in-

> telligently, honestly and discriminatingly decided that they were acting within their constitutional limits and powers. That determination is not to be lightly set aside. It is not enough that the court be of the opinion that had the question been originally submitted to it for decision it might have held the contrary view. The question has been submitted in the first instance to the tribunal designated by the Constitution, the Legislature, and its decision is not to be overturned by the court unless no room is left for rational doubt. All honest and reasonable doubts are to be resolved in favor of the constitutionality of the act. This healthy doctrine is recognized as the settled policy of this court."

See also *Ulmer* v. *Railroad Co., supra,* and *Morris et al. Pet'rs.* v. *Goss,* 147 Me. 89, 83 A. (2nd) 556 (1951).

In applying the principles of law to the situation before us, we must keep in mind that the decisive question turns upon the meaning of "public use."

The Legislature has stated there are two public uses; first, the clearance of the "blighted area" as in the instant case, or the slum, and second, the redevelopment of the cleared area, under restrictions designed to prevent the recurrence of the "blight" or slum. This redevelopment may be accomplished by sale or lease of so much of the redeveloped area for private purposes as may not be utilized for public purposes, such as parks or schools. Section 7(a) of the Act, *supra.*

The clearance of the "blighted area" in our view is the use of property for purposes of public health, morals, safety and welfare. The "public use" within the meaning of our constitution lies in the removal of breeding grounds of disease, juvenile delinquency, and other social evils.

> "The elimination of slums can be found to be a direct benefit and advantage to all of the people, to be a matter not readily approached through pri-

> vate initiative but demanding co-ordinated effort by a single authority, to be in line with the purposes of promoting the public safety, health and welfare for which the government of the Commonwealth was established, and to require for its successful accomplishment the exercise of the power of eminent domain. It may well be deemed to rise to the dignity of a public service."

Allydonn Realty Corp. v. *Holyoke Housing Authority,* 304 Mass. 288, 23 N. E. (2nd) 665 (1939).

With the "public exigencies" we are not as a court concerned. On this condition upon the exercise of the right to take property by eminent domain, the Legislature has spoken. It has declared in substance that regulatory measures designed to control the use of his property by an individual cannot remedy "the menace," and that the clearance and redevelopment of the infected area is necessary.

There is no element of private use in the removal of the conditions of blight. Great public purposes are thereby served and the entire community will benefit. For the moment we pass the question of redevelopment. If there is a "use" within the constitution the use is "public."

It is not necessary, in our view, that an active use be contemplated in a taking by eminent domain. The use may be negative in character. The prevention of evil may constitute a use, and as here a public use. Land may be taken to protect a public water supply, and so here land may be taken to protect the community against the destructive forces mentioned.

In determining whether a given use is public in nature, we must consider existing conditions. It was well said in the *Laughlin* case, *supra,* at page 492:

> ". . . what could not be deemed a public use a century ago, may, because of changed economic and industrial conditions, be such today. Laws which

> were entirely adequate to secure public welfare then may be inadequate to accomplish the same results now."

In the recent case of *State of Maine* v. *Vahlsing, Inc., supra,* Justice Thaxter said, at page 426:

> "Admittedly the line of demarcation between a public and a private use is not always easy to draw. Whether a use is public or private is a question of law for the court. This question must be determined by the application of established legal principles to the then existing facts."

We find nothing in the opinions of our court that require us to reach a different result. The principle that "public use" in eminent domain means use by the public, or employment by the public, in contrast with public advantage, is well and firmly established. *Opinion of Justices, supra,* at page 514; *Paine* v. *Savage,* 126 Me. 121, 136 A. 664 (1927); *Haley* v. *Davenport et al.,* 132 Me. 148, 168 A. 102 (1933).

In general, our cases deal with whether a proposed active use will be for public or private use. For example, a water storage reservoir to increase value and capacity of water powers, *Opinion of Justices, supra,* at page 508; protection of public water supply, *Bowden* v. *York Shore Water Co., supra;* a private logging road, *Paine* v. *Savage, supra;* a drain across a neighbor's land, *Haley* v. *Davenport, supra.*

The application of the "use or employment by the public" rule is less difficult or at least more readily apparent in cases where there is an active use of the property for a given purpose. If active use by the public in the sense that property of a public utility is so used, is an essential requirement under our constitution for the taking of property by eminent domain, then the State is helpless to take necessary action for purposes of public health, morals, safety or welfare. We do not believe that our constitution has so

limited the exercise of proper and necessary governmental functions by the Legislature. To this point, namely, the clearance of the blighted area, we find nothing unconstitutional in the 1951 Act.

The determination of whether an area is "blighted" or "slum" under the statute must rest upon facts directly bearing upon the public health, safety, morals or welfare. Consideration of other facts not so grounded, however, does not affect the validity of the finding, if the pertinent facts are in themselves sufficient to show the "blighted" or "slum" condition. The Vine-Deer-Chatham Project Area is properly a "blighted area" under this test.

Several of the conditions stated in the statute in clauses 1 and 2 of Section 3 (g) *supra,* and particularly in clause 2, do not in our view touch upon a public use. Examples are found in "faulty lot layout," "deterioration of site," "diversity of ownership," "defective or unusual conditions of title," "improper subdivision or obsolete platting," or "mixture of incompatible land uses." Nor are public uses involved in correcting a condition from which an area "substantially impairs or arrests the sound growth of the municipality, or constitutes an economic or social liability." The public use, as we have said, is found in the course of conditions harmful to the public health, safety, morals or welfare.

Further, we do not in this opinion pass upon the constitutionality of Section 9 of the Act, *supra,* relating to the "Acquisition and development of undeveloped vacant land." Our discussion is confined to the validity of the Act with reference to the action here taken and proposed.

After the clearance of the blighted area, the Authority is faced with the question of its future use. We have seen that the redevelopment of the area, with disposal of parts thereof for private use with restrictions to prevent recur-

rence of the blight, is a second purpose of the Act. Section 2, *supra.*

Taken alone, the redevelopment of a city is not, in our view, a "public use" for which either taxation or taking by eminent domain may properly be utilized.

However beneficial it might be in a broad sense, it would clearly be unconstitutional for the Legislature to provide for the taking of any area in a city for the purpose of redevelopment by sale or lease for private purposes. Such a proposal would amount to no more than the taking of A's property for sale or lease to B on the ground that B's use would be economically or socially more desirable.

In the instant case redevelopment of the "blighted area" is, in our view, a secondary or minor purpose. The first and main purpose of the Legislature is not to redevelop Portland, but to clear away blighted areas and slums and to prevent their recurrence. If the only uses for which a blighted area or slum may be put when cleared must be uses public in nature by the test of active employment as, for example, parks, playgrounds, schools, municipal buildings and the like, there would be no occasion whatsoever for the 1951 Act. A taking for such public uses requires no consideration of the problems of the slum or blighted area. In brief, the purpose of redevelopment is not the dominant purpose of the Act. Compare *Opinion of Justices, supra,* at page 513, "The dominant purpose here (water storage reservoir) is for private benefit and not for the 'benefit of the people,' and therefore the power of taxation to promote it does not exist," and *Bowden* v. *York Shore Water Co., supra,* in which it was held the real purpose of the taking was to serve a private use of protection of timberlands from fire, and not a public use of protection of a public water supply.

Property may be taken "for public uses" to carry out the main purpose of the Legislature under the 1951 Act. And

further, the facts show that the City Council and Authority have acted and propose to act in good faith to carry out such main purpose. See *Smith* v. *Power Co., supra.*

Plainly, redevelopment of the area is an essential purpose of the Act. It must be recognized that a large part of the area and perhaps as much as is now in private hands will return to private uses after the cleansing process of removal of the infection. From the disposal of the area to private uses the cost of the project will in part be recouped. The Federal Government, the Authority, and the city all have an interest in the future of the area from the viewpoint of total expense.

There will be, however, in the private uses within the area in the future this significant difference from the past. Under the Act it will be the obligation of the Authority to make suitable provision in disposing of the property for the purpose of preventing a recurrence of the evils eliminated. In a limited sense the *public use* of the area will continue. Private uses will be permitted, but only to the extent the purposes of public health, morals, safety and welfare benefited by the clearance of the area remain unaffected.

Without question, the Authority will be in the business of selling and leasing real estate within the area for private purposes. This situation arises only as a result of the public uses for which it acquired and cleared the area. The disposal of the property, particularly in light of required restrictions to prevent the recurrence of the evil conditions, is not an unreasonable method of returning to private use property no longer needed in its entirety by the Authority.

The constitutionality of slum clearance and urban redevelopment statutes alike in principle if not in detail with our 1951 Act is upheld by the great weight of authority in other jurisdictions. Only Florida and Georgia have taken a contrary view.

Typical cases are: *Ajootian* v. *Providence Redevelopment Agency,* 91 A. (2nd) 21 (R. I. 1952) (two judges dissenting); *Gohld Realty Company* v. *City of Hartford, et al.,* 104 A. (2nd) 365 (Conn. 1954); *Velishka, et al.* v. *City of Nashua, et al.* (N. H. 1954); *Belovsky* v. *Redevelopment Authority of Penna.,* 357 Pa. 329, 54 A. (2nd) 277, 172 A. L. R. 953 (1947); *Schneider* v. *District of Columbia,* 117 Fed. Supp. 705 (D. C. 1953); *Foeller* v. *Housing Authority of Portland,* 198 Ore. 205, 256 P. (2nd) 752 (1952) (includes citations to cases throughout the country); *Murray* v. *LaGuardia,* 291 N. Y. 320, 52 N. E. (2nd) 884 (1943) (special constitutional provision). *Contra: Housing Authority of City of Atlanta* v. *Johnson,* 209 Ga. 560, 74 S. E. (2nd) 891 (1953); *Adams* v. *Housing Authority of City of Daytona Beach,* 60 So. (2nd) 663 (Fla. 1952). Miscellaneous: 29 C. J. S. 823, 850, eminent domain, Sections 31, 64, on public use; 18 Am. Jur. 660 et seq. 680, eminent domain, Sections 36 et seq., 51, 52; 2 Nichols on Eminent Domain, Section 7.2 (3rd Ed. 1950); 2 Yokley Zoning Law and Practice, Section 196 et seq. (1953 Ed.) on urban redevelopment; 28 Tulane L. Rev. 96 (1953) (Public Purpose in Urban Redevelopment); 29 B. U. L. Rev. 318 (1949) (Urban Redevelopment); Summaries of Slum Clearance and Public Housing Decisions, Housing and Home Finance Agency Office of the Administrator Division of Law (Oct. 1949 and Second Supplement Jan. 1954).

The attack upon the constitutionality of the Slum Clearance and Redevelopment Authority Law fails.

Bill dismissed without costs.

MINNIE B. BOWIE
vs.
ALFRED A. LANDRY

Androscoggin. Opinion, October 13, 1954.

New Trial.

A new trial will not be granted unless the verdict is clearly wrong.

The burden is on the moving party to show that the adverse verdict is clearly and manifestly wrong.

ON MOTION FOR NEW TRIAL.

This is an action of trespass before the Law Court upon plaintiff's motion for new trial. Motion denied. Judgment for defendant.

May & May, for plaintiff.

Frank W. Linnell, for defendant.

SITTING: WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, JJ. THAXTER, A. R. J., FELLOWS, C. J., AND TAPLEY, J., did not sit.

TIRRELL, J. This case is before this court upon plaintiff's motion for a new trial addressed to this court. The plaintiff brought the original action in the Superior Court for the County of Androscoggin, the same being an action of trespass containing two counts against the defendant for the alleged cutting of 44,284 feet of standing timber contained in 313 trees and the removal thereof from land which plaintiff claims.

At the time of the trial the parties thereto lived or claimed property on the Pownal Road in the city of Auburn, said properties being adjacent to each other, and the prop-

erty of the defendant lying next northerly to the premises of the plaintiff. There was no dispute in the testimony that the defendant did in fact cut and remove from the area in question certain standing trees. The mainly disputed question was upon whose land the trees were cut, whether the plaintiff's or the defendant's, and the number of board feet contained in the trees and the value thereof.

The case was tried before a drawn jury and the jury returned a verdict for the defendant. There were no exceptions to the charge of the presiding justice and no requested instructions were asked for. After the jury had returned its verdict for the defendant the plaintiff filed a motion for a new trial addressed to the presiding justice on the grounds, (1) that the verdict was against evidence and manifestly against the weight of the evidence; (2) that the verdict was against law; and further, a motion was filed on the ground of newly discovered evidence. No testimony was offered in support of the plaintiff's motion for a new trial on the ground of newly discovered evidence. However, the motion was argued before the presiding justice and several affidavits were offered in evidence. Both motions for a new trial addressed to the presiding justice were denied.

After the adjournment of the term of court the plaintiff and defendant entered into a stipulation by the terms of which the affidavits that were presented were withdrawn from the record. It is apparent from the briefs and arguments of plaintiff's counsel that the plaintiff relies now upon that part of his general motion which indicates that said verdict is against the evidence and manifestly against the weight of evidence.

These rules are so well settled that citations of authority seem almost unimportant. However, to cite a few cases to show the prevailing rules we refer to the case of *Hatch* v. *Dutch,* 113 Me. 405, at page 411. In that case the court said:

> "The credibility of witnesses and the weight to be given to their testimony is peculiarly within the province of the jury; and although, if we were sitting as jurors, we might reach a different conclusion from that of the jury, yet we should not set their finding aside unless manifest error is shown, or it appears that the verdict was the result of bias or prejudice."

A verdict by a jury on a properly submitted issue should not be set aside even when there is strong doubt of the actual occurrence or existence of a fact found by a jury. If the evidence is conflicting, their finding will not be disturbed on that ground. A new trial will not be granted unless the verdict is clearly wrong. Where there is evidence to support a verdict and there is nothing in the case which would justify the substitution of the judgment of the court, who did not see nor hear witnesses, for that of the jury who did, and it appearing that the parties have had a fair trial without prejudicial error in law, the verdict should not be disturbed. See *Cobb* v. *Coggswell,* 111 Me. 336; *Sanford* v. *Kimball,* 106 Me. 355; *Lewis v. Railroad Co.,* 97 Me. 340; *Stone* v. *Street Railway,* 99 Me. 243; *Atkinson* v. *Orneville,* 96 Me. 311. The burden is on the moving party to show that the adverse verdict is clearly and manifestly wrong. *Day* v. *Isaacson,* 124 Me. 407. See also *Perry* v. *Butler,* 142 Me. 154 and *Jannell* v. *Myers,* 124 Me. 229.

The second reason contained in the motion for a new trial is because said verdict is against law.

The presiding justice in his charge set forth the rules of law relative to trespass by which the jury was to be guided in its deliberation. No special instructions were requested by the plaintiff and no exceptions were taken to the charge.

The jury had an opportunity to see the witnesses and to hear the testimony and to evaluate that testimony, and in addition, to study the documents introduced as exhibits, and there is nothing in this case to indicate to us that the jury

arrived at the verdict as a result of misconduct. The evidence in this case was such that intelligent and fair-minded persons might differ thereon.

This court will not interpose its judgment for that of the jury. The entry therefore must be.

Motion denied.

Judgment for defendant.

STATE OF MAINE
vs.
HAROLD W. JONES

Knox. Opinion, October 13, 1954.

Intoxicating Liquor. Corpus Delicti. Evidence. Admissions. Confessions. Circumstantial Evidence.

To sustain the burden of proving guilt beyond a reasonable doubt it is necessary to establish the *corpus delicti* by *some proof* independent of extra judicial statements or confessions.

Some proof means such credible evidence as standing alone to create a really substantial belief that a crime had actually been committed.

State v. Hoffses, 147 Me. 221, distinguished.

To justify a conviction on circumstantial evidence alone, the circumstances must point to the respondent's guilt and be inconsistent with any other reasonable hypothesis.

ON EXCEPTIONS.

This is a criminal action charging respondent with operating a motor vehicle while under the influence of intoxicating liquor. The case is before the Law Court upon exceptions. Exceptions sustained. Judgment for the respondent.

Curtis Payson, for plaintiff.

Edward W. Bridgham, for defendant.

SITTING: WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ. THAXTER, A. R. J., FELLOWS, C. J., did not sit.

TIRRELL, J. This case is before us on respondent's exceptions to the failure of the presiding justice at *nisi prius* to direct a verdict for the defendant for the reason that the State had not established a *corpus delicti.* The facts as we understand them from a reading of the transcript of testimony are as follows:

The testimony disclosed that on February 2, 1954, at the intersection of Broadway and Masonic Streets, in the City of Rockland, at approximately 5:50 p.m. a motor vehicle was observed off the road with its front end against a tree. A witness testified that he came upon the situation at the above stated time, and as he approached the scene he observed two cars stopped, one of them being the motor vehicle which has been described as being off the road against a tree. The second motor vehicle was apparently on the road, and before he could reach the scene where this was taking place, the second motor vehicle drove off. The witness testified that when he did reach the scene, after he had been there a moment or two, an individual whom he identified as the respondent, came to the right-hand door of the witness's car and said something about wishing to be pushed out of the spot he was in so that he could get out into the road. There was other testimony from a police officer, Maurice H. Benner, who testified that in response to a contact made by the witness Perry, he went to the scene of the accident, arriving there at approximately six o'clock, where he found the motor vehicle off the road at the intersection of Broadway and Masonic Streets against a tree. When the officer arrived there was no one at the scene of the accident, and shortly after the officer arrived he testified

that he saw a man, later identified as the respondent, coming up the street approximately fifty (50) feet away.

There was no issue raised as to the question of the condition of the respondent, as there was sufficient evidence upon which the jury was justified in finding that the respondent was under the influence of intoxicating liquor. The main issue relied upon by the respondent was whether or not he, the respondent, had been operating the car at any time prior to its leaving the road. A further issue was raised as to whether or not extra-judicial admissions made by the respondent, after he appeared on the scene, were properly admitted into evidence for the purpose of proving operation. There is further issue as to the failure of the presiding justice to rule upon a motion for a directed verdict made by the respondent at the close of the State's case and the granting to the State the right to re-open and introduce additional evidence after the respondent had rested and made his motion. We do not deem it necessary in this particular case to rule upon the issue as to whether or not the presiding justice erred in permitting the State to introduce further evidence after having refused to direct a verdict on motion of the respondent at the time the State first closed its case.

The respondent was charged by virtue of a complaint and warrant issued by the Rockland Municipal Court charging the respondent with illegal operation of an automobile on February 2, 1954. The alleged crime as set forth in the complaint is the operation of an automobile on that date, to wit: February 2, 1954, while he, the respondent, was then and there under the influence of intoxicating liquor.

On reading the testimony it appears that the main exception of the respondent is the failure of the presiding justice to direct a verdict in favor of the respondent. The respondent's first exception relates to the admission of certain statements alleged to have been made by the respondent in the

nature of extra-judicial admissions or confessions. The respondent objected to their admission on the ground that no proof of *corpus delicti* had been established by the State up to that time by evidence independent of the respondent's statements sufficient to create a reasonable probability that a crime had been committed so as to warrant the admission of the respondent's statements as corroboration of the *corpus delicti.* This court has ruled very recently on the law relating to this problem and the position of our law is now fairly well established. *State* v. *Robert Levesque,* 146 Me. 351. In that case, which was the first in many years, the court reviewed the authorities on the question of when the admission of a respondent became proper evidence in proof of the commission of the crime, and concluded that:

> "It is necessary to establish by some proof, independent of extra-judicial statements or confessions, that some portion of the building was burned or ignited in the slightest degree in order to sustain the burden of proof that a respondent is guilty beyond a reasonable doubt."

The court also indicated that before these admissions were admissible there must be *some* independent evidence of *corpus delicti* but did not further indicate the volume or quality of evidence necessary to constitute *some* evidence. The court clearly indicated that there was no variance upon the issue that the *corpus delicti* cannot be established by the extra-judicial confession of respondent unsupported by other evidence.

In January 1952 this court undertook to apply the rule in the Levesque case and further evaluate the nature of what constitutes *some* evidence of a *corpus delicti. State* v. *Hoffses,* 147 Me. 221. In the *Hoffses* case, as in the case at bar, the admissions of the respondent were introduced for the purpose of proving operation of the motor vehicle by the respondent. The first element that the crime of operating a motor vehicle while under the influence of intoxicating

liquor was the issue for determination on the basis of whether there was some independent proof of this essential element. There the court found that the testimony disclosed such evidence although not to the degree of proof beyond a reasonable doubt of the *corpus delicti,* but sufficient to prove that the crime was real and not imaginary. We know the *Hoffses* case established a measure of *some* evidence as held in the *Levesque* case to be such credible evidence as standing alone to create a really substantial belief that a crime had actually been committed.

We adopt the *Hoffses* case as a substantial finding relative to what constitutes sufficient evidence to warrant the introduction of admissions in a driving-under-the-influence case. It is interesting to consider the elements which were established in the *Hoffses* case with the elements established in the case at bar. The cases are not similar. In the *Hoffses* case the overturning of the motor vehicle was observed by a witness looking out of the window of a house nearby and that witness went to the scene promptly, and when he reached the scene the respondent was standing in front of the truck and within a few feet of it. In the present case there is absolutely no evidence of when the car, alleged to have been operated by the respondent, went off the road, and the only testimony is that the witness Perry a short time before 6:00 o'clock in the evening came upon the scene and found two cars stopped, one of which apparently was in trouble.

From the testimony it cannot be said as to when the car left the road. From all that appears of record it might have been minutes or hours before the arrival of the witness Perry. The *Hoffses* case and the present case are similar to the extent that the State had shown an accident and no more. Admittedly there were other persons at the scene of the accident who were seen as soon as the respondent was seen but the other car was driven off before the first

witness arrived, and admittedly someone must have driven off in the other vehicle. None of the other elements that were present in the *Hoffses* case are present here.

The entire case of the State is based upon conjecture, suspicion and guess. It is just as probable to assume that the car had been a long time off the main travelled highway before having been discovered by any person and it is just as probable to assume that the respondent became intoxicated of his own volition after the car had left the road and before he attempted in any manner to operate the motor vehicle. The State's case is absolutely void of any evidence to connect the operation of the automobile with the respondent on that day and surely upon the presentation of the entire case of the State there was not one iota of evidence to connect the respondent with the operation of the automobile while he was under the influence of intoxicating liquor.

> "To justify a conviction on circumstantial evidence alone, the circumstances must point to the respondent's guilt and be inconsistent with any other reasonable hypothesis. *State* v. *Murray*, 136 Me. 243. The principal facts in a criminal case must be consistent with each other. They must point to the guilt of the accused and they must be inconsistent with his innocence. Guesswork is not the moral certainty of guilt that the law requires. Conjecture, surmise, and suspicion do not constitute proof beyond a reasonable doubt. *State* v. *Morton*, 142 Me. 254." *State* v. *DeBery*, 150 Me. 38, at page 40.

A verdict in favor of the respondent after the presentation of the State's entire case should have been directed. The entry therefore shall be

Exceptions sustained.

HERMAN CYR, PRO AMI
vs.
JOSEPH H. GIESEN

LEON CYR
vs.
JOSEPH H. GIESEN

Kennebec. Opinion, October 13, 1954.

Negligence. Malpractice. Physicians and Surgeons. Evidence. Expert Testimony. Non-Suit.

The recognized and accepted rule is that expert evidence is essential to sustain an action for malpractice against a physician or surgeon except where the negligence and harmful results are sufficiently obvious as to lie within common knowledge.

A physician contracts with his patient that he has the ordinary skill of members of his profession in like situation, that he will exercise ordinary care in treatment and his best judgment in the application of his skill.

A physician is not an insurer.

A scintilla of evidence will not support a factual finding.

ON EXCEPTIONS.

This is an action for malpractice before the Law Court on plaintiffs' exceptions to the granting of a non-suit. Exceptions overruled.

Jerome G. Daviau, for plaintiffs.

Locke, Campbell, Reid and Hebert, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, TAPLEY, JJ. BELIVEAU, J., did not sit.

TAPLEY, J. On exceptions to the granting of a nonsuit in each case.

Herman Cyr, a young man of nineteen years of age, brought an action against the defendant, Joseph H. Giesen, a physician, alleging negligence, and the father, Leon Cyr, brought his action for expenses. The cases were tried together at the October Term, A. D., 1953, of the Superior Court for the County of Kennebec and State of Maine before a jury. Consideration is given to the case of Herman Cyr because upon the determination of his case rests that of his father, Leon Cyr. Plaintiff has the burden of proving first that the defendant was negligent and, second, that his negligence was the proximate cause of the injury. If he fails in his proof to maintain either of these propositions, there is no question for jury determination.

Herman Cyr sustained a trans-cervical fracture of the neck of the left femur (thigh bone) on the twenty-third day of February, A. D., 1949. Immediately following the injury he was taken to the hospital where he was attended by one Dr. Ovide Pomerleau who called in Dr. Joseph H. Giesen, the defendant. Dr. Giesen then took charge of the case. Dr. Giesen on February 25, 1949 performed surgery, using the Smith-Peterson nail technique. The plaintiff remained in the hospital for a period of fifteen days and then was discharged from the hospital. A month later he returned to Dr. Giesen who took x-rays. In June, 1949, x-rays were again taken by the defendant and on the twenty-first day of June, A. D., 1949, the plaintiff went back to work and continued to work without interruption until July 31, 1951. In May of 1950 pain developed in plaintiff's left hip, lasting for three or four months and then disappeared. The pain appeared again several months later. The facts concerning these pains were not brought to the attention of the defendant until August, 1951, when the plaintiff went to the defendant and submitted to surgery, whereby the Smith-

Peterson nail was removed. This operative procedure occurred on August 10, 1951, and the plaintiff was discharged from the hospital August 28, 1951. A cast was applied to plaintiff's left leg at that time which he wore for eight and one-half months, during which time defendant caused x-rays to be taken every two months. Defendant treated plaintiff during this period. X-rays taken July 31, 1951, indicate early evidence of aseptic necrosis of the left femoral head.

A summary of plaintiff's allegations is as follows:

1. Defendant failed to inform the plaintiff of all the advantages and disadvantages of treating the fractured hip with a Smith-Peterson nail and that the defendant failed to recognize the limitations for perfect immobilization in the use of the Smith-Peterson nail from the reading of the x-ray.

2. Defendant failed to use his best judgment in the use of the Smith-Peterson nail; to use the latest approved method and technique; to bring about the proper type of apposition of the bone fragments in the reduction of the fracture; to take proper steps that were available to him by not resorting to bone pegging, osteotomy or to the drilling of holes in the femoral neck for the purpose of promoting blood circulation.

3. Defendant failed in his post operative care in not taking sufficient x-rays in order to acquaint himself with the progress or lack of progress of the union of the fractured femur and of any necrosis or ankylose condition that might have developed.

The defendant filed a plea of general issue with a brief statement alleging as special matter of defense that he was confronted with a very rare and difficult fracture; that the surgical technique which he used was proper in the light of modern orthopedic surgery; that proper union and a com-

pletely healed fracture was procured and that the diseased condition of the head of the femur was not caused by any violation of proper treatment on defendant's part.

Counsel for plaintiff concedes that the surgery as performed by the defendant in the reduction of the fracture was proper but maintains his complaint as to alleged negligent post operative care on the part of the defendant.

The record discloses that the plaintiff presented as his evidence the testimony of three witnesses, being himself, Dr. Paul J. Gephart, an osteopathic physician, and Dr. A. Leo Brett, an orthopedic surgeon. In addition to the testimony of these witnesses, there appears exhibits in the nature of hospital records, x-rays and medical reports.

The testimony of the plaintiff in so far as the medical aspect of this case is concerned is not of any probative force excepting as to those subjective symptoms that may have been present. This case must be analyzed entirely from the standpoint of the medical testimony as given by the doctors and evidenced by the exhibits.

The medical facts in this case are such that they come within the realm of expert testimony and must be considered on that basis.

The recognized and accepted rule is that expert evidence is essential to sustain an action for malpractice against a physician or surgeon.

70 C. J. S., page 1006:

> "Professional testimony alone should be looked to for matters of fact or opinion peculiarly within the learning and experience of professional witnesses. Thus, where the exercise of proper skill or care on the part of a physician or surgeon is in issue, expert medical testimony is ordinarily essential. Accordingly, expert testimony is ordinarily required to establish the prevailing standard

> of skill and learning in the locality, and expert testimony is required to establish usual or proper practice in medical treatment, the propriety of particular conduct of the practitioner, and want of professional skill; and such testimony, although not conclusive in the sense that it must be accepted as true, is conclusive as against that of lay witnesses where the matter in issue is within the knowledge of experts only, and not within the common knowledge of laymen."

The exception to the rule is that under some circumstances where the negligence and harmful results are sufficiently obvious as to lie within common knowledge, a verdict may be supported without expert testimony.

The case under consideration concerns such technical and involved medical procedure that it rules out any possibility of understanding on the part of a layman as to its medical nature and it is therefore self evident that this is not a case falling within the exception of the general rule relating to expert medical testimony in malpractice cases.

We start with the premise that the defendant performed the operation in a proper manner. This fact is not only disclosed by the evidence but also admitted by the plaintiff's counsel. It is also evident that following the insertion of the Smith-Peterson nail nature progressed in a normal way, bringing about a proper union of the fracture line. The plaintiff then returned to his employment which he continued without interruption for a little more than two years, during which time the defendant was not consulted or advised of any trouble that the plaintiff may have been experiencing as a result of the fracture.

In considering the medical evidence, we must look to the testimony of Dr. Paul J. Gephart, an osteopathic physician who was testifying in the capacity of a specialist in x-ray, and to that testimony of Dr. A. Leo Brett, a recognized authority on orthopedic surgery.

The apparent purpose of the testimony of Dr. Gephart was to show from the x-rays the development of aseptic necrosis and that it could have been either prevented or its progress retarded if the defendant had followed post-operative conditions by medium of x-ray. Testimony of Dr. Gephart appears in the record relative to the presence of necrosis of the head of the femur in June, 1950, some fifteen months after the operation.

"Q. As long as you have the x-ray up—one other thing, Dr. Gephart, in regard to it—this being #16 with #13 in parenthesis, that is, #13 on the white paper, that is the 1950 x-ray which you have just described, in June. Do you bear in mind, please, that in the evidence introduced by the plaintiff here as original evidence of the truth therein stated, there is a history and statement by this man given to Dr. Giesen in 1951, that the last of May of 1950 you see, the last of May before this x-ray was taken in June—he had rheumatism following getting his feet wet and had some pain. Will you bear in mind that history coming from the plaintiff?

A. Yes, sir.

Q. Will you look at the x-ray and see if you find any evidence which warrants a diagnosis of necrosis, or at least requires a diagnosis of necrosis of the head of that femur in 1950? Take your time and look it over. May I add one thing more, Doctor? View it in the light as if you were looking at it in 1950 and not by hind-sight in the light of what you find in 1951 or 1952. Do you understand what I mean?

A. Yes, sir. I don't see any evidence of any bone pathology.

Q. Would the statement in the record of this plaintiff which has been put in, that that x-ray of 6-28-50 revealed the fracture site is

well healed. There are no areas of softening or destruction and the nail is well placed. There is no action whatever about the nail. Is that a fair statement?

A. Yes, sir."

Dr. A. Leo Brett, admittedly a specialist in orthopedic surgery, testified for the plaintiff and, upon his testimony primarily, the plaintiff must base his case. The material and relevant testimony of Dr. Brett, as developed on cross-examination, appears in the record in the following words:

"Q. Now then, the first time we have any indication of necrosis here is in July, 1951, when this boy quit work at the mill where he had been for two years steady, and came to the doctor; do you remember that?

A. Yes.

Q. And then from the x-rays you have examined, and then for the first time there was evidence of it; isn't that true?

A. That is right.

Q. And you stated in direct examination at that time when the x-ray was taken, July 31st, it showed early evidence of aseptic necrosis?

A. That is right.

Q. By 'early' you mean just started, or something of that sort?

A. Well, I don't know how long it had been going, but it had not involved the whole head.

Q. No. It had not accomplished that?

A. No.

Q. Now then, the treatment given by the doctor from then on, as you have seen from the record which the plaintiff has offered, and heard from the plaintiff on the stand, consisted of the cast and the correction of an adduction

and the flexion deformity in the leg; do you recall that?

A. Yes."

* * * * * * * * * * *

"Q. So it was a proper and wise and good practice thing to do, wasn't it?

A. That is right."

* * * * * * * * * * *

"Q. Now then, in all this story can you find any bad practice on the part of this doctor which has caused any damage to this plaintiff here?

A. I know of no evidence of it.

Q. Regardless of academic questions of chasing x-rays?

A. That is right."

* * * * * * * * * * *

"Q. Now then, we make our contentions regarding the aseptic necrosis, but I have been all over that with you and don't want to repeat it; but do you find or have any question there is any breach of good practice by this surgeon here on this history that has caused any damage to this plaintiff?

A. I don't know of any."

In view of all the evidence, has the plaintiff raised an issue for a jury determination of the factual questions of negligence and proximate cause?

The legal responsibility of the defendant to the plaintiff is well and clearly defined in the case of *Coombs* v. *King*, 107 Me. at 378, where the court said:

> "The measure of a physician's legal responsibility has been stated many times by this court. He contracts with his patient that he has the ordinary skill of members of his profession in like situation, that he will exercise ordinary or reasonable care and diligence in his treatment of the case, and that

> he will use his best judgment in the application of his skill to the case. ***** The physician is not an insurer. He does not warrant favorable results. If he possesses ordinary skill, uses ordinary care, and applies his best judgment, he is not liable even for mistakes in judgment. Medical science is not yet, and probably never can be, in many respects, an exact, certain science." ********
>
> "The rule of liability is not a hard one, it is a reasonable one. And the burden is on the plaintiff to show a malpractice."
>
> See *Emery* v. *Fisher,* 128 Me. 453.

The testimony of the plaintiff has no probative force on the question of negligence.

The medical testimony, particularly that of Dr. Brett, was obviously presented for the purpose of proving plaintiff's claims in his declaration that defendant was negligent in the performance of the operation and post operative care of the plaintiff and that the alleged negligence was the proximate cause of the injury complained of by the plaintiff.

In the case of *Glazier* v. *Tetrault,* 148 Me. at 132, the late Chief Justice Murchie sets out the established principles of law in the matter of nonsuit when he says:

> "There are two firmly established principles of law which support the action taken in the Trial Court in these cases. The first is that a mere scintilla of evidence will not support a factual finding. Connor v. Giles, 76 Me. 132; Nason v. West, 78 Me. 253, 3 A. 911; Adams v. Richardson, 134 Me. 109, 182 A. 11; Bernstein v. Carmichael, 146 Me. 446, 82 A. 2d. 786. As Chief Justice Peters stated it in Connor v. Giles, supra:
>
> > 'a jury cannot be permitted to find there is evidence of a fact when there is not any.'
>
> The other is that conjecture is not proof. Alden v. Maine Central Railroad Co., 112 Me. 515, 92 A. 651; Mahan v. Hines, 120 Me. 371, 115 A. 132;

> Bernstein v. Carmichael, supra. As was said in Mahan v. Hines, supra, when a plaintiff seeks to prove his case by inferences 'drawn from facts,' the facts themselves must be proved.
>
> > 'Inferences based on mere conjecture or probabilities'
>
> cannot support a verdict, and when nothing more is presented by a plaintiff, the principle heretofore noted is applicable —a non-suit is in order."

Upon the completion of plaintiff's case, there was not sufficient evidence, taken in its most favorable light to the plaintiff, upon which a jury could base an inference of legal liability on the part of the defendant.

Nonsuit was properly ordered in each case.

Exceptions overruled in each case.

CENTRAL MAINE POWER CO.
vs.
PUBLIC UTILITIES COMMISSION

Kennebec. Opinion, October 20, 1954.

Rates. Public Utilities Commission. Statutes. Words and Phrases. "Reproduction Cost." "Fair Value." "Net Average Property." "Cost." "Depreciated Original Cost." "Prudent Acquisition Cost." "Current Value." Evidence. Judicial Notice. Amortization. Subsidiaries. Tax Accruals.

The first task of the Commission in any rate case is to determine the rate base—the "fair value" for rate making purposes upon which the company is entitled to earn a fair rate of return.

P. L., 1953, Chap. 377, Sec. 17, which enumerates certain factors to be taken into consideration for rate making purposes does not change the substantive law; it merely clarifies and amplifies the procedural

requirements to effectuate what has long been the accepted law of this State.

Evidence of reproduction cost less depreciation is material to a determination of "current value."

Once a factor of "fair value" is well proven, "due consideration" under the statute requires that such factor find reflection in the Commission's finding of value.

The weight to be attached to estimates concerning the net average property account on the books of the company is to be determined by the Commission.

The "cost" referred to in the "original cost less depreciation factor" is taken as of the time when the property was first devoted to public use.

When the Commission makes a determination of *depreciated original cost* and discloses manifest, substantial and prejudicial error in the method employed in arriving at that determination, the result is legal error.

"Prudent acquisition cost less depreciation" factor is intended to reflect the difference between original cost and the amount invested upon acquisition. The company has the burden of proving its prudence in acquiring property.

The "current value" factor must include a proper consideration of reproduction cost less depreciation.

Statutes relating to procedure or remedies not affecting substantive rights operate retroactively.

The words "current value thereof less depreciation" in R. S., 1944, Chap. 40. Sec. 16 and 17 as amended by P. L., 1953, Chap. 377 apply only to "original cost" and "prudent acquisition cost" factors and not to "current value" which in and of itself reflects depreciation.

In dealing with estimates and matters of judgment the Commission is justified in subjecting the proferred evidence to very close scrutiny and critical analysis. The weight to be given it is for the Commission, but the assessing of weight can only be done properly in a spirit which is not arbitrary or capricious or founded on immovable preconceptions.

Where "current value" is the only factor which in any way reflects the greatly increased costs which seem to have become implemented into our economy, it is not enough to give mere token recognition of such a factor imposed by legislative mandate. The factor, properly determined, must find appreciable reflection in the end result.

The principle that judges are not necessarily ignorant in court of what everybody else, and they themselves, out of court are familiar with is applicable to justices of the Law Court.

It is error for the Commission to disregard an annual amortization of pension premium charge for pension payment as part of an amortization and general expense where the amortization program was set up over a ten year period under the Internal Revenue Code and constituted a fair method of spreading the past service costs.

Where part of the subsidiary property is not devoted to operations of the Company and is subject to rights of long term leasees who are third parties, prejudicial error cannot properly be predicated upon the failure of the Commission to include the subsidiary property in the rate base.

The Commission is justified in not giving approval to the distribution of the undistributed property account where the delay in distribution was the fault of the company and the work not completed until the pendency of the rate case.

There is no error in the Commissions determination that income tax accruals should provide for working capital needs after proper deduction for materials and supplies used for new construction.

ON EXCEPTIONS.

This is an application for revision of rates before the Law Court upon exceptions to a decree of the Public Utilities Commission. Exceptions sustained. Case remanded to Maine Public Utilities Commission for a decree upon the existing record in accordance with this opinion.

Hutchinson, Pierce, Atwood & Scribner,
Everett H. Maxcy, for Central Maine Power Co.

Richard Sanborn, for Public Utilities Commission.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

WEBBER, J. On December 29, 1952 the Central Maine Power Company filed with the Public Utilities Commission a revision of its rates. Suspension orders issued pending hearing. Public hearings were duly held during which voluminous testimony and exhibits were received in evidence. By its decree on November 6, 1953, the Commission disallowed the proposed rates but authorized an increase of rates designed to produce approximately $750,000 total additional gross revenues. The authorized rates were predicated upon the assumption that the corporate income tax rate would be reduced on April 1, 1954 from 52% to 47%. Upon reconsideration, the Commission on November 18, 1953, anticipating correctly that Congress might, as it now has, maintain the 52% rate, issued a supplemental decree authorizing a surcharge of 2.7% to be added to all bills, designed to cover the interim situation until the new corporate income tax rate should be established. The surcharge was expected to produce additional annual revenues of $670,000. These total revenues, however, are substantially less than those proposed by the Company, and its exceptions properly raise here legal issues testing the decrees.

The 19 exceptions overlap as to issues raised and we will therefore deal with issues rather than with the exceptions seriatim. In general, the basic question before us is whether or not the Commission has fixed reasonable and just rates, supported by substantial evidence, which will produce a fair return upon the reasonable value of the property of the Company used or required to be used in its service to the public within the state.

The Legislature has established the formula for making rates and has entrusted to the Commission the difficult task of balancing between the interests of the producer of elec-

tric power and the consumer. The Commission deals exclusively with problems of this type and is expected to have and acquire special knowledge and skill which come to the specialist through experience. In a review of Commission action in a rate case, therefore, the court must not err on the side of substituting its discretion and judgment for that of the Commission. It is unlikely that in any given case the rates established by the Commission would be exactly the same as those which a court might determine upon the same evidence—but that fact in and of itself does not render the rates erroneous. Rate making is by no means an exact science and in the last analysis fair rate making depends on the application of a sound judgment. Our review is confined to matters of law only. As we so recently stated in *New England Tel. & Tel. Co.* v. *Public Utilities Commission,* 148 Me. 374 at 377, "The Commission is the judge of the facts in rate cases such as this. This court under the statute which created it is only a court to decide questions of law. It must be so, for it has not at its disposal the engineering and the technical skill to decide questions of fact which were wisely left within the province of the Commission. Only when the Commission abuses the discretion entrusted to it, or fails to follow the mandate of the legislature, or to be bound by the prohibitions of the constitution, can this court intervene. Then the question becomes one of law. We cannot review the Commission's findings of fact and seek to determine what rates are reasonable and just. When the Commission decides a case before it without evidence, or on inadmissible evidence, or improperly interprets the evidence before it, then the question becomes one of law."

The first task of the Commission in any rate case is to determine a rate base, that is to say, the *fair value for rate making purposes* upon which the Company is entitled to earn a fair rate of return. This fair value is quite distinguishable from a fair value as a basis of purchase. It is in

effect a composite ascertained and fixed by giving "due consideration to evidence" of certain factors. The Legislature during the pendency of these proceedings by enactment in P. L. 1953, Chap. 377, Sec. 17 enumerated these factors as "the cost of the property when first devoted to public use, prudent acquisition cost to the utility, current value thereof, less depreciation on each, and any other factors or evidence material and relevant thereto." We agree with the Commission and both parties to the controversy that here was no change in the substantive law, but only an attempted clarification and amplification of procedural requirements to effectuate what has long been the accepted law of this state. As evidence of reproduction cost less depreciation would be material in any determination of "current value," it would be improper for the Commission to exclude such evidence or fail to give it "due consideration." We so recently defined fair value for rate making purposes in the *Telephone* case *(supra)* that no further elaboration seems helpful or necessary.

The requirement that the Commission give "due consideration" to evidence tending to establish any factor of fair value does not mean that the Commission is not the judge of the weight to be given to the proffered evidence. Nor does it mean that equal weight must be given to each factor proven. The Commission may not proceed with a closed mind and no disposition to be convinced by unimpeachable evidence. "Due consideration" requires at least reasonable and fair consideration, and once a factor is well proven, "not only must the Commission give consideration to it, but such factor must find reflection in the finding of value." *Ashland Water Co.* v. *R. R. Com.*, 7 Fed. (2nd) 924 at 927. As was emphasized in the *Telephone* case *(supra)*, arbitrary and capricious disregard by the Commission of a factor established by legislative mandate, or of evidence tending to prove such a factor, is reversible error.

In this case the Company offered evidence in support of the various factors, none of which was excluded. Admittedly the Company had the burden of proof throughout. R. S., 1944, Chap. 40, Sec. 69.

Average book value depreciated. As a preliminary to a determination as to what property of the company remains unretired and devoted to public service and what the depreciated original cost factor may be, substantial evidence was received as to the net average property account as shown on the books of the company. As the property is always in a state of flux resulting from increases by way of new construction and other acquisitions and from decreases by way of destruction, obsolescence, retirement and the like, it is recognized that some average period must be used. The Company relied on estimates to forecast the future for the year 1953. The weight to be attached to such estimates is to be determined by the Commission, and the Company does not show prejudicial error where the Commission found an average figure substantially higher than the average for the most recent full year of actual figures, especially where figures for the last four months of that period indicate that the then current trend was for retirements to exceed acquisitions. It is not in dispute that on a long range basis the Company is expanding very substantially, but in its determination of a fair average of book properties, the Commission could not be expected to project its forecast beyond the period it chose, which reflected six months of actual figures and six months estimated. We therefore find no error as a matter of law in the finding of the Commission "that $135,000,000 represents a fair estimate of what the net operating properties will average on the books of the Company for the year 1953, under the Company's present method of allocation and distribution of accounts." It should be noted that this finding was not of such a nature as to preclude the Commission from a further determination as to whether all

of this book property was of a type properly includable in a rate base or whether there should be further reductions for retirement and the like.

Original cost less depreciation. There is no dispute that this factor is intended to be the depreciated original cost of property now existing and devoted to the public use. This cost is taken as of the time when the property was first devoted to the public use, whether that event occurred when it was in the hands of this Company or a former owner. There is apparent agreement also that if accounts are properly distributed and kept in accordance with the Uniform System of Accounts promulgated by the Commission, the original cost is readily ascertainable by subtracting so-called Account E-371 from the amount of net operating property or "book cost." Any and all excess over original cost paid by any subsequent owner or owners is properly accumulated and carried in E-371. The problem here, however, is complicated by conflicts arising out of the evidence as to whether or not Account E-371 is accurate or complete and as to whether or not further deductions should not be made for non-operating property, non-existent property or property which has been or should have been retired. The Company has acquired many plants from other concerns as it has expanded. The original cost of the operating property of some of these plants was incurred thirty or forty years ago. Such matters are properly to be weighed by the Commission both in determining what was depreciated original cost and in giving due consideration to original cost as a factor.

When, however, the Commission makes a determination of depreciated original cost, as it did in this decree, and discloses manifest, substantial and prejudicial error in the method it employed in arriving at that determination, the result is legal error. We need not look beyond the decree

itself to see where obvious though entirely unintentional error occurred. The decree states,

> "There was presented by the state, substantial evidence that there is about $8,200,000 of property presently listed on the Company's books which is open to considerable doubt as to the propriety of its inclusion in original cost of operating property in service. We do not feel sufficient information is presently at hand to adopt the state's evidence in toto. But considering all the above factors and the evidence of both sides as to the original cost of the present properties when first devoted to public use, we find that a total of about $4,500,000 in addition to the present E-371 account, should be deducted from the Company's book figures to arrive at original cost. In short, the original cost of the properties, in our best estimate, is about $128,000,000."

The E-371 account was approximately $2,500,000. It represented a difference between two gross figures and was itself a gross figure. The other disputed items comprising the $4,500,000 seem also to have been gross items. Yet the sum of these *gross* items amounting to $7,000,000 was subtracted from $135,000,000, admittedly a *net depreciated* figure, in order to produce original cost *depreciated,* itself a *net* figure. In an effort to minimize this error, the able counsel for the State argues that some of the items are non-depreciable and it cannot be ascertained which among items totaling $8,200,000 the Commission selected for deduction. He argues further that the difference between $7,000,000 and $8,200,000 or $1,200,000 is ample provision for accrued depreciation on depreciable items and therefore the $7,000,000 is in fact a *net* figure. This latter argument presupposes however that the Commission found $8,200,000 to be deductible and then deducted only $7,000,000. This the Commission tells us it did *not* do. It mentioned $8,200,000 as doubtful but said the *evidence* only supported a deduction of $7,000,000. Thus the express finding left no $1,200,000

as a margin to cover depreciation. As to the ascertainment of items selected, there is at least no doubt that the E-371 account was selected, for the Commission says so. That being a gross item, it makes little difference whether the items comprising the $4,500,000 are depreciable or non-depreciable, gross or net. The simile employed by the counsel for the Company is apt. "One cannot add pears to potatoes and get potatoes." Is the error important? Is it prejudicial? We think so. Without suggesting that any rate or method of depreciation is the proper one, but for illustration only, let us assume the composite depreciation rate of 2.193% used by the Company on excess acquisition cost. Applied to approximately $2,500,000 in Account E-371 for a period covering some forty years, the depreciation would be approximately $2,193,000. This amount would represent excess erroneously deducted by the Commission in determining depreciated original cost, and would have to be added to the $128,000,000 which was found. The impact of the error could easily be greater depending on the number of depreciable items in the $4,500,000. This analysis, however, suffices to demonstrate that the result of the error was very substantial and that the Commission in giving the required "due consideration" to depreciated original cost was considering an amount which, *by its own method of computation,* was far lower than was proper. The basic issue is raised specifically by the eighth and ninth exceptions taken by the Company. These exceptions must be sustained.

Prudent acquisition cost less depreciation. As has been stated, this factor is intended to reflect the difference, most often an excess, between the original cost when first devoted to public service and the amount invested upon acquisition. This factor brings into focus what the Company *prudently* invested in the property and takes into account that property which is part of an established business often demands a higher price than its original cost. The Company has the

burden of proving its prudence in acquiring property, for the consumer cannot be compelled to provide the utility with an income on its unjustifiable and imprudent acquisitions. The Commission did not determine any amount directly for this factor. It said, "In this instance where the property connected with this acquisition amount has been substantially retired, we can give very little consideration to such amount in the rate base." We do not construe this statement as meaning that the Commission failed to give "due consideration" to the factor. Rather does it appear that upon due consideration, having in mind that the acquisition excess over original cost first made its appearance many years ago, and the item being depreciable, the net result does not weigh heavily in the scales in assessing fair value for rate making purposes. We cannot say that the Commission was in error in this determination. However, we cannot lose sight of the fact that this method of disposing of the factor of prudent acquisition cost less depreciation does nothing to diminish the impact of the error above noted in determining original cost less depreciation.

Current value. The Commission properly recognized that no effort to appraise "current value" as a factor would be complete without proper consideration of reproduction cost less depreciation. Reproduction cost as a factor in rate making cases has sailed over stormy and tumultuous judicial seas. Acclaimed as necessary to any determination of fair value in *Smyth* v. *Ames,* 169 U. S. 466, 18 S. Ct. 418; vigorously attacked by Mr. Justice Brandeis, the "pioneer juristic advocate of the prudent investment theory for man-made utilities," * dissenting in Missouri ex rel *South Western Bell Telephone Co.* v. *Public Service Com.,* 262 U. S. 276, 43 S. Ct. 544; it was finally eliminated in any test of rates promulgated pursuant to Congressional legislation in *Federal Power Com.* v. *Hope Natural Gas Co.,* 320 U. S. 591, 64 S. Ct. 281.

(*Mr. Justice Jackson dissenting in the *Hope Case* cited *infra.*)

Many commissions have repudiated it as a factor as they have repudiated the relation of rates to "fair value." But our legislative mandate, consistently interpreted by this court, has dictated consideration of this factor as we so strongly emphasized in the *Telephone* case *(supra)*. The language of Congress and the language used by our Legislature are not the same. The statute in force at the inception of these proceedings was R. S., 1944, Chap. 40, Secs. 16 and 17, which read as follows:

> "**Sec. 16. Public utility to furnish safe and reasonable facilities; charges to be reasonable and just. R. S. c. 62, sec. 16.** Every public utility is required to furnish safe, reasonable, and adequate facilities. The rate, toll, or charge, or any joint rate made, exacted, demanded, or collected by any public utility for the conveyance or transportation of persons or property between points within this state, or for any heat, light, water, or power produced, transmitted, delivered, or furnished, or for any telephone or telegraph message conveyed, or for any service rendered or to be rendered in connection with any public utility, shall be reasonable and just, taking into due consideration the fair value of all its property with a fair return thereon, its rights and plant as a going concern, business risk, and depreciation. Every unjust or unreasonable charge for such service is prohibited and declared unlawful.
>
> "**Sec. 17. Valuation of property to be made if necessary for fixing rates. R. S. c. 62, sec. 40.** The commission shall fix a reasonable value upon all the property of any public utility used or required to be used in its service to the public within the state whenever it deems a valuation thereof to be necessary for the fixing of fair and reasonable rates, tolls, and charges; and in making such valuation it may avail itself of any reports, records, or other information available to it in the office of any state officer or board."

This statute, judicially interpreted, furnished the substantive law applicable here. In Chap. 377 of P. L., 1953, enacted during the pendency of these proceedings, the Legislature reversed the order of the words "just" and "reasonable" in Section 16 and removed from that section the words "taking into due consideration the fair value of all its property with a fair return thereon, its rights and plant as a going concern, business risk, and depreciation." It further substituted a new Sec. 17 to read as follows:

> "Valuation of property made for fixing rates. In determining reasonable and just rates, tolls and charges, the commission shall fix a reasonable value upon all the property of any public utility used or required to be used in its service to the public within the state and a fair return thereon. In fixing such reasonable value, the commission shall give due consideration to evidence of the cost of the property when first devoted to public use, prudent acquisition cost to the utility, *current value thereof, less depreciation* on each, and any other factors or evidence material and relevant thereto. In making such valuation the commission may avail itself of any reports, records or other information available to it in the office of any state officer or board." (Emphasis supplied)

These amendments elaborated as to procedural matters, but did not change the basic substantive law which was in effect at the inception of this rate case and which of course controlled the disposition of this case as all concerned recognize. "Commonly statutes relating merely to the remedy or procedure and not affecting substantive rights have been said to operate retroactively. * * * It is usual for such statute to be applied to existing causes of action and even to pending cases." *E. B. Horn Co.* v. *Assessors of Boston,* 321 Mass. 579, 74 N. E. (2nd) 421 at 423; see also 82 C. J. S. 999 (Note 37 and cases cited); *Oriental Bank* v. *Freeze,* 18 Me. 109.

The conjunction in the amendment of the words "current value, less depreciation on each" creates some confusion as to legislative intent. Obviously the Legislature could not have intended that the words should mean "current value less depreciation." This would create a paradox as "current value" in and of itself reflects depreciation, and depreciation is not applied twice. It is apparent that the words "less depreciation on each" were intended to apply to the original cost and prudent acquisition cost factors only, leaving "current value" to reflect those factors which are ordinarily determinative of the current value of anything. Not the least of these factors, as we have said, is reproduction cost less depreciation. With this concept of legislative requirement apparently in mind, the Company presented the testimony of an independent engineer together with a voluminous exhibit prepared by him. Presumably the Company sought to escape the charge of bias and prejudice which would naturally attend any effort to rely on the evidence of its own engineers and officers. The witness does not appear to lack either training or experience. His approach was to use reproduction cost less depreciation, controlled downward by other operative factors, in an effort to estimate current value. In dealing with this factor, we are necessarily dealing with estimates and matters of judgment. Where judgment is involved, the Commission is justified in subjecting the proffered evidence to very close scrutiny and critical analysis. The weight to be given to it is for the Commission, but the assessing of weight can only be done properly in a spirit which is not arbitrary or capricious or founded on immovable preconceptions. The Commission severely criticised the witness for a bias which on perusal of his testimony and exhibit tends to escape us, and for errors which seem to us hardly prejudicial enough to defeat the entire purpose of the evidence. The Commission is highly critical of his comparisons of hydro-electric property and steam operated property, and say in the decree, "His meth-

od of evaluating the hydro facilities of the Company on what costs would be for equivalent steam plants, discounts sharply this State's acknowledged natural water resources and leaves the public to absorb the extra costs entailed by expensive transportation of oil and total use of steam." The Commission would indeed be derelict in duty if it did not preserve for the public every benefit to be derived from the presence of natural water power in this state. But as we read the record, we are at a loss to find any evidence whatever to support the statement quoted. What the witness did seems quite obvious. He took into account the very high corporate income tax rate of 52% of net earnings, which in the last analysis must be paid by the rate-paying consumer of power. He recognized the fact that hydro property with its large investment and low operating cost is more vulnerable to the income tax than steam property with its relatively low investment and relatively high operating expense. Wherever he found hydro property which under these conditions was not as advantageous a producer as comparative steam property, he *reduced* the value of the hydro proportionately. In not one instance did he use steam comparison to *increase* the current value which he placed on hydro property. The cases cited by the State repudiate the assignment of an *increased* value of water rights by capitalizing the savings of hydro production over equivalent steam operation as tending to deprive the public of the benefit of its natural resources. We do not see that they apply where the value of the natural resources tend under certain conditions to be *diminished* by steam competition. Actually, the impact of steam comparison as applied by the witness resulted in a reduction in current value of approximately four million dollars, all to the advantage of the public and the detriment of the Company. This does not impress us as the attitude of a person heavily biased in favor of the Company. The witness produced as a final estimate of current value (a depreciated figure) the amount of $163,986,139. In estimat-

ing a property of such size, perfect exactitude could neither be expected nor required. Certain errors were inevitable and the Commission was duty bound to weigh the evidence fairly and, if necessary, reduce the estimate as the evidence and sound judgment might suggest. What the Commission did was summarily to dismiss any evidence of current value in these words, "Altogether, we feel that the witness, with his exhibit, has not produced a total figure which is satisfactory evidence of the current value required by the statute." Starting with a depreciated original cost erroneously computed as $128,000,000, and disregarding prudent acquisition cost depreciated for reasons we have discussed, the Commission determined fair value for rate purposes as $132,000,000 which is only $4,000,000 more than its own concept of original cost depreciated. Yet it cannot be disputed that the factor of current value is *the only one* which in any way reflects the greatly increased costs which seem to have become implemented into our economy. We cannot escape the conclusion that the Commission based its findings on a preconception that the Legislature is in error in using current value as a factor. It is not enough to give mere token recognition of a factor imposed by legislative mandate. The factor, properly determined, must find appreciable reflection in the end result. In the light of what everyone knows about increased costs generally, we do not believe that an increase over original cost depreciated of barely over 3% is an appreciable reflection of the impact of inflation upon values. Obviously if the original cost factor had been correctly determined, the percentage of increase reflected in an end result of $132,000,000 *would be substantially less than 3%*. The fact that there has been a substantial inflation has not escaped our attention. "Judges are not necessarily ignorant in court of what everybody else, and they themselves out of court, are familiar with; and there is no reason why they should pretend to be more ignorant or unobserving than the rest of mankind." *Affili-*

ated Enterprises v. *Waller,* 5 A. (2nd) (Del.) 257, 261. We quoted this statement in *Melanson* v. *Reed Bros.,* 146 Me. 16 at 22, and added this comment, "This principle is as applicable to justices of the Law Court as it is to justices at *nisi prius.* * * * It not only may, but should be applied in determining what conclusions should be drawn from existing facts." We conclude that the Commission misinterpreted and closed its mind to the evidence relating to current value and failed to give any proper weight to the factor in determining the rate base. As these issues are specifically raised by the Company's 11th, 12th and 13th exceptions, those exceptions must be sustained.

Amortization of pension premiums. In 1946 the Company set up an insured pension plan for its officers and employees as part of its wage structure. Substantial premiums were paid on account of the past services of its then employees. The Internal Revenue Code, Title 26, Sec. 23, subsec. P (1) (A) (iii) provided that for tax purposes there was deductible "an amount not in excess of ten per centum of the cost which would be required to completely fund or purchase such pension," etc. Accordingly, the Company set this up to be amortized over a ten year period. In determining how the impact of this cost should be reflected in rates, the Commission decreed that amortization should be spread over what remains of a thirty year period. There appears to be a well defined trend of authority which supports the treating of such payments as operating expense. In *PUC* v. *N. E. Tel. & Tel. Co.,* 80 PUR (N.S.) 397, 417 et seq., the Maine Commission allowed interest on the unfunded actuarial reserve requirement for pensions to be included as an operating expense in computing rates. See also re *Michigan Tel. Co.,* 91 PUR (N.S.) 129; re *Cinn. & Sub. Bell Tel. Co.,* 100 PUR (N.S.) 179; re *Uniform System of Accounts* (N.Y.), 82 PUR (N.S.) 161; *Pittsburgh* v. *Penn. PUC,* 370 Pa. 305; 88 A. (2nd) 59; and Note on Unfunded Actuarial Liability in 64 Harvard Law Review 633. The

reason usually advanced is that present and future consumers are deemed to benefit from the increasingly contented work force which results from an equitable wage structure including the granting of past service pensions. It seems clear that the longer the past employment of an employee continued, the shorter will be the time during which he will serve before retirement and benefit the Company and its customers as a satisfied employee, *but* the greater will be his impact on the premium for past services. This suggests the fairness to future consumers in not extending the amortization period too far into the future. It is the consumer of the relatively near future who will benefit most from the expenditure of the past service premium. The Company, in setting up the amortization program, had very properly to consider the impact of the income tax and the tax limitations upon its right to amortize, and also the impact of the proposed program upon rate paying consumers present and future. In adopting the ten year period, the Company chose the shortest time permitted by the Internal Revenue Code, *supra,* but it also chose the period during which pension rights, which accounted for over 87% of the past service premium, will have vested. Those employees whose pension rights have vested can leave their employment even before they are eligible for retirement and take their pension rights with them. We think that under all the circumstances this was as fair a method of spreading the past service cost as could be readily devised. The determination was primarily a matter of managerial discretion and certainly no abuse of such discretion was involved, nor was there any capricious or arbitrary action which would place an unfair burden upon any group of consumers. On the other hand, we are unable to follow the reasoning of the Commission in arbitrarily selecting a period of thirty years for amortization. Some employees may have been employed for a period of as much as thirty years in the past, but that fact does not seem to us to compel the conclusion that there-

fore rate paying consumers should bear expense extending thirty years into the future. As we have said, the consideration should rather be as to what present and future consumers are benefited, and to what extent, by the particular pension expense. It was error for the Commission to disregard the annual charge for pension payments which was included in Amortization and General Expense. The allegation of error in this respect was made by the Company in its 16th Exception, and this exception must therefore be sustained.

Other issues. In view of the necessary disposition of this case which results from our determination of the basic issues above discussed, it seems unnecessary to consider in detail what may perhaps be considered secondary issues. However, some brief comment may be helpful in such further proceedings as may be required.

(a) *Wholly owned subsidiary.* The Company owns all the stock of Union Water Power Company which controls reservoirs, dams and water rights useful to the Company in its operations. The Commission does not make it apparent whether it included or excluded this property from the rate base, although the inference appears to be that it was excluded.

Where the subsidiary property is entirely devoted to the operation of the parent company and would clearly be included in the rate base if legal title stood in the name of the parent company, some authorities have held that there is no sound or practical reason for excluding it only because complete control is by stock ownership rather than deed. *City of Detroit* v. *Detroit Edison Company,* PUR 1933 E 193; *Public Service Commission of Washington* v. *Grays Harbor Rwy. Light Co.,* PUR 1915 C 518. Some Commissions refuse to include the property in the rate base but make allowance for required earnings to compensate for the elimination. Re *Public Serv. Co. of N. H.,* 92 PUR (N.S.) 443;

Re *Public Serv. Co. of N. H.*, 93 PUR (N.S.) 129. But where, as here, it appears that part of the subsidiary property is not devoted to operations of the Company, and in addition is subject to rights of long term lessees who are third parties, prejudicial error cannot properly be predicated on the failure of the Commission to include the subsidiary property in the rate base. We assume that if income by way of dividends from the subsidiary corporation was included by the Commission in estimating operating revenues of the Company, and at the same time the subsidiary property was excluded from rate base, the error was inadvertent and will be corrected. We cannot determine with certainty from the decree whether such was the case.

(b) *Undistributed property account.* There existed three such accounts totaling $19,396,065. It is not disputed that the required distribution of these accounts to appropriate primary accounts was delayed by the Company for many years, presumably because substantial manpower and expense would be involved. The Company admits that it has been repeatedly urged by the Commission in the past to make the distribution. The very considerable task involving the work of many months was finally undertaken and was virtually completed in March while this rate case was pending. We do not feel that the Company can now be heard to complain if the Commission, having been afforded no reasonable time or opportunity to verify and approve the distributions, has refused to give present blanket approval to Company action. The task of the Commission in scrutinizing the distributions is itself a considerable one and the Company in selecting a time to propose new rates must have known that an intelligent appraisal of a distribution action so long delayed would be a virtual impossibility in the midst of a pending case.

(c) *Working capital.* We find no error in the determination of the Commission that income tax accruals should

provide for working capital needs after proper deduction for materials and supplies used for new construction. We do not understand that the Company contends that income tax accruals may not be so employed as a matter of law. Moreover, taxes will continue to be accrued on the basis of the current 52% rate.

(d) Other issues seem to us of relatively minor importance and we note no prejudicial error in the Commission's action with respect to them.

Conclusion.

The Commission determined that,

> "Considering all the evidence before us, including various bases of property value, we find that under these present circumstances a rate of return of 5.9% is just and reasonable on a rate base of $132,000,000. This will result in a fair return to the Company of $7,800,000."

We do not understand that the Company questions the fair rate of return fixed at 5.9% and in any event there was substantial evidence to support the finding. This fair rate of return as has been pointed out must be applied to a fair rate base and one which is determined pursuant to legislative mandate. The rate base here selected not only is artificially reduced by error in the original cost factor patent on the face of the decree, but gives insufficient consideration rather than appreciable reflection to the factor of current value or what might be termed the present well known economic facts of life. Rates predicated on such error must be reconsidered. The public properly demands service and to fulfill these demands the Company must expand. It cannot serve or expand if its financial structure does not attract confidence. The uncertainties of the weather and its water resources compel it to have standby steam capacity to guarantee service under all conditions, with resulting unavoid-

able expense. It must contend with greatly increased costs of materials and labor and an income tax which deprives it of over a half of every net dollar. On the other hand, the Commission must strike a nice balance between the essential revenue needs of the Company and the value of the service to the rate payer and his ability to pay. *Kennebec Water Dist.* v. *Waterville,* 97 Me. 185. We cannot and do not say what is the fair value for rate making purposes or what the rates should be. That determination must reflect the judgment of the Commission within the scope permitted by the evidence. We say only that when error is manifest, there must be reconsideration, where the result of that error appears to be substantial prejudice.

Exceptions sustained.

Case remanded to Maine Public Utilities Commission for a decree upon the existing record in accordance with this opinion.

HOWARD A. MILLER
vs.
CECIL M. HUTCHINSON

Kennebec. Opinion, November 12, 1954.

Elections. Ballots. Oath. Jurat.

The right to vote *in absentia* by absentee ballot is statutory and one who exercises such statutory rights must comply substantially with the provisions of the statute.

A certificate on the envelope of an *absentee* ballot that "the above statements made by said affiant are true to the best of my knowledge and belief" does not constitute a compliance with a statute which requires a jurat that the voter "personally appeared x x x and made oath to the truth of the statement contained hereon." R. S., 1944, Chap. 6, Sec. 2 as amended by P. L., 1953, Chap. 365, Sec. 19.

ON APPEAL.

This is a proceeding under R. S., 1944, Chap. 5, Sec. 85 before the Law Court upon appeal from a decision in favor of respondent. Appeal sustained with costs to the petitioner.

Dubord & Dubord, for plaintiff.

Arthur Eaton, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

BELIVEAU, J. Proceedings as in Equity authorized by Section 85, Chapter 5, Revised Statutes. These proceedings were instituted by the petitioner, Howard A. Miller, alleging that at a Municipal election in Waterville on the first Monday of December 1953 he was duly elected a Member of the Board of Education. A hearing was had on this bill and the decision favored the respondent. An appeal from that decision is before this court.

While several issues are raised by the petitioner this opinion is confined to and deals only with the legality of the absentee ballots.

Prior to the enactment of the so-called absentee voting law, a citizen unable to present himself at the voting place was by that fact denied the right to cast his vote. The law now makes it possible for a vote to be cast in case of his absence from the locality on election day, if he certifies, under oath, that he will be absent on the day of the election or is unable to cast his vote in person, because of physical incapacity or religious reasons.

Section 2, Chapter 6, R. S., amended by Section 19, Chapter 365, Laws of 1953, provides the following jurat as it applies to an absentee voter, to wit:

> "Personally appeared the above (name of voter) and made oath to the truth of the statement contained hereon."

It is admitted by the parties involved, that instead of the oath prescribed by the above statute, the following appeared on each of the sealed envelopes, containing the absentee voter's ballot:

> "I hereby certify that the above statements made by said affiant are true to the best of my knowledge and belief."

Was this certificate a substantial compliance with the law? We hold it was not.

The absentee voting law gives the voter a right that did not exist before its enactment and, if perchance, this law were repealed, no voter could claim the right to vote *in absentia* as a matter of right.

It must of necessity follow that a voter who has occasion to avail himself of this right must, at least substantially, comply with the provisions of the law. If he fails in this

respect, then his vote amounts to nothing and cannot be considered as properly cast.

Was the required oath administered?

The certificate on the face of the envelope is at most a statement by some individual that he believes the statements made by the voter over his signature "are true to the best of my knowledge and belief." This does not involve the voter in the least, and at best, is an expression of belief by some other individual, and is not in our opinion, a substitute for, or a compliance with, substantial or otherwise, the required oath.

Could the voter, who had falsified his inability to vote in person, be prosecuted for falsely swearing to these facts? The defense that he did not take the prescribed oath would be a successful answer to such a prosecution.

The legislature well knew this method of voting is open to abuse and fraud. For that reason the law requires the oath, so that a voter who sought to circumscribe it could be brought to justice and punished.

We hold that the oath required was mandatory and failure of the voter to make or take such an oath, administered by a qualified official, is fatal and invalidates the vote so cast.

Section 2, Chapter 6 of the Revised Statutes, as amended by Chapter 365 of the Laws of 1953, directs the City Clerk to prepare an absentee voting ballot, a blank form of application for such ballot and envelopes of sufficient size to contain the ballot. Among other requirements the aforesaid envelopes are to bear on the reverse side the required affidavit prescribed by Section 19, Chapter 365 of said Laws of 1953. This requirement was not met by the City Clerk of Waterville.

We do not accept the certificate as a compliance with the statutory requirements which we rule are mandatory. We

adopt the reasoning of this court in Opinion of the Justices in 124 Me. 453, 126A54, wherein the court says:

> "It is not easy to frame a definition that shall cover all cases, but, broadly speaking, requirements in a statute which are of the very essence of the thing to be done and the ignoring of which would practically nullify the vital purpose of the statute itself are regarded by the Courts as mandatory and imperative."

The proper administration of the oath was "mandatory and imperative."

It was found by the justice who heard this matter that in the event the absentee ballots were ruled out, the vote would be 473 for Miller and 446 for the respondent, or a majority of 27 votes for the claimant or petitioner.

We adopt these figures and find the petitioner was elected by a majority of 27 votes and is entitled to a certificate of election as a Member of the Board of Education of the City of Waterville.

Appeal sustained with costs to the petitioner.

CAROLYN KEEGAN
vs.
GREEN GIANT COMPANY

* * * * * * *

WILLIAM KEEGAN
vs.
GREEN GIANT COMPANY

Penobscot. Opinion, November 12, 1954.

Negligence. Evidence. Writings. Authorship. Food.

A can of peas purporting to bear defendant's label is not admissible in evidence in and of itself to prove that the defendant manufactured, packed and distributed the peas.

The general principle has been enforced that a writing purporting to be of a certain authorship cannot go to the jury as possibly genuine, merely on the strength of this purport; there must be some evidence of the genuineness (or execution) of it.

ON EXCEPTIONS.

These are actions of negligence before the Law Court upon plaintiff's exceptions (1) to the refusal of the presiding justice to admit certain evidence and (2) to the direction of a verdict for defendant. Exceptions overruled.

Edward Stern, for plaintiffs.

James E. Mitchell,
John W. Ballou, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, TAPLEY, JJ. BELIVEAU, J, did not sit. WILLIAMSON, J. dissents.

TAPLEY, J. On exceptions. Action is brought by plaintiff, Carolyn Keegan, against defendant, Green Giant Com-

pany, for damages alleging that the defendant negligently prepared, manufactured, packed and distributed a can of peas which contained a sharp piece of metal concealed in the peas and that the plaintiff while eating them swallowed the piece of metal, it lodging in her throat. Plaintiff, William Keegan, husband of Carolyn Keegan, seeks recovery for expenses of his wife and loss of consortium. The cases were tried before a jury at the November Term, A. D. 1953 of the Superior Court in the County of Penobscot and State of Maine.

At the close of the plaintiffs' cases, the defendant rested without submission of evidence and requested the court to direct a verdict for the defendant in both cases.

The plaintiffs excepted to the refusal of the presiding justice to admit certain evidence in the nature of a proposed exhibit in the form of a tin can encircled with a label, and also to the direction of the verdicts in favor of the defendant.

The record discloses that on the fourth day of February, 1953, Carolyn Keegan was living in Jonesport, Maine and working at D. O. Hall's Grocery Store and that the store purchased Green Giant Company canned peas from T. R. Savage & Company of Bangor, a distributor.

Mrs. Nettie R. Alley, mother of Carolyn, purchased a can of peas from the store in which her daughter was employed on the day that the peas from this can were served to her daughter in Mrs. Alley's home. Mrs. Alley opened the can, poured the peas into a pan, warmed them and later served a portion to her daughter Carolyn at the evening meal. Carolyn in eating the peas, along with other food, suddenly experienced a choking sensation and then dislodged a triangular piece of steel identified as "Plaintiff's Exhibit 3."

The exceptions in these cases concerning the direction of verdicts for the defendant will be determined by the

disposition of those exceptions pertaining to the refusal of the presiding justice to admit the can with the label thereon and marked "Plaintiff's Exhibit 1" (for identification).

The can is described as the usual sized tin can ordinarily used to contain green peas. It has imprinted on the bottom portion the following:

"A C f C 5"

and directly underneath these letters and number is:

"3 L Y"

The can is encircled by a label. The pertinent and important material printed thereon are the words:

"GREEN
GIANT
Brand
Great Big
Tender
SWEET PEAS.
Distributed by
GREEN GIANT
COMPANY
Le Suer, Minn.

C GG Co. Reg. U. S. Pat. Off. Packed in U. S. A.
Replacement or refund of money

*

Guaranteed by
Good Housekeeping
If not as advertised therein."

There is other printed matter on the label which is not material or germane to the issue.

The plaintiffs contend that "Plaintiff's Exhibit 1" (marked for identification), being the can with label there-

on, should have been admitted as evidence for the purpose of showing that the Green Giant Company was the distributor of this can of peas and for the further purpose that the can of peas by reasonable inference was packed by the defendant, Green Giant Company, and that the jury should have had an opportunity of determining if these were the facts. The defendant contends that Plaintiff's Exhibit 1 (marked for identification) should not have been admitted without extrinsic evidence connecting the defendant with the case other than through the medium of the label on the can.

Exceptions to the refusal of the presiding justice to admit Plaintiff's Exhibit 1 are stated in the record as follows:

> "Mr. STERN: Your Honor, I would like to introduce Plaintiff's Exhibit Number One in evidence for the purpose of showing that it is self evident that the Green Giant Company was the distributor of this can of peas and also for the purpose of showing that if the jury did find that the Green Giant Company was the distributor that the jury could reasonably infer that this can of peas was also packed by the Green Giant Company.
>
> The COURT: I will exclude it and you may have an exception."

Plaintiff's mother, Nettie R. Alley, testified that she purchased the can of peas from D. O. Hall's Grocery Store in Jonesport on the morning of the day she served them to her daughter and that Plaintiff's Exhibit 1 is the same can which contained the peas that she purchased.

The question here to be determined is whether or not Plaintiff's Exhibit 1 (marked for identification) is admissible in and of itself as evidence to prove that the defendant manufactured, packed and distributed the peas.

The plaintiffs in their brief cite a number of cases which they argue sustain their contention that this label is suf-

ficient by itself to establish that the company whose name and other information appears upon the label is the manufacturer and packer of the contents of the can upon which it is placed. A careful analysis of the cases cited shows that in addition to the printed matter on the label, there was other evidence in connection therewith which identified the defendants with being the manufacturer, packer or distributor of the product.

There are no decisions precisely determining the question of admissibility of an exhibit under circumstances similar to those in this case. This fact requires reference to the substantive law for an answer to the problem. We are here concerned with the authorship of the printed matter on the label and are asked to approve its admissibility without proof of authorship. The admission of such material under these circumstances would violate the cardinal principle of proof of a written or printed document.

Wigmore on Evidence, Vol. VII, Sec. 2150:

> "Printed matter in general bears upon itself no marks of authorship other than contents. But there is ordinarily no necessity for resting upon such evidence, since the responsibility for printed matter, under the substantive law, usually arises from the act of causing publication, and merely of writing, and hence there is usually available as much evidence of the act of printing or handing to a printer as there would be of any other act, such as chopping a tree or building a fence.
>
> There is therefore no judicial sanction for considering the contents alone as sufficient evidence."

Sec. 2130:

> "******** The general principle has been enforced that a writing purporting to be of a certain authorship cannot go to the jury as possibly genuine, merely on the strength of this purport;

there must be some evidence of the genuineness (or execution) of it."

See 131 A. L. R., Page 301.

This case is devoid of any evidence connecting the defendant as the author of the printed material on the label and, further, that it was the packer, manufacturer or distributor of the contents of the can encircled by the label.

The can itself bore certain distinguishing letters and figures which might be code numbers identifying the packer but here again there is no extrinsic evidence bearing on the fact.

The presiding justice below committed no error in excluding the exhibit.

Exceptions, in each case, overruled to the exclusion of evidence.

Exceptions, in each case, overruled to the direction of verdicts for the defendant.

DISSENTING OPINION

WILLIAMSON, J. I would sustain the exceptions. The position of the Green Giant Company as I understand it is this: A can of peas with certain letters and numbers imprinted on the bottom portion and encircled with a label bearing the defendant's registered trademark and its name as the distributor, and in no way distinguishable to the purchaser or consumer from the defendant's product, is not evidence in itself sufficient to prove that the particular can was distributed by the defendant.

Day in and day out every one of us accepts the label on canned food products as sufficient proof of the brand and the producer or distributor. How else can we identify as a

practical matter types and brands of canned food products? We are urged by every method of publicity to purchase "brand" products by the label. Further, it is common knowledge that the misuse of a trademark and the misbranding of food products are serious offenses under Federal laws designed to protect all concerned from producer to consumer.

There is of course the possibility of substitution or imitation. This risk must be small indeed in a business which has gained the confidence of the consuming public through the use of distinctive labels.

Surely we may assume that the defendant does in fact distribute a product of the type described in the label. If this were not so, it could readily have disposed of the case. There is no suggestion by the defendant that such is not the fact. There are imprinted on the bottom portion of the can certain letters and numbers, e.g., "A C f C 5" "3 L Y." They have no meaning to the purchaser. A distributor can readily tell us whether they identify its own product.

Apart from the question of proof of the fact of distribution, there is no objection by the defendant to the sufficiency of the evidence on the other issues in the case. In my opinion the can and label should have been admitted in evidence and the case submitted to the jury.

STATE
vs.
CHESTER WING

Kennebec. Opinion, November 16, 1954.

Criminal Law. Plea. Withdrawal.

It is well known that permission to withdraw a plea of guilty and plead anew is wholly within the discretion of the justice, and a refusal to permit a withdrawal will not be overruled where there is no abuse of that discretion or the action is not arbitrary.

ON EXCEPTIONS.

This case is before the Law Court upon exception to the refusal of the presiding Justice of the Superior Court to permit defendant to withdraw a plea of guilty made before the Municipal Court. Exception overruled. Judgment for the State.

Joseph B. Campbell, for State.

Niehoff & Niehoff, for defendant.

SITTING: WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ., THAXTER, A.R.J. FELLOWS, C. J., did not sit.

BELIVEAU, J. On exception. The respondent at the June Term, 1954, of the Superior Court for Kennebec County filed a motion for permission to withdraw a plea of guilty, made by him, in the Augusta Municipal Court, April 17, 1954, and plead anew.

Testimony was taken on this motion and, after hearing, was denied by the presiding justice. An exception was seasonably taken to this ruling.

The respondent argues his exception should be sustained because the denial of the motion was an abuse of discretion by the justice.

Commonwealth v. *Crapo,* 212 Mass. 209, the respondent pleaded guilty in the lower court and appealed after sentence was imposed. In the Superior Court he seasonably filed a motion to withdraw the plea of guilty below and be allowed to plead anew. On this point the court said:

> "The appellate court, however, upon the defendant's application, which seems to have been made seasonably, could permit him to withdraw the plea below, and plead anew, if satisfied that his admission of guilt was not voluntary and intentional, but resulted from inadvertence."

It appears from the evidence, that the respondent, after he was arrested and before hearing in the Municipal Court, consulted a friend, a Police Officer, about the possible punishment he would receive and was informed that, because this was his first offense, the jail sentence imposed, if any, would probably be probated.

The officer had no connection, whatever, with the case and we gather from the evidence, he did no more than express his opinion as to the sentence to be expected.

The discussion with the officer was not as to the guilt or innocence of the respondent but as to the disposition of the case in the event he was found guilty. The officer's opinion would have no effect on the court below, was not intended to influence the respondent and could not be reasonably construed or interpreted to have any such meaning. The plea of guilty was voluntary and intentional.

The respondent argues in support of his exception that the denial of the aforesaid motion was an abuse of discretion by the justice.

It is well known law that permission to withdraw a plea of guilty and plead anew is wholly within the discretion of the justice, if there is no abuse of that discretion or the action is not arbitrary.

We find there is no semblance of abuse of discretion and the denial of the motion was within the sound discretion and judgment of the justice presiding.

Exception overruled.

Judgment for the State.

WILLIAM GASTON

vs.

HARLAND A. TOWNSEND, CLINTON K. SMITH AND L. GRANT DUELL, TAX ASSESSORS FOR THE TOWN OF VINALHAVEN

Knox. Opinion, November 18, 1954.

Taxation. Assessment.

The question whether assessors have done their duty with respect to the amount of an assessment is one of fact which will not be set aside unless it appears that the taxpayer has been deliberately forced to pay more than his just share of the tax burden or that the assessors have intentionally violated the essential principle of practical uniformity.

Mere error of human judgment will not support a claim of overrating.

ON EXCEPTIONS.

This is an action for abatement of taxes before the Law Court upon exceptions to the acceptance of a referee's report. Exceptions overruled.

Jerome C. Burrows, for plaintiff.

Stuart C. Burgess, for defendant.

SITTING: WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ., THAXTER, A.R.J. FELLOWS, C. J., did not sit.

THAXTER, A.R.J. This is an appeal from a decision of the tax assessors for the Town of Vinalhaven refusing to abate certain taxes of the plaintiff who is a resident of New Canaan, Connecticut. The case was tried in the County of Knox by a judge of the Superior Court acting under a rule of reference dated May 28, 1953. Objections were filed to the acceptance of the referee's report. On their being overruled, exceptions were taken to this court April 15, 1954. These exceptions are now before us.

The case involves the assessment on certain land and buildings, and furniture, at Vinalhaven in the County of Knox, and minor items such as the assessments on three small rowboats, a canoe, and a 40 yr. old sailboat. The amount of the assessment was $7,318.00 and the tax amounted to $665.94.

It is typical island property somewhat in a state of disrepair and depreciation. It is undoubtedly very beautiful property as most of such Maine properties are.

The plaintiff filed with the local tax assessors a list of all his properties in the Town of Vinalhaven with a statement of what he thinks the assessment should be on each separate parcel. He was not required to give an estimate of values but it does no harm to have done so. It is nothing more than showing his judgment of their worth. If there were some testimony in the case as to what the owner thought the value of these properties was, it might be of consequence, but there was no such testimony. There was testimony giving the opinion of real estate experts as to values, and as to sales of supposedly comparable properties. Such evidence is not decisive. Evidence of sales does not indicate that the assessment was necessarily exorbitant. It was a question for the trier of fact and he has found for the defendants on that point. The question really is not simply whether the tax imposed is too high but whether the assessors who have a very serious public duty to perform have not done their

duty, and have deliberately forced the plaintiff to pay more than his just share of the tax burden. 51 Am. Jur. 667; *Sweet* v. *City of Auburn,* 134 Me. 28. There is absolutely no evidence that such is the case.

The proving of a mere error of human judgment will not support a claim of overrating. The rule to guide the assessors of the Town of Vinalhaven, so pertinently pointed out by the plaintiff in his own brief, is well stated by Chief Justice Taft in *Sioux City Bridge Company* v. *Dakota County,* 260 U. S. 441, at page 447, that "there must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity."

There is absolutely no evidence to sustain the plaintiff's contention on this point. The assessors did their full duty.

Exceptions overruled.

ROLAND G. FORTIN
vs.
ERNEST H. JOHNSON, STATE TAX ASSESSOR

Androscoggin. Opinion, November 24, 1954.

Sales Taxes. Food. Dairy Queen. Exemptions. Packages. Rebates. Presumptions. Abatements.

Food products which are neither meals nor furnished for consumption at or from facilities of the retailer under Sec. 10 III (c) of the Sales Tax Law are exempt, and a mere presumption of taxability for such food products under Sec. 10 III (d) cannot breathe the life of taxability into products clearly within the exemption. R. S., 1944, Chap. 14-A.

Disposal straws, spoons or containers do not have the permanence associated with "trays, glasses, dishes or other table ware" within

the meaning of the exclusion from exemption provisions of Section 10 III (c).

The provisions of Sec. 10 III (d) (prior to the 1953 amendment—P. L., 1953, Chap. 146) providing for a mere presumption of taxability cannot create a new class of taxable sales for products clearly within the preview of other exemption provisions of the statute even though the conditions which give rise to the presumption have been met—since the presumption is overcome by the exemption.

Sales of Dairy Queen products in cones and open containers are not "packaged" or "wrapped" within the meaning of Sec. 10 III (d).

The Superior Court has no jurisdiction to entertain an appeal from a refusal of the State Tax Assessor to rebate tax payments made, and such jurisdiction does not arise from statutory provisions allowing appeals from decisions denying "reconsideration of assessments" under Secs. 29 and 30.

ON EXCEPTIONS.

This case is before the Law Court upon exceptions to an order of the Superior Court ordering a rebate and abatement of certain taxes under the Sales Tax Law. Exceptions overruled as to the abatement. Exceptions sustained as to the rebate. Case remanded for decree in accordance with the opinion.

Edward Beauchamp, for plaintiff.

Boyd Bailey, Asst. Attorney General, for defendant.

SITTING: WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, JJ., THAXTER, A.R.J. FELLOWS, C. J., and TAPLEY, J., did not sit.

WILLIAMSON, J. This is a sales tax case in which sales of "Dairy Queen" products were held to be nontaxable by a justice of the Superior Court upon an appeal by the taxpayer from the decision of the State Tax Assessor. The court ordered (1) the rebate of sales taxes reported and

paid without assessment for the period from July 1951 through August 1952 in the amount of $226.27, and (2) the abatement of a sales tax demanded under a deficiency assessment of $236.35, "made in addition to any sales tax already paid" for the same period. The case is before us on exceptions of the State Tax Assessor to this order. References to the statutes are, unless otherwise noted, to "Sales and Use Tax Law." R. S., c. 14-A (1944), as amended.

The issue on which the decision was based, incorrectly as will later appear, and here argued by the parties, lies in the interpretation of the sentence from Section 10-III, reading, prior to the amendment in 1953, as follows:

> "It shall be presumed that the sale of food products ordinarily sold for immediate consumption on or near the premises of the retailer is a taxable sale unless such products are sold on a 'take out' or 'to go' order, and are actually packaged or wrapped and taken from the premises."

We first discuss that part of the decision relating to the abatement of tax. Only questions of law are presented by the exceptions. Under the statute the decision "of said court or justice upon all questions of fact shall be final." Section 30.

We quote from the decision of the justice:

> "Evidence was presented that the appellant was engaged in the sale of what is known as the "Dairy Queen" product, which is a frozen milk product dispensed in a number of ways, namely, cones, pasteboard cartons, sometimes with cartons being capped and other times being open. The business was conducted from a building in which the ice cream was made, placed in containers, of one kind or another, and passed to the customer through two windows made for that purpose. The building stands on a lot approximately 70 feet by 100 feet facing the highway and access is had through a driveway from the street onto the property and

out through an exit into the street. The appellant leased a parcel of land next to the one described, where customers parked their cars and came to the building to purchase the product. There were no benches, tables, chairs or settees provided for the customers to use in consuming the product. The facts further disclose as to method of operation that a customer might purchase ice cream in a cone or in a pint or quart container or in an individual container sometimes covered, sometimes not, and sometimes a spoon would be furnished with a small container. The customer would then leave the window with the product thus purchased."

* * * * * * * * * * *

"The product sold by the Dairy Queen may be called 'frozen custard,' 'ice cream' or 'ice milk' but however it may be characterized, it is in a semi-frozen state and cannot be purchased and consumed without some type of container or package. The Court finds that the product contained in a cone or other container is 'packaged' or 'wrapped' within the meaning of (the Act)."

The justice also found the taxpayer "was conducting his Dairy Queen business on the basis of 'take-out' ".

In the bill of exceptions the State Tax Assessor properly conceded "that all sales of frozen milk products made by (the taxpayer) on a 'take out' or 'to go' order, and as evidenced by the sale of covered quart containers and lidded containers, are non-taxable." The final position of the Assessor is expressed in his brief as follows:

"If, in the Court's opinion, the taxpayer's sales are all exempt, the Exceptions should, of course, be overruled. But, if the Assessor is correct that the Legislature directed him to tax sales of ice milk cones, sundaes and milk drinks served in open containers equipped with straws or spoons for immediate eating, not ordered to 'take out' or 'to go', and not 'packaged or wrapped' in a manner to

facilitate transportation, then the deficiency assessment should be sustained in the amount of $31.46."

This amount was reached by deducting the payments made from the tax allegedly due on the above items for the entire period.

The pertinent parts of the Act read:

(a) "**Sec. 10. Exemptions.** No tax on sales, storage or use shall be collected upon or in connection with:
" . . .
" . . .

(b) "III . . . Sales of food products as hereinafter defined. As used herein the term 'food products' shall, except as herein otherwise provided, include cereals and cereal products; milk and milk products, other than candy and confectionery, but including ice cream . . ."

(c) " 'Food products' also shall not include meals served on or off the premises of the retailer; or drinks or food, furnished, prepared, or served for consumption at tables, chairs or counters, or from trays, glasses, dishes or other tableware provided by the retailer."

(d) as amended "~~It shall be presumed that the~~ **The** sale of food products ordinarily sold for immediate consumption on or near the ~~premises~~ **location** of the retailer is a taxable sale unless such products are sold on a 'take out' or 'to go' order, and are actually packaged or wrapped and taken from the premises."

By amendment effective August 8, 1953, after the sales were made, the words indicated were deleted, and the words emphasized added. P. L., 1953, c, 146, § 8. The letters on the margin are added by us for convenience in reference.

Clause (c) is found in California in 1939. See *Treasure Island Catering Co.* v. *State Board of E.*, 19 Calif. (2nd) 181, 120 P. (2nd) 1 (1941). See also 139 A. L. R. 392. Clauses (c) and (d) were enacted in Rhode Island in 1947-48. Chapter 2004 of Public Laws of R. I., 1948, amending Sec. 31 of Art. 2 of Chap. 1887 of Public Laws of 1947. So far as we are aware, Rhode Island is the only state with the "presumption" clause (d) since Maine enacted clause (d) amended in 1953.

On careful consideration of the statute, we conclude that the justice correctly ordered the abatement of the tax. We place our decision, however, upon grounds not stated by him or argued by the parties. The nontaxable status of the sales in which we are now interested, namely, sales in cones and open containers, does not rest upon the interpretation given to clause (d) by either party.

The taxpayer and the State Tax Assessor are in accord that if clause (d) were not part of the Act, the sales in this instance would be nontaxable. We may quickly trace such sales through the Act. The sales (1) are taxable as sales of tangible personal property under Section 3, and (2) are exempt from taxation as "food products" under Section 10-III, clauses (a) and (b). They are neither meals nor are they furnished for consumption at or from the facilities listed under clause (c). Disposable straws, spoons or containers do not have the permanence we associate with "trays, glasses, dishes or other tableware." A paper napkin about a "hot dog" was held under a like statute not to be "tableware." The same principle applies to the disposable container and spoon. *Treasure Island Catering Co.* v. *State Board of E., supra;* 47 Am. Jur. 223, Sales and Use Taxes, § 18.

The difficulty arises in that both the taxpayer and the State Tax Assessor read into clause (d) not merely a presumption of taxability, but the creation of a new class of

taxable sale. In brief, they take the view, as did the justice in the Superior Court, that clause (d) with its "presumption" has exactly the same meaning as the flat statement in clause (d) amended, that the sale is a taxable sale, found in the 1953 amendment. The State argues that the "unless" conditions, or at least one of them, have not been satisfied and therefore the sales are taxable. The taxpayer and the justice say the "unless" conditions have been met and therefore the sales are not taxable.

In our view, *taxability* does not hinge upon the existence of the "unless" conditions or any of them. The sentence deals only with a presumption. If the conditions are not met, the sale is presumptively taxable, and no more. The presumption may, however, be overcome and the sale be nontaxable. Clause (d) is, therefore, of importance in the first instance to determine the presence of a presumption of taxability, but not the final fact of taxability.

How are the sales affected by clause (d), or the "presumption" sentence? First: Is there a presumption of taxability? Second: If so, has the presumption been overcome? We answer both questions in the affirmative.

It seems clear that the Dairy Queen products in which we are interested are "ordinarily sold for immediate consumption on or near the premises of the retailer." If frozen milk or a milk drink or a sundae are not products of this type, then we may well inquire what, if any, products the Legislature had in mind. So then, the sale of the product is *presumptively* a *taxable sale.*

The statute does not in the language of clause (d) create a new class of taxable sales. It does no more than say that a certain class of sale presumptively comes within a class of sale otherwise taxable. The sentence is closely related to the provisions for meals and drinks and food for consumption at or from facilities provided by the retailer. The pre-

sumption is created unless certain facts appear, namely, (1) sale on a "take out" or "to go" basis; (2) "actually packaged or wrapped"; and (3) "taken from the premises."

The justice erred, in our view, in finding sales in cones and other open containers were "packaged" or "wrapped" within the meaning of the Act. In ordinary usage a package is a closed container designed for carrying an article. We speak of "opening a package" or "undoing the wrapper." The primary purpose of the cone and open disposable container is not for use in transportation for long distances, but for use in the immediate consumption of the product. They take the place of dishes, glasses, and other tableware.

The choice is not, as the taxpayer would have it, between ice cream in a dish or in a package. There is a third choice —ice cream in a disposable open, and in the case of the cone, edible, container.

The cases cited in the decision of the justice do not, in our view, sustain his position. In both *Mayo* v. *Ar-Tik-Systems, Inc.*, 62 So. (2nd) 408 (Fla. 1953) and *Linnenkamp* v. *Linn*, 51 N. W. (2nd) 393 (Iowa 1952), the issue was whether the cone and open cup were packages under statutes designed to require identification of iced milk products. The point was identification of product, not type of sale for purposes of a sales tax. In *Mexican Petroleum Corp.* v. *South Portland*, 121 Me. 128, 115 A. 900 (1922), the original package in which oil was imported, namely, the oil tanker, was held broken by transfer into tanks on shore. As in the identification cases, we have here a special problem of packaging in no way necessarily related to packaging under a sales tax.

The justice also found the sales were on "the basis of takeout" and hence were "taken from the premises." "Premises" under the Act means at least the area under control of the retailer on which the sale is made. In this in-

stance the premises of the "Dairy Queen" establishment included the house, the lot on which it stood, and the adjoining parking lot. *Cumberland Amusement Corp.* v. *Johnson*, 150 Me. 304. (*Drive-in Theatre* case.)

The justice may have found, although this is not entirely clear, that consumption of the Dairy Queen products on the premises was insignificant in comparison with the total sales, and hence fairly all sales were "take out" and taken from the premises. Under the Act (Section 30), we consider the decision of fact on this point is final.

The presumption of taxability of the sales remains alive, therefore, for the reason that the sales were not "packaged" or "wrapped." One of the three "unless" conditions was not satisfied, and hence the taxpayer must meet the presumption that the sales were taxable.

We conclude the presumption was overcome by the taxpayer. He proved beyond any doubt, let alone simply overcoming an adverse presumption, that he did not provide tables, trays, or other facilities, and that the sales were not "meals." Thus, the sales were not taxable under clauses (a), (b), and (c) of the Act. The "presumption" sentence, clause (d), cannot breathe the life of taxability into a sale otherwise proven not taxable. The presumption was here destroyed, and the sales were not taxable. The decision of the justice on this point so holding is therefore upheld, but not for the reasons given.

The order for a rebate of taxes paid to the State presents a different problem. With the abatement of the tax demanded under the deficiency assessment, any legal ground for collection of tax from the taxpayer disappears. We are forced to the conclusion, however, that the Superior Court had no jurisdiction to entertain an appeal from a refusal of the State Tax Assessor to rebate payments made, as in this case.

The statute in Section 16 read at the time of the appeal:

> **"Sec. 16. Overpayment; refunds.** If the assessor determines that any tax or interest has been paid more than once, or has been erroneously or illegally collected or computed, the assessor shall certify to the state controller the amount collected in excess of what was legally due, from whom it was collected, or by whom paid, and the same shall be credited by the assessor on any taxes then due from the retailer under this chapter, and the balance shall be refunded to the retailer or user, or his successors, administrators, executors or assigns, but no such credit or refund shall be allowed after 3 years from the date of overpayment. The assessor shall also have the right to cancel or abate any tax which has been illegally levied."

Amendments to Section 16 in P. L., 1953, c. 72, are not material.

Under Section 16 *supra,* there is no provision for a petition by the taxpayer to the State Tax Assessor, or for an appeal from an adverse decision upon a claim for refund of taxes paid. We find in Section 30 that an appeal is given to "any taxpayer aggrieved by the decision upon such petition," and in Section 29 that the "petition" is a "petition for reconsideration of assessment." Nothing is said either about a petition by the taxpayer for a refund on account of overpayment, or about an appeal from a decision upon such a petition. The only other provision for appeal under Section 30 is in Section 7, relating to revocation of voluntary registration. The Act does not grant authority to the court to order the State Tax Assessor to certify to the state controller an amount to be credited or refunded. The entry will be

> *Exceptions overruled as to that part of the decree abating the tax demanded under the deficiency assessment.*

Exceptions sustained as to that part of the decree rebating sales taxes paid.

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

CUMBERLAND AMUSEMENT CORP.
vs.
ERNEST H. JOHNSON, STATE TAX ASSESSOR

Cumberland. Opinion, November 24, 1954.

Sales Tax. Appeal.
Drive-in Theatres. Food Products.
Exemptions.

The "reasons for appeal" required by Sec. 30 of the Sales Tax Law must be filed prior to the reporting of a case to the Law Court since such "reasons" are essential to a determination of the legal questions involved.

The record in a case entered before the Law Court cannot be corrected by the parties.

Whether jurisdiction depends upon the timely filing of "reasons for appeal" and "affidavit" under Sec. 30 is not decided.

Ice cream in small covered cups, chocolate coated ice cream bars, hot dogs in individual rolls, napkins, or small cardboard open top trays, popcorn in boxes, coffee in individual cups sold at the drive-in for consumption upon the theatre premises are taxable under the 1953 Amendment. (P. L., 1953, Chap. 146, Sec. 8, effective August 9, 1953.)

Food products sold for consumption upon the premises of a drive-in theatre are plainly "food products ordinarily sold for immediate consumption on or near the premises within the meaning of Sec. 10 (d) and (d) amended.

ON REPORT.

This case is before the Law Court upon report from the Superior Court. The case arose upon appeal from the refusal of the State Tax Assessor to abate Sales Taxes.

Report discharged. Case remanded to Superior Court.

Henry Steinfeld, for plaintiff.

Boyd Bailey,
Miles Frye, Asst. Attorneys General, for State.

SITTING: WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, JJ., THAXTER, A.R.J. FELLOWS, C. J., and TAPLEY, J., did not sit.

WILLIAMSON, J. On report upon an agreed statement of facts. This is an appeal from the refusal of the State Tax Assessor to abate a sales tax assessed against the taxpayer, the operator of a "drive-in" theatre. References to the statute are, unless otherwise noted, to "Sales and Use Tax Law." R. S., c. 14-A (1944), as amended. The sales were made during the months from May through October 1953, and the taxpayer neither reported nor paid a sales tax thereon.

The principal business of the taxpayer is "to run, operate, conduct, and manage a drive-in theatre. . . . In conjunction with and while exhibiting . . . motion pictures, the (taxpayer) maintains a refreshment booth . . . located on the theatre grounds . . ."

The sales consisted of the following: ". . . ice cream in individual portions enclosed in small cups with covers thereon; or in the form of chocolate coated ice cream bars; hot dogs, so-called, placed in individual rolls, wrapped in a napkin, and placed in a small cardboard, open top, tray; popcorn in boxes; soft drinks in individual bottles; and coffee in individual cups." They are ". . . usually taken by the

customer for consumption to the motor vehicle in which he sits while viewing the motion picture."

The controlling portion of the Act is Section 10-III, as follows:

(a) " 'Food products' also shall not include meals served on or off the premises of the retailer; or drinks or food, furnished, prepared, or served for consumption at tables, chairs or counters, or from trays, glasses, dishes or other tableware provided by the retailer."

(b) "~~It shall be presumed that the~~ **The** sale of food products ordinarily sold for immediate consumption on or near the ~~premises~~ **location** of the retailer is a taxable sale unless such products are sold on a 'take out' or 'to go' order, and are actually packaged or wrapped and taken from the premises."

(b) amended

By amendment effective August 8, 1953, the words indicated were deleted, and the words emphasized added. P. L., 1953, c. 146, § 8. The letters on the margin are added by us for convenience in reference.

The report must be discharged and the case remanded to the Superior Court on two grounds: First, that the reasons of appeal are not properly before us, and second, that the agreed statement contains "but a partial statement of the facts essential to determination." *State* v. *Corriveau,* 131 Me. 79, 85, 159 A. 327 (1932).

First: The taxpayer's appeal was taken to the April term 1954 of the Superior Court. At that term the case was reported to us by the presiding justice for final decision. It was entered upon the docket of the Law Court at our May term.

In vacation of the June term 1954 of the Superior Court an affidavit with reasons of appeal was filed, with service acknowledged, and made a part of the record.

The statute in Section 30 reads:

> "The appellant shall, on or before the 3rd day of the term to which such appeal is taken, file an affidavit stating his reasons of appeal and serve a copy thereof on the assessor, and in the hearing of the appeal shall be confined to the reasons of appeal set forth in such affidavit."

It is not necessary for us to determine whether the statutory affidavit may be filed late by agreement of the court and the parties. We do not here consider whether jurisdiction turns upon the timely filing and service. The reasons of appeal at the latest must be filed before the presiding justice reports the case. Otherwise he cannot know the legal questions involved, and so cannot determine whether there is good warrant for the report. Further, the record in a case entered in the Law Court cannot be corrected by the parties. *Powers* v. *Rosenbloom,* 143 Me. 408, 59 A. (2nd) 844 (1948).

So then, the report must be discharged to enable the Superior Court to make such corrections in the record as may be deemed necessary or proper.

Second: The parties seek a decision on the merits. It is clear from the record that in reporting the case the presiding justice and the parties had fully in mind the issues raised before us. The failure to file the affidavit was through inadvertence, and neither the presiding justice nor the parties have been misled thereby.

Accordingly, we are prepared to consider the case on the merits, as if the affidavit with reasons of appeal had been duly filed and served. The result is not changed. On the merits the report must be discharged.

The sales in question fall into three classes for purposes of taxation. The record does not show the volume of sales in each class, and since one of the classes is nontaxable, we cannot determine the sales tax properly due the State. (1)

". . . food products (that is, non-taxable food products) shall not include . . . soft drinks . . ." Section 10-III. The sales of soft drinks are taxable. (2) Sales of the other products in the period ending August 8, 1953 under clause (b).

The products sold, except the soft drinks, are for purposes of both clauses (d) and (d) amended, plainly "food products ordinarily sold for immediate consumption on or near the premises (or location) of the retailer. . . ." *Fortin* v. *Johnson,* 150 Me. 294 (*Dairy Queen* case).

The presumption of taxability under clause (b) was overcome. Under the *Dairy Queen* case *supra,* the sales for this period are nontaxable. (3) Sales of the other products for the period after August 8, 1953 under clause (b) amended. With the amendment of 1953 sales presumptively taxable became in fact taxable. A new class of taxable sale was thereby created, unless the three conditions, previously bearing only upon the presumption, appeared; namely, the "take out" or "to go" order, "actually p a c k a g e d or wrapped," and "taken from the premises."

The grounds of the "drive-in" theatre were in the possession and control of the taxpayer. As a part of the business of the theatre, the taxpayer maintained the refreshment booth from which the sales were made. "Premises" in this instance included the theatre grounds. The products were there consumed and were not "taken from the premises."

Since one of the three conditions vital to an exemption from taxation under clause (b) amended was not established, it is unnecessary to consider the other "unless" conditions.

Three sales tax cases have come to our attention involving the meaning of "premises" in connection with the consumption of food products.

The California court has held that "premises" under a statute taxing sales for consumption "on the premises" were

restricted to the vendor's booths and did not include other parts of the exposition grounds not subject to the vendor's control. *Treasure Island Catering Co.* v. *State Board of E.*, 120 P. (2nd) 1 (Cal. 1941).

In Ohio under a constitutional prohibition against a sales tax on "food for human consumption off the premises where sold," sales of milk from vending machines within an industrial plant for consumption within the plant, and sales of food and refreshments from booths and by itinerant vendors in the grandstand of a stadium for consumption wherever the purchasers might wish, have been held nontaxable. *Castleberry* v. *Evatt*, 147 Ohio St. 30, 167 A. L. R. 198, 67 N. E. (2nd) 861 (1946); *Cleveland Concession Co.* v. *Peck*, 159 Ohio St. 480, 112 N. E. (2nd) 529 (1953).

In each of the cases above the lack of control by the vendor of the area where the products were consumed was of decisive importance. In the present case, on the contrary, we have the significant facts of possession and control by the taxpayer.

Thus, with one "unless" condition not established, the sales by the taxpayer since August 8, 1953 are taxable. Until we have evidence of the volume of either the taxable or nontaxable sales, it will be impossible to assess the proper tax.

The entry will be

Report discharged.

Case remanded to Superior Court.

STATE OF MAINE
vs.
ANTHONY CASALE

Cumberland. Opinion, December 1, 1954.

New Trial. Evidence. Recantation of Witness. Lie Detectors.

A respondent cannot complain because as a result of trial strategy he was unsuccessful in submitting his case to the jury solely upon evidence produced by the State.

In order to justify a new trial the court must be satisfied that a state witness was not telling the truth when testifying against the respondent and that such recantation has the stamp of truth.

Testimony concerning the falsity of earlier testimony at a criminal trial given before a Justice of the Superior Court where no process or proceeding is pending and the State is not represented is at best to be treated as an admission by the witness that she testified falsely.

Lie detector tests have been universally rejected by courts as evidence to be used in trial courts.

ON MOTION FOR NEW TRIAL.

This is a motion before the Law Court for new trial on the grounds of newly discovered evidence. Motion overruled.

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

Stanley L. Bird, for defendant.

SITTING: WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, JJ. THAXTER, A.R.J., does not concur. FELLOWS, C. J., and TAPLEY, J., did not sit.

BELIVEAU, J. On motion for new trial. The respondent was indicted at the September 1951 Term of the Superior

Court for Cumberland County on a charge of transporting one Marilyn Sargent "with intent and purpose to induce and entice the said female to become a prostitute."

The respondent was put on trial at the January Term 1952 and convicted. Marilyn Sargent Morris testified for the State that on January 3 or 4, 1951, she was transported by the respondent to Melody Ranch at Old Orchard to a house of prostitution and there held a prisoner. Until she escaped she was engaged in prostitution with men brought to her room by the operator of the establishment. The case was submitted to the jury on the State's evidence and no defense offered. Several exceptions were taken during the trial.

At the same term of court a motion for a new trial on the grounds of newly discovered evidence was filed by the respondent. Testimony on this motion was taken at Portland April 28, 1952. The exceptions and motion for a new trial were argued before this court and both overruled. *State* v. *Casale,* 148 Me. 312, 92A Sec. Series 718.

The court in that opinion said:

> "the tests to be applied to this motion for a new trial, on grounds of newly discovered evidence are: (1) that the evidence is such as will probably change the result if a new trial is granted. (2) that it has been discovered since the trial, (3) that it could not have been discovered before the trial by the exercise of due diligence, (4) that it is material to the issue, and (5) that it is not merely cumulative or impeaching, unless it is clear that such impeachment would have resulted in a different verdict."

The court discussed, in detail, evidence offered in support of the motion and decided that, first, it did not deny the charge in the indictment, and second, that much of the evidence, if not all of it, would be admissible only within the discretion of a presiding justice and that this evidence was

known to the respondent before the trial, or could have been found by the exercise of reasonable diligence.

It was further ruled that no injustice was done at the trial and no injustice would be done by the denial of the motion for a new trial.

Another motion for a new trial on grounds of newly discovered evidence was filed February 10, 1954. Testimony in support of this motion was taken at Portland on March 29, 30, 31, 1954, again on July 12 and 13 of the same year, and is now before this court for decision.

Much of the evidence heard on this last motion was largely repetition of the old script with additional actors. It was cumulative to that given on the first motion for a new trial.

Our court in *State* v. *Casale, supra,* in discussing similar evidence ruled it did not stand the legal tests applicable. This ruling applies with equal force to the evidence taken on this motion, which for the most part, has for its purpose an attempt to furnish an alibi for the respondent. Other testimony, heard on this motion for a new trial, other than that of Morris and his wife was inadmissible and immaterial.

Tony Casale, the respondent, in his testimony on first motion for a new trial, testified he went to Boston on December 31, 1950 and remained there until he returned to Maine, January 5, 1951. He gave then as his reason for not providing witnesses at the trial, "I didn't bother about it. It was none of my business. I thought maybe the State would not prosecute." He testified he did not offer himself as a witness on the advice of counsel.

On the pending motion, he gave as a reason, "I thought the State would be fair enough to bring their witnesses forward."

It is well known to those familiar with trial work that trial strategy is usually discussed and planned. It goes with-

out saying that much discussion was had between counsel, as to strategy to be followed in the trial, and between counsel and the respondent. It was decided by them that they would offer no testimony in defense and would submit the case to the jury on the evidence produced by the State. If that is so, then the respondent will not be granted his motion for a new trial, so that he may have an opportunity to do now what he should have done at his trial. He cannot complain that the strategy was not successful.

In order for this court to grant the motion it must be satisfied from all the evidence that Marilyn Sargent Morris was not telling the truth when she testified against the respondent in January 1952 and that the recantation has the stamp of truth.

It would appear from the record that she first gave this information to Captain Edward M. Kochian, of the Portland Police, at her home in the spring of 1951. Captain Kochian called there on another matter and while at the house, the husband requested she tell the Captain the whole story about the Casale affair and she is quoted by the Captain as saying, "No, I don't want to go through that. I don't want to repeat anything that went on. I want to forget the whole thing." The husband repeated his request and she finally told Kochian about the episode. As a result she went to the office of the County Attorney the next day, repeated to that official, with others present, what she had told Captain Kochian, the night before and gave a written and signed statement to that effect.

Nothing else was done until she appeared before the Grand Jury in Portland in September 1951, at which term the Grand Jury returned the indictment on which Casale was tried and convicted. She appeared before the Grand Jury at the November 1951 Term of the Superior Court at Alfred and gave the same testimony there. She again gave

like testimony at the trial of the respondent at the January 1952 Term in Portland, as before stated.

The cross-examination of Mrs. Morris, at the respondent's trial, was relentless and gruelling and every device of the cross-examiner was tried to trip the witness. She accused the cross-examiner of "bellowing" at her and gave that as her reason for crying during some of the cross-examination.

It is probably true that the jury, after listening to this kind of cross-examination, was satisfied that Mrs. Morris was telling the truth. As is sometimes the case, the cross-examination, as it appears from the cold record alone, served to emphasize, elaborate and give in greater detail the events involved in the transportation of Mrs. Morris to Melody Ranch. It shows no contradiction and would seem, if anything, to make her testimony more certain, convincing and effective.

The record discloses that Mrs. Morris' direct and redirect testimony covers 16 pages, while the cross-examination and recross covers 73 pages.

Mrs. Morris' testimony, given under oath, prior to September 25, 1953, covering the several occasions she testified, seems consistent.

No hint of any recantation or change in testimony is suggested until sometime after new counsel employed by the respondent had completed his investigation and not until after several interviews with Morris and his wife.

It is admitted by counsel for the respondent, that he was employed in June 1953; that he made a lengthy investigation, which was completed about September 25, 1953, after which time he called on Marilyn Sargent Morris in Lewiston. There he talked with Mr. and Mrs. Morris and told them about the results of his investigation. Apparently, on

that visit, the conversation was between counsel and Morris, the husband. Counsel attempted to convince the husband that his wife had not told the truth when she testified. He went over with Morris, piece by piece, the alleged evidence discovered in Boston but the husband would not be convinced and the suggestion was made that the wife had lied to her husband in order that he might believe she had not gone to Melody Ranch of her own accord. Counsel came back four or five days later and attempted, as he had before, to convince the husband that his wife had lied to him and had done other things which the husband did not know about. After this had been going on for some time, and apparently the husband had not yet been convinced, sexy pictures were mentioned. Morris became angry. His wife ran into the bedroom and he after her. This was the occasion, as testified later by the wife, that she was choked by the husband. He came out of the bedroom and informed counsel his wife had been lying, that he would talk to her and come back in a few days.

The husband came to the office of the attorney for *Casale* in Waterville on March 16, 1954 and inquired if something could not be done to straighten out the case and avoid the necessity of his wife's or his presence at Portland on the 29th of March.

At the same interview the husband suggested the payment, to him, of eight hundred dollars by counsel so they could leave town. Counsel says as to that, "I didn't say yes or I didn't say no."

Within a day or two after this conversation, Morris called at counsel's office in Waterville with an itemized account of these expenses, in the neighborhood of $1200. Counsel knew Morris was coming to his office with the statement and before this meeting withdrew from a bank in Waterville the sum of $1100. When Morris entered his office, $1000 of this money was in plain sight and as Morris entered the office

counsel testified, "I was slowly counting it out as he came into the room." Counsel stated the reason for this display of money was to induce the husband to confess his part in this affair. If such a confession was made, according to counsel, then he planned to give him a manila envelope, made up of dummy packages of newspaper money. Counsel readily admitted there was no question but that Morris dominated his wife absolutely, and that the money on the desk and in full view of Morris was to "whet his appetite" and keep him "on the hook."

The husband again came to the attorney's office on the 18th day of March, presumably after his wife had been summoned to appear at a hearing on March 29. At this conference he wanted something done so she would not again have to testify in court. He suggested that a statement made by his wife, before an attorney, would be sufficient. Counsel advised him to go to a reputable lawyer and have such a statement properly prepared. Counsel was informed that Morris had called an attorney on Saturday morning the twentieth, so that such a statement might be prepared. Counsel phoned this attorney about 11:30 that morning and was told he could not handle the matter. Morris and his wife then went to the office of another attorney to prepare such a statement. Counsel called this last attorney's office at about twelve o'clock noon that day and was informed it would take about an hour to prepare the statement and asked him to call back about one o'clock. Such a call was made and the statement read to counsel over the telephone. Counsel was not satisfied and asked that Mr. and Mrs. Morris be recalled for a more detailed statement. Another statement was obtained and read to counsel over the telephone. This apparently was satisfactory.

Marilyn Sargent, who testified for the State at the trial of the respondent, was the first witness for the petitioner on the pending motion. On direct examination she testified that

Anthony Casale did not take her to Melody Ranch on January 2, 1951 and that she saw the respondent for the first time, two days later, or January 4th of the same year. She admitted on cross-examination that she testified before the Grand Jury at Alfred, York County, at the November 1951 Term that she was taken to Melody Ranch at Old Orchard, by the respondent, as alleged; that she gave the same testimony at the respondent's trial in Portland at the January 1952 Term, and on December 3, 1953 before the Governor and Council on the respondent's petition for a pardon. She admitted making the same statement or accusation in November 1953 in the presence of several law-enforcement officials. Again, on cross-examination, she admitted that before the Governor and Council at the pardon hearing on December 3, 1953, she told of having been threatened by the attorney for Casale and gave as another reason for changing her testimony on October 2 before a Justice of the Superior Court, the physical abuse by her husband.

There was introduced, at this hearing, a report of testimony by this woman before this justice at Auburn, October 2, 1953, when she testified Anthony Casale, the respondent, did not transport her to Melody Ranch from Portland, as testified by her, under oath, on several prior occasions.

At the time the testimony was taken before the justice there was no process or proceeding pending before that court and this presumably was done at the request of counsel for the respondent and for his accommodation. The State was not given the opportunity to take any part in this so-called hearing. At best it can only be treated as an admission by Mrs. Morris that she testified falsely at Casale's trial.

On resumption of the hearing, July 12, 1954, after the petitioner rested, the State called Morris and his wife. She repudiated her testimony exonerating Casale and again testified that he had transported her to Melody Ranch, as

charged by the State. She gave as a reason for testifying otherwise on two or three prior occasions that counsel informed them he was going to reopen the Casale case and to avoid a lot of much bad publicity and discomfort "that the best thing for us would be to make a statement in front of a judge that Mr. Casale did not take me to Melody Ranch."

And again she stated,

> "For three years I have lived a life of Hell. I have been bothered continuously by F.B.I. men, private detectives, State Police, State investigators. We have had to move; my husband has lost jobs; I have lost friends; I had a premature baby because of it; I haven't been well because of it; and I was sick and tired of the whole business and wanted to get it over with; and we thought we had found an easy way out; and thinking that the easy way was the best way, I did what I did, but I can see it was wrong, — it was the wrong thing to do, because he did take me to Melody Ranch."

At the time counsel was retained by Casale, there was deposited in a Portland bank, and available to him, the sum of $10,000 which was subject to his order when authorized by defendant's mother.

Money was paid Morris by counsel but there is some controversy as to how much. Morris testified he received several sums of money from counsel—in installments of $50, $17, $20, and $50 when his wife was arrested on a perjury warrant. Counsel testified he paid Morris no more than $60 or $65. In addition to that it is admitted counsel paid the sum of $250 for services in preparing the affidavit, which purported to exonerate Casale, and for the attorney's appearance at the March hearing, on this motion, as counsel for Mrs. Morris.

Morris was an unsavory character and in this situation apparently saw an opportunity to secure for himself some of the money available to counsel for the purpose of secur-

ing Casale's freedom, and it requires little imagination to picture the pressure which Morris exerted on his wife to help Casale.

Counsel on cross-examination testified Morris had a very definite impression he was to be paid some money by counsel and not only did he, counsel, do nothing to change that belief but from the testimony one would gather that this impression on the part of Morris was encouraged. Counsel attempts to justify this conduct as being in his opinion proper procedure in order to arrive at the "truth."

While counsel may have been motivated by the very best of intentions, it must at all times be borne in mind that his employment was to secure Casale's freedom with ample money available to bring about that result.

Unfortunately it has happened, in some cases, that witnesses have been offered money or other inducements to testify to other than the truth, but we are not aware of any situation where witnesses have been paid or offered money to testify truthfully.

We cannot and do not approve the tactics or procedure resorted to by counsel in this case insofar as it concerns his relations with Morris and his wife.

On March 29, 1954, Mrs. Morris voluntarily submitted to a lie detector test conducted by Arthur W. Drew, Jr. This test is, in fact, a series of tests conducted by the examiner. When completed, the results are studied by him, analyzed and evaluated. From that study he then reaches a conclusion.

Such tests have been the subject of much judicial discussion with the result that they have been universally rejected by the courts as evidence to be used in the trial courts.

The Nebraska Supreme Court passing upon this question, cited many authorities in support of its ruling that such

tests are not admissible, and has this to say, after a lengthy discussion of the problem:

> "It is apparent from the foregoing authorities that the scientific principle involved in the use of such polygraph has not yet gone beyond the experimental and reached the demonstrable stage, and that it has not yet received general scientific acceptance. The experimenting psychologists themselves admit that a wholly accurate test is yet to be perfected."

Boeche v. *State,* 151 Neb., 368, 37 N. W. (2nd) at Page 597.

The Supreme Court of Florida said that the use of such a test

> ". . . . . resulted, in effect, in the substitution of a mechanical device, without fair opportunity for cross-examination, for the time-tested, time-tried, and time-honored discretion of the judgment of a jury as to matters of credibility."

Kaminski v. *State,* 63 So. (2nd) (Fla.) 339 at 341.

We agree with what seems to be the universal opinion of courts called upon to pass upon this question, and rule that such evidence is not admissible.

We are not satisfied that Mrs. Morris committed perjury or falsified her testimony before the several Grand Juries, when single, and at Casale's trial, after her marriage to Morris. There is no testimony in the case to warrant counsel's argument that her purpose was to secure money from Casale. As a matter of fact, from the record, it appears that her story was not changed until after several interviews with counsel, beginning September 1953, and it is probably true that the so-called recantation was made partly for the reasons she gave in her testimony, quoted earlier in this opinion.

Our court has the following to say on recantations:

> " 'It cannot be said as a matter of law that a new trial should be granted whenever an important witness against the defendant shall make an affidavit that he committed perjury in his testimony. If that were so, justice might be defeated in many grave cases.' In a similar vein the New York Court in People v. Shilitano, 218 N.Y., 169, 180, said in substance; Recantation on the part of a witness does not necessarily entitle a respondent to a new trial, otherwise the power to give a convicted person a new trial would rest with the witnesses who testified against him.
>
> Other courts have also recognized the great danger of accepting without rigid scrutiny this kind of evidence, or recantation of testimony given at the trial as sufficient ground for granting a new trial in criminal cases. Lucia v. State, 77 Vt., 279; State v. Blanchard, 88 Minn., 82; People v. McGuire, 2 Hun., 269."

State v. *Dodge,* 124 Me. 249.

We find the alleged recantation by Mrs. Morris was made because of improper pressure, promises, threats, and in addition to that, actual violence by Morris, the husband, and is of no value. No injustice will be done by the denial of this motion.

Motion overruled.

MURIEL E. DREW
vs.
ALTON T. MAXIM

Cumberland. Opinion, December 6, 1954.

Brokers. Contracts. Exceptions. Pleading. Damages.

Where a case is heard by a justice without a jury with the right to except as to matters of law reserved and the justice gives judgment without specific findings it must be assumed he found for the prevailing party upon all issues of fact necessarily involved. It is only when he finds without evidence or contrary to the only conclusion which can be drawn therefrom is there error of law.

Whether a real estate prospect is assigned exclusively to a broker under an oral split-fee contract is a question of fact.

Where a broker seeks damages for breach of a split-fee contract with another broker (and not recovery of a commission allegedly earned) it is unnecessary to allege and prove that plaintiff sold the property or was the procuring cause of said sale.

The amount of damages is not a fact to be alleged other than in general terms.

ON EXCEPTIONS.

This is an action for breach of contract before the Law Court upon defendant's exceptions. Exceptions overruled.

Childs & McKinley, for plaintiff.

Clifford E. McGlauflin, for defendant.

SITTING: WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, JJ., THAXTER, A.R.J. FELLOWS, C.J., and TAPLEY, J., did not sit.

WILLIAMSON, J. On exceptions. In this action between two licensed real estate agents the plaintiff seeks to recover for breach of an agreement for the equal division of commis-

sions. The case was heard by a Justice of the Superior Court without a jury and with reservation of the right to except as to matters of law. The justice in giving judgment for the plaintiff in the sum of $437.50, or one-half of the commission received by the defendant, made no specific findings of fact.

We briefly set forth significant facts which the justice could have found under the rule stated by Justice (later Chief Justice) Sturgis in *Sanfacon* v. *Gagnon,* 132 Me. 111, 113, 167 A. 695 (1933):

> "Inasmuch as the presiding Justice made no specific findings of fact, it must be assumed that he found for the defendants upon all issues of fact necessarily involved. *Chabot & Richard Co.* v. *Chabot,* 109 Me., 403, 405. He is the exclusive judge of the credibility of witnesses and the weight of evidence, and only when he finds facts without evidence or contrary to the only conclusion which may be drawn from the evidence is there any error of law. *Weeks* v. *Hickey,* 129 Me., 339; *Bond* v. *Bond,* 127 Me., 117, 129; *Pratt* v. *Dunham,* 127 Me., 1; *Ayer* v. *Harris,* 125 Me., 249; *Chabot & Richard Co.* v. *Chabot, supra.*"

In January 1952 "it was agreed that I (the plaintiff) would work for (the defendant) as a broker, or with him, and any sales I made, the commission would be split fifty-fifty, and out of that he paid the office expenses and advertising, telephone, and so forth." The plaintiff paid "just my transportation and incidentals."

At certain times in the office the plaintiff had the duty "to take the calls coming in on advertising and give the necessary information. . . ." A prospect file was maintained by the defendant. If the caller's name did not appear in the file, a card was prepared and the new prospect assigned exclusively to the plaintiff.

In April 1952, a new prospect talked with the plaintiff about the purchase of a house for her uncle. A card was pre-

pared and filed in the prospect file, showing the assignment of the prospect to the plaintiff.

In October 1953, on approaching the new prospect about a certain property recently listed, the plaintiff learned that the property was being purchased through defendant's office through another salesman. The defendant said to the plaintiff "there was nothing he would do about it," and "that he didn't feel he should take the sale away from another broker and give it to me."

The action for breach of contract followed. The defendant denied that under the arrangement with the plaintiff prospects were exclusively assigned to her. The issue of fact on this vital point was decided in favor of the plaintiff and there it must rest, under the rule in the *Sanfacon* case, *supra.*

FIRST AND SECOND EXCEPTIONS:

> "First. That the alleged contract was a unilateral contract under which the plaintiff was under no obligation to do anything but under which if she became the procuring cause of the sale, she was to receive one-half of the commission so *earned,* but since she never even called the buyer's attention to the property purchased, never showed it to the purchaser, and had no part in the sale, she cannot legally recover a commission for her services.
>
> "Second. That since a broker can never receive a commission on a sale in which he was not the procuring cause, the plaintiff cannot legally recover a commission for services which she did not render."

The defendant fails to consider that the court necessarily found that he had prevented the plaintiff from making the sale.

The statements of the defendant in the exceptions are sound, but not applicable. The plaintiff does not seek a com-

mission for a sale completed by her, but damages for breach of a contract under which so far as defendant was concerned she had an exclusive agency to make the sale. The exceptions are overruled.

THIRD EXCEPTION:

> "That the plaintiff's writ sets forth no facts from which it is possible for any court or jury to determine amount of commission, even had such commission been earned, and therefore she cannot legally recover, since proof without allegation is futile."

The declaration, in our view, is not defective. After setting forth an agreement with the defendant, the plaintiff avers:

> "she faithfully performed all of her obligations under said agreement and that the Defendant, unmindful and with disregard for the Plaintiff's rights under said agreement, did violate said agreement and that the Plaintiff became and was entitled to one half the commission earned on said sale of the Ernest Lewis residence at 54 Richardson Street in said Portland which said prospective buyer has purchased through the Defendant's office. All to the damage to the said Plaintiff in the sum of One thousand dollars ($1,000.)"

The statement about the commission is not, as defendant would have it, a claim that plaintiff *earned* the commission by a sale, but as we have before indicated, a claim that by interference plaintiff was *prevented* from making the sale and earning the agreed commission. The amount of the damages was a fact to be found by the court. It was not a fact to be alleged, other than in general terms.

There is no suggestion in the record that the plaintiff would have incurred expenses of any consequence had she made the sale. It follows that the commission of $437.50

was a proper measure of loss caused by the defendant. 25 C. J. S. 575, Damages, § 78; 15 Am. Jur. 445, Damages, § 45.

FOURTH EXCEPTION:

> "That the plaintiff never properly alleged or proved an exclusive agency, and stated no time limit. Had she done so, her remedy would have been a suit for damages for breach of contract, and not a suit for commission, and that therefore she cannot legally recover in this suit."

We are not concerned with contracts for the sale of real estate and the time limitations therein. This is neither more nor less than an agreement between two real estate agents to divide a commission. See 12 C. J. S. 176, Brokers, § 81; 9 C. J. 583, Brokers, §§ 82, 83. A real estate agent may, of course, employ sub-agents, or brokers, to sell real estate in his name, either with or without the exclusive assignment of prospective customers. The terms of the particular arrangement have been determined by the fact finder.

We have stated above our view that this is an action for damages for breach of contract and not a suit for a commission as such. Exception overruled. The entry will be

Exceptions overruled.

WILMER L. LYLE
vs.
BANGOR & AROOSTOOK RAILROAD CO.

Penobscot. Opinion, December 6, 1954.

Negligence. Workmen's Compensation. Contributory Negligence. Admissions. Non-suit.

No negligence can be predicated on the furnishing of kerosene for the purposes of filling lanterns, flares, and for lighting fires.

Even though the defense that the employee was negligent is not available to a non-assenting employer under the Workmen's Compensation Act, where the employee's negligence is not only contributory but is the *sole proximate cause* of injury such negligence is conclusive.

A non-assenting employer has no duty to anticipate an employee's negligence.

Investigatory or settlement talk is not equivalent to an admission of liability.

It is a beneficent and desirable rule which permits an employer to pay expenses of his employee or assist the family during incapacity without thereby admitting liability or fault.

Whether payment or compromises tendered are intended as admissions of liability are preliminary questions for the court.

ON EXCEPTIONS.

This is a negligence action before the Law Court upon plaintiff's exceptions to a non-suit. Exceptions overruled.

Harry Stern, for plaintiff.

Rudman & Rudman,
Scott Brown, for defendant.

SITTING: WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ., THAXTER, A.R.J. FELLOWS, C. J., did not sit.

WEBBER, J. This matter comes before the Law Court on plaintiff's exception to an order of non-suit. Plaintiff was employed as a section hand and track man on defendant's railroad. It is properly alleged and not in dispute that defendant is a non-assenting employer of more than five workmen and that by the terms of the Workmen's Compensation Act, R. S., 1944, Chap. 26, Sec. 3, the common law defenses,

"I. That the employee was negligent;

II. That the injury was caused by the negligence of a fellow employee;

III. That the employee has assumed the risk of the injury,"

are not available to this defendant. The sole issue for determination is whether or not any negligence of the defendant was a proximate cause of injury to plaintiff. We need not consider plaintiff's reference to the possible applicability of the Federal Employers' Liability Act as the issue as to defendant's negligence would remain unchanged.

The evidence, viewed in the light most favorable to the plaintiff, discloses that plaintiff's duties embraced "all track work and keeping the car house clean, lighting fires and other things that was done in that line." The defendant maintained a small "car house" in which was stored a gasoline powered car used to transport crews over defendant's tracks, tools, kerosene, gasoline for the car and "stuff like that." Defendant maintained an "oil house" some distance from the car house where supplies of gasoline and kerosene were stored. The kerosene was used for lanterns and flares and for lighting fires. On the day in question there were two one-gallon cans of kerosene and a larger can of gasoline on the floor of the car house about six feet from the stove. Plaintiff often filled these cans and knew the contents of each.

On the day of the accident plaintiff reported for work at the car house at 6 A.M. He found a hot wood fire already

burning in the car house stove. It was a cold, rainy day. The crew waited in the car house about forty-five minutes and then left with the car for the location of work. When they left, a "very hot fire" was still burning in the stove. About 12:30 P.M. they returned to the car house. "Some of the boys" put more wood in the stove and the plaintiff "right out of a clear sky" picked up one of the cans of kerosene and doused the fire generously with it. At this moment there occurred an explosion, and flame emerged from both the bottom and the top of the stove, burning the plaintiff. No one asked or instructed him to pour the kerosene on the fire and it is obvious that the entire action transpired very quickly. The foreman was at his desk and there is no suggestion that he was observing the plaintiff or had any intimation of the way in which the plaintiff intended to use the kerosene in time to give warning, even if one was required. Plaintiff had had experience over fifteen or twenty years in using kerosene to prepare a fire in a stove, although his custom apparently had been to "put the wood on and throw kerosene on, and then light." There is no indication of any previous incident, habit or experience of pouring liberal quantities of kerosene into a stove which had very recently contained a "red hot fire."

The only allegation of negligence in plaintiff's writ is that defendant caused an explosion "by negligently, carelessly, and recklessly furnishing highly dangerous and explosive fuel for the fire in the stove." The fuel was kerosene. Kerosene is a household commodity. It may be purchased without restriction in many a grocery store, hardware shop, or filling station. The housewife burns it in the kitchen range; the sportsman uses it to light his camp fire; the "Cape Cod lighter" which stands beside many a New England fireplace depends upon it. It is less volatile than gasoline, of which we said in *Loring* v. *Railroad Co.*, 129 Me. 369 at 373: "It is used by persons of all ages and of varying intelligence and experience, and handled properly does not readily ex-

plode. This is common knowledge." No negligence of the defendant can be predicated on its furnishing kerosene for the purpose of filling lanterns and flares and for lighting fires. Improper and careless use and handling of an otherwise safe commodity may sometimes create an unnecessary hazard. "It is common knowledge that an explosion often results from pouring kerosene directly from a can upon a fire or live coals in the stove. Recognizing this fact, courts have declared such an act negligence *per se.*" *Loring* v. *Railroad Co., supra,* at page 374. Upon this evidence the inference is compelling that this is exactly what happened here, and the inevitable explosion occurred. The plaintiff's negligence, which would be immaterial here if only contributory, is conclusive against his recovery where it is the sole proximate cause of his unfortunate injury. The defendant had no duty to anticipate his negligence. It even had no duty to mark or identify the can as containing kerosene, although in any event plaintiff was not confused or deceived by an absence of marking and knew that the can contained kerosene. *Loring* v. *Railroad Co., supra.*

The plaintiff relies upon *Bubar* v. *Bernardo,* 139 Me. 82, but that case is readily distinguishable. There the employer furnished the employee with a defective hammer. We are not here dealing with any defective substance or equipment. Rather do these facts more closely resemble those in *Vining, pro ami* v. *Bridges Sons Co.,* 127 Me. 544, in which the defendant was held not liable for leaving a box containing blasting caps in plaintiff's yard where the plaintiff held the cap in his hand and applied a lighted match to it. There also plaintiff's negligence was held to be the sole proximate cause of his injury.

The evidence disclosed some conjecture and surmise that the can might have contained a mixture of gasoline and kerosene, although the only direct and positive evidence from plaintiff and his witnesses was that the can contained

straight kerosene. This suspicion in the minds of witnesses appears to have been based upon the erroneous assumption that unmixed kerosene applied liberally upon a live fire would not explode. Conjecture and surmise will not substitute for evidence and inferences may not be drawn which contravene well known physical laws. *Jordan* v. *Portland Coach Co.*, 150 Me. 149.

Plaintiff further contends that defendant has admitted liability because it is not disputed (1) that an investigator employed by defendant discussed the case with the plaintiff's attorney and did not specifically deny liability, (2) that in certain correspondence between attorneys for plaintiff and defendant liability was not specifically denied, and (3) that defendant voluntarily and without solicitation paid the hospital and medical expenses incurred by plaintiff. These contentions are obviously without merit. Mere investigatory or settlement talk is not equivalent to an admission of liability. With particular reference to the third contention, it is a beneficent and desirable rule of law which permits an employer to pay the expenses of his employee or assist the family during the employee's incapacity without thereby admitting liability or fault. The intention may well be, and often is, either to promote good employment relations, or to be charitable, or to avert undesired litigation. It was for the court to determine the preliminary question as to whether the payment or compromise tendered was intended by the defendant to be an admission of liability. This question the presiding justice resolved in favor of the defendant by ordering non-suit. To this sound exercise of his discretion, no exceptions lie. *Finn* v. *Tel. Co.*, 101 Me. 279; *Hunter* v *Totman*, 146 Me. 259.

The entry will be,

Exceptions overruled.

STATE OF MAINE
vs.
ROBERT WHEELER

Sagadahoc. Opinion, December 9, 1954.

Criminal Law. Rape. Evidence. Corroboration.

To prove rape of a female of the age of sixteen years, the State must prove beyond a reasonable doubt that respondent carnally knew the prosecutrix by force, without her consent or against her will.

It is well settled that a verdict based on the uncorroborated testimony of a complainant will not be disturbed on the mere fact of lack of corroboration.

Where corroboration is lacking to any reasonable degree, it becomes necessary to scrutinize and analyze the testimony of the prosecutrix with great care.

Where the uncorroborated narration of a rape charge by the prosecutrix is inherently improbable or incredible and does not meet the standards of common sense, exceptions to the refusal to direct a verdict for defendant will be sustained.

ON EXCEPTIONS.

This is an indictment for rape before the Law Court upon exceptions. Exceptions to the refusal to direct a verdict of not guilty sustained.

George M. Carleton, for plaintiff.

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

SITTING: WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ., THAXTER, A.R.J. FELLOWS, C.J., did not sit.

TAPLEY, J. On exceptions. The respondent was indicted for the crime of rape. The case was tried at the Oc-

tober Term, 1953 of the Superior Court for the County of Sagadahoc and State of Maine before a jury. Jury found respondent guilty. Respondent excepted to rulings as to the admissibility of evidence and to the refusal of the presiding justice to direct a verdict of not guilty at the conclusion of the testimony.

The indictment charged the respondent with rape of a female of the age of sixteen years. The act was alleged to have occurred on September 28, 1953 at Bowdoinham, Maine. The prosecutrix resided in the Town of South Freeport, Maine and on the twenty-seventh day of September, 1953 she went to the Town of Richmond where she was accustomed to spending considerable time. There is much testimony in the record relating to her activities with three boys with whom she was acquainted. It appears that during the evening of September 27th she went to ride with these boys for a distance of one or two miles from Richmond and that during this ride she was submitted to physical violence by being slapped on the face and having her arm twisted in an attempt to remove a portion of her clothing; that she was forcibly ejected from the car and later made her way back to Richmond; that following her return to Richmond she was again approached by the same boys, caused to re-enter the car and then taken to a point outside of Richmond where the car was stopped and an attempt made by one of them to rape her. During this attempt, a car passing the parked car of the boys was stopped by one of them. This car was operated by the respondent. The prosecutrix was transferred from the boys' car to that of the respondent. He drove some distance, stopped his automobile on a side road and there committed the act complained of, for which he was indicted, tried and found guilty.

The State must prove beyond a reasonable doubt that the respondent carnally knew the prosecutrix by force, without her consent or against her will. *State* v. *Flaherty,* 128 Me.

141 at page 144. The element of force and the act against her will are inconsistent with consent. It is obvious, of course, if the prosecutrix willingly consented to the act, there would be no rape.

During the course of the trial the State presented a witness in the person of one Donald Shields, a boy sixteen years of age, who testified in direct examination that he was a passenger in the back seat of the respondent's car and was present at the time of the alleged rape. The substance of his testimony was that no act of intercourse occurred between the respondent and the prosecutrix. After completion of his direct testimony there was no cross-examination by the defense. Later he was called to the stand by the State and at that time testified that his testimony in direct was false and that he so testified because he was requested and urged to do so by the respondent.

The State's case was predicated on the testimony of the prosecutrix with very little, if any, corroboration. There is no statute in Maine requiring corroboration on the part of the prosecutrix in cases of this nature and it is well settled that a verdict based on the uncorroborated testimony of a complainant will not be disturbed on the mere fact of lack of corroboration. *State* v. *Newcomb,* 146 Me. 173 at page 181. Corroboration, if there is corroboration, must come from sources other than the prosecutrix. Although corroboration is not necessary, it is well for the purpose of this case to analyze the record to determine what corroboration, if any, there is present. The cases hold that where corroboration to any reasonable degree is lacking, it becomes necessary to scrutinize and analyze the testimony of the prosecutrix with great care. Her testimony as to the acts complained of must be such they would be within the realms of probability and credibility.

75 C. J. S., Page 560, Sec. 78.

> "At common law, and in the absence of a statute requiring corroboration, it is generally held that the unsupported testimony of the prosecutrix, if not contradictory *or incredible, or inherently improbable,* if believed by the jury, is sufficient to sustain a conviction of rape - - - - - -."
>
> (Underscoring ours.)

The prosecutrix testified that soon after the alleged act occurred she complained to her mother. The mother did not appear as a witness in corroboration of the complainant. There was medical testimony resulting from the examination of the girl but this did not disclose in any way that she had been raped by the defendant.

There is evidence that the complainant suffered some injury to her jaw and she complained of a soreness in the vicinity of her ribs. This condition, according to her own testimony, resulted from the violent physical treatment that she received from the three boys. This fact is further established by the testimony of the boys. The prosecutrix furnishes the only testimony of the actual act of rape.

The testimony of the prosecutrix is of such sordid nature that a detailed account will serve no good purpose. It is suffice to say that the prosecutrix' narration of the rape is inherently improbable and incredible and does not meet the test of common sense.

Terry v. *State (Texas),* 266 S. W., page 511.

> "The question at issue in the present case is whether there was carnal knowledge of the prosecutrix by the appellant without her consent. Upon such an issue experience demonstrates that the evidence of the prosecutrix demands careful scrutiny - - - - -. The absence of visible evidence of injury to the prosecutrix by her alleged assailant or the spoiling or disarray of her garments are of probative value - - - - -."

See 44 Am. Jur., Page 968, Sec. 104. 60 A. L. R. 1131.

The testimony of Shields, where he deliberately lied at the request, as he says, of the respondent, must have inflamed the minds of the jury and prejudiced it against the respondent. It may be that the respondent is guilty of the crime of subornation of perjury but he was being tried for the crime of rape and not subornation of perjury. The State had the burden of proving each essential allegation of the indictment beyond a reasonable doubt. One of the necessary averments to be proven is that of lack of consent, and the only witness to prove it is the prosecutrix. Her testimony of the account of the rape is of such a nature that it is highly improbable and incredible that intercourse could have taken place without her consent. The lack of damage to clothing, absence of injuries and physical position of prosecutrix on the seat of the automobile all argue against "without consent."

State v. *Davis,* 116 Me. 260 at page 262.

> "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. A refusal to so instruct is a valid ground of exception."

State v. *Martin,* 134 Me. 448.

State v. *Clukey,* 147 Me. 127.

The refusal to instruct a verdict of not guilty in this case is a valid ground of exception.

This conclusion obviates the necessity of considering the other exceptions.

Exception to refusal to direct a verdict of not guilty sustained.

UNIVERSAL C. I. T. CREDIT CORP.
vs.
CLAIR H. LEWIS

Penobscot. Opinion, December 17, 1954.

Liens. Conditional Sales. Possession. Repossession. Recording

Until a Conditional Sales Agreement is properly recorded, a garageman may properly treat a conditional vendee as owner under the lien statutes.

Possession need not be retained by a garageman for preservation of his statutory lien for repairs (R. S., 1944, Chap. 164, Sec. 61 as amended by P. L., 1949, Chap. 154, and P. L., 1951, Chap. 363).

Repossession by a conditional vendor is not a "changed ownership" within the meaning of P. L., 1949, Chap. 154.

ON EXCEPTIONS.

This is an action of trover before the Law Court upon exceptions by defendant. The action was originally brought by a conditional vendor against the attaching officer in a lien action. Exceptions sustained.

M. W. Epstein,
Harry Stern, for plaintiff.

Judson A. Jude,
Clayton Eames, for defendant.

SITTING: WILLIAMSON, TIRRELL, WEBBER, TAPLEY, JJ., THAXTER, A.R.J. FELLOWS, C.J., and BELIVEAU, J., did not sit.

WILLIAMSON, J. On exceptions. The decisive issue is whether a garageman loses his statutory lien for repair of an automobile by relinquishing possession to the owner. This action of trover was brought by the conditional vendor

of the automobile against the attaching officer in a lien action brought by the garageman against the conditional vendee. The referee who heard the case with right of exceptions reserved found for the vendor and assessed damages at an agreed amount.

The conditional sale agreement was dated September 16, 1950, and recorded on January 18, 1952. Under the statute the agreement ". . . shall not be valid, except as between the original parties thereto, unless it is recorded. . . ." R. S., c. 106, § 8 (1944), as amended, P. L., 1951, c. 349. The 1953 amendment permitting recording of a memorandum was not then in effect. P. L., 1953, c. 159. "This statute is interpreted as meaning that an unrecorded conditional sales contract is not valid against the lawful claims of third persons." *Beal* v. *Universal C. I. T.*, 146 Me. 437, 440, 82 A. (2nd) 412 (1951). It follows that until the agreement was recorded, the garageman properly could treat the conditional vendee as the owner.

The garageman had a lien for labor and materials on the automobile which, to use the words of the referee, "matured December 20, 1951, and was recorded properly," in the town clerk's office on January 19, 1952. On March 19, 1952, he brought a bill in equity to enforce the lien and attached the automobile. The plaintiff admits that the garageman obtained a valid lien which he might have enforced under R. S., c. 164, §§ 61, 62 (1944) if he had retained his lien, but, says the plaintiff in argument, "it is settled law that such liens may be lost or 'dissolved' before enforcement."

On December 27, 1951, the garageman, who then had possession of the automobile, permitted the vendee to take it from the garage to Bangor to a bank for the purpose of making a loan to pay both the conditional vendor and the garageman. This was known to the vendor. The vendee also used the automobile for his own purposes. On January 7, 1952, at the request of the vendor, the garageman gave a

statement in writing that "I will not take any legal action to collect bills against (the automobile) held by (the vendee) until 1/14/52." On January 12 the vendor repossessed the automobile from the vendee.

The referee held "that while (the garageman) had a lien that when he allowed (the vendee) the possession of the car he lost it because the car was repossessed by the (vendor) under its conditional sales agreement. Although the agreement was not then recorded, as between (the vendee) and (the vendor), it was good. It became valid against (the garageman) when he gave up possession and (the vendor) took possession." The referee under this holding was apparently of the view that the lien continued while the car was in the possession of the vendee, and was not lost until repossessed by the vendor.

The reasoning of the referee is not grounded in the last clause of the lien statute ". . . said lien, however, shall be dissolved if said property has actually changed ownership prior to such filing." There was no change of ownership from the repossession by the vendor.

The lien statute, R. S., c. 164, § 61 (1944) as amended P. L., 1949, c. 154, reads as follows:

> "**Sec. 61. Liens on vehicles, aircraft or component parts thereof, and parachutes.** Whoever performs labor by himself or his employees in manufacturing or repairing the ironwork or woodwork of wagons, carts, sleighs and other vehicles, aircraft or component parts thereof, and parachutes, or so performing labor furnishes materials therefor or provides storage therefor by direction or consent of the owner thereof, shall have a lien on such vehicle, aircraft or component parts thereof, and parachutes, for his reasonable charges for said labor, and for materials used in performing said labor, and for said storage, which takes precedence of all other claims and incumbrances on said vehicles, aircraft or component parts thereof, and

> parachutes, not made to secure a similar lien, and may be enforced by attachment at any time within 90 days after such labor is performed or such materials or storage furnished and not afterwards, provided that a claim for such lien is duly filed as required in the following section; said lien, however, shall be dissolved if said property has actually changed ownership prior to such filing."

Section 62, as amended P. L., 1951, c. 363, provides for the filing of the lien claim within 30 days in the town clerk's office, or under certain circumstances in the registry of deeds or registry district.

The fourth exception to the acceptance of the report of the referee is the fourth objection to the report in slightly different language. It reads:

> "4. That the refusal of the referee to rule that (the garageman), by following the Statutes in all respects in perfecting his lien claim for labor done and materials furnished on the motor vehicle, had a lien claim on said motor vehicle which took precedence over the claim of (the vendor), is error as a matter of law."

This exception reaches the heart of the problem. First, we have seen that the vendee was properly considered to be the owner of the automobile by the garageman at all times until the recording of the conditional sales agreement on January 18, 1952. Second, admittedly the garageman followed the steps required in the statute for perfecting his lien. Third, the only point at issue is whether by giving the vendee possession, or in any event on repossession by the vendor, the garageman lost the lien.

In our view possession need not be retained by a garageman for preservation of his statutory lien. We are not concerned with a common law lien in which continued possession is required, with some exceptions for temporary use. The Legislature has provided a careful procedure for the

filing and recording of a claim. The record is as readily available as the record of a conditional sales agreement or chattel mortgage. Action must be brought by attachment within 90 days. In this manner the lien is preserved. The lien is dissolved on an actual transfer of ownership before the filing.

If continued possession is an essential fact, the statute adds little to the common law lien. It is plain that a second method—the statutory lien method—to protect garagemen and others was created by the statute. In some states we find possession is required by the statute, but not so here. The garageman did not lose his lien by returning possession to this vendee, whom he could treat as the owner. There was no actual transfer of ownership prior to the filing with the town clerk. Whatever the rights the vendor may have had against the vendee, it could retain none against the property superior to the lien originating through the vendee (or "owner" under the unrecorded conditional sales agreement).

It is unnecessary for us to pass upon the remaining exceptions. What may be the effect of a temporary relinquishment of possession upon a common law or other lien in which possession is an essential ingredient, does not touch the basic issue under our particular statute. *Drummond* v. *Griffin,* 114 Me. 120, 95 A. 506 (1915), and *Perkins* v. *Boardman,* 80 Mass. 481 (14 Gray) (1860), cited by the referee, are cases of this type. Nor need we consider further the effect of the failure to record the conditional sales agreement until after the lien had been created. The vendee was the owner insofar as the garageman was concerned until the conditional sales agreement was recorded. The lien could not be dissolved by the vendor. The statutory means for preservation and enforcement of the lien remained available to the garageman.

The entry will be

Exceptions sustained.

HAROLD A. LABBE
vs.
GERALD A. CYR
AND
KATHERINE L. CYR

Kennebec. Opinion, December 20, 1954.

Rule XVII.
New Trial. Exception. Brokers. Instructions.

Exceptions to rulings of the presiding justice pertaining to the admission of evidence and instructions to the jury are not waived by a motion for a new trial subsequently addressed to the presiding justice. In this connection there is no distinction between civil and criminal cases.

Motions should be formally addressed to the court whose action is sought. (Rule XVII of Revised Rules of the Supreme Judicial and Superior Courts).

Where the only performance by the (real estate) broker is the procuring from his seller of a written contract or option not binding upon the purchaser, the commission is not earned unless the purchase be consummated or consummation be prevented by the seller.

A party is not entitled to have a requested instruction given, even if it states the law correctly, unless it appears that it is supported by facts, that it is not misleading, that it is not already covered by the charge, and that a refusal to give it would be prejudicial.

Where an excluded question does not upon its face disclose the relevancy or competency of the evidence solicited and no offer of proof was made in support of the question, there is no showing of prejudicial error.

ON EXCEPTIONS.

This is an action of assumpsit before the Law Court upon exceptions to certain rulings of the presiding justice. Exceptions overruled.

Jerome G. Daviau, for plaintiff.

Burton G. Shiro, for defendant.

SITTING: WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ., THAXTER, A.R.J. FELLOWS, C.J., did not sit.

WEBBER, J. This was an action of assumpsit to recover a real estate broker's commission. Verdict was for the plaintiff. Exceptions are raised to certain rulings of the presiding justice.

After verdict, defendant presented a motion to the presiding justice for a new trial on the usual grounds. The written motion itself shows nothing on its face to indicate whether it was addressed to this court or to the presiding justice, but the docket entries indicate that the motion was laid before the presiding justice and that he denied it. Apart from this source of information, it would be impossible for this court to determine from the record whether the motion was intended for the presiding justice or for the Law Court. We take this opportunity to emphasize once again the importance of formally addressing motions for new trial either to the "Justice Presiding" or to the "Supreme Judicial Court sitting as a Court of Law," as is permitted by Rule XVII of the Revised Rules of the Supreme Judicial and Superior Courts (147 Me. 464). We urged the desirability of formal address to the court whose action is sought in *Carroll* v. *Carroll,* 144 Me. 171.

Plaintiff contends that defendant, having made his motion for new trial to the presiding justice, thereby waived his right to exceptions to any rulings of the court during trial. In support of this position he relies upon *Cole* v. *Bruce,* 32 Me. 512 and *Ellis* v. *Warren,* 35 Me. 125. These cases were decided in 1851 and 1852 respectively. In 1822 a Court of Common Pleas was established. P. L., 1822, Chap. CXCIII, the creating statute, provided in Sec. 5 thereof for the taking of exceptions to "any opinion, direction, or judgment of said Court of Common Pleas," and contained the following: "And thereupon all further proceedings, in such

action in said court, shall be stayed." By P. L., 1839, Chap. 373, the Court of Common Pleas was abolished and District Courts were created as a substitute. The same phrase as to stay of proceedings after exceptions taken was carried over and incorporated in the law. R. S., 1840, Chap. 97, Sec. 18 contained substantially the same phrase as applicable to proceedings in District Courts. It was this statutory phrase which governed the decision in both of the cited cases. In *Cole* v. *Bruce, supra,* the case arose in the District Court. In holding that exceptions were waived by a motion for new trial addressed to the presiding justice, the court quoted from R. S., 1840, Chap. 97, Sec. 18 the phrase applicable to stay of further proceedings. It is clear that the court treated the motion as a "further proceeding" which was not open to the moving party unless he had first waived his exceptions. *Ellis* v. *Warren, supra,* likewise up from the District Court, hinged upon the same statute. However, P. L., 1852, Chap. 246, abolished District Courts and transferred their jurisdiction to the Supreme Judicial Court at *nisi prius*. Significantly, the phrase applicable to stay of proceedings disappeared from statutory law at that time, never since to return. Moreover, the provision had never been applicable to proceedings in the Supreme Judicial Court. R. S., 1840, Chap. 96, Sec. 17 provided for the taking of exceptions in that court and no such phrase appears.

The reasoning which underlay the decisions in these two cases is not to be confused with the reasoning employed in *State* v. *Simpson,* 113 Me. 27. In that case, involving a misdemeanor, exceptions were taken to a refusal to direct a verdict for respondent. These were deemed waived by a motion for new trial addressed to the presiding justice on the ground that exceptions and motion raised the *same question,* and as between the Law Court and the presiding justice, the respondent had elected his tribunal and was bound by the result. By dictum the court mentioned the rule in *Cole* v. *Bruce, supra,* as "well settled," but there is no sug-

gestion that the historical reason for the rule was examined and we do not feel ourselves bound by that dictum.

The rule of *Cole* v. *Bruce, supra,* was reaffirmed in an analogous situation in *State* v. *Power,* 123 Me. 223. The court made no analysis of the underlying reasons for the rule and, insofar as the *Power* case applies to the waiver of *all exceptions to rulings* by the filing of a motion for new trial addressed to the presiding justice, it is overruled.

Whenever the issue has been raised as to whether exceptions to a refusal to direct a verdict were waived by a motion to the presiding justice for a new trial, conflicting reasons have been advanced for the result reached. Sometimes the court has placed emphasis on the *finality* of the decision of the tribunal selected. Sometimes emphasis has been placed on the *identical nature* of the question submitted by exceptions and by motion. This difference in emphasis is manifest in *State* v. *Bobb,* 138 Me. 242, which involved a felony. In this case the court placed the emphasis on the *finality* of decision of the tribunal chosen, and determined that where, by virtue of the appeal permitted in felony cases, the decision of the presiding justice on motion is *not* final, the exceptions should not be deemed waived. With reference to the two methods of bringing the same issue to the attention of the appellate tribunal, (1) by exceptions to refusal to direct verdict, and (2) by motion to presiding justice for new trial and appeal, the court said: "Both are not necessary. It should not follow, however, that if there be error in perfecting the second method, it is fatal to the first." Obviously, if the court had considered itself bound by the broad rule in *Cole* v. *Bruce, supra,* it would have been compelled to decide that the mere making of the motion to the presiding justice waived any and all pending exceptions. The court mentioned the *Cole* case and the *Ellis* case in passing and called attention to the fact that the *Ellis* case was decided in 1852, since which

time appeals in felony cases had been first permitted. The court overlooked the more compelling reason for disregarding these cases, which is that the statutory change in 1852 effectively terminated their applicability. If there is validity in the concept that there is no waiver where the decision of the presiding justice is not final, as in felonies, the same reasoning might well be applied in civil cases where, by statute, one may now address a motion for new trial to the Law Court after such a motion has been denied by the presiding justice. R. S., 1944, Chap. 100, Sec. 60. Mr. Justice Hudson, dissenting in *State* v. *Bobb, supra,* as to procedural matters, emphasized that the reason for waiver which had always been relied upon in previous cases had been the *identity of the question* submitted by the two procedural methods. In his view, the adoption of the second method waived the first whether or not the result of the second procedure was final or appealable. Even if this reasoning were followed, however, it would be proper to note that exceptions to the rulings of a presiding justice upon the admission of evidence and instructions to the jury do not present *the same question* which is raised by a motion for a new trial. The problem has been perhaps further complicated by the suggestion in *Mills* v. *Richardson,* 126 Me. 244, that in civil cases a motion for new trial does not exactly overlap exceptions to a refusal to direct a verdict where an added issue of excessive damages is presented by the motion. But see *Symonds* v. *Free Street Corp.,* 135 Me. 501, in which the identity of issues was assumed.

For the purposes of this case, however, it seems only necessary to say, and we so hold, that exceptions to rulings of the presiding justice during trial pertaining to the admission of evidence and instructions to the jury are not waived by a motion for a new trial subsequently addressed to the presiding justice. There has been no sound or valid reason for a contrary view since 1852. In this connection we can see no distinction between civil and criminal cases. There

are numerous instances in which our court has considered exceptions to such rulings after motion for new trial addressed to the presiding justice. *State* v. *Friel,* 107 Me. 536; *State* v. *Albanes,* 109 Me. 199; *State* v. *Howard,* 117 Me. 69; *State* v. *Sanborn,* 120 Me. 170; *State* v. *Dodge,* 124 Me. 243; *State* v. *Carter,* 121 Me. 116; *State* v. *Morin,* 131 Me. 349; *State* v. *Dorathy,* 132 Me. 291.

The evidence discloses that defendant entered into an ordinary arrangement with plaintiff real estate broker for the sale of defendant's house. Under this contract plaintiff could earn a commission by finding a purchaser as no special conditions were attached requiring the broker actually to complete or consummate a sale. Plaintiff found a purchaser ready, able and willing to purchase on terms agreed upon by the seller as evidenced by an option in writing executed by the seller. A substantial deposit was paid by the purchaser to bind the bargain. Thereafter the seller, for personal reasons and without legal excuse, delayed for several months to execute a deed and complete the transaction. The purchaser finally wearied of unexplained delay, demanded and received return of her deposit, and abandoned the transaction. The jury very properly found for the plaintiff.

In cases involving claims for commissions by real estate brokers, the first consideration must be as to the nature of the contract between seller and broker. A familiar and ordinary type of arrangement contemplates that the broker will find a purchaser ready, able and willing to buy the property on the exact terms authorized or agreed to by the seller. Such a contract may result even where the parties make use of such words as "sale" or "to sell" or "to make a sale." *Paradis* v. *Thornton,* 141 Me. 23. Although in such a case the parties obviously have in mind a transaction of purchase and sale as an ultimate objective, the completion or consummation of a sale is not a condition precedent to the earning of a commission. *Jutras* v. *Boisvert,* 121 Me. 32. "To entitle

a broker to a commission when no sale is actually consummated, a broker employed to find a purchaser must either produce to the owner a customer who is able, ready, and willing to buy on the terms prescribed by the owner, or else take from the customer a binding contract of purchase, unless those requirements are waived by the principal's refusing to proceed after notice by the broker that he has such a contract or purchaser." *Damers* v. *Fisheries Co.*, 119 Me. 343 at 350. The duty of a broker to find a purchaser "is discharged by producing a customer ready and willing to meet the exact terms of sale proposed by his employer. If, however, he produces a customer who enters into a *mutually enforceable* contract with the owner for the purchase and sale of the real estate in question, upon terms satisfactory to the owner, the broker is entitled to his commission whether or not the customer actually carries out his contract. The principal is deemed to have accepted the contract in lieu of exact performance of the broker's contract." *MacNeill Real Estate* v. *Rines, et al.*, 144 Me. 27 at 31; *Veazie* v. *Parker*, 72 Me. 443. Cases arise, however, where the contract between seller and broker clearly contemplates that a sale must be completed or consummated as preliminary to the earning of a commission. "A broker employed to sell, as distinguished from a broker employed to find a purchaser, is not entitled to compensation until he effects a sale, or procures from his customer a binding contract of sale." *Damers* v. *Fisheries Co., supra,* at page 350. Where the *only* performance by the broker is the procuring from his seller of a written contract or option not binding upon the purchaser, the commission is not earned unless the purchase be consummated *or consummation be prevented by the seller. MacNeill Real Estate* v. *Rines, et al., supra; Hanscom* v. *Blanchard,* 117 Me. 501. (Emphasis supplied.)

These well accepted propositions of law were all fully and adequately covered by the instructions given by the presiding justice to the jury, and no exception was taken to the in-

structions given. At the close of the charge, however, defendant presented twenty requested instructions. Two of these were given and the others refused. Exceptions were noted to the refusal. "A party is not entitled to have a requested instruction given, even if it states the law correctly, unless it appears that it is supported by facts, that it is not misleading, that it is not already covered by the charge, and that the refusal to give would be prejudicial." *Desmond, pro ami* v. *Wilson,* 143 Me. 262 at 268. All the instructions refused fell within one or more of the above categories and were properly rejected. For example, several of the requested instructions related to the obligation of good faith and loyalty owed by the broker to his principal. These statements of law, although perhaps academically correct, had no applicability in view of the fact that the record discloses not even a scintilla of evidence of any failure of the broker in this respect. Such instructions, if given, would only have tended to confuse the jury by suggesting to their minds that such issues had in fact been raised by the evidence. It seems unnecessary to discuss all of the requested instructions in detail.

During the trial defendant noted exceptions to various rulings of the presiding justice upon the admission of evidence. In some instances evidence was excluded where the question as phrased by the examiner did not, upon its face, disclose the competency or relevancy of the evidence solicited and no offer of proof was made in support of the question. In such a case neither this court nor the presiding justice could know how the exclusion might prejudice the party claiming error. The presiding justice should be fully informed before exclusion, that he may rule advisedly. *Brown* v. *McCaffrey,* et al., 143 Me. 221. The record fails to disclose any instance of prejudicial error arising out of the rulings on the admission of evidence.

The entry will be,

Exceptions overruled.

GREEN ACRE BAHA'I INSTITUTE
vs.
TOWN OF ELIOT

York. Opinion, December 23, 1954.

Taxation. Exceptions. Charitable Institutions.

The findings of fact of a single justice are final and binding if supported by any credible evidence.

Taxation is the rule and exemption the exception.

Exemption is not defeated by the fact that the use by the charitable institution for its own purpose is seasonal.

Tax exemption will not be defeated by occasional or purely incidental letting or renting of property where the dominant use by such institution is for its own purposes.

The amendments to R. S., 1944, Chap. 81, Sec. 6 were not intended to change or alter the well defined rules of exemption.

Where exemption is claimed there should be a careful examination to determine whether (1) in fact the institution is organized and conducting its operation for purely benevolent and charitable purposes in good faith (2) whether there is any profit motive revealed or concealed (3) whether there is any pretense to avoid taxation and (4) whether any production of revenue is purely incidental to a dominant purpose which is benevolent and charitable.

ON EXEMPTIONS.

This is an appeal from the refusal of the Selectmen to abate taxes. The case is before the Law Court upon exceptions to findings and a decree of a single Justice of the Superior Court ordering abatement. Exceptions overruled.

Francis F. Neal,
Thomas E. Flynn, Jr.,
John DeCourney, for plaintiff.

Varney & Levy,
Richard E. Poulos, for defendant.

SITTING: WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ., THAXTER, A.R.J. FELLOWS, C.J., did not sit.

WEBBER, J. This was an appeal from the refusal of the Selectmen of the Town of Eliot to abate taxes assessed against the Green Acre Baha'i Institute for the year 1952. The matter was heard by a single justice below, who entered a decree embracing findings of fact and rulings of law and which ordered the taxes abated in full. Exceptions thereto are before us.

The petitioner deems itself exempted from taxation as a benevolent and charitable institution under the provisions of R. S., 1944, Chap. 81, Sec. 6, as amended, the pertinent portions of which read as follows:

> "**Sec. 6. Exemptions.** The following property and polls are exempt from taxation: * * * * III. * * * * the real and personal property of all benevolent and charitable institutions incorporated by the state; * * * * but so much of the real estate of such corporations as is not occupied by them for their own purposes shall be taxed in the municipality in which it is situated. Provided, however, that nothing in this subsection shall be construed to entitle any institution, association, or corporation otherwise qualified for exemption as a * * * * benevolent or charitable institution to any exemption from taxation if any officer, member, or employee thereof shall receive or may be legally entitled to receive any pecuniary profit from the operation thereof, except reasonable compensation for services in effecting one or more of such purposes, or as proper beneficiaries of its strictly benevolent or charitable purposes, or if the organization thereof for any such avowed purposes be a pretense for directly or indirectly making any other pecuniary profit for such institution, corporation, or association, or for any of its members or employees, or if it be not organized and conducted exclusively for benevolent and

> charitable purposes. * * * * and provided, however, that the provisions of this subsection shall not apply to a summer camp or other seasonal resort which derives a profit on its actual operating and administrative expenses incurred thereat or within this state, nor to that part of its property from which it receives compensation in the form of rent. Such camp or resort shall keep full financial records which shall at all times be open and available to inspection by the tax assessors of the town or city where it is located."

Petitioner is a corporation organized under the laws of Maine by members of the Baha'i faith to "conduct educational facilities, including classes, public lectures and research, for the exposition of spiritual truths, principles and religious precepts based upon the extent and available sacred literature of all revealed faiths, with particular reference to the Baha'i teachings on progressive revelation, religion, unity, and the oneness of mankind; to build and maintain and operate such buildings, museums, dormitories, libraries and facilities as may be necessary to carry out the educational, religious, charitable and benevolent purposes of the corporation;" and further, "In the conduct of its educational program and the operation of its properties for the aforesaid purposes, (to) conform to the administrative principles and spiritual authority duly established in the Baha'i teachings as upheld by the elective national Baha'i body known as the National Spiritual Assembly of the Baha'is of the United States."

Petitioner owns and operates in respondent town certain real estate comprising a number of acres of land and certain buildings suitable for classes, lectures, concerts and the like, with facilities for lodging and board. The activities are confined to the summer season. Persons in attendance include members of the Baha'i faith, non-members who express a sincere interest in the faith, and citizens of the local community. There are facilities for recreation. Persons

who require board and lodging pay for those services, but are required to participate in the classes and lectures. As the Baha'i faith has no official clergy, all members are expected to serve in a missionary role and expand the faith. In short, the purposes of the Institute embrace the essential elements of missionary societies which have long been deemed to possess the required attributes of benevolent and charitable institutions for tax exemption purposes. *Universalist Church* v. *City of Saco,* 136 Me. 202; *Park Association* v. *Saco,* 127 Me. 136; *Convention* v. *Portland,* 65 Me. 92.

In such a tax exemption case as this, many of the issues for determination are questions of fact. The findings of fact of a single justice are final and binding if supported by any credible evidence. *O'Connor* v. *Wassookeag School, Inc.,* 142 Me. 86; *Sanfacon* v. *Gagnon,* 132 Me. 111.

The justice below found on the basis of supporting evidence that the institution was operating the property for the benevolent and charitable purposes for which it was organized, that the program was conducted in good faith and not with any purpose or intention of tax evasion, that the dominant purpose of the operation was the furtherance of its religious and missionary aims and that any charges for board or lodging were purely incidental to the dominant purpose, and that neither the institution nor any individual was deriving any profit from the operation other than reasonable compensation for services performed.

Certain rules governing situations of this sort are well established. Taxation is the rule and exemption the exception. *Park Association* v. *Saco, supra.* Exemption is not defeated by the fact that the use by the charitable institution for its own purposes is seasonal. *Universalist Church* v. *City of Saco, supra; Park Association* v. *Saco, supra; Camp Emoh Associates* v. *Inhabitants of Lyman,* 132 Me. 67. Property of charitable institutions which is let or rented

primarily for revenue is taxable, but where the dominant use by such institution is for its own purposes, tax exemption will not be defeated by either occasional or purely incidental letting or renting. *Curtis* v. *Odd Fellows,* 99 Me. 356; *Lewiston* v. *Fair Association,* 138 Me. 39. We do not think the amendments incorporated in the exemption statute *(supra)* as it now stands were intended to change or alter these well defined rules of exemption. In each situation where exemption is claimed, there must be a careful examination to determine whether in fact the institution is organized and conducting its operation for purely benevolent and charitable purposes in good faith, whether there is any profit motive revealed or concealed, whether there is any pretense to avoid taxation, and whether any production of revenue is purely incidental to a dominant purpose which is benevolent and charitable. When these questions are answered favorably to the petitioner for exemption, the property may not be taxed.

Among the properties of the petitioner were two undeveloped woodland areas. There was evidence that those participating in the program regularly used these areas for walks, prayer, meditation, outdoor meetings and recreation. There was further evidence that certain locations therein had special significance for members of the faith arising out of a former visitation to the area by a leader of the faith. There was also evidence of a hopeful, though not a clearly planned or definite intention, that the area might in the future be used for the enlargement and development of the institution's facilities. There was no suggestion of any present intention or purpose to hold the property as commercial timberland or for any other revenue use. Upon this evidence, the justice below found that the institution was devoting the entire tract to its benevolent and charitable uses. Under such circumstances, such an area may be shown to be exempt. *Osteopathic Hospital* v. *Portland,* 139 Me. 24; *Wheaton College* v. *Norton,* 232 Mass. 141, 122 N. E. 280.

Upon this record, we cannot say that any finding of the justice below was legally erroneous or that he erred as a matter of law in determining that all of the property of the petitioner was exempt from taxation.

The entry will be,

Exceptions overruled.

STATE OF MAINE
vs.
HERBERT W. NOLAN

Cumberland. Opinion, February 2, 1955.

Criminal Law. Intoxicating Liquor. Trial Justices. Jurisdiction. Words and Phrases.

The jurisdiction of trial justices is statutory and cannot be enlarged by presumption or implication.

Jurisdictional facts in proceedings before trial justices must appear of record.

Failure of the record to show that there was no trial justice at Falmouth where the alleged offense occurred, or that the trial justice at Gray had a "usual place" of holding court "nearest to where the offense is alleged to have been committed" is alone sufficient to arrest the proceedings under R. S., 1944, Chap. 133, Sec. 10.

The word "nearest" in R. S., 1944, Chap. 133, Sec. 10 is not determined by the contiguity of towns but is ascertained by measure over the shortest usual route of travel from the alleged locus of the offense to the locus which is the "usual place" of holding court of the trial justice.

ON REPORT.

This is a criminal proceeding before the Law Court upon report and agreed statement of facts. Case remanded for quashing the complaint.

Frederic S. Sturgis, for State.

Arthur Peabody,
Sidney W. Thaxter, for respondent.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

WEBBER, J. This matter comes before us on report on an agreed statement of facts. The respondent was arrested and charged with the operation of a motor vehicle while under the influence of intoxicating liquor. The locus of the alleged offense as charged in the complaint was "at Falmouth in the County of Cumberland and State of Maine" and "upon, over and along Route No. 88, a public highway in said Falmouth." The alleged offense is cognizable by trial justices. The officer took the respondent to Portland and lodged him in the county jail. Thereafter, he took him to the Town of Gray before a trial justice where, upon warrant and complaint, the respondent was found guilty and appealed. In the Superior Court the respondent filed a motion to quash the complaint, asserting lack of jurisdiction of the trial justice.

"That the jurisdiction of trial justices depends upon statutory provisions and cannot be enlarged by presumption or by implication, and that the facts which determine the jurisdiction must appear of record, are familiar rules, resting upon long established law and practice." *Inman* v. *Whiting,* 70 Me. 445 at 447. Failure of the record to disclose the jurisdiction is fatal to the proceeding. *Inman* v. *Whiting, supra;* see also *South Berwick* v. *County Commissioners,* 98 Me. 108; *Faloon* v. *O'Connell,* 113 Me. 30; *State* v. *Ford Touring Car,* 117 Me. 232; *Brooks* v. *Clifford et al.,* 144 Me. 370; *Commonwealth* v. *Fay,* 151 Mass. 380.

The applicable jurisdictional statute is R. S., 1944, Chap. 133, Sec. 10, which provides:

> "Any person accused of an offense cognizable by trial justices, if brought or ordered to appear by an officer before a trial justice, shall be brought or ordered to appear before a trial justice holding court within the town where the alleged offense occurred; but if there is no trial justice within said town, then to a trial justice whose usual place of holding court is nearest to where the offense is alleged to have been committed."

We look first to the record of the proceedings before the magistrate. From the record, it is apparent that the trial justice in the Town of Gray was not holding court in the Town of Falmouth, where the alleged offense occurred, but otherwise the record is silent as to jurisdictional facts. From the record, we cannot determine that there was no trial justice in the Town of Falmouth or that the trial justice in the Town of Gray had a usual place of holding court "nearest to where the offense is alleged to have been committed." The failure of the record in this respect is alone sufficient to arrest the proceedings. But the agreed statement of facts which accompanies the motion to quash made at appellate court level only serves to emphasize the apparent lack of jurisdiction. Therein it is agreed that there was in fact no trial justice in the Town of Falmouth, that the locus of the alleged offense in the Town of Falmouth was at a point on the highway known as Route 88 "at or near the premises of the Portland warehouse of Canada Dry Beverages so-called," and that by highway measure the usual place of holding court of the trial justice in the Town of Freeport is over five miles nearer that locus than is the usual place of holding court of the trial justice in the Town of Gray. Even nearer is the Portland Municipal Court in the City of Portland.

The statute before us was enacted as P. L., 1939, Chap. 245. We had occasion to examine this statute in *State* v. *Harnum*, 143 Me. 133, and therein we said at page 136, "The

legislative intention of P. L., 1939, Chap. 245 is undoubted. * * * * It is to require an officer serving a process alleging an offense cognizable by trial justices and electing to use such a court to take his prisoner *before a particular one.*" (Emphasis supplied.) And again at page 137 we said, "The statute limits the geographical jurisdiction of trial justices for the trial of cases so that *a particular one, designated by its terms, and no other,* has jurisdiction of each individual violation of law cognizable by trial justices. ****" (Emphasis supplied.) The legislature may well have intended to correct what it deemed to be abuses under the old law which permitted a choice among trial justice courts by arresting officers. In any event, the emphasis placed by the legislature on the "nearest" trial justice makes plain the intention of the lawmakers to insure to the respondent a speedy trial and to eliminate the cost of unnecessary travel.

As to what is meant by "nearest," we think there can be no doubt. The agreed statement asserts that the Town of Falmouth is contiguous with, and abuts on, the Town of Gray but (by inference at least) not the Town of Freeport. In determining the statutory meaning of "nearest," however, the contiguity of town lines is not the test. If it were so, there might be two or more trial justices in adjacent towns having equal jurisdictional claims. In order to effectuate legislative intent and determine the "particular one" having jurisdiction, we must conclude that the ascertainment of the "nearest" trial justice is by measure over the shortest usual route of travel from the alleged locus of the offense to the locus which is the usual place of holding court of the trial justice. *State* v. *Johnson,* 46 A. (2nd) (Del.) 641; *State ex rel. Lohman* v. *District Court,* 49 Mont. 247, 141 Pac. 659.

The officer here had a choice. He could, if he saw fit, institute proceedings against the respondent in a municipal court, which was only a few miles away. Or he could select

a trial justice court, even though that court was located at a greater distance from the scene of the offense than was the municipal court. In choosing the trial justice court, however, it became incumbent upon him to choose the "nearest" one, and it became incumbent also upon the trial justice selected to exercise only the jurisdiction conferred upon him by statute. The action of the arresting officer in taking the respondent, not before the municipal court which was most conveniently at hand and not before the trial justice whose usual place of holding court was nearest to the locus of the offense, but before a trial justice further removed from the scene in point of distance than either of these, seems to present an excellent example of the very thing which the legislature sought to remedy by its enactment of the statute in question.

The record of the proceedings before the magistrate having failed to disclose jurisdiction, and the statement of agreed facts having affirmatively shown the jurisdiction to be elsewhere, the complaint may not be prosecuted. The mandate will be,

Case remanded for quashing the complaint.

NORMAN W. BEALS
vs.
MONTGOMERY WARD COMPANY

Kennebec. Opinion, February 2, 1955.

Assumpsit. Pleading. Demurrer. Specifications.

Specifications voluntarily attached to money counts are no part of the count and do not make the count demurrable regardless of the extent to which the action may appear self defeating.

A different rule obtains where specifications are ordered by the court to be filed to supplement a declaration sounding in tort.

ON EXCEPTIONS.

This is an action of assumpsit before the Law Court upon defendant's exceptions to the overruling of a demurrer. Exceptions overruled.

Arthur T. Eaton, for plaintiff.

Goodspeed & Goodspeed, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

WEBBER, J. The declaration in this case contained a single count for money had and received. This count was followed by lengthy specifications setting forth the nature of the plaintiff's claim. The specifications disclose that plaintiff entered into a written contract of employment with the defendant for a period of twelve months, for which he was to be paid an annual salary. In addition to salary, at the end of the year he was to receive a percentage bonus based upon net profit from operations. The contract further contained an express provision providing for eligibility for such bonus in event plaintiff's employment

should be terminated for any reason or he should become disabled or placed on leave of absence, and such determination of eligibility was left to the sole and final discretion of a bonus committee. The contract further provided that no such bonus, or any part thereof, should become due or payable before the end of the fiscal year. The specifications further disclose that plaintiff became dissatisfied with changing management policies of his employer and as a result became ill and voluntarily terminated his employment before the expiration of the year. The defendant seasonably filed demurrer, reserving the right to plead over in event of an adverse decision. The demurrer was overruled and defendant's exceptions bring the matter before us.

That plaintiff when put to his proof will be limited and confined to the grounds set forth in his specifications as a basis of recovery is undoubted. *Gooding* v. *Morgan,* 37 Me. 419; *Carson* v. *Calhoun,* 101 Me. 456; *Powers* v. *Rosenbloom,* 143 Me. 361. One needs only to read the plaintiff's specifications in the light of such cases as *Miller* v. *Goddard,* 34 Me. 102; *Veazie* v. *City of Bangor,* 51 Me. 509; *Norton* v. *Soule,* 75 Me. 385; *Thurston* v. *Nutter,* 125 Me. 411; *Levine* v. *Reynolds,* 143 Me. 15, and *Preble* v. *Preble,* 115 Me. 26, to recognize that there are difficulties which lie in the way of the plaintiff's ultimate recovery. Whether or not these difficulties are insuperable, we need not determine here. The defenses available to the defendant are not raised by demurrer. In cases in which specifications were not ordered by the court but were voluntarily attached to money counts by the plaintiff, this court has repeatedly held that such specifications are no part of the count and are not vulnerable to demurrer. *Dexter* v. *Copeland,* 72 Me. 220; *Baxter-Fraternity Co.* v. *MacGowan, Jr.,* 132 Me. 83; *Bean* v. *Fuel Co.,* 124 Me. 102; *Carey* v. *Penney,* 127 Me. 304. A different rule obtains where specifications are ordered by the court to be filed by the plaintiff to supplement a declaration

sounding in tort. *Brown* v. *Rouillard,* 117 Me. 55. The count for money had and received standing alone is in proper form and withstands the demurrer regardless of the extent to which the action may appear to be self-defeating as disclosed by specifications voluntarily attached. At a proper time and in an appropriate manner the defendant may raise the defenses available to it.

The entry will be,

Exceptions overruled.

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

* * * * * *

QUESTIONS PROPOUNDED BY
GOVERNOR EDMUND S. MUSKIE
IN A LETTER DATED JANUARY 20, 1955
ANSWERED FEBRUARY 2, 1955

LETTER PROPOUNDING QUESTIONS
STATE OF MAINE
OFFICE OF THE GOVERNOR
AUGUSTA

January 20, 1955

To the Honorable Justices of the Supreme Judicial Court:

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

I, Edmund S. Muskie, Governor of Maine, respectfully

submit the following statement of facts and the questions and respectfully ask the opinion of the Justices of the Supreme Judicial Court thereon.

STATEMENT

WHEREAS the 95th Legislature proposed a constitutional amendment to the people by the provisions of Chapter 119 of the Resolves of 1951 (the proposed amendment attached hereto and marked Exhibit A) to raise the constitutional limitation upon municipal indebtedness found in Article IX, Section 15 of the Constitution of Maine from 5% to 7½% of the municipal valuation, *which amendment failed of ratification by the people;*

WHEREAS the 95th Legislature proposed a further constitutional amendment to the people by the provisions of Chapter 127 of the Resolves of 1951 which would add to Article IX, Section 15 of said Constitution the following exemption:

> "Long term rental agreements not exceeding forty years under contracts with the Maine School Building Authority shall not be debts or liabilities within the provisions of this article,"

which amendment was favorably voted upon by the people, and by proclamation of the Governor became part of Article IX, Section 15 of the Constitution aforesaid, on September 26, 1951;

WHEREAS the 96th Legislature proposed a constitutional amendment to the people by the provisions of Chapter 78 of the Resolves of 1953 (the proposed amendment attached hereto and marked Exhibit B), which had the same effect as the proposal found in Chapter 119 of the Resolves of 1951, being worded exactly the same, but which failed to include the exemption for indebtedness incurred under contracts with the Maine School Building Authority

which was previously incorporated in the Constitution of Maine, Article IX, Section 15, as aforesaid, which amendment was *favorably voted upon by the people* and proclaimed by the Governor on September 21, 1954 to be Article IX, Section 15 of the Constitution of Maine;

NOW, THEREFORE, I, Edmund S. Muskie, Governor of Maine, respectfully request an answer to the following questions:

I. Did the acceptance of the amendment of Article IX, Section 15, of the Constitution of Maine proposed in Chapter 78 of the Resolves of 1953 effectively remove from Article IX, Section 15, the exemption added by the people voting on the amendment proposed in Chapter 127 of the Resolves of 1951?

II. If the answer to Question I is in the affirmative, then the further question arises: Does the removal from the Constitution of the exemption of debts incurred under contracts with the Maine School Building Authority require that those debts which were exempt from municipal indebtedness under Article IX, Section 15, when incurred, must now be counted as part of the municipal debt of any municipality which has contracted with said Authority?

Respectfully submitted,

EDMUND S. MUSKIE
Governor of Maine

EXHIBIT A

Constitution, Art. IX, Section 15, repealed and replaced. Section 15 of article IX of the constitution, as amended, is hereby repealed and the following enacted in place thereof:

'Section 15. No city or town shall hereafter create any debt or liability, which singly, or in the aggregate with previous debts or liabilities, shall exceed seven and one-half per cent of the last regular valuation of said city or town; provided, however, that the adoption of this article shall not be construed as applying to any fund received in trust by said city or town, nor to any loan for the purpose of renewing existing loans or for war, or to temporary loans to be paid out of money raised by taxation, during the year in which they are made.'

EXHIBIT B

Constitution, Art. IX, Section 15, repealed and replaced. Section 15 of article IX of the constitution, as amended, is hereby repealed and the following enacted in place thereof:

'Section 15. No city or town shall hereafter create any debt or liability, which singly, or in the aggregate with previous debts or liabilities, shall exceed seven and one-half per cent of the last regular valuation of said city or town; provided, however, that the adoption of this article shall not be construed as applying to any fund received in trust by said city or town, nor to any loan for the purpose of renewing existing loans or for war, or to temporary loans to be paid out of money raised by taxation, during the year in which they are made.'

ANSWER OF THE JUSTICES

To the Honorable Edmund S. Muskie, Governor of Maine:

The undersigned Justices of the Supreme Judicial Court, having examined the facts stated in your communication of January 20, 1955, are unanimously of the opinion that on September 26, 1951 the Constitution of Maine, Article IX, Section 15 as then amended and then proclaimed by the Governor, fixed the limitation upon municipal indebtedness at 5 per cent of the valuation, except that contracts with the Maine School Building Authority for long term rental agreements not exceeding forty years, and certain other stated

exceptions relating to trusts and loans, should not be debts or liabilities within the provisions of the Article.

On September 21, 1954 by amendment to said Article IX, Section 15, favorably voted upon by the people and on that date proclaimed by the Governor, the whole of said Section 15 as previously amended was repealed, and by new provision the municipal debt limit was increased to 7½ per cent of the valuation. There was no provision in this amendment of September 21, 1954 relative to contracts with the Maine School Building Authority. The provision relating to exemptions from the debt limit of contracts with the Maine School Building Authority was repealed, and it was not readopted, as were previous provisions relating to trust funds, renewal of certain loans, war loans, and temporary loans. Any contracts between municipalities and the Maine School Building Authority entered into between September 26, 1951 and September 21, 1954, within the terms of the provision adopted in 1951, would not be affected by the amendment proclaimed on September 21, 1954.

The debts and liabilities of a municipality incurred under contracts with the Maine School Building Authority, which were exempt from municipal indebtedness when incurred, are not a part of the municipal debt of the municipality within the limitation of the Constitution.

We, therefore, answer the questions presented as follows:

Question I. Did the acceptance of the amendment of Article IX, Section 15, of the Constitution of Maine proposed in Chapter 78 of the Resolves of 1953 effectively remove from Article IX, Section 15, the exemption added by the people voting on the amendment proposed in Chapter 127 of the Resolves of 1951?

Answer to Question I: We answer in the affirmative.

Question II. If the answer to Question I is in the affirmative, then the further question arises: Does the removal from the Constitution of the exemption of debts incurred under contracts with the Maine School Building Authority require that those debts which were exempt from municipal indebtedness under Article IX, Section 15, when incurred, must now be counted as part of the municipal debt of any municipality which has contracted with said Authority?

Answer to Question II: We answer in the negative.

Respectfully submitted:

RAYMOND FELLOWS
ROBERT B. WILLIAMSON
FRANK A. TIRRELL, JR.
DONALD W. WEBBER
ALBERT BELIVEAU
WALTER M. TAPLEY, JR.

Dated at Bangor, Maine, this 2nd day of February, 1955.

STATE OF MAINE
vs.
GRAYDON W. MCBURNIE, APT.

Aroostook. Opinion, February 9, 1955.

Criminal Law. Night Hunting. Fish and Game.

Mere conjecture will not support a verdict.

ON EXCEPTIONS.

This is a criminal action before the Law Court upon exceptions, among other rulings, to the refusal of the Presiding Justice to direct a verdict of not guilty. Exceptions sustained.

Melvin E. Anderson, for State.

Albert M. Stevens,
James A. Bishop, for respondent.

SITTING: TIRRELL, WEBBER, WILLIAMSON, BELIVEAU, TAPLEY, JJ., THAXTER, A. R. J. FELLOWS, C. J., did not sit.

THAXTER, A. R. J. The respondent was charged in a complaint brought before the Caribou Municipal Court within and for the County of Aroostook on the 16th day of October, 1953, with the offense of night hunting. He pleaded not guilty; was found guilty; and a minimum sentence was imposed from which he appealed to the Superior Court in said County of Aroostook.

He was tried before a jury at the November Term 1953 of the Superior Court, which jury returned a verdict of guilty; and the case is now before the Law Court on exceptions by the respondent to the denial of his motion for a directed verdict of not guilty, to the exclusion by the presiding justice of certain testimony, and to the refusal of the presiding justice to strike certain testimony from the record.

Mr. Levasseur, the Fish and Game Warden, testified as follows: that on the night of October 14, 1953, at about 5 minutes of nine in the evening, while he was on duty in what is known as the Dunntown Road area in the Town of Wade, he saw lights flashing, thought he heard a deer blowing, heard voices of people but could not determine any of the conversation; that he got out of his car and chased two men and fired some shots; that one of the men also fired shots; that he caught the respondent who was lying on the ground when the shooting started, found that he had no gun, light or shells on his person, and inquired of him who the other man was and the respondent replied that he did not know.

The respondent did not testify.

From the record it does not appear to us that the State, except for proving that the respondent was in the area at the time the crime was committed, has produced evidence of the respondent's participation in the crime of night hunting. We can merely conjecture that the respondent may have been night hunting, but our conclusion would be only conjecture. As we said in the case of *Brunswick Construction Co., Inc.* v. *George Leonard, et al.*, 149 Me. 426, 428, "conjecture is not enough."

On this basis, a directed verdict should have been granted. Therefore it is unnecessary for us to consider the other exceptions in this case.

Exceptions sustained.

STATE OF MAINE
vs.
FREDERICK W. PAPALOS

Cumberland. Opinion, February 11, 1955.

Criminal Law. Conspiracy. Evidence. Witnesses. Competency. New Trial. Immunity.

Common law conspiracy is the combination of two or more persons, by concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means.

The statutory crime of conspiracy appears in R. S., 1944, Chap. 117, Sec. 25.

The exclusion of evidence is not error where no prejudice results.

The propriety of a ruling on evidence must be tested in the light of the situation as it appeared at the time the ruling was made and objections were taken.

The permitting of cross examination from documents or papers is discretionary and no error is committed unless this discretion is abused.

At common law an accused is not a competent witness.

Under Maine practice the competency of an accused depends upon R. S., 1944, Chap. 135, Sec. 22; he may testify "at his own request but not otherwise."

R. S., 1944, Chap. 135, Sec. 22 is applicable to a joint trial of co-indictees.

One co-indictee is not an interested party in the refusal of the court to direct a verdict for the other co-indictee.

Whether the respondent intended to agree to a bribe of a public official is a question of fact.

In Maine concurrence between the giver and taker is not required to establish the substantive crime of bribery. Where concurrence and agreement, essential to conspiracy but not to bribery, are shown to exist between prospective givers, the crime is properly charged as conspiracy.

A motion for new trial in criminal cases raises the question whether in view of all the testimony the jury were warranted in believing beyond a reasonable doubt that respondent was guilty. It is only where injustice would inevitably result that the law of the case may be examined.

Recantation by a witness subsequent to trial is not sufficient evidence upon which to base a new trial where such would not result in a different verdict.

Concealment of immunity by a witness cannot be based upon the fact that several persons and the witness relied upon different interpretation of R. S., 1944, Chap. 122, Sec. 8 (immunity statute).

ON EXCEPTIONS. APPEAL AND NEW TRIAL.

This is a criminal proceeding before the Law Court upon exceptions, appeal, and motion for new trial. Exceptions overruled. Motion for new trial denied. Appeal dismissed. Motion for new trial on the ground of newly discovered evidence denied. Judgment for State.

Alexander A. LaFleur, Attorney General,
James Archibald,
Boyd L. Bailey,
Miles P. Frye, Asst. Attorneys General, for State.

Berman, Berman and Wernick, for respondent.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

WILLIAMSON, J. The respondent, Frederick W. Papalos, was found guilty of conspiring with Herman D. Sahagian to bribe Bernard T. Zahn, chairman of the State Liquor Commission. The case is before us (1) on two motions for a new trial upon the ground of newly discovered evidence, (2) on appeal, and (3) on fourteen exceptions to rulings made by the presiding justice in the Superior Court during the trial.

The indictment charges the crime of conspiracy in the following language:

> "Frederick W. Papalos . . . and Bernard T. Zahn . . . at Portland in the County of Cumberland and State of Maine, on the twenty-third day of October, in the year of our Lord, one thousand nine hundred and fifty-one, feloniously did combine, conspire and agree together with . . . Herman D. Sahagian . . . to commit a crime punishable by imprisonment in the State Prison to wit: to commit the crime of bribery . . . the said Frederick W. Papalos and the said Herman D. Sahagian to offer and give to . . . Bernard T. Zahn . . . an executive officer to wit: the duly appointed and qualified Chairman of the State Liquor Commission of the State of Maine, and the said Bernard T. Zahn to accept, a gratuity and valuable consideration with intent to influence his action, opinion and judgment in the discharge and performance of his duties as Chairman of said State Liquor Commission aforesaid . . ."

Sahagian, the chief witness for the State, was not indicted. The respondent and Zahn pleaded not guilty and were tried jointly. Zahn rested his case at the close of the State's case, and moved unsuccessfully for a directed verdict. The respondent presented evidence, including his own testimony, in defense. The jury acquitted Zahn and found the respondent guilty.

It is unnecessary that we review the evidence in detail. In substance the story at the trial was this:

Sahagian was the president and treasurer of the Fairview Wine Corporation. For purposes of the case we may speak of the business of the corporation as the business of Sahagian. His principal customer was the State Liquor Commission. In 1951 he became disturbed at rumors that his corporation would lose its license with the Commission because of a false statement made by him with respect to a conviction of felony in another state many years in the past. He first received this information from the respondent. He

was concerned with the "delisting" or removal of certain of his products from the list of wines sold in the state stores. There were rumors that the Commission would discontinue ordering wine in certain size containers to his detriment. He was troubled by price competition.

The respondent, formerly a resident of Maine and then in business in Boston, entered the picture to assist in solving the difficulties with the Liquor Commission, and from July to October 1951 had several conversations with Sahagian. During the conversations, to use the words of respondent's argument:

> ". . . Papalos had repeatedly represented to Sahagian that he (Papalos) had been in touch with Bernard T. Zahn, Chairman of the Maine State Liquor Commission, and that Zahn had agreed with Papalos, and wanted Papalos to tell Sahagian, that Zahn would accept a share of money paid by Sahagian to Papalos; that he (Zahn), in return for his share of the money paid by Sahagian, would favor Sahagian in various respects regarding the prices of wines, the listings of wines, and ensuring that Sahagian's wines would never run out of stock in the liquor stores.
>
> "All of these conversations between Papalos and Sagahian took place in the absence of Zahn. Papalos, himself, on the witness stand, denied categorically that he had ever talked with Zahn about Zahn's receiving any money or other thing of value as a bribe in order to favor Sahagian. He further denied, categorically, that he had ever offered any money to Zahn in any respect or for any purpose, and he said on the witness stand that he never entertained any intention of undertaking, at any time, to approach Zahn with a bribe. Papalos admitted in his testimony that he had made such representations to Sahagian but that in fact they were only so much 'wild talk'—for the purpose of keeping Sagahian favorable toward Papalos, especially since Sagahian seemed so willing to pay

money to Papalos if there was any mention of influence."

A contract between Sahagian's company, signed by Sahagian, and the respondent dated October 23, 1951, was executed and left in escrow with an attorney to become effective when and if there should be an increase in the price of wine sold the Commission. Under the contract the respondent received the "exclusive right within the State of Maine to sell all products sold by the Company" with a commission per case at stated rates. Shortly thereafter the price was increased, and the contract in terms became effective. From October 1951 to February 1952, when Sahagian refused to make further payments under the contract, Sahagian's company paid the respondent over $12,000.

Before his agreement with the respondent and before paying him any money, on the advice of Mr. Stanley Bird, an attorney, Sahagian informed the Chief of the State Police that an unnamed individual had approached him for money to use to pay graft and obtain influence. The suggestion by the Chief of the State Police that marked money be used did not meet with Sahagian's approval. At no time did Sahagian name any individuals.

Sahagian, on cross-examination, testified:

"Q. This thought of paying graft was repugnant to your nature, wasn't it?

"A. It was definitely against my nature, if I could help it.

"Q. And you would never intend, deliberately and knowingly, to pay anyone graft, would you?

"A. Before I answer that yes or no—there is a clause in that. If it was a matter of my business or my investment that I have to protect I would not only pay graft but I would do anything and everything to protect my business, protect my investment and protect my lifetime savings.

"Q. You would even resort to bribery to do that?
"A. Yes. I had no alternative.

"Q. Is it your statement that when Mr. Papalos came to you and talked with you about paying money, that you called it 'graft' in order to get influence, you deliberately and knowingly entered into a conspiracy to accomplish that?
"A. I most certainly did.

"Q. And you did it, intending to commit a crime?
"A. I did."

* * * * * * * * * *

"Q. And so you pretended to go along, hoping that he (Papalos) would feed you with evidence?
"A. That is right.

"Q. And when you paid him the money you paid him the money because you were still pretending to take part in this scheme even though you really never intended to go through with it? You wanted the evidence; isn't that right?
"A. That is correct. I was after evidence. I answered that question several times. I was after evidence and it is all I was after."

* * * * * * * * * *

"Q. And by pretending to be a part of this scheme?
"A. There was no such a thing as pretending. I became a part of it. I didn't care what the consequence was. If I had to go to jail I am willing to accept it. I had to do it to protect my business.

"Q. You took the precautions about going to jail first by talking with Mr. Bird and by talking with the Chief of the State Police before you undertook it; isn't that true?
"A. I didn't do that for any protection reason. I just went and told them.

"Q. You wanted to be sure you were on record that you were not doing anything wrong; isn't that right?

"A. Naturally."

* * * * * * * * * *

The respondent's defense at the trial, broadly stated, was that although Sahagian and the respondent each believed the other was a conspirator, nevertheless neither had the evil intention essential to a conspiracy to bribe Zahn, for Sahagian was only securing evidence to expose corruption and the respondent was simply cheating Sahagian.

We are here concerned with the crime of conspiracy.

> "We have defined common-law conspiracy to be a combination of two or more persons, by concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means." *State of Maine* v. *Parento*, 135 Me. 353, 354, 197 A. 156 (1938).
>
> The statutory crime of conspiracy is defined as follows:
>
> "If two or more persons conspire and agree together, with the fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business, or property of another; . . . or to do any illegal act injurious to the public trade, health, morals, police, or administration of public justice; or to commit a crime punishable by imprisonment in the state prison, they are guilty of a conspiracy, and every such offender, and every person convicted of conspiracy at common law, shall be punished by a fine of not more than $1,000, or by imprisonment for not more than 10 years." R. S. c. 117, § 25 (1944).

Bribery of the Chairman of the Liquor Commission is a crime punishable in state prison under the general statute relating to bribery and acceptance of bribes by public officials. R. S., c. 122, § 5 (1944).

This indictment was directed to the statutory crime. A careful review of the legal principles may be found in the *Parento* case, *supra*.

FIRST EXCEPTION

The court excluded the following question asked of Sahagian:

> "So someone came and told you about this meeting between the Research Committee, the sub-Committee of the Legislative Committee in charge of Legislation, and the Liquor Commission with regard . . . to the investigation of the falsification of your liquor application; is that true?"

The respondent urges that this question was "an additional link in this chain of defense" described in the bill of exceptions in these words:

> "This interrogation (concerning various items of information which Sahagian had been obtaining from other persons than the respondent) was for the purpose of building up a claimed defense that Mr. Sahagian had not really relied on Frederick W. Papalos, or on what Frederick W. Papalos had been telling him and that he was not really seeking to obtain influence through Frederick W. Papalos, but that throughout his relationship with Mr. Papalos Mr. Sahagian was merely leading Mr. Papalos on, to 'bleed' him of whatever information Mr. Papalos could reveal, to bait Mr. Papalos and to trap him — as well as others — all as part of a scheme in which Mr. Sahagian was pretending to be a crook and a conspirator in order to obtain evidence of possible wrong-doing and corruption and thereby to expose and eliminate certain persons against whom he held grievances."

The record immediately following the excluded question reads:

> "Q. In any event, you knew that such a meeting had taken place?
> ". . . .
> "A. The answer is generally Yes, but it needs an explanation. If, after I explain it, it is very clear—

> "MR. WERNICK: If the Court please, I submit the witness may explain when his counsel goes into redirect. He has answered my question."

Furthermore, Sahagian later stated who had told him about the meeting between the Liquor Commission and Research Committee. The respondent was in no way prejudiced by the ruling of the presiding justice. *State* v. *Wombolt,* 126 Me. 351, 138 A. 527 (1927); *State* v. *Caruso,* 129 Me. 492, 493, 151 A. 439 (1930); *State* v. *Stuart,* 132 Me. 107, 167 A. 550 (1933). The exception is overruled.

Second Exception

The respondent objected to the exclusion of the following question:

> "I am calling your attention, Mr. Sahagian, to the year 1952, sometime in the spring of 1952, and I ask you whether there was an incident some time then in which you requested Byron Nichols to obtain some information for you from the Liquor Commission?"

This question relates, it is to be noted, to a time after the conclusion of the conspiracy. For this reason alone the exclusion was proper. Furthermore, the record discloses that the subject matter was covered in detail by Byron Nichols. If we assume the question was technically admissible, nevertheless the respondent has failed to show any prejudice from the ruling. The exception is overruled.

Third Exception

A series of questions asked of Sahagian on cross-examination about details of the felony mentioned in the statement of facts were excluded. The respondent excepted on the ground that he sought thereby not to impeach the credibility of the witness by proof of crime but, to quote from the record:

> "To impeach the witness by showing his statement that Mr. Papalos told him all these things could not possibly have been true, that the details that Mr. Papalos related were such that only Mr. Sahagian could have told him about them."

Sahagian testified that the respondent first mentioned the felony charge and the false affidavit on the application before the Liquor Commission. The respondent denied this statement and gave a complete version of the incident. The respondent has failed to convince us that he was prejudiced by the ruling. The exception is overruled.

FOURTH EXCEPTION

The respondent objected to the exclusion of excerpts from the transcript of two meetings of the sub-committee on Liquor of the Legislative Research Committee, and the members of the State Liquor Commission held on July 5, 1951 and August 21, 1951.

In his brief the respondent says:

> "Such evidence would tend to show, once again, that Papalos was not the only person known to Sahagian who had heard about the license difficulty in which Sahagian was involved; that Sahagian was not really relying on Papalos but might have been using other persons who were in possession of power and influence, to furnish him with information and to protect him against possibly unjust discrimination; that, therefore, Sahagian was only pretending to be relying on Papalos in order to procure evidence and to set a trap, not only for Papalos, but for other persons who were in public office and against whom Sahagian had grievances."

Passing questions of admissibility, we conclude that the excerpts have no weight in the cause. That Sahagian did not rely solely upon the respondent for the facts is shown in the following testimony:

"Q. Did you ask anyone in the Commission for the true facts? Did you ask anybody connected with the Liquor Commission the true facts?

"A. Yes, I did.

"Q. Who?

"A. When Mr. Papalos told me that my license was going to be revoked I went down to Mr. Tabb and Mr. Tabb went to the Liquor Commission to find out if it was so because Mr. Papalos had dared me and asked me to check on it. He said, 'I am telling you the truth.' He said, 'I want you to send somebody up there so you will know I am telling you the truth.' It was on that promptness I asked Mr. Tabb and Mr. Tabb went out and got both of the other Research Committee members with him and Mr. Jalbert came back and he told me all about it, and as I stated before, I have a wire recording of every word Mr. Jalbert said to me. There was no need of me going any further because I already had the information."

The exclusion of the evidence was in no way harmful to the respondent. The exception is overruled.

The FIFTH and SIXTH EXCEPTIONS were abandoned.

SEVENTH EXCEPTION

During cross-examination by the State, the respondent testified that a record had been played to him in the office of Mr. Bird in Waterville. The respondent was then asked the following question:

"Whether it was your voice and Sahagian's voice that you heard when those records were heard when the records were played to you."

Objection was taken on the ground that the line of inquiry was "entirely improper" and that the State was "trying to introduce evidence in an indirect manner which cannot be introduced secondarily in this way." The attorney for the

State informed the court: "I am at this stage introducing nothing. I am laying a foundation." The witness answered:

"It sounded like my voice." Whether the recordings should be introduced in evidence was a matter for determination when and if offered. We test the propriety of the ruling in light of the situation at the time the objection was taken. We do not consider the acts complained of in the EIGHTH EXCEPTION in passing upon the ruling in the SEVENTH EXCEPTION. The exception is overruled.

EIGHTH EXCEPTION

During cross-examination of the respondent by the State, and following the evidence discussed in the SEVENTH EXCEPTION, the State examined the respondent at length by questions plainly based upon documents furnished to him by Mr. Bird sitting at the table with counsel for the prosecution. An example of the type of questions and answers are the following:

> "Q. Do you remember telling Mr. Sahagian sometime in October, 1951, making this statement or a similar statement to Mr. Sagahian in your discussion of this alleged contract, 'I have told you the truth, see. I also told you this and I want you to think about it very carefully, Herman, because I am going to, we are going to continue to do business. I want a written contract with me.' Did you make that statement to Sahagian?"
>
> "A. I wanted a written contract? Certainly."
>
> "Q. Do you remember you made a statement similar to that to him?"
>
> "A. Mr. Niehoff, I made so many statements to Mr. Sahagian I could not remember everything I said to him. The fact there was an agreement made is evidence of the fact."

The EIGHTH EXCEPTION is to this entire line of testimony. The respondent in effect says the State wrongly

introduced as evidence the contents of a recording by reading it to the respondent and that thereby he was materially prejudiced.

In our view there was no error on the part of the presiding justice in permitting the cross-examination or in refusing to order that counsel for the respondent be given an opportunity to see and examine the papers from which counsel for the State was conducting his examination. The court said, and we approve: "If the witness cannot answer the question all he has to do is say he doesn't understand it . . . Questions are being put to the witness and if the witness cannot answer them he may say so, always."

The answers of the respondent throughout the long cross-examination show that he was thoroughly familiar with the subject matter. We find that there was no danger that the jury would regard the questions and not the answers by the respondent as the substance of the evidence. Much must be left to the discretion of the trial judge in matters of this nature. The respondent has failed to show there was an abuse of discretion in the rulings by the presiding justice. The exception is overruled.

NINTH EXCEPTION

Exception was taken to the denial of respondent's motion for mistrial based on abuse of discretion in permitting the tactics of the prosecution described in the SEVENTH and EIGHTH EXCEPTIONS. The respondent does no more than raise again the questions considered under the exceptions noted in which we found no error. The exception is overruled.

TENTH EXCEPTION

After Zahn rested and his motion for a directed verdict was denied, the respondent called Zahn as a witness in his

behalf. The presiding justice ruled correctly that Zahn was incompetent to testify. The exception must be overruled.

The entire record on the point under discussion reads:

"MR. WERNICK: I will call Bernard Zahn.

"MR. NIEHOFF: We object to the competency of this witness at this time, and would like to state our reasons in the absence of the jury.

"MR. WERNICK: May I state for the record, if the Court please, that I am calling Mr. Zahn insofar as I represent the respondent, Papalos, and I call him as a witness to testify in that regard.

"THE COURT: Do you wish to be heard further in Chambers, Brother Niehoff?

"MR. NIEHOFF: Yes, Your Honor."

(In Chambers)

"MR. NIEHOFF: May it please the Court, the State objects to the competency of Bernard T. Zahn appearing as a witness in this case. The record discloses that the proceedings before the jury is on a joint indictment wherein Papalos and Zahn are co-defendants. The record further discloses that the Respondent Zahn rested his defense. It now appearing that his co-defendant Papalos has called the defendant Zahn as a witness in a trial of the issue in the same indictment before the same jury, the State contends that Section 22 of Chapter 135, Revised Statutes of 1944 sets forth the only method and conditions upon which the accused may testify. The statute says that in all criminal trials the accused shall, at his own request but not otherwise, be a competent witness. The State further contends that the defendant Zahn had an opportunity during the trial of the cause to avail himself, at his request, to testify. He has waived that right by resting his case. He cannot now be a competent witness called by his co-defendant Papalos.

"THE COURT: Do you wish to say anything for the record, Brother Wernick?

"MR. WERNICK: I suppose there is no need to say anything for the record except to note my exception to Your Honor's ruling, which I do.

"THE COURT: Yes.

"MR. WERNICK: I suppose I am premature. Your Honor has not ruled yet?

"THE COURT: I have indicated what my ruling would be.

"MR. WERNICK: I was simply going to offer Mr. Zahn for the purpose of having him testify in regard to these matters in which he is alleged to have participated as co-conspirator with Papalos and Sahagian and we were intending to prove through him that he never had any conversation whatever with either Sagahian or Papalos about taking money or anything of value, that he never had any contact with either of them with regard to any attempts to influence him nor did he know of any such thoughts or ideas that might have been in the mind of anyone about trying to influence his judgment by offering him anything of value for that purpose."

(In the Court Room)

"THE COURT: The Court is of the opinion Mr. Zahn cannot properly testify in behalf of Mr. Papalos in this case, and so the offer of Mr. Zahn as a witness must be denied."

(Exception noted for Respondent Papalos)

"MR. KNUDSEN: May it appear for the record that Mr. Zahn and counsel do not object to his appearing to testify.

"MR. WERNICK: On behalf of the Respondent Papalos, I rest, subject to right of sur-rebuttal."

The issue lies in the competency of the witness, not in the materiality of the evidence offered.

When the Court ruled, there was nothing whatever in the record to disclose that Zahn had made a request or indeed was willing to testify. Thus, the ruling was correct upon the record when it was made.

Our statute reads:

> "**Sec. 22. Respondent may testify; not compelled to incriminate himself; failure to testify; husband or wife may testify** . . . In all criminal trials, the accused shall, at his own request but not otherwise, be a competent witness. He shall not be compelled to testify on cross-examination to facts that would convict, or furnish evidence to convict him of any other crime than that for which he is on trial; and the fact that he does not testify in his own behalf shall not be taken as evidence of his guilt. The husband or wife of the accused is a competent witness." R. S. c. 135, § 22 (1944).

It is familiar law that the accused was not a competent witness at common law. Maine led the way in permitting the accused to testify in P. L., 1864, c. 280, "said by Professor Thayer (Cases on Evidence, 2d Ed., p. 1117) to be 'the earliest statute permitting the defendant in a criminal case to testify.' " 2 Wigmore on Evidence, 3rd Ed. § 579. There must be no element of compulsion to make the accused take the witness stand. He must not be forced to elect whether he will testify. Competency rests upon the statute and depends upon compliance with the words "at his own request but not otherwise." "He is made simply 'at his own request, but not otherwise,' a competent witness." *Wolfson* v. *U. S.*, 101 F. 430 (5th CCA 1900).

The competency statute is applicable in the joint trial of co-indictees. Each may be a witness for himself, for a co-indictee, or for the State, provided his testimony is given at his own request, but not otherwise. *State* v. *Barrows*, 76 Me. 401 (1884); *Wolfson* v. *U. S.*, *supra;* 2 Wigmore on Evidence (3rd Ed.) § 580.

Whether the statement by counsel for Zahn was a request within the meaning of the statute need not be decided by us. If it was not a request, then the ruling was correct for, as we have seen, Zahn in the absence of a request would not have been a competent witness. On the other hand, if we view the remarks by counsel as an expression of willingness to testify and such willingness as a request, then the respondent is faced with the fact that the ruling by the court was made prior to any "request" by the witness, and further that nothing was done by either Zahn or by the respondent to call again the issue to the attention of the court.

In brief, the question of Zahn's competency insofar as the court is concerned ended with the ruling, which as matters then stood was unexceptionable. It could not be reopened merely by a subsequent statement of counsel of a willingness to testify. Thereafter no affirmative action was taken by respondent which would require an additional ruling of the court nor was any further exception noted.

ELEVENTH EXCEPTION

The respondent excepted to the denial of his motion for a directed verdict of not guilty at the conclusion of the evidence. The theory of the motion was: (1) that Zahn was entitled to a directed verdict, and (2) that therefore under the indictment and on the evidence the respondent could not be guilty of conspiracy with Sahagian to bribe Zahn. Zahn was in fact acquitted by the jury. It is sufficient to say that whether Zahn was entitled to a directed verdict was a matter between Zahn and the court in which the respondent was not an interested party. The second point is covered in the TWELFTH and THIRTEENTH EXCEPTIONS. The ELEVENTH EXCEPTION is overruled.

TWELFTH AND THIRTEENTH EXCEPTIONS

In the TWELFTH EXCEPTION the respondent objects to the refusal of the presiding justice to charge that if Zahn was

not guilty then the respondent must be acquitted. The same issue is raised in the THIRTEENTH EXCEPTION to the instruction that the jury could find Zahn "not guilty" and the respondent "guilty." In effect, the respondent requested a directed verdict in event Zahn was acquitted.

The respondent first attacks the indictment in these words from his brief:

> *"Under the indictment, it was not possible for the jury to be permitted to return a verdict of 'not guilty' for Zahn and a verdict of 'guilty' against Papalos. The indictment alleges but a single conspiracy and one in which the respondent, Zahn, was an essential and indispensable party. The proof of a conspiracy between Sahagian and Papalos, without Zahn, would constitute a fatal variance."*

For the reasons set forth under the FOURTEENTH EXCEPTION, we hold the indictment was a proper vehicle for a charge of conspiracy between Sahagian and the respondent to bribe Zahn, without the participation of Zahn. With Zahn eliminated by the verdict, the charge of conspiracy remained against Sahagian and the respondent.

The second argument is directed to the sufficiency of the evidence. The respondent's position is stated as follows:

> "According to the direct evidence, then, there could be a finding of a *genuine common* purpose and *meeting of the minds* between Sahagian and Papalos *only if the complicity of Zahn in the conspiracy is accepted. Zahn's actual participation in the conspiracy was the foundation and inducement of the entire project between Sahagian and Papalos.* The Court's instruction to the jury that, on the evidence, the jury could acquit Zahn and yet convict Papalos (of conspiring with Sahagian to implicate Zahn at some future time, all of this being unknown to Zahn,) was, therefore, a contradiction of all the direct, categorical, and undisputed evidence in the case."

The acquittal of Zahn is of course a finding that Zahn did not join the evil project. If the actual participation of Zahn in the conspiracy was essential to the proof of a conspiracy by the respondent and Sahagian, then the court was in error in the rulings.

The conspiracy of Sahagian and the respondent does not rest upon the participation of Zahn in fact. Without entering into details, the jury could properly make the following significant findings:

The respondent induced in Sahagian the belief that Zahn was implicated prior to the October agreement between Sahagian and the respondent. Zahn was a public official whom Sahagian believed could be bribed. From the agreement, and the other evidence including in particular the meetings of the respondent and Sahagian, it was the understanding on the part of Sahagian that Zahn would be paid for future benefits from the commissions received by the respondent on the sale of Sahagian's wines to the State Liquor Commission. The intention of Sahagian to enter into a conspiracy with the respondent to bribe Zahn could be based upon a belief in, as well as upon the fact of, Zahn's implication.

The essential evil intention on the part of the respondent is not negatived by the innocence of Zahn. It does not follow therefrom that the respondent did not intend to bribe Zahn when the October agreement was made with Sahagian. The jury did no more it would seem than accept his statements of intention directed to Sahagian.

In short, the respondent asserts he was not telling the truth and therefore his intention however clearly expressed in words did not exist as a fact.

From the entire record we conclude it was a question of fact for the jury whether Sahagian and the respondent both intended to agree to bribe Zahn, or in the case of Sahagian,

only to uncover corruption, or in the case of the respondent, only to cheat Sahagian.

The jury, in reaching its decision, necessarily considered the fact of Zahn's freedom from guilt, and the lack of evidence that either Sahagian or the respondent approached Zahn. The weight to be given such evidence in a search for the intention of the respondent and Sahagian was for the determination of the jury. We have found no compelling reason for holding that the jury having acquitted Zahn could not find the respondent to be guilty.

The rulings were correct, and the exceptions are overruled.

FOURTEENTH EXCEPTION

The respondent excepted to the denial of his motion in arrest of judgment on the ground that the indictment failed to set forth the crime of conspiracy. The alleged deficiency in the indictment may properly be raised by such a motion. *State* v. *Beattie*, 129 Me. 229, 151 A. 427 (1930).

The argument of the respondent is that "a preliminary combination, or agreement, aimed at the *giving and receiving* of a bribe made by *only* the prospective givers and the prospective taker of the bribe, cannot amount to a criminal conspiracy, since the ultimate acts of giving and receiving a bribe themselves involve concert of action, agreement and combination."

The effect of a verdict in favor of Zahn was to remove him from the case. With Zahn stricken from the indictment, that is from those parts in which he allegedly is an actor, there is left a sufficient charge of conspiracy against Sahagian and the respondent. Prospective givers alone are thus charged with a conspiracy. The prospective taker has been eliminated. Where the indictment contains surplusage as shown by the verdict, the offending words may be

stricken and the motion denied if the remainder charges a crime. *State* v. *Chartrand,* 86 Me. 547, 30 A. 10 (1894). Where concurrence between giver and taker is required to establish the substantive crime of bribery, it is argued that it is improper to deal with that same substantive offense under the guise of conspiracy. But whatever may be the rule in other jurisdictions, in this state and under our statute *(supra),* concurrence is not required to establish a substantive crime of bribery. *State* v. *Vallee,* 136 Me. 432, 12 A. (2nd) 421 (1940). And where the concurrence and agreement, essential to conspiracy but not to bribery, are shown to exist between prospective givers, the crime is properly charged as conspiracy. The exception is overruled.

THE APPEAL

There are two principles governing the review of criminal appeals. First, the general rule set forth in *State* v. *Morin,* 149 Me. 279, 100 A. (2nd) 657 (1953), at page 282, as follows:

> ". . . 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."

Second, the exception to the rule that ". . . 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." *State* v. *Wright,* 128 Me. 404, 148 A. 141 (1929), quoted with approval in the *Morin* case.

Under the exception, it is urged that the appeal should be sustained on the ground that the presiding justice erred

in denying Zahn's motion for a directed verdict. If the verdict had been directed for Zahn, he would have been freed from any restrictions upon his competency as a witness under the statute discussed in the TENTH EXCEPTION, and thus would have been available as a witness for the respondent.

An objection to the refusal to direct a verdict for Zahn, however, cannot be raised by his co-respondent Papalos. We are asked, after the jury has acquitted Zahn, to hold that the respondent was harmed by a ruling in no way directed to his case, and which, assuming error, was corrected by the verdict. Must we examine the Zahn case to determine if error existed, when the jury has ended the matter? We think not.

For a second ground of appeal under the general rule, the respondent again raises the question that with the acquittal of Zahn, the jury was not warranted in finding the respondent guilty of conspiracy with Sahagian to bribe Zahn. The respondent in his brief states in effect that the issue is presented on appeal lest the court be unable to consider it under EXCEPTIONS TWELVE and THIRTEEN, to which we are referred for his argument. The issue was fully and completely brought before us by the exceptions noted. The appeal is dismissed.

MOTIONS FOR NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE

The two motions may be treated for convenience as one. The evidence has been "certified to the Law Court for determination." R. S., c. 94, § 15 (1944). The controlling principles are found in *State* v. *Casale*, 148 Me. 312, 320, 92 A. (2nd) 718 (1952).

The argument of the respondent in substance is this: first, that since the trial Sahagian has repudiated his testi-

mony that he acted with an evil and corrupt or criminal intent; second, that Sahagian falsely concealed his promised immunity; third, that the State improperly concealed the promised immunity of Sahagian from the respondent.

The testimony of Sahagian was vital to the State's case. Unless his testimony was believed, the respondent could not have been convicted. Without a criminal intent on the part of Sahagian, there was no conspiracy.

On the question of repudiation of evidence of criminal intent, we have the testimony of Francis W. Tully, a radio commentator and newspaper editor and publisher, and John J. Lindsay, a newspaper reporter, to the effect that in November 1952 following the trial in September, Sahagian said in substance that he had not intended to commit a crime. Sahagian testified under oath to a like effect at a hearing before an examiner of the Federal Alcohol Administration in April 1953. On cross-examination by the State, Mr. Tully testified:

> "Q. Now as I understand it, you now say that Mr. Sahagian said that in substance 'that when I testified at the Papalos trial I testified incorrectly because I did not and never had intended to commit a crime?'
> "A. Yes, sir.
>
> "Q. In any other respect did Mr. Sahagian attempt to retract any of the testimony that he had given at that trial?
> "A. No, sir."

Sahagian also testified for the respondent at the hearing on the motion. He said in part:

> "Q. So when you answered that question in saying 'I would not only pay graft but I would do anything to protect my business, protect my investment, and protect my lifetime savings' that you had no intent to break any law?

"A. My interpretation of that was, the way I understood that, I am not breaking the law. I am breaking the law but yet I could not be punished for it because I was advised to do it.

"Q. In other words, you take the position that the Chief of the Maine State Police told you to break the law and you couldn't be punished for it?
"A. No, he did not tell me that I could go ahead and break the law. He told me to go ahead and get the evidence, and I had to get the evidence to the best of my ability."

The evidence noted above came into being after the trial. It is material to the issue. The most, however, that can be said is that Sahagian recanted on his testimony. The respondent would have it, to put his case most favorably, that he is entitled to a new trial because Sahagian since the trial has said that he had no criminal intent contrary to his testimony in the case at bar.

In *State* v. *Dodge,* 124 Me. 243, 127 A. 899 (1925) the court said, at page 249:

"The mere fact that an important witness comes forward and confesses himself a perjurer at the trial does not *ipso facto* warrant the court in granting a new trial. Recantation has frequently been declared by the courts to be the most unreliable form of evidence on which to base a new trial."

The issue of Sahagian's *intent* was thoroughly examined at the trial. The jury had the advantage not available to an appellate court of seeing and hearing Sahagian and the other witnesses. They were in a position from all of the evidence, not alone from what Sahagian said, to discover his true intentions. The evidence offered on the motion for new trial reflects, so it seems to us, the interests of Sahagian at the time he spoke with the reporters and testified before the federal examiner. The evidence on this issue

would not, in our opinion from an examination of the entire record, result in a different verdict if added to the material considered by the jury in reaching their verdict.

Mr. Lindsay also testified that he overheard a brief conversation during the trial between Sahagian and another State's witness. This amounted to no more, as we read the record, than a remark by Sahagian upon his success in meeting a skillful cross-examination. It did not bear upon the claim that Sahagian had given false testimony.

On the question of concealment of immunity, the evidence discloses that Mr. Bird, in urging Sahagian to disclose information, was of the opinion that Sahagian would be immune from prosecution under the statute, reading:

> "**Sec. 8. Informer is exempted from punishment.** . . . Whoever, offending in the manner described in the 3 preceding sections (relating to bribery), gives information under oath against the other party so offending and duly prosecutes him shall be exempt from the disqualifications and punishments therein provided." R. S. c. 122, § 8 (1944).

Further, at the request of Mr. Bird, without however being informed of the individuals concerned, Mr. Niehoff gave his opinion to the like effect. Before Sahagian made any disclosures of the contract, the payments, or of the persons involved, Sahagian was informed of the opinions of Mr. Bird and Mr. Niehoff upon immunity and also sought and received the opinion of Charles N. Nawfel, his personal attorney, which was to the same effect. Armed with three opinions that he had an immunity from prosecution, Sahagian then proceeded to disclose the Papalos-Zahn matter to Mr. Bird. Later, it appears Mr. Niehoff was of the view that the immunity statute did not apply to a conspiracy to bribe. Mr. Bird and Mr. Nawfel did not alter their opinions. Counsel for the respondent were also of the opinion that the statute did not apply to a conspiracy. In discussing Sa-

hagian's position with the State, counsel for the respondent were advised that "no deal" had been made with Sahagian.

Sahagian, in testifying at the trial, believed he had gained immunity. There is, however, no evidence that anyone who acted for the State in the case, either before or during the trial, ever did more than say to Sagahian in substance that the statute governed. In brief, the immunity of Sahagian, which he believed he had, came not by way of the promise of the State, or anyone acting for the State, but from the statute.

The legal situation arising from the statute quoted was as well known to the respondent's counsel as to the State. Concealment by Sahagian or by the attorneys for the State cannot be based upon the fact that several persons interpreted the statute quite differently.

There is also a complaint that Sahagian was not permitted to explain an answer relating to his criminal intent. The record shows no more than that Mr. Nawfel requested the prosecution to put Sahagian on the stand again for this purpose. On denial of the request, neither Sahagian nor his attorney took any further action, such as communicating with the court, for example. There was nothing improper, in our view, in the conduct of the prosecution on this point. The motions are denied.

The entries will be:

Exceptions overruled.

Motion for new trial denied.

Appeal dismissed.

Motions for a new trial on the ground of newly discovered evidence denied.

Judgment for the State.

STATE OF MAINE
vs.
ALTON L. MITCHELL

Hancock. Opinion, February 11, 1955.

Criminal Law. Fish and Game. Words and Phrases. Statutes.

The word "owner" in R. S., 1944, Chap. 34, Sec. 121, as amended, has a broad application and includes a finder of a lost lobster trap with possession and control good against all the world, except the rightful owner.

R. S., 1944, Chap. 34, Sec. 121 is designed to punish interference with traps set for lobster fishing and is aimed at protecting the possession and control of the one who has set the traps.

The problems of the lobster industry are of a nature peculiar to itself and the statutes are designed and enacted with reference thereto.

ON REPORT.

This is a criminal action before the Law Court upon report and agreed statement. Respondent adjudged not guilty and discharged.

W. Atherton Fuller, Jr., for State.

Blaisdell & Blaisdell, for respondent.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, TIRRELL, BELIVEAU, TAPLEY, JJ.

WILLIAMSON, J. On report upon an agreed statement. The respondent, a lobster fisherman, found a lost lobster trap adrift bearing the name and license number of H. W. Sawyer, its owner. Instead of returning the trap to Mr. Sawyer, who was known to the respondent, and as he first intended, he set and placed it among his own traps attached

to a buoy marked with his name and license number. While he was under observation of a warden he raised the trap, and was thereupon charged with violation of the statute, reading in part, as follows:

> "No person, except the owner or an officer authorized to enforce the sea and shore fisheries laws, shall raise, lift or in any manner molest any pot, trap, car or other contrivance that is set for the taking or holding of lobsters or crabs without the written permission of the owner thereof."
>
> R. S. c. 34, § 121 (1944), enacted P. L. 1947, c. 332, § 121; now R. S. c. 38, § 117 (1954).

It is agreed that the respondent was neither the owner of the trap nor an authorized officer, and that he did not have written permission of the owner.

On first reading it would seem that the respondent admittedly was not within a class eligible to raise the trap. The word "owner," however, in the agreed statement plainly was intended by the State and the respondent to mean the person with good title to the trap or the rightful owner, and was used without reference to the statute.

The case turns upon the meaning of the word "owner" in the statute. Obviously if "owner" includes only the rightful owner, then the respondent must be found guilty. In our view, however, "owner" has a broader application; and the respondent was the owner of the trap within the meaning of the statute.

The respondent was the finder of the lost trap with possession and control good against the world, except the rightful owner. *Lawrence* v. *Buck,* 62 Me. 275 (1874); *James* v. *Wood,* 82 Me. 173, 19 A. 160 (1889); *Weeks* v. *Hackett,* 104 Me. 264, 71 A. 858, 129 Am. St. Rep. 390, 19 L. N. S. 1201 (1908); *Armory* v. *Delamirie,* 93 Eng. Rep. 664, 1 Strange 505 (1722); 52 Harv. L. Rev. 1105; 36 C. J. S. 772, Finding Lost Goods, § 5(a); 34 Am. Jur. 637, Lost Property, § 8.

In raising the trap the respondent in no way raised, lifted, or molested a trap in the possession or control of the rightful owner. He was doing no more than raising a trap which from the time it was found adrift had been at all times in his possession and control.

We need not determine what, if any, liabilities the respondent may be under apart from the statute in question. He may have become liable to Mr. Sawyer for conversion of the trap, or for damages from its use, for example. On the criminal side he may have violated the law by taking the trap for his own purposes. These are problems not peculiar to this particular type of property and are not controlled by the statutes regulating the lobster fishing industry.

In reaching our conclusion we have in mind that "owner" does not necessarily have the same meaning under differing circumstances. The Massachusetts Court has said: "The word 'owner' is not a technical term. It is not confined to the person who has the absolute right in a chattel, but also applies to the person who has the possession and control of it." *Keith* v. *Maguire*, 170 Mass. 210, 48 N. E. 1090 (1898). See also 73 C. J. S., Property §§ 13, 13 (c); 50 C. J., Property §§ 48, 50. We are not, therefore, compelled to treat the rightful owner alone as the statutory owner. We may look further to find the meaning of the statute.

The purpose of the statute seems clear; namely, to punish severely interference with traps set for lobster fishing. The penalties are fine or imprisonment or both; and ineligibility to hold a lobster fishing license for three years.

In our view the statute is not aimed at punishing, for example, the larceny of A's trap from A's yard. There is ample law governing such a case. It bears no relation to the raising of traps set for fishing.

Under the statute the Legislature protects by penalties the possession and control of the person who has set traps for lobster fishing. The precise ownership of the trap below the surface of the sea is not the important factor. In other words, the gist of the offense lies in the interference by B with traps set by A.

The parties here are the State and the finder. This is not the case of the rightful owner against the finder, or the first finder against the second finder, in which the plaintiff prevails.

On the theory of the State carried to its logical conclusion, a conditional vendee or mortgagor would not be an owner under the statute. If A purchased a trap in good faith from C which C had stolen from B, A would be violating the statute in raising the trap when set by him.

Suppose X, at the respondent's written request, had raised this particular trap. Would X without any knowledge whatsoever that the trap attached to the respondent's buoy was owned by Mr. Sawyer, have been liable under the statute for raising it? We think not.

In no way does the fact that the finder is an "owner" under the statute alter the situation to the disadvantage of the rightful owner. At all times his rights are greater than the rights of the finder.

It will serve no useful purpose to compare the meanings of "owner" in the lobster fishing statute with "owner" under the lien, motor vehicle, and other statutes. The problems of the lobster industry are of a nature peculiar to itself and the statutes are designed and enacted with reference thereto.

The respondent was then the owner of the trap within the meaning of the statute. He was accordingly eligible to raise the trap, and committed no offense in so doing. In accordance with the terms of the report, the entry will be

Respondent adjudged not guilty and discharged.

LESTER FARRINGTON
vs.
EUGENE L. MERRILL

Oxford. Opinion, February 11, 1955.

Title. Real Actions. Transcript of Record. Referees. Exceptions.

A referee's report must be sustained and the exceptions overruled where a defendant, being a moving party, has failed to bring before the Law Court a record sufficient to determine whether error was committed.

ON EXCEPTIONS.

This is a real action before the Law Court upon defendant's exceptions to the overruling of objections to a referee's report. Exceptions overruled.

Berman & Berman,
Neil L. Dow,
W. A. Trafton, Jr., for plaintiff.

William E. McCarthy,
Peter M. McDonald, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, BELIVEAU, TAPLEY, JJ. WEBBER, J., did not sit.

TIRRELL, J. This is an action to try the title to land and also for damages claimed for waste.

The writ was entered in the Superior Court at the November Term 1952 and at the June Term 1953 was referred with rights of exceptions reserved as to matters of law. On September 25, 1953 the report of the Referee was filed. At the November Term written objections to acceptance of the report of the Referee were filed. On motion of the plaintiff

report of the Referee was accepted and exceptions filed by the defendant. The report of the Referee is as follows:

"REPORT OF REFEREE

"This was an action to try the title to land described in Plaintiff's writ. Defendant in substance denies any title in the plaintiff and asserts title in himself gained through adverse possession. It may be said at the outset that the defendant has failed upon his evidence to establish any title in himself and the issue is thus narrowed to a determination as to whether there is title in the plaintiff.

"It is not in dispute that plaintiff shows a continuous chain of title to Lot 9 First Range, First Division of Lots on the east side of Ellis River, all in the Town of Andover in Oxford County and that said unbroken chain of title goes back to the Proprietors of the Town of Andover and their deed to a predecessor of plaintiff in 1813. The land in dispute here lies westerly of Lot 9 projecting toward but not reaching the Ellis River. Lot 9 itself is upland and the disputed area, likewise upland almost in its entirety, forms upon the face of the earth a sort of point or promontory roughly triangular in shape, surrounded upon its two outer sides by a bank, its point toward the Ellis River, and with most of its wide base abutting against the westerly line of so much of Lot 9 as was originally lotted by plan.

"In this case a review of ancient documents and records is enlightening. About 1794 the original Proprietors of Andover were in the process of lotting portions of the town. Their records, copies of pertinent portions of which are in evidence, disclose that one Enoch Adams, first record owner of this disputed land, successfully bid in the task of doing some of this lotting. These records further disclose that a committee was assigned to determine which of the lots as laid out by Mr. Adams should be considered first or second division lots.

On January 24, 1794 the Proprietors voted 'to extend the sidelines of the upland lots to the intervale through the skirts as they now run'; and voted further 'that each proprietor have his skirts lying between his lot and intervale.' It is apparent that the intent then was to recognize three types of land, upland lots which presumably would be arranged, laid out and plotted in a more or less regular manner, intervale, which seems to have been somewhat lower land lending itself to cultivation or improvement and which for the most part was to be also laid out and lotted, and that which was designated skirts, being land lying between the lotted upland and the lotted intervale and which no doubt was at that time considered of more doubtful value. It seems obvious that on January 24, 1794 the proprietors desired and intended to establish an ownership of what they termed skirts and in very direct language they added the skirts to the upland lotted land and provided for the extension of the lines of the lotted upland to include and embrace the skirts. In 1813 Enoch Adams became the first record owner of Lot 9 on east side of the river and the skirts which went with that lot, which skirts without any doubt included all of the land now in dispute. About 1845 a blueprint was prepared, which bears this legend: 'Andover, Maine. Traced from a plan compiled from unknown sources by Winslow Talbot for Sylvanus Poor, Esq., about 1845'. This plan discloses Lot 9 on the east side of the Ellis River as a rectangular lot marked 'E. Adams' and discloses unlotted land irregular in shape lying out along the westerly line of Lot 9. There was, however, produced for the inspection of the Referee an ancient document in the form of an old parchment plan of the same area on which very significantly the northerly and southerly sidelines of Lot 9 were extended westerly toward the Ellis River and as though to conform with the votes of the proprietors above referred to. It must be noted that in all the deeds comprising plaintiff's chain of record title Lot 9 is never described by reference to any recorded plan and

therefore is not limited as it might otherwise have been if a plan had been incorporated by reference in the description.

"I find, therefore, that Lot 9 from its very beginning was enlarged to include its skirts along its westerly line which in turn included all of the land here in dispute. Admittedly any owner of Lot 9 could have, by appropriate conveyance, severed the skirts or any part thereof from the rest of Lot 9, but the record discloses no such severance.

"In addition to the issue of title, the plaintiff seeks to recover damages for destruction and waste, and in support of that demand has shown that the defendant entered upon the land in dispute and cut valuable timber. I assess the value of the timber cut at Five Hundred and Seventy-five Dollars. Accordingly the plaintiff must have judgment for recovery of the premises described in his writ with damages as assessed for waste and his costs to be taxed by the Clerk.

"Dated this 9th day of September, 1953."

This above report of the Referee having been filed in the Superior Court, and the plaintiff having filed a motion for an allowance of the same, the defendant made written objections to the acceptance of the report. The written objections were overruled by the justice presiding. Thereafter a Bill of Exceptions was filed with the presiding justice which exceptions were allowed by him.

The plaintiff in his brief states that there are plans which were a part of the case below but which are not included here. This is borne out by the statement in the report of the Referee that an ancient parchment was presented to him for his inspection. We also note the fact brought out by the plaintiff in his brief that there was no reporter at the hearing before the Referee and that there were ten to twelve witnesses who testified as to damages, to the use of the plaintiff's predecessors in title of the land in dispute

and *to the description of the land* and its identity with that described in the writ, and to other facts material to the case.

The defendant in his brief, under the heading, "Statement of the Case," says: "Rehearsal of the *testimony* at this point would be of no value."

It is therefore apparent to this court that the defendant has failed to produce the complete record, and in particular, has failed to produce for our inspection a transcript of the oral testimony. The evidence here shows only the chain of title of the plaintiff and the town vote. The defendant's bill of exceptions does not include as a part thereof any transcript of the oral 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. See *Bickford* v. *Bragdon*, 149 Me. 324.

The report of the Referee must be sustained and the exceptions of the defendant overruled on the ground that the defendant, he being the moving party, has failed to bring before us a sufficient record from which we can determine whether or not there was error. Neither the oral testimony nor the ancient parchment has been produced, as we have before said, by the defendant.

For these reasons the exceptions of the defendant are overruled.

Exceptions overruled.

PETER P. CAREY
vs.
HECTOR J. CYR
AND
CARLETON DENICO

Kennebec. Opinion, February 12, 1955.

Liens.
Trover. Sales. Election of Remedies. Waiver.
Agreed Statement.

A plaintiff in trover must show invasion of his possessory interest, that he had a general, or a special property in the goods, and the right to their possession at the time of the alleged conversion.

The question whether a sale has been completed and title passed depends upon the intention of the parties at the time the contract was made; if such intent is not expressed it must be discovered from the surrounding circumstances.

The assertion of a lien for materials furnished must be deemed an election of remedies.

Where one has waived the tort and collected for goods sold upon an implied contract, he cannot afterwards allege *against anybody* that he did not sell the goods.

When parties have chosen to rely on an agreed statement of facts in lieu of evidence, they must state the facts with such certainty that legal principles may be applied.

ON REPORT.

This is an action of trover before the Law Court upon report and agreed statement. Judgment for defendants with costs.

Jerome G. Daviau, for plaintiff.

Joly & Marden, for defendant.

SITTING: FELLOWS, C. J., TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ. WILLIAMSON, J., did not sit.

WEBBER, J. The plaintiff, a building contractor, brings this action of trover for the alleged conversion of certain building materials. The matter is reported here on an agreed statement of facts. Plaintiff by written contract undertook to erect a building for Bourque-Lanigan Post No. 5, The American Legion, which, for convenience, we may refer to as the "Post." Subsequently plaintiff brought a bill in equity to enforce his lien for labor and materials furnished by him to the Post. In this action he was successful. The parties agree that, "The identical materials included in said lien claim are now the subject of the present suit." When plaintiff ceased operations, work remained to be done and defendants were employed by the Post to complete the building.

The plaintiff in trover must show invasion of his possessory interest. "So the possession of personal property carries with it the presumption of title and enables the possessor to maintain trover against any person except the rightful owner." *Stevens* v. *Gordon,* 87 Me. 564 at 567. "The plaintiff must show that he had a general, or a special property in the goods, and the right to their possession at the time of the alleged conversion." *Giguere* v. *Morrisette,* 142 Me. 95 at 98; *Landry* v. *Mandelstam,* 109 Me. 376. But here the plaintiff shows neither title nor possession. He had furnished and delivered the materials to the Post with the obvious intention of passing title thereby and of receiving payment therefor under either express or implied contract. This intention the plaintiff confirmed by including them in his lien claim. The materials remained on the land of the Post and in its possession. "The question whether a sale has been completed and title to the property involved has passed depends on the intention of the parties at the time the contract was made. * * * * Where such intent is not expressed, as in the instant case, it must be discovered from the surrounding circumstances and from the conduct and

the declarations of the parties." *Wallworth* v. *Cummings,* 135 Me. 267 at 269. It was open to the defendants to show title in the Post at whose direction they were acting. *Clapp* v. *Glidden,* 39 Me. 448.

Moreover, upon these facts, the plaintiff by his assertion of lien must be deemed to have elected his remedy and to have adopted the theory that the property had passed to the Post. This theory would ground the claim of lien or assumpsit but not the tort. The doctrine of election of remedies has been applied in somewhat similar situations. *Ware* v. *Percival,* 61 Me. 391; *Hussey* v. *Bryant,* 95 Me. 49. In *Van Winkle* v. *Crowell,* 146 U. S. 42, plaintiffs who were furnishing machinery filed a mechanics' lien which reached trial stage and was then dismissed by plaintiffs without trial on the merits. The court said at page 50, "The *assertion* of that lien treated the property as the property of (the purchasers) * * * *. It was inconsistent with the existence in the plaintiffs of a title to the property. It treated the sale of the property to (the purchasers) as unconditional." (Emphasis supplied). In *Shonkweiler* v. *Harrington et al.,* 102 Neb. 710, 169 N. W. 258, the court said at page 259 of 169 N. W.: "And so here, if he has waived the tort and collected from the corporation upon the implied contract to pay for the goods, he cannot afterwards allege *against anybody* that he did not sell the goods to the corporation." (Emphasis supplied). See also *Davis* v. *Hauschild,* 243 S. W. (2nd) (Mo.) 956 at 959 where it is said: "The basis of the rule sought to be invoked is that one may not have the aid of the courts upon two *contradictory* principles or theories based upon one and the same set of facts. * * * * 'The basic concept of the doctrine of election is that a party shall not be permitted to insist at different times upon the truth of two inconsistent and repugnant positions, according to the promptings of his own interest, as to first affirm and later disaffirm a contract, or the like.' *Myers* v. *Ross,*

D. C., 10 F. Supp. 409, 411." We do not think the limitations upon the application of the doctrine imposed in such cases as *Wyman* v. *Bowman,* 71 Me. 121; *Clark* v. *Heath,* 101 Me. 530; and *Marsh Bros. & Co.* v. *Bellefleur,* 108 Me. 354, apply here upon the facts before us.

The agreed statement of facts contains the following: "When (plaintiff) and the (Post) severed relations, there was a considerable amount of building material not yet affixed to the building, left on the premises, which said defendants at the request and order of the (Post), proceeded to use for the completion of the building." This nebulous statement does nothing to assist us in deciding this cause. It does not inform us whether any part or all of these items are involved in this trover action—or even what the items consist of. The parties have chosen to rely on an agreed statement of facts in lieu of evidence and must state the facts with such certainty that legal principles may be applied. However, even if we were supposed to infer from this statement that the items alleged to have been converted were not affixed by plaintiff to the real estate, we would not be disposed to reach a different result. The unequivocal statement that they were included by plaintiff in his claim of lien and the admission that they were left on the real estate of the Post and were treated by the Post as by one having possession, title, and the right to control and disposition are consistent only with the theory adopted by the plaintiff himself that both title and possession had passed to the Post before any acts of alleged conversion by these defendants ever occurred. If that be so, the only question remaining unresolved was one of payment by the Post to the plaintiff and this action of trover against third party defendants claiming under the Post would not lie. The complete record of the lien action is before us and there is no suggestion that plaintiff's recovery was in any way reduced because of the non-lienability of any items or of these items

now in suit in particular. But even if there had been such reduction, upon the theory of passage of title and right to possession adopted by plaintiff, his vehicle of attempted recovery should have been assumpsit. The plaintiff cannot now classify as conversion the use made by defendants under the orders and directions of the Post of property which both the plaintiff and the Post have consistently dealt with as belonging to, and possessed by, the Post.

We have not looked beyond the record before us in reaching the foregoing conclusion which effectively decides this case, but we do not deem it improper to draw upon our own intimate familiarity with all of the circumstances solely for the purpose of suggesting that no injustice can or does result from this decision. The plaintiff here was in willful breach of his building contract with the Post. This court has now been called upon to issue its fourth opinion directly resulting from this controversy. The lien claim together with an action of damages brought by the Post against this plaintiff were reviewed by us in *Bourque-Lanigan Post No. 5, The American Legion* v. *Peter P. Carey,* 148 Me. 114. Thereafter, plaintiff brought assumpsit for his own services and this action was reviewed by us in two opinions, both captioned *Peter P. Carey* v. *Bourque-Lanigan Post No. 5, The American Legion, et al.,* and reported in 149 Me. 390 and 150 Me. 62. In the latter opinion we said at page 66, "The combined result of the two previous actions gave the plaintiff, having in mind his unexcused non-performance and breaches of contract, all that the law would allow on the most favorable view of the equities of his position." We think there should be an end of the flood of litigation involving the same parties or those in privity with them arising from the breach by a contractor of his building contract. It seems apparent that the plaintiff and his counsel are unwilling or unable to accept the basic principle that when one is guilty of willful breach of his contract with re-

sulting damage, he cannot ordinarily expect to have *all* the benefits of his contract as though he had performed it. As a result of the first cross actions, plaintiff recovered for what he did, since when he has been seeking by direct and indirect action to recover for what he did not. His failure in subsequent litigation is the penalty of his breach.

Judgment for defendants, with costs.

THOMAS J. KENNON, LIBLT.
vs.
CECELIA M. KENNON, LIBELEE

Kennebec. Opinion, February 12, 1955.

Divorce.

The rule that findings of fact will not be disturbed in appellate proceedings, if supported by credible evidence, is applicable to divorce proceedings.

ON EXCEPTIONS.

This is a divorce proceeding before the Law Court upon exceptions to the dismissal of the libel by the presiding justice. Exceptions overruled.

Joly & Marden,
F. Harold Dubord, for libelant.

Goodspeed & Goodspeed, for libelee.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, TIRRELL, TAPLEY, JJ. BELIVEAU, J., did not sit.

WILLIAMSON, J. This is a libel of divorce brought by a husband on the grounds of extreme cruelty, cruel and abu-

sive treatment and gross and confirmed habits of intoxication from the use of intoxicating liquors. R. S., c. 153, § 55 (1944) as amended; now R. S., c. 166, § 55 (1954). The libel was entered at the June 1953 term of Superior Court in Kennebec County and was heard and decided at the February 1954 term by the presiding justice without a jury and without making findings of fact. Specific charges of the acts of cruelty and cruel and abusive treatment were filed by the libelant. The presiding justice denied the divorce and the case is before us on exceptions by the libelant. In his bill, the libelant says "This finding (dismissal of the libel) was plainly wrong and against the evidence and the preponderance of the evidence."

There are three principles governing our consideration of the case. First:

> "It is well established in this State that the general principle applicable to factual findings, i.e. that those made by the trier of fact will not be disturbed in appellate proceedings if supported by credible evidence, is controlling in divorce proceedings."

Hadley v. *Hadley,* 144 Me. 127, 130, 65 A. (2nd) 8 (1949) quoted with approval in *Geyerhahn* v. *Geyerhahn,* 148 Me. 534, 97 A. (2nd) 230 (1953).

The rule has also been stated in these words:

> "This Court can not review the findings of a single justice on questions of facts. He is the exclusive judge of the credibility of witnesses and the weight of the evidence; and only when he finds facts without evidence or contrary to the only conclusion which may be drawn from the evidence is there any error of law." *Bond* v. *Bond,* 127 Me. 117, 129, 141 A. 833 (1928).

Other illustrative cases are: *Mitchell* v. *Mitchell,* 136 Me. 406, 11 A. (2nd) 898 (1940); *Heaton* v. *Heaton,* 137 Me.

325, 14 A. (2nd) 708 (1940); *Alpert* v. *Alpert,* 142 Me. 260, 49 A. (2nd) 911 (1946); *Stewart* v. *Stewart,* 143 Me. 406, 59 A. (2nd) 706 (1948).

It is plain that the libelant takes nothing by his complaint that the decision was ". . . against the evidence and the preponderance of the evidence." He must bring the case within the rule stated above.

Second: Upon establishing a cause for divorce alleged in the libel, the libelant thereupon gains an absolute right to a divorce. In other words, it is not within the discretion of the court to grant or refuse a divorce, provided the libelant proves his case. The court must look to the statutes for the rules governing divorce. *Michels* v. *Michels,* 120 Me. 395, 115 A. 161 (1921). See annotation in 74 A. L. R. 271.

Third: Gross and confirmed habits of intoxication are a ground for divorce only if they continue to the time of the filing of the libel. It may be inferred, under certain circumstances at least, that such confirmed habits once proven continue to exist in the absence of evidence to the contrary. *Fish* v. *Fish,* 126 Me. 342, 138 A. 477 (1927).

There is no dispute about the principles of law in the instant case. The difficulty lies in finding the facts to which the law must be applied.

It will serve no useful purpose to rehearse the unhappy story of this marriage from the record before us. There are no facts proven to compel the granting of a divorce either for extreme cruelty or cruel and abusive treatment. The incidents disclosed in the record were doubtless considered by the presiding justice in the setting of the entire married life of the parties.

Admittedly there was excessive use of liquor by the libelee for a period of their married life. There was, however, ample evidence that the evil habit (whether or not it had

reached the state of "gross and confirmed habits" under the statute) had ceased to exist more than a year prior to filing of the libel. In particular the court could have found that the libelee from January 1952 successfully taught in the public schools of the community where the family was living without returning to the conditions existing prior thereto.

In brief, the case presented questions of fact for the determination of the presiding justice. His ultimate finding for the libelee was based on credible evidence and, under the rules stated, must stand.

Exceptions overruled.

AGNES J. FOSSETT, GEORGE M. FOSSETT, DOROTHY PAYNE, HELEN J. SOUZA AND JOSEPH SOUZA

vs.

RICHARD DURANT

York. Opinion, February 28, 1955.

Negligence. Automobiles. Passengers. Loss of Consortium. Damages.

On motion for a new trial the issue is whether the verdicts are substantially wrong and the burden is on the one seeking to set aside the verdict.

In a suit by a husband for damages consequent to his wife's injury, where no loss or expense is shown, a verdict is properly rendered for the defendant. Loss and expense sustained by him are not merely items of damages, but are essential to the cause of action itself.

When the evidence discloses two arguable theories both sustained by evidence, and one is reflected in the verdict, the Law Court cannot act.

ON MOTION FOR NEW TRIAL.

These are negligence actions before the Law Court upon plaintiff's motions for new trials. Motion denied.

Robert M. York,
Julian G. Hubbard, for plaintiff.

William H. Clifford,
John J. Connor, Jr., for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

TIRRELL, J. The cases presented to this court are all on motions for a new trial. There are five cases involved, all of the cases having been tried together in the Superior Court. The plaintiffs allege in their writs that the injuries claimed to have been received by them or the damages resulting from such injuries were solely the result of the rear-end collision between two automobiles, to wit, one operated by plaintiff, George M. Fossett, and the other by the defendant.

The plaintiff, George M. Fossett, was the owner and driver of the car in which all of the plaintiffs were riding. The defendant, namely Richard Durant, at the time of the trial at least, was a minor, and the court on motion appointed a guardian *ad litem* in his behalf.

Agnes J. Fossett, one of the plaintiffs, whose case we will first consider, is before us "on motion of plaintiff because it is against the evidence, because it is manifestly against the weight of the evidence, and because the damages are inadequate." The issue in these cases is whether or not the verdicts are substantially wrong.

George M. Fossett, the second plaintiff, at the time of the accident, was the owner of one of the automobiles involved in the rear-end collision. For the sake of convenience we will first consider the case of Agnes J. Fossett in which the jury returned a verdict in her favor of $100. There is no question but that sometime on the afternoon of the alleged

accident Agnes J. Fossett, wife of the plaintiff, George M. Fossett, received serious injury, namely a fracture on the right side of the pelvis. The jury returned a verdict in her case of $100. It would appear at first glance that this amount was entirely inadequate. However, the defendant contended, and presented evidence, that after the rear-end collision of the two automobiles Mrs. Fossett was struck by another automobile after she had alighted from the vehicle in which she was riding and when she was crossing the highway. This other car was travelling in the opposite direction. The question then before the jury was as to whether or not and how much injury Mrs. Fossett received as a result of the collision between the car in which she was riding and the car operated by the defendant. The verdict as rendered by the jury, namely for the plaintiff, was in the amount of $100. It is the purpose of a jury to decide questions of fact. Questions of fact were before the jury in this case. Therefore the jury was within its province when it made its decision as to when and how the plaintiff was injured.

The power of this court to grant new trials is limited to decisions on the question as to whether the verdict of the jury is so plainly contrary to the evidence that manifestly it was influenced by prejudice, bias, passion or mistake; otherwise its findings of fact are binding upon this court. *Witham* v. *Quigg*, 146 Me. 98, at 102, 77 A. (2) 595.

In the present case the question for the weight of any testimony given was plainly within the province of the jury unless it is shown that the jury was activated by improper motives. In the case of *Rawley* v. *Palo Sales, et al.*, 144 Me. 375, 70 A. (2) 540, the court said:

> "This court cannot say that the verdict here is clearly wrong. There is competent evidence on which reasonable men might differ in conclusions . . . It certainly has not been shown to the court

> that there was 'prejudice, bias, passion or mistake'. *Jannell* v. *Myers*, 124 Me. 229."

See also *Lessard* v. *Sherman Corp.*, 145 Me. 296, at 297, 75 A. (2) 425:

> "It hardly seems necessary to reiterate the rule, so well known and so consistently applied in this state, that the jury is the arbiter of the facts and that this is a court of law which will not interfere with a jury's verdict unless it is clearly and manifestly wrong."

It is well settled law in this state that the burden of proof to show that the verdict is manifestly wrong is on the party seeking to set such verdict aside. See *Witham* v. *Quigg, supra,* at page 103; *Fotter* v. *Butler,* 145 Me. 266, at page 269.

When a motion for a new trial is before this court the evidence in the case must be looked upon in the light most favorable to the successful party involved in the trial by jury. *Bragdon* v. *Shapiro,* 146 Me. 83, at page 84. The evidence in the instant case, namely that of Agnes J. Fossett, presented to the jury such facts from which they might decide as to whether all of the injuries of the plaintiff were due to the collision of the two automobiles first involved in the accident or whether the plaintiff received some of her injuries as a result of being struck by the second car being operated by one other than this defendant.

It is therefore apparent to the reader of the record containing the transcript of the testimony that the jury decided that the more serious injuries of the plaintiff should have been attributed to her being struck by a vehicle proceeding in the opposite direction from the one in which she had been riding, when she was crossing the highway after having been in the collision. The jury, as triers of the facts, had the right to determine in what manner the plaintiff, Agnes J. Fossett, received her injuries. If the evidence in a case of

this nature presents only a question of fact to the jury concerning which intelligent and conscientious men may differ, this court will not substitute its judgment for that of the jury. *Lange* v. *Goulet,* 144 Me. 16, at page 17.

In the trial of this case two theories were presented. The findings of the jury are reflected in its verdict. Therefore this court cannot act. *Brown* v. *McCaffrey, et al.,* 143 Me. 221; *Jenness* v. *Park,* 145 Me. 402.

This court, in considering a motion for a new trial, will not disturb a jury's verdict unless there is a moral certainty that the jury erred. This rule of law is so well known that no citations are necessary and the same statement of law is contained in the cases previously cited.

Therefore the motion of Agnes J. Fossett is denied.

We will now turn to consideration of the case of George M. Fossett in which he attempts to have damages awarded to him. The motion for a new trial by George Fossett, the husband of Agnes J. Fossett, whose case we have previously decided, is based on these same grounds, namely because it is against evidence and because it is against the weight of the evidence. The verdict in this case was for the defendant. The declaration in Mr. Fossett's writ is to the effect that his wife, allegedly having received injuries in the collision of the two cars before referred to, it became necessary that she receive medical, surgical and hospital care and attendance, and that he had been deprived, *solely* by reason of said injury, of the consort, society and companionship of his wife, and that in addition he, being the husband of the said Agnes J. Fossett, and as a result thereof did incur great and substantial medical, surgical and hospital bills and expense, and that he will in the future be compelled to incur and expend large sums of money for her medical, surgical and hospital care and attention.

Having decided that the jury verdict in the case of Agnes J. Fossett should not be disturbed because it is reflected in the findings of fact concerning her, and having decided that the injury received by her was only to the value of $100, it is the opinion of this court that the jury considered her injury attributable to the first collision to be of only $100 value, that the plaintiff, George M. Fossett, was due nothing from this defendant because of the alleged loss of his wife's services or his expenditures in her behalf by reason of the first accident, and therefore the verdict of the jury should not be and is not disturbed, namely in favor of the defendant. In a suit by a husband for damages consequent to his wife's injury where no loss or expense is shown, verdict is properly for the defendant. "Loss and expense sustained by him are not merely items of damages, but are essential to the cause of action itself." 27 Am. Jur. 102, sec. 503.

In the case docketed as *Dorothy Payne* v. *Richard Durant* we find that she also was involved not only as a passenger in the Fossett car but also as a pedestrian attempting to cross the main highway, and that the jury from the evidence could have found that she was in the same position, and the same rules apply, as in the case of *Agnes J. Fossett* v. *Richard Durant*. Her motion, namely that of Dorothy Payne, therefore is denied.

Mrs. Helen J. Souza was not involved in the second collision and the defendant does not contend that any injuries she received were not received in the first collision, although issue was taken as to the extent of the severity of those injuries. The jury returned a verdict in her favor in the amount of $220. The question involved in this case is confined solely to the inadequacy of the damages awarded.

Mrs. Souza brought suit against the defendant for personal injuries with an *ad damnum* of $15,000.

It is not disputed by the defendant that Mrs. Souza was in the Fossett automobile when it was struck by the automobile operated by the defendant. The testimony in this case of the experts, namely the osteopathic physician and the medical doctor, differs. A doctor called on behalf of the plaintiff admitted that he felt that her condition was not very serious. X-rays taken of her coccyx appeared to be negative. The medical testimony given in behalf of the plaintiff alluded to the complaints of the plaintiff and was to the effect that they were mainly subjective. It is therefore, in this case, a matter of fact to be decided by the jury as to the extent of the plainiff's injuries.

When the evidence discloses that in the trial below two arguable theories are presented, both sustained by evidence, and one is reflected in the verdict, the Law Court cannot act. *Brown* v. *McCaffrey, et al.*, 143 Me. 221, 59 A. (2) 702; *Jenness* v. *Park,* 145 Me. 402, 76 A. (2) 321.

In considering a motion for a new trial the court will let the verdict of the jury stand unless there is a moral certainty that the jury erred. *Josselyn* v. *Dearborn, et al.*, 143 Me. 328, at page 339, 68 A. (2) 174.

This court will not disturb the findings of a jury when there is reasonable evidence to justify the verdict reached by the jury. This theory of the law has been set forth so many times by this court that it serves no purpose to cite cases already decided by us to which reference may be had.

The motion therefore in this case, namely *Helen J. Souza* v. *Richard Durant,* is denied.

In the suit of Joseph Souza against this defendant the allegations are for loss of services of his wife and the medical bills incurred by her for which he would be liable. His recovery is dependent upon the wife's injuries and the amount shown as paid by Joseph Souza is $17. The jury returned a verdict in favor of Mr. Souza in excess of the

amount shown by him for medical attention. There is in the record no evidence to show that Mr. Souza paid out any other medical bills on behalf of his wife nor is there any evidence of his spending any money due to his wife's injury other than the $17.

The docket entry in each and every case which we have before us must be

Motion denied.

DORIS BRADFORD
vs.
JAMES M. DAVIS AND BESSIE E. DAVIS

DORIS BRADFORD
vs.
MERRILL F. DRISKO

Washington. March 10, 1955.

Exceptions. Rule 40.
R. S., 1954, Chap. 106, Sec. 14.

A bill of exceptions which does not include the material required by the docket entry is not complete, and therefore, under Maine practice cannot be considered.

ON PETITION.

These are petitions before the Law Court to establish the truth of exceptions disallowed by a Justice of the Superior Court. Petitions to establish the truth of exceptions dismissed.

William Silsby, for plaintiff.

Dunbar & Vose, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, BELIVEAU, TAPLEY, JJ. WEBBER, J., did not sit.

WILLIAMSON, J. These petitions in two cases to establish the truth of exceptions disallowed by a Justice of the Superior Court present identical issues. R. S., c. 94, § 14 (1944), now R. S., c. 106, § 14 (1954); Revised Rules of Court 40, 147 Me. 481 (1952).

A petition for writ of review in the *Drisko* case was entered in the Superior Court in Washington County on November 14, 1952 returnable at the February term 1953. The docket entries read in part as follows:

"Oct. T/53, 9,	Hearing had and by agreement decision to be rendered by the presiding justice in vacation as of this term, with right of exceptions reserved as to rulings of law. Extended bill of exceptions, if filed, to include the petition as filed, defendant's motion to dismiss as filed, certified copies of docket entries in Bradford vs. Drisko, October Term 1947 #29, Bradford vs. Drisko, October Term 1950 #87, Bradford vs. Drisko, October Term 1951, #216, as filed by the defendant, and all papers in dockets as filed in Bradford vs. Drisko, October Term 1950 #87, and Bradford vs. Drisko, October Term 1951, #216.
Dec. 30, '53	Writ denied.
1/28/54	Bill of Exceptions filed and allowed. Extended Bill of Exceptions to be filed on or before August 1, 1954. Transcript of evidence to be filed on or before September 1, 1954.
7/30/54	Extended date of filing Bill of Exceptions to Sept. 1, 1954.

	Extended time of filing transcript of evidence to Oct. 1, 1954.
8/6/54	Extended Bill of Exceptions filed.
8/31/54	Exceptions disallowed."

The plaintiff thereafter filed the present petition which the defendant answered. Depositions of witnesses were taken by a commissioner appointed on motion of the defendant.

It is unnecessary, in our view, to consider or pass upon two issues raised by the defendant. First—the defendant moved in this cause to dismiss the petition on the ground that the printed case did not show an entry relating to filing depositions and did not contain the depositions mentioned above. Second—the defendant urged that the court had no authority to extend the time for filing the extended bill of exceptions from August 1, 1954 to September 1, 1954, on the ground that neither the defendant nor his attorneys waived or consented to such extension.

The issue presented by the defendant relating to the sufficiency of the bill of exceptions is decisive of the case, and we base our decision thereon.

It is plain from reading the bill that the plaintiff has not included therein by reference or otherwise the material specifically set forth in the docket entry at the October Term 1953. A copy of the findings and formal written report of the Referee in the action, and a copy of the writ and declaration were attached to the bill and made a part thereof. The bill, however, does not include the motion to dismiss, and several certified copies and other papers described in the docket entry. In brief, the plaintiff has not complied with the terms of the agreement. The bill of exceptions which the presiding justice declined to sign, and which is now presented to us, does not meet the requirements of the docket entry. The governing principle was stated in *Jones* v. *Jones*, 101 Me. 447, 451, 64 A. 815 (1906) in these words:

> "The bill must be strong enough to stand alone. The court, in considering the exceptions, cannot travel outside of the bill itself."

The plaintiff here considered it unnecessary to include the material set forth in the docket entry of October Term 1953. It is clear that without the material the bill is not complete, and therefore under our practice cannot be considered. *Bradford* v. *Davis, et al.*, 143 Me. 124, 56 A. (2nd) 68 (1947). See also the informative address by Justice (later Chief Justice) Merrill on "Some Suggestions on Taking a Case to the Law Court" in Vol. XXXX Maine State Bar Association 175 (1951).

The entry in each case must be

Petition to establish truth of exceptions dismissed.

THEODORE PAGE

vs.

HEMINGWAY BROS. INTERSTATE TRUCKING CO.

Kennebec. Opinion, March 10, 1955.

Witnesses. Cross-examination. Exceptions.
R. S., 1944, Chap. 100, Sec. 105.
Agency. Judge's Charge.

The interest of a witness, and its extent, may always be shown on cross-examination, and the limit of such inquiry is within the discretion of the court.

It is well established that the limits to collateral cross-examination lie within the discretion of the trial justice, and his exercise of this discretion is not ordinarily reviewable.

To constitute error in a ruling involving the exercise of legal discretion it must be shown that the ruling constituted a clear abuse of discretion and that it was prejudicial.

It is recognized law of this state that grounds for exception must be stated and exception taken at the time of the ruling.

R. S., 1944, Chap. 100, Sec. 105 relates to expressions of opinion on "issues of fact."

Where a judge's charge taken as a whole is sufficient and proper and the elements of the law have been fully and adequately covered, further instructions on the point are not required.

ON EXCEPTIONS AND MOTION.

This is an action of assumpsit before the Law Court upon defendant's exceptions and motion for a new trial. Exceptions overruled. Motion denied.

Edmund S. Muskie, for plaintiff.

Niehoff & Niehoff, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, TAPLEY, JJ. BELIVEAU, J., did not sit.

TIRRELL, J. This action was of assumpsit on account annexed to recover $822 for labor and materials. Plaintiff is an independent contractor engaged in doing general work in moving earth and gravel, and defendant is a corporation engaged as a common carrier in the hauling of freight in interstate commerce and in the State of Maine.

The defense to the action was a plea of the general issue, and consisted of a denial that the work done and labor furnished by the plaintiff was authorized by the defendant.

The evidence shows that the events leading up to this litigation took place in the summer of 1952. One James Welch owned a filling station in Winslow, and a part of the premises of this filling station was being used by the defendant on a rental basis for the parking of its trucks and the transfer of truck cargoes. In addition to the payment of rental at $45 a month, the defendant purchased gasoline and oil at

a discount at Welch's service station. During this summer of 1952 it was suggested that the transfer of truck cargoes by the defendant be undertaken at a point farther away from the edge of the main highway. Subsequently Welch discussed this suggestion with a Mr. Gaudreau, General Manager for the defendant. During this discussion it was proposed that a shelf be cut into a nearby embankment of earth so that trucks owned and operated by the defendant might back up to the shelf and use such platform to transfer cargo which was being transported in its trucks.

The case went to the jury and its verdict was that the plaintiff Page recover from this defendant the sum of $856.43. The case is now before this court on a bill of exceptions presented by the defendant and in addition thereto a general motion for a new trial. The first exception relied upon by the defendant is based on the following issue:

During the course of the trial James Welch was called as a witness and testified for the plaintiff. After testifying on direct examination that he had contracted with the plaintiff for labor and material and that he did so in behalf of the defendant and upon the express authority of the defendant, counsel for the defendant asked Welch on cross examination the following questions:

By MR. NIEHOFF:

Q. Did you tell Mr. Jortberg if the Hemingway people would agree to pay half of it they should give the check to you and not to Theodore Page because Page owed you money for gasoline and it is the only way you could get it?

A. No, sir.

Q. You had no such talk with Mr. Jortberg?

A. No, sir.

Q. Did Mr. Page owe you a bill at the time?
A. Yes, sir.

MR. MUSKIE: I object.

THE COURT: It is excluded. You will ignore it, members of the panel. Forget the question and that answer.

MR. NIEHOFF: I understand that was excluded?

THE COURT: That is right.

MR. NIEHOFF: I want to ask: Does he owe you any money now?

MR. MUSKIE: I object.

THE COURT: Excluded.

MR. NIEHOFF: The purpose is to show interest of the witness.

MR. MUSKIE: I object.

THE COURT: I think it is a bit far fetched. Excluded.

MR. NIEHOFF: May I have an exception?

THE COURT: You may have an exception.

To facilitate the discussion of the issues contained in defendant's bill of exceptions we will consider each exception as it occurred during the trial of the case. The exception above stated will be referred to as defendant's Exception No. 1.

It is the contention of the defendant that no person is excused or excluded from testifying in any civil suit or proceeding at law or in equity by reason of his interest in the event thereof as a party or otherewise, but such interest may be shown to affect the credibility of the witness. Chap. 100, Sec. 115, R. S., 1944, now Chap. 113, Sec. 114, R. S., 1954.

Interest signifies the specific inclination which is apt to be produced by the relation between the witness and cause at issue in the litigation. Wigmore on Evidence, 3rd Ed. Vol. III, Sec. 945.

Any motive which the witness may have, the manner in which the witness testifies and the temptation he might have to color his testimony should be taken into consideration by the jury. The jury has the right in both civil and criminal cases to consider the interest which the witness may have in the result of the litigation in which he is testifying. It is within the province of the jury to pass upon the weight of the testimony given by an interested witness. 58 *Am. Jur.* 495, Sec. 866.

The interest of a witness, and its extent, may always be shown on cross-examination, and the limit of such inquiry is within the discretion of the court. *Vermont Farm-Mach. Co.* v. *Batchelder,* 35 A. 378 (Vt.).

The weight of testimony and the credibility of witnesses are to be determined by the jury and not by the court. *Lyschick* v. *Wozneak,* 149 Me. 243; 100 A. (2) 425.

At the least, we hold that the ruling on the proffered question and answer was one well within the legitimate range of judicial discretion. It is well established that the limits to collateral cross-examination lie within the discretion of the trial justice, and his exercise of this discretion is not ordinarily reviewable. *State* v. *Rollins,* 77 Me. 380; *Thompson* v. *Thompson,* 79 Me. 286, 289, 9 Atl. 888, 889.

> "The limits of collateral cross-examination, are to be determined by the presiding judge, and his determination is not subject to revision or exceptions." *Grant* v. *Libby,* 71 Me. 427, 430.

The defendant must show that there was a clear *abuse of discretion* by the justice below.

In a Massachusetts case involving a point quite similar to the one at bar, the trial justice excluded evidence that the plaintiff signed a bond on the behalf of a witness after the defendant had sued the witness into debtor's court. The Supreme Court of Massachusetts said that such exclusion was within the discretion of the trial justice and that no reversible error had been caused. *Gavin* v. *Durden Coleman Lumber Co.*, 229 Mass. 576, 118 N. E. 897.

Beyond showing that the ruling of the presiding justice was clearly erroneous and an abuse of discretion, defendant must also demonstrate that such ruling was prejudicial to it. *Pitcher* v. *Webber*, 104 Me. 401, 71 A. 103; *State* v. *Ouellette*, 107 Me. 92, 77 A. 544.

The record clearly shows that the ruling of the justice presiding was not prejudicial to defendant. The transcript of the evidence shows that defendant's counsel was trying to bring out the interest of the witness Welch by questioning him as to bills which plaintiff owed Mr. Welch. This was objected to and such objection sustained. However, the transcript of the evidence shows that Mr. Jortberg, an employee of the defendant corporation, on direct examination by defendant's counsel, testified as follows:

> "A. As I remember, he said that Page owed him some money for gasoline and he preferred having the money paid to him so that he could clear that account when he was paying Page."

This was not objected to by plaintiff's attorney and the evidence was before the jury in this instance, at least. The record shows that the very transaction which defendant's counsel contended showed interest on the part of Welch went into evidence, being brought out by defendant's counsel. For this reason defendant was not prejudiced by having this evidence produced for deliberation by the jury at a later stage of the proceedings. Any prejudice which might have occurred to defendant was erased by this later testi-

mony. This court has spoken on this very point before in the case of *Allard* v. *LaPlain*, 125 Me. 44, 45, 130 Atl. 737, 738, as follows:

> "Nor was the defendant aggrieved by the exclusion of the assessed value, . . . inasmuch as the amount was later testified to and allowed to stand as its fair market value."

The ruling of the presiding justice in excluding the cross examination above referred to was within his judicial discretion and is not here reviewable because the same testimony did not and could not prejudice defendant's case. The defendant takes nothing by the exclusion of this testimony by the presiding justice.

No reversible error was committed by the presiding justice in his remark, "I think it is a bit far fetched." made in connection with the exclusion of testimony regarding a debt owed the witness Welch by the plaintiff. As a matter of fact this issue is not properly before this court. It is well known and recognized law in this State that grounds for exception must be stated and exception taken at the time of the ruling. If counsel for the defendant thought the remark of the presiding justice was in contravention of the statute (R. S., 1944, Chap. 100, Sec. 105), and had he been desirous of preserving his rights by exception, it was his duty to call the attention of the court to the fact at the time instead of lying by in silence and taking a chance of a verdict in his favor. Reference to the transcript of evidence makes it clear to this court that defendant's counsel was excepting only to the ruling of the presiding justice as to cross-examination. Counsel had indicated the reason for his proposed cross-examination, but failed to suggest to the presiding justice that the statement, "I think it is a bit far fetched" was then being questioned. The presiding justice was given no opportunity to correct thereby any impression the jury might have received as a result of his remark. This

court does not consider the remark of the presiding justice as being improper and was in no manner prejudicial to the defendant. He used the language as indicated to inform counsel the reason for his ruling on the objection. It operated only as an explanation by the justice presiding as to the reason he had made such ruling, and nothing more.

In any event, the remark, if the remark could be considered as an expression of opinion, was not on an "issue of fact," as is referred to in R. S., 1944, Chap. 100, Sec. 105. See *Elwell* v. *Sullivan,* 80 Me. 207, at page 208. In this case the court said:

> "And it is not every remark of the presiding justice, especially when made to counsel in relation to the manner of conducting a cause, that is to be regarded as the expression of an opinion upon "issues of fact." If counsel thought the remark was in contravention of the statute, and he was desirous of preserving his rights by exceptions, it was his duty to call the attention of the court to the fact at the time, instead of lying by in silence and taking the chance of a verdict in his favor, and complaining afterward."

We now, therefore, decide that the defendant took nothing by his first exception and it is overruled.

The next exception as presented to this court by the defendant in its bill of exceptions is the refusal of the presiding justice to give certain requested instructions to the jury. At the conclusion of the charge to the jury by the presiding justice the defendant seasonably requested the following instructions:

(1) A person dealing with an agent assumes the risk of lack of authority in the agent. He cannot charge the principal by relying solely on the alleged agent's assumption of authority.

(2) If one deals with a special agent or an agent who has only special authority to act for his

> principal, he acts at his peril, for he must acquaint himself with the strict extent of the agent's authority and deal with the agent accordingly.

The presiding justice, as part of his charge to the jury, stated, and we now quote from the record:

> "This is an action in which the plaintiff seeks to recover for labor and materials furnished, he alleges, the defendant company. The testimony you have heard, and in this case as in most civil cases, the testimony comes from the mouths of witnesses. It is oral testimony, and it is what you have here, and the case centers largely, almost wholly, on one point and that is the one point that is in issue: Was Mr. Welch the agent of this defendant? This defendant had the power, authority and the right if it saw fit to appoint or to make Mr. Welch its agent for this or any other thing it saw fit to do and any other thing which Mr. Welch engaged to do for them.
>
> "I am not going over the testimony. You have heard it. You have heard Mr. Welch's testimony. You have heard the testimony of the representatives of this defendant company.
>
> ". . . In this case it is claimed the defendant made Mr. Welch its agent, and as I said, had authority to do that. Now, did it? The burden is on the plaintiff to satisfy you by a fair preponderance of the evidence that that is what happened."

We are of the opinion that the charge to the jury by the presiding justice in this case, taken as a whole and in connection with the evidence, was sufficient and proper. *Reed et al.*, v. *Power Co.*, 132 Me. 476, at 480. Where the elements of the law have been fully and adequately covered by the charge, the judge is not required to give further instructions on the point. *Desmond, Pro Ami* v. *Wilson,* 143 Me. 262; *Dall* v. *Electric Co.*, 126 Me. 261.

The court is not required to charge the jury in the precise language used by counsel. The exceptions to the refusal of the presiding justice are also without merit and are hereby overruled.

Having overruled the defendant's exceptions, we now pass to the general motion for a new trial. This court on so many different occasions has refused to grant new trials on the grounds usually contained in general motions, such as here appears, that the law concerning the same is well established and citations are unnecessary. There was ample evidence for the jury to decide the issue as it did and this court will not interfere nor become the trier of facts. The motion is denied.

The entry must be

Exceptions overruled.
Motion denied.

LEWISTON - AUBURN SHOEWORKERS PROTECTIVE ASSOCIATION
vs.
FEDERAL SHOE, INC.

Androscoggin. Opinion, March 16, 1955.

Arbitration and Award. Labor. Collective Bargaining. Revocation. Bad Faith.

One acting as attorney, agent, and arbitrator under an arbitration agreement in inducing the other arbitrators to defer decision beyond the contract time limit cannot complain because the time limit has expired, since such conduct results in a waiver.

The common law had recognized that arbitration agreements may be revoked at any time before final award.

Under no circumstances will revocation of the submission of labor management contracts to arbitration be effective when the revoking party fails to act in good faith.

A party may not in good faith revoke an arbitration agreement solely to avert an unfavorable decision.

ON REPORT.

This is an action to enforce an arbitration award. The case is before the Law Court upon report.

Judgment for the plaintiff in the sum of $7666.66 with interest from the date of the writ and costs.

Frank W. Linnell, for plaintiff.

Alonzo Conant, for defendant.

SITTING: WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ. FELLOWS, C. J., did not sit.

TIRRELL, J. On report. This is an action to enforce an arbitration award. Plaintiff is an independent labor union acting as bargaining agent for approximately 3500 shoe workers. Defendant is an employer engaged in shoe manufacture and a party with other employers to a labor-management contract covering wages, hours and conditions of employment bargained with them by plaintiff. In March, 1953 a dispute arose concerning vacation pay of defendant's employees. Article XI of the basic contract provides as part of the grievance machinery:

> "STEP #4. In the event the grievance shall not have been satisfactorily adjusted within forty-eight (48) hours time after the initial conference under STEP #3, the matter shall be referred to arbitration, as hereinafter provided in Article XII."

Final submission to arbitration is provided as follows:

> "Article XII. ARBITRATION. Any grievance or disputes not adjusted by negotiations between the parties under the grievance procedure of this

> Agreement may thereupon be submitted to arbitration at request of either party by written notice to the other before a Board of three arbitrators, one to be appointed by the Employer, one to be appointed by the Union, and a third impartial arbitrator to be chosen by the two.
>
> Appointments by the Employer and the Union shall be made within five (5) working days after the date upon which the notice is given. In the event of the failure of the arbitrators chosen by the Employer and the Union respectively, to agree upon such a third arbitrator within five (5) days after their appointment, such third arbitrator shall be appointed by the American Arbitration Association, Boston, Massachusetts.
>
> Arbitration hearings shall be held as promptly as possible and the decision of the arbitrators, or a majority of them, shall be rendered in writing within thirty (30) calendar days and shall be final and binding upon both parties to this Agreement. All expenses and fees reasonably incident to the services of any such third arbitrator shall be borne equally by the Employer and the Union."

Pursuant to these provisions the matter was submitted to arbitration. Mr. Frank W. Linnell, attorney for the Union, was named as its representative, and Mr. Benjamin E. Gordon, attorney for the Lewiston-Auburn Shoe Manufacturers Association, was named as arbitrator by defendant. These two agreed upon and named Mr. John J. Murray as the third and impartial member of the Board. The arbitrators first met on June 10, 1953, at which time a written submission to arbitration was prepared and executed as follows:

> "MEMORANDUM OF AGREEMENT, made this tenth day of June, 1953, by and between FEDERAL SHOE, INC., a corporation duly created by law and having an established place of business at Lewiston, in the County of Androscoggin and State of Maine, and LEWISTON-AUBURN SHOE-

WORKERS PROTECTIVE ASSOCIATION, a corporation duly existing under the laws of the State of Maine, and having an established place of business at Auburn, in said County and State.

W I T N E S S E T H :

WHEREAS a controversy is now existing between said Federal Shoe, Inc., and Lewiston-Auburn Shoeworkers Protective Association, arising out of the terms of a labor management contract in existence between said parties, dated August 21, 1950, as amended.

The question to be decided is whether or not any persons in the employ of Federal Shoe, Inc., between June 2, 1952 and May 29, 1953, are entitled to receive from Federal Shoe, Inc., vacation pay for the vacation period occurring in the year 1953, in accordance with the provisions of said contract.

NOW, THEREFORE, we, the undersigned, Federal Shoe, Inc. and Lewiston-Auburn Shoeworkers Protective Association, aforesaid, do hereby submit the said controversy for determination by a Board of Arbitration, to consist of John J. Murray of Boston, Massachusetts, as the impartial member, Benjamin E. Gordon of Boston, Massachusetts, chosen by the employer, and Frank W. Linnell of Auburn, Maine, chosen by the Union, and we do mutually agree that the award to be made by the Arbitrators, or any two of them, shall in all things by us and each of us, be well and faithfully kept and observed, and shall be final and binding upon both parties hereto.

IN WITNESS WHEREOF, the parties hereto have executed this agreement this day and year first above written.

FEDERAL SHOE, INC.
By DORT S. BIGG
Vice-President

LEWISTON-AUBURN SHOEWORKERS
PROTECTIVE ASSOCIATION
By MARK H. BURKE
Secretary-Treasurer"

Hearing was then held by the arbitrators at which Mr. Linnell, acting also in his capacity as attorney for the Union, presented its case, and Mr. Gordon, in his dual role as attorney for the Employer, presented its case. At the close of the hearing, the business agent of the Union suggested that he would be leaving on a vacation and requested a decision before his departure. Mr. Gordon stated that there was no hurry, that he desired to negotiate further, and the matter could wait until Mr. Burke returned from vacation. Mr. Burke returned on July 13, 1953, at which time Mr. Gordon expressed a further desire to negotiate. As a result of conversations that day, a meeting of the Board was arranged for July 15th. Both Mr. Burke and Mr. Linnell felt and understood that any delay was at Mr. Gordon's request and to afford him an opportunity to seek an amicable solution with Mr. Burke. On July 15th the terms of the final award were agreed upon by a majority of the arbitrators. Mr. Gordon was present at these deliberations and stated that he could not agree to the terms of the award and would therefore not be able to sign the written decision. When the award was fully decided upon, Mr. Gordon informed the president of the defendant company of the terms by telephone and then made one final effort looking to a compromise solution. This failing, Mr. Gordon suggested that the impartial arbitrator prepare a written draft of the award and send each arbitrator a copy. It was understood that only two arbitrators would sign the written award and that the matter would be handled by mail. On the following day, July 16th, each arbitrator received a telegram from defendant's president in these words:

"Re Federal Shoe, Inc. arbitration. We hereby withdraw from submission agreement and revoke

the authority of arbitrator John J. Murray to act in this matter.

Federal Shoe, Inc.
By Hyman Shockett, President."

A short time later a written award was prepared and signed, which after reciting the issues and respective contentions and discussing the reasoning employed by the majority of the arbitrators, contained the following decisive paragraph:

"AWARD

Those employees who were on the payroll of the Company during the week ending March 21, 1953 and who had been employed by the employer for not less than six continuous months prior to May 20, 1953, and who have worked a minimum of 500 hours therein shall receive a vacation of one week with pay equal to 10/12th of 2% of his or her earnings for continuous period of his or her employment during the 12 month period immediately preceding May 20, 1953, provided such employees had not lost seniority rights under Article 13 D of COLLECTIVE BARGAINING AGREEMENT as above interpreted by this Board."

The issues appear to be three in number:

1. Did the award come too late?
2. Was the submission effectively revoked?
3. Was the award defective in not being signed by the arbitrators in the presence of one another?

The provision in the basic contract for a time limit of 30 days after hearing, within which award must be filed, was clearly waived. In fact, there is a strong indication that the session on July 15th was itself a hearing within the meaning of the contract. The parties were there as well as the arbitrators. Negotiations were carried on which, if suc-

cessful, would have altered the award. But even if that were not so, the conduct of Mr. Gordon acting as the attorney and agent for defendant as well as its arbitrator, induced the arbitrators to defer decision until after the expiration of 30 days from June 10th. Moreover, the conduct of defendant on July 15th is only consistent with waiver. Defendant and his agent were still participating in the arbitration and seeking to vary the award. There was no suggestion by them on July 15th that time had run out on the arbitration. We conclude that these parties, acting through their authorized agents, effectively waived the 30 day provision of Article XII of the basic agreement and by mutual agreement extended the time, as they had a perfect right to do. In the absence of a definite extended time limit, the arbitrators were bound to conclude their deliberations, arrive at an award and reduce the award to writing within a reasonable time after hearing, and this they did. The defendant cannot therefore avoid the award on the ground that it came too late.

But was the submission to arbitration effectively revoked before final award? We think not. The basic agreement called for a written award and in the absence of waiver, we do not think the award was final until it was reduced to writing and signed by a majority of the arbitrators. Before that could be done, the defendant had sought to revoke the arbitration by telegram. In ordinary commercial arbitration the common law has long recognized and upheld the right to revoke agreements to arbitrate at any time before final award. Although one may be sued for such unjustified revocation, the measure of damages is out of pocket expense in preparing for the arbitration hearing. *Call* v. *Hagar*, 69 Me. 521. In short, for the payment of a nominal sum, one need not respect his otherwise valid obligation. The doctrine of revocability seems to have had origin in an offhand remark of Lord Coke that arbitration agreements were of

their own nature revocable. Coke's great prestige gave rise to acceptance of his dictum which soon flourished as legal doctrine. The jealousy of courts for their jurisdiction prompted them to maintain and encourage the fiction. "No one has ever adequately explained just what there is in the nature of an agreement to arbitrate that makes it inherently revocable." 17 University of Chicago Law Review 233, 236 (The Enforcement of Labor Arbitration Agreements).

"Arbitration is a mode of adjusting disputes favored by the law, and is peculiarly appropriate in controversies like the one existing between these parties." *Cushing* v. *Babcock,* 38 Me. 452 at 455. This quotation had reference to commercial arbitration. The reasons for looking with favor on arbitration of disputes arising under labor-management contracts are far more compelling. As collective bargaining has gained increasing acceptance in the favorable climate of the past twenty years, it has become almost universal practice for unions and employers to insert in their contracts contractual obligations banning strikes and lock-outs and substituting therefor an orderly grievance machinery culminating in arbitration. Strikes and lock-outs always result in lost wages and curtailed production harmful to both employer and employee, and in addition they tend to have a seriously adverse effect upon the economic life of the community in which they occur. The public therefore has a real interest in the success of arbitration of labor-management disputes and sound public policy requires more than token acceptance of a speedy and effective substitute for economic warfare. Whether or not this public policy is so compelling as to require judicial decision that arbitration submission agreements under labor-management contracts are irrevocable, or whether the common law rule applicable to commercial arbitrations in this respect so controls in the labor-management field as to require legislation if irrevocability is to be accomplished, we need not decide here. We have no

hesitation in holding that under no circumstances will revocation of the submission be effective when the revoking party fails to act in good faith. In the case before us, the defendant was participating fully in the arbitration proceedings, seeking by the offering of evidence and by negotiation to obtain a favorable award. Only when the award had been finally determined and made known to defendant and when defendant was aware that it was unfavorable to its contentions did defendant seek to revoke. We deem that it would be intolerable and grossly inequitable to permit a party to seek every possible advantage from arbitration procedure and then at the last moment, solely to avert an unfavorable decision which had been orally announced by a majority of the arbitrators, escape the result by arbitrary revocation of the submission. Such action under such circumstances cannot be considered as taken in good faith. If permitted, it would effectively destroy and disrupt the grievance machinery which is so valuable to employers and employees and so important to the public. In *Pittsburgh Union Stock Yards Co.* v. *Pittsburgh J. S. Yards Co.*, 309 Pa. 314, 163 Atl. 668, the court held that when a party to arbitration has discovered that the majority have determined the issue against him, it is not within his power at the last moment suddenly to give a notice of revocation and avert a result. And in *Commissioners of Montgomery County* v. *Carey*, 1 Ohio State Reports 463, the Commissioners were secretly informed of the conclusion of the majority of arbitrators at a time when an award had been substantially agreed upon but had not been made. Before the arbitrators had signed the award and delivered it to the parties, the Commissioners revoked their submission. The court said at 468:

> "To allow a revocation by one party at such a time, and under such circumstances, instead of accomplishing the objectives of an arbitration law, the speedy and final adjustment of the controversies of parties, by a tribunal amicably con-

> stituted for that purpose, would make it a mere means of mischief, trickery, and fraud."

We therefore conclude that the revocation attempted here was not effective.

The basic agreement contained no requirement that the written award be signed by the arbitrators in the presence of each other. Where all the arbitrators participate in arriving at a decision which is known to all of them and the written award embodies that decision, there being no contractual requirement to the contrary, it is our opinion that there is no requirement that the written award be signed by the arbitrators in the presence of each other. Such would be quite contrary to the general and accepted practice as we understand it, especially in the field of labor-management arbitrations. Even if there had been such a contractual requirement, it would have been a technical one which the parties could waive, and upon the facts in this case would have been waived.

There is no suggestion that the award is vitiated by any fraud, prejudice or mistake on the part of the arbitrators. The arbitrators having properly heard the issues submitted to them and having seasonably filed their written award, the plaintiff is entitled to the benefit of it and its action sounding in assumpsit is appropriate as a vehicle of enforcement. *Conant* v. *Arsenault,* 118 Me. 281. Accordingly the entry will be,

Judgment for the plaintiff in the sum of $7,666.66 with interest from the date of the writ and costs.

STATE OF MAINE
vs.
MILTON DOUGLAS

Piscataquis. Opinion, March 16, 1955.

Criminal Law. Plea. Withdrawal. Grand Juries. Evidence.

The grand jury is a judicial body whose finding, properly presented to the court and duly endorsed as a true bill, is conclusive as to the regularity of the finding.

The secrecy of the grand jury will not be invaded.

The law does not permit the court to go behind an indictment to inquire into the evidence considered by the grand jury to determine whether it was in whole or in part competent and legal.

The withdrawal of a plea is a matter of judicial discretion.

ON EXCEPTIONS.

This is a criminal action before the Law Court upon exceptions by respondent to the refusal of the presiding justice to permit a withdrawal of a plea of not guilty for the purpose of attacking the indictment. Exceptions overruled.

Matthew Williams, for State.

Bartolo M. Siciliano, for respondent.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

TIRRELL, J. At the September Term 1954 of the Superior Court held in the County of Piscataquis three *indictments* for indecent liberties were returned by the Grand Jury against one Milton Douglas. The indictments were numbered 691, 692 and 693 on the criminal docket for the County of Piscataquis. We use the word *indictments* advisedly, meaning to set forth the presentation of three separate

charges against this same respondent, and for no other reason. Examination of the indictments in each case shows no irregularity.

To indictment No. 693 the respondent plead *not guilty* on the second day of the Term. On the following day the respondent filed a motion for continuance of the cause for the reason that certain witnesses, whose testimony was alleged by him to be material and necessary, were unavailable and not subject to subpoena. This motion was granted by the presiding justice.

At the same time the respondent was arraigned on the other two indictments, namely No. 691 and No. 692. His plea to each indictment was *not guilty.* These two cases were also continued by the presiding justice.

On the fifth day of the Term the respondent filed a motion to be permitted to withdraw his plea made to each of the aforesaid indictments for the purpose of suggesting to the court that the indictments were not true bills and were void and invalid in that no lawful admissible evidence had been submitted or presented to the grand jury which returned the indictments, and for the purpose of suggesting to the court that the finding of the true bills against the respondent was an abuse of power by the grand jury.

Each of the said motions was denied by the presiding justice to which ruling exceptions were seasonably taken by the respondent and on which exceptions the matter is now before this court.

Following is the bill of exceptions:

Respondent's Bill of Exceptions

> The respondent excepts to the rulings of the Presiding Justice of the Superior Court denying respondent's petitions to withdraw his plea in each of the above entitled causes, for the following reasons:

Exception No. 1

That on all of the evidence and testimony in the cases it is claimed that the ruling of the Presiding Justice denying respondent's motions to retract his plea to each of the indictments returned against him, to wit, Number 691, number 692, and number 693, each entitled State of Maine vs. Milton Douglas, at the September 1954 Term of the Superior Court for Piscataquis County was error as a matter of law for the reason that such denials, and each of them, were an abuse of judicial discretion.

The aforesaid indictments, pleas thereto, motions for continuance filed on behalf of the said respondent, motions to withdraw the said respondent's plea to the said indictments, the transcript of the record, the evidence and testimony given in said cases, the ruling of the Presiding Justice, the respondent's exceptions to the rulings of the Presiding Justice, the docket entries and all other records in the aforesaid cases are made a part hereof and incorporated into this Bill of Exceptions with the same effect as if set forth herein at length. To all of which rulings and refusals to rule, including the denial of the motions to withdraw respondent's plea to each of the aforesaid indictments, the said respondent excepts and says that he is aggrieved and prejudiced thereby and prays that his exceptions may be allowed.

We do not, of course, pretend to nor are we allowed to go outside of the bill of exceptions. However, in this case it is our opinion that all of the minor exceptions reserved by the respondent are directly stated and set forth in the bill of exceptions, and it was said by the attorney for the respondent in oral argument that his one exception was the refusal of the presiding justice to allow the original plea to be withdrawn, and that being so, did the presiding justice abuse his discretion?

The ruling we are about to announce has been so universal in this State that our Reports are practically bare of any decisions thereon. To change this rule and to open up the fact of inquiry into grand jury proceedings would open the door to abuse in this court whereby this court would eventually find itself a fact finding body rather than a court of law. In other words, this court is not, as one might say, the headwaters from which the smaller streams and brooks flow, and it cannot be used as a fishing ground by the fisherman who has failed to find or capture his fish in the smaller streams or brooks.

Before quoting any law upon the particular subject it is well to say that the presiding justice in the lower court preserved any and all rights which the respondent may have claimed at that time to have. In an endeavor to see that the respondent's rights were not possibly invaded the presiding justice held an informal hearing before ruling on the motions.

At this hearing Mr. Packard, being the foreman of the grand jury, testified under oath as did a Mrs. Brown, a member of the grand jury. Mr. Packard testified that on all three of these indictments, namely 691, 692 and 693, twelve or more grand jurors voted to return them. Mrs. Brown, one of the grand jurors as aforesaid, testified in answer to a question by Mr. Siciliano that there were other persons before the grand jury. At this time the presiding justice interposed, "There were police officers who testified in this case?" and the answer of the witness was "Yes." The presiding justice also asked Mrs. Brown, "Was there a document evidence in the case, documentary evidence?" and her answer was, "Yes. Papers."

In Maine Reports we find only one case bearing in any manner upon the subject which we are discussing. This is *Low's Case,* 4 Me. 439, at page 453, in which Preble, Justice, states as follows:

> "*But it must be* remembered, that the indictment being in due form indorsed as a true bill, by the foreman, the inference is that the fact is not as the defendant states it to have been; - an inference not to be controlled by vague, uncertain, or doubtful testimony. He will therefore be held to make out his case, to the *entire satisfaction of the court,* so as to *leave no doubt on the subject.*" (Emphasis supplied)

In the case of *Mack* v. *State of Indiana,* reported in 83 A. L. R. 1349, at page 1355, it is said:

> ". . . . it is conclusive evidence of the regularity of the finding and it is not competent to inquire into the amount or kind of evidence upon which they acted."

Also, 27 *Am. Jur.* 715, Sec. 166:

> "It is a well-settled rule in some jurisdictions that a grand jury ought not to receive any but legally competent evidence, and in some of the states this rule has taken statutory form, but such statutes have been held to be directed to the *grand jury* rather than to the *courts.* It is the majority rule that the law does not permit the court to go behind an indictment to inquire into the evidence considered by the grand jury to determine whether it was in whole or in part competent and legal. This has been held to be the rule under statutes limiting the evidence which the grand jury can receive to evidence given by witnesses produced and sworn before them, and to legal documentary evidence, and stating that they can receive none but legal evidence and the best evidence in degree, to the exclusion of hearsay or secondary evidence. This view is based, by the courts adhering to it, on one or more of the following reasons: that the grand jury is a judicial body whose finding, properly presented to the court and duly indorsed as a true bill, is conclusive as to the regularity of the finding; that the secrecy of grand jury proceedings will not be invaded; and that a statute prescribing

> grounds for the quashal of indictments, and not mentioning insufficiency of the evidence, is conclusive. It has been held that failure of a grand jury to observe a statute directing that it shall receive none but legal evidence does not afford grounds for quashing an indictment. In a minority of the jurisdictions, however, it is the rule that the court may inquire into the legality of the evidence before the grand jury, and if it is found to have been plainly illegal and incompetent as a whole, the indictment may be quashed. This practice finds some support, inferentially, in the cases holding that an indictment cannot be quashed merely on the ground that there was some illegal evidence before the grand jury, where there was also other and legal evidence, ..." (Emphasis supplied)

In the case of *Joseph Blowe, Appt.* v. *State of Mississippi,* 24 A. L. R. 1429, at page 1431, it was stated:

> "There is a division among the authorities elsewhere on this question, but the weight of authority as it appears is to the effect that, in order to determine whether an indictment was legally found, no inquiry whatever will be gone into as to whether the evidence before the grand jury was either competent or legally sufficient."

and in 31 A. L. R. at pages 1479, 1480, 1481, 1482, 1483, 1484, see particularly *State* v. *Boyd,* at page 1481:

> "Though the indictment was found on incompetent secondary evidence, the courts are not authorized to inquire into the sufficiency of the evidence on which the grand jury acted."

We are aware of the fact that in some cases the rule as laid down above has been altered or changed by reason of provisions in state constitutions or by statute. However, this state has never adopted any constitutional or statutory authority concerning the same.

The presiding justice had discretionary powers as to matters of continuance or withdrawal of plea, and we are of the

opinion that in no instance has the respondent shown that the presiding justice has abused that discretion.

The exception in each case is overruled.

The docket entry in each case must be

Exception overruled.

STATE OF MAINE
vs.
RICHARD PALMER

Kennebec. Opinion, April 8, 1955.

Intoxicating Liquor. Pleading.

PER CURIAM.

On exception to a ruling denying the respondent's motion in arrest of judgment.

The respondent was tried and convicted at the October 1954 Term of Kennebec Superior Court for operating a motor vehicle while under the influence of intoxicating liquors.

The motion attacks as insufficient the allegation in the complaint,

> "**** that Richard Palmer of Oakland in Kennebec County, on the 3rd day of July, A. D. 1954, at No. Belgrade in the County of Kennebec, and State of Maine, did operate and drive a certain motor vehicle, to wit, an automobile, on a certain public highway, to wit, Route 135, while under the influence of intoxicating liquor ****"

The respondent argues that this is too general and uncertain. We are unable to agree with this contention and rule

the allegation is sufficient in that it charges he did operate a motor vehicle upon a way while under the influence of intoxicating liquors as provided in R. S., 1944, Chapter 19, Section 121, now R. S., 1954, Chapter 22, Section 150.

In *State* v. *Peterson,* 136 Me. 165 the court ruled that "route" did not mean "way" and for that reason the complaint was defective. It intimates that if the offense had been alleged as in this case it would then meet the requirements of good pleading. While "route" is mentioned in this complaint its purpose is to describe the "way."

Exceptions overruled.
Judgment for the State.

Joseph B. Campbell, for State.
Anthony Cirillo, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

STATE OF MAINE
vs.
JOHN ERNST

Kennebec. Opinion, April 8, 1955.

Criminal Law.
Murder. Evidence. Photographs.
Relevancy. Burden on Exceptions.
Instructions.

The law is well settled that the mere fact a photograph is gruesome is not a reason for its non-admission. A presiding justice has great latitude and discretion in determining the admissibility of photographs.

The admissibility of a photograph does not depend upon its verification by a photographer, provided it is shown to be an accurate representation by one competent to speak from personal observation.

Evidence relating to tests and experiments concerning the firing capacity of a gun are relevant where a defendant in a murder charge takes the position that deceased caused the gun to be fired by grabbing it and trying to pull it from defendant's hands.

A party excepting to the exclusion of evidence has the burden of showing affirmatively that the exclusion was prejudicial.

A presiding justice is not bound to repeat what had been substantially covered in his charge.

It is unnecessary to give a requested instruction on circumstantial evidence where there is no such evidence as would require the instruction.

It is unnecessary to give a requested instruction on killing my misadventure where respondent's own testimony makes it clear that such is not in issue.

Where none of the testimony has the quality of intentional falsity instructions on false testimony are unnecessary.

Instructions concerning killing while in the commission of a felony are not prejudicial where the verdict is manslaughter and the charge contained nothing, in the light of the evidence, which would influence the jury to return a manslaughter verdict.

An instruction concerning trespassers does not amount to legal error where it could not have prejudicated the minds of the jurors.

An objection that a presiding justice misstated some of the testimony in his charge to the jury comes too late after verdict.

ON EXCEPTIONS AND APPEAL.

This is criminal action charging the defendant with the crime of murder. The jury returned a verdict of manslaughter. The case is before the Law Court upon appeal, exceptions and motion for new trial. Exceptions overruled. Appeal dismissed. Motion for new trial denied. Judgment for the State.

Joseph Campbell, for State.

Dubord & Dubord, for respondent.

SITTING: WILLIAMSON, TIRRELL, WEBBER, TAPLEY, JJ.
FELLOWS, C. J., and BELIVEAU, J., did not sit.

TAPLEY, J. On exceptions and appeal. The respondent was tried for the crime of murder, before a jury, at the October Term, 1953 of the Superior Court, within and for the County of Kennebec and State of Maine. The jury returned a verdict of manslaughter. The respondent was sentenced to a term of not less than two years and not more than four years in the Maine State Prison.

John Ernst, the respondent, is a chicken farmer living in Sidney, Maine and operating two chicken farms located on the West side of the Middle Road in Sidney and identified as the Upper Farm and the Lower Farm. He lives on the Lower Farm. These farms are approximately a mile apart. His principal business is the production and sale of eggs. He employs an average of fourteen persons, among whom was one Alfred Snow, the victim.

About 10:45 P. M. of the evening of August 14, 1953, the respondent, then at his home, was called upon by his foreman, Gerald H. Campbell, who notified him that he had just seen an automobile, which he identified as belonging to Snow, parked on the Middle Road approximately 350 feet North of the driveway leading to the Upper Farm. He told Ernst he thought that someone "might be making off with chickens." The respondent armed himself with his shotgun and proceeded to where the Snow car was parked on the Middle Road. Campbell followed in his automobile. The respondent parked his car directly in front of the Snow car and Campbell parked his car to the rear of the Snow car and then they proceeded to search for Snow by investigating the brooder houses and egg house located on the Upper Farm. They then walked to the Middle Road where the cars were parked, after finding no evidence of larceny, whereupon their attention was attracted by two men hurrying along

the highway carrying a case of eggs between them. Upon being discovered they dropped the eggs and ran into the woods. One of the men was Alfred Snow, the victim, and the other named Roger Owens, his companion. Ernst ordered Campbell to go to the farmhouse, notify the State Police and upon his return to bring with him Ernst's shotgun which he had left propped against an automobile standing in the yard of the farmhouse. When Campbell came back from the farmhouse with Ernst's gun, Ernst took possession of the gun and fired it twice into the woods in the general direction taken by Snow and Owens, whereupon Owens emerged from the woods and approached Ernst who was then standing in a clearing near the road and when he reached a point in close proximity to Ernst, the respondent struck him in the stomach with the muzzle of the gun. Soon after the appearance of Owens, Snow came from the woods and, as he left the wooded area, Ernst went into a clearing after Snow and escorted him to a position near the parked cars on the road, Ernst being behind Snow directing the gun at him as they were walking. When they reached a point on the road near the car of Ernst, the gun was fired, resulting in the death of Snow.

During the trial of the case, respondent took exceptions to the exclusion of testimony; to the admission of testimony; to the admission of exhibits in the form of photographs; to the refusal of the presiding justice to give requested instructions to the jury; and to certain portions of the charge of the presiding justice. The respondent also appealed from the denial of a motion for a new trial. The respondent's bill of exceptions contains a total of thirty-two exceptions and of this number the following designated exceptions are expressly waived: numbers 1, 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 21, 24, 25, 26 and 28.

In the interests of clarity, the exceptions will be considered in numerical sequence.

EXCEPTION 3.

Exception 3 concerns a question asked of Frederick Kneeland, a State Police Officer, on cross-examination by defendant's counsel and relating to Roger Owens. The question reads as follows:

> "Q. How many other cases do you know of where a man has admitted committing a felony and he is charged with a misdemeanor and allowed to go on probation?"

The question was excluded.

This question had nothing whatever to do with the issues in the case or the status of Roger Owens as a witness for the State, and by its exclusion the respondent could not have been aggrieved.

Exception 3 overruled.

EXCEPTION 4.

Frederick Kneeland testified that Roger Owens was charged with the larceny of a case of eggs; that upon his plea of guilty he was sentenced to sixty days in the County Jail; that sentence was suspended and he was placed upon probation for one year conditioned that he go to Togus for a checkup. On cross-examination, Officer Kneeland was asked this question, referring to Owens and the condition of probation:

> "Q. Is it because this man needs psychiatric treatments?"

The record discloses that Officer Kneeland knew nothing about the reasons why Owens was placed on probation conditioned that he go to Togus and it is apparent that any answer to the question could not have been within the knowledge of the officer. His testimony in respect to the dis-

position of Owens' case was personal knowledge of disposition only and nothing more.

Respondent takes nothing by this exception.

EXCEPTIONS 14, 16, 17, 18, 19 AND 20.

These exceptions relate to the admissions of photographs displaying the body of the victim, showing a gunshot wound and other wounds about the left side, the forehead and right arm of the deceased. The pictures also depicted the condition of the body during various stages of the autopsy. The record shows testimony relating to various wounds and abrasions on the body that were depictured in the photographs and concerning each photographic exhibit there was testimony referring to these wounds and abrasions alleged to have been caused by the actions of the respondent. The photographs were extremely gruesome primarily because of the fact that they were taken during autopsy procedure. It is signficant to note that the gunshot wound and other wounds, contusions and abrasions were plainly visible and not interfered with by autopsy incisions. The law is well settled that the mere fact that a photograph is gruesome is not a reason for its non admission. *State* v. *Stuart,* 132 Me. 107.

The presiding justice has great latitude and discretion in determining the admissibility of photographs and unless there is shown an abuse of discretion, his ruling will not be disturbed on exceptions.

State v. *Jordan,* 126 Me. 115, at page 116:

> "Our court has granted to trial judges a very wide latitude in receiving or refusing this kind of evidence. Whether or not photographs may be admitted as evidence is a question addressed to the discretion of the trial judge. Whether any given photograph appears to be fairly representative of the object portrayed and whether or not it may

> be useful to the jury are preliminary questions addressed to his discretion, and, except for abuse of that discretion, no exception lies. ****** The admissibility of a photograph does not depend on its verification by the photographer, provided it is shown to be an accurate representation by any one competent to speak from personal observation. The sufficiency of the verification is a preliminary question of fact for decision by the trial judge. ****"

State v. *Turmel,* 148 Me. 1, at page 7.

State v. *Rainey,* 149 Me. 92, at page 94.

See 159 A. L. R., page 1413, *et seq.*

See Wigmore on Evidence, Vol. IV, Sec. 1157.

There was no abuse of discretion in admitting the photographs.

Exceptions 14, 16, 17, 18, 19 and 20 overruled.

EXCEPTION 22.

Arthur Freeman was a captain in the Maine State Police and performed the particular functions of Supervisor of the State Police Bureau of Identification. There was no objection to his qualifications. During the course of his testimony he was questioned about a certain test or experiment he made on the gun that was used in the shooting. The purpose of this test was to determine whether or not there was any mechanical failure in the operation of the gun. Counsel for the respondent objected in the following language:

> "Without describing any test I object to any evidence about the test in the absence of showing there is any similarity in the conditions under which tests were made and any evidence in the case relating to the account, itself."

The testimony of the witness Freeman was that the gun was dropped from a distance of about thirty inches onto the floor by the butt and then thrown on its side several times at a distance of thirty inches to ascertain if it would explode, and that the trigger pull was tested to ascertain the required pull in poundage to release the hammer. There was also some evidence of test firing the gun. In view of the position taken by the respondent, that the deceased grabbed the gun and started to pull it out of the respondent's hand and that the respondent had nothing to do with causing the gun to be fired, it becomes relevant under these circumstances for the State to determine, by test and experiment, exactly what the condition of the gun was insofar as its firing capacity was concerned.

26 Am. Jur., pages 466-467.

Mansfield v. *Commonwealth,* 174 S. W., page 16 (Ky.)

This exception is overruled.

EXCEPTION 23.

Norman Hamilton, a sergeant of the Maine State Police, witnessing for the State, was asked on cross-examination the following question:

> "Q. One more question. Do you know whether or not, Sergeant Hamilton, on August 14, 1953 Alfred Snow was on parole from Maine State Prison?"

Counsel for the State objected to the question and counsel for the respondent, in the absence of the jury, made the following offer of proof:

> "MR. DUBORD: We are offering it, Your Honor, for the reason that there have been two State witnesses testify, one was Roger Owens who testified that as the respondent, Ernst, was bringing Snow up through the woods he

> said, 'Don't shoot. I will pay for the eggs.' Another State witness who testified was Mr. Campbell, who testified that the remark Snow made was 'Don't have me locked up. I will pay for the eggs.' It is our position that the fact, if we are able to establish it, and I think we can, that Alfred Snow was on parole from Maine State Prison and it would have been more likely for him to have made the remark that Mr. Campbell testified to than the remark that Mr. Owens testified to."

Counsel for the respondent contends that an answer to the question should have been allowed because if it was shown that Snow was on parole from Maine State Prison he would be more likely to have said, "Don't have me locked up. I will pay for the eggs" instead of "Don't shoot. I will pay for the eggs." thus, to some degree, authenticating Campbell's testimony rather than that of Owens'. The respondent, Ernst, testified that Snow said, "Don't have me arrested. I will pay for the eggs."

We have here a situation where the testimony of the respondent and that of Campbell corroborated each other, where from the testimony of the respondent himself, Snow is pleading that Ernst shall not have him arrested and also from the testimony of Mr. Campbell, a State witness, a quoted remark of Snow's, "Don't have me locked up."

The testimony of Roger Owens in this particular does not exactly coincide with that of Ernst and Campbell. Owens testified that Snow said, "Don't shoot me and I will pay for the eggs."

We fail to see, in light of the evidence, where refusal to permit the question to be answered was prejudicial to the respondent.

Gross v. *Martin*, 128 Me. 445, at page 446:

> "A party excepting to the exclusion of evidence always has the burden of showing affirmatively that the exclusion was prejudicial to him."

Exception 23 overruled.

EXCEPTION 27.

Joyce Campbell was a witness testifying in behalf of the defense. A portion of her testimony concerned her activity in telephoning the State Police from the home of Mr. Smalley who resided a short distance from the scene of the homicide. She testified in substance that her husband took her to the Smalley residence in his car; that she alighted from the car and proceeded to gain entrance to the Smalley home for the purpose of using the phone. She had some difficulty in gaining entrance. She evidenced some fear that she might be prevented in doing so by Owens and Snow whom she thought might be in the vicinity. On cross-examination she testified that while waiting to get inside the house she was nearly crying and when asked why she was so distraught and ready to cry, she answered:

> "Because I was out alone and the thought that was coming to me was that they might be circling around and they might be armed."

and that they might prevent her from using the telephone.

Later in the trial, State Trooper Paul S. Blethen, a State's witness, took the stand in rebuttal. Officer Blethen was a dispatcher on duty at State Police Headquarters on the night of the homicide. He had previously testified that he had received a telephone call from Joyce Campbell reporting the homicide. Blethen was asked in rebuttal the question:

> "Q. Will you describe for the jury what her tone was and her manner of speech?"

This question was objected to by defense counsel. The question was allowed to stand over the objection and the answer was:

"A. Very calm, cool, and collected."

The State's purpose in propounding the question was to show that by the tone of her voice over the telephone there was no indication that she was emotionally upset as she had previously testified.

The allowance of the question under the circumstances was proper and the exception must be overruled.

EXCEPTION 29.

This exception pertains to the refusal of the presiding justice to give instructions requested by the respondent. The requested instructions in this exception are numbered 1, 3, 6, 7, 9, 12, 15, 16, 17, 18, 19, 21, 22, 23 and 24. The substance of the requested instructions are set out as follows:

1. Definitions of murder, malice and implied malice.

3, 6. Burden of proof and reasonable doubt.

7. Circumstantial evidence.

9. Justifiable homicide.

12. Instructions to disregard gruesome character of photographs.

15, 16, 17, 18, 19, 21, 22, 23. Homicide resulting from accident or misadventure.

24. False testimony as to any material matter.

In considering these requested instructions, the court does so with the accepted and well established rule of law in mind so aptly and thoroughly expressed by Justice Worster in *State* v. *Cox*, 138 Me. 151, at page 169:

"A presiding justice is not bound to repeat what has been substantially and properly covered in his

> charge to the jury, nor is he bound to adopt the particular language used in the requested instruction, if the jury had otherwise been properly instructed in accordance with law."

(Requested Instructions 1, 3, 6, 7, 9.)

A review of the charge as given shows that requested instructions 1, 3 and 6 were adequately covered; that requested instruction 7 is unnecessary of consideration because there was no circumstantial evidence in the case requiring instruction on that point; that number 9 was properly given.

(Requested Instruction 12.)

The presiding justice in his discretion properly admitted the photographs. The respondent contends that the justice below committed error in not giving instruction 12, which, in effect, is an admonition to the jury that it is not to permit the gruesome character of the photographs to inflame the minds of the jurors against the defendant. The gruesomeness of the pictures was caused by the autopsy procedure, which is apparent on the face of the photographs. They further show that the type of gruesomeness complained of could not have been caused by the acts of the defendant.

The respondent has not shown that he was aggrieved by the refusal to give this instruction nor can it be said that he was prejudiced by its exclusion.

(Requested Instructions 15, 16, 17, 18, 19, 21, 22, 23.)

These instructions concern basically a killing by accident although some of them contain a request for instruction on homicide by misadventure. It is to be remembered that one element of defense was that the deceased in grabbing and pulling the gun, then in the hands of the respondent, caused it to fire, projecting the bullet into the body of the deceased, causing his death.

The respondent in "Requested Instruction No. 15," speaks particularly of homicide by misadventure or accident, and says, in part:

> "***** it is necessary that the act resulting in death must have been a lawful one; that the killing was accidental and without unlawful intent or evil design; and that the person responsible for the death was not guilty of a high degree of carelessness."

The respondent met Snow in a small clearing a short distance from the road and there took him into custody at the point of a gun. They then proceeded to the road where respondent's car was parked, during which time Snow was in front with the respondent behind covering him with the gun and, according to the respondent's testimony, he pushed him with the gun twice. Respondent escorted Snow to a point in front of respondent's automobile and, desiring to turn on the lights of his car, the respondent passed Snow as he was standing there and, while passing, he claims that Snow grabbed the gun and started to pull it out of his hand, at which time the gun exploded. There is no evidence in the case that Snow, the deceased, attempted flight or became hostile to detention at any time after custody was taken of him by the respondent. The respondent cannot complain if we take his version of the action between himself and the deceased at the time of the fatal shooting. According to his own story, the arrest of Snow had been completed. In respect to the apprehension of Snow by Ernst, the record shows that Ernst testified on cross-examination as follows:

"Q. Had he surrendered? Had he come out?
A. He would not come up on the road.

Q. He had come out?
A. He had come out.

Q. He was coming in your direction?
A. Yes.

Q. Did he ever make any attempt to run after that?
A. No.

Q. Did he ever make any attempt to get away?
A. No."

The fact, as he says, that he was leaving the immediate presence of the deceased to turn on the lights of his automobile would indicate no thought in his mind that Snow would attempt flight or otherwise relieve himself of restraint.

Therefore, under the circumstances, homicide by misadventure does not apply.

Respecting accidental killing, the presiding justice expressed himself in the following language:

> "Counsel for the respondent has called my attention to what on my part was not an intentional omission, that being the claim made by the defense that this was an accidental killing for which the respondent was not responsible. It is for you to say whether it was accidental killing. When they were up there at the car and the respondent had the gun in his hands, pressed against the body of the man who is now dead, and he turned and grabbed, if you believe he grabbed, was it accidental killing? Was it an accident? Was it something for which the deceased person was solely responsible, or was it because of the situation he had been placed into by this respondent? They claim accidental killing and if you find, of course, from the evidence, that the shooting was accidental, of course this respondent is not guilty."

It is to be noted that there is absent from this portion of the charge such expressions as "that the act resulting in death must be a lawful one, without unlawful intent or evil design." The fact that the presiding justice did not include these rules of law pertaining to misadventure is something

of which the respondent should not complain as it was to his advantage. The jury was merely told:

> "They claim accidental killing, and if you find, of course, from the evidence, that the shooting was accidental, of course this respondent is not guilty."

In these words the respondent received all that he was entitled to, according to the evidence, and certainly was not prejudiced by such a clear and concise utterance. *State* v. *Kurz,* 37 A. (2nd) 808, at page 811 (Conn.); *Commonwealth* v. *Knox,* 105 A. 634 at page 636 (Pa.)

In reference to accidental killing, see *State* v. *Benham* (Iowa) 92 Am. Dec. 417; 26 Am. Jur. "Homicide" Secs. 204, 212, 220.

(Requested Instruction 24.)

The instruction, as requested, is in the following language:

> "The Court instructs the jury that, if the jury believe that any witness testified falsely on any material matter, that in such case the jury is at liberty to disregard entirely the testimony given by that witness."

Counsel for the respondent points out that this instruction is submitted "in view of the apparent wilful and material discrepancies in the testimony of various State witnesses, especially as relates to the Municipal Court testimony and the Superior Court testimony."

The record does not reveal any testimony of State witnesses which raises anything other than factual questions for jury determination. There is no element of that quality of intentional falsity in the testimony that requires favorable consideration of the instruction. It appears from the cases bearing on the point that it is better practice that the giving of this type of instruction should be left to the discretion of the court.

State v. *Abbott,* 245 S. W. (2nd) 876, at page 881 (Mo.):

> "Where there is a factual basis in the testimony of the witnesses for the giving of such an instruction, this court has always held that it was discretionary with the trial court to give or to refuse to give an instruction of this character."

State v. *Kolylasz,* 47 N. W. (2nd) 167 (Iowa).

90 A. L. R. 74; 23 C. J. S. Criminal Law, Sec. 1259.

Exception 29 overruled.

EXCEPTION 30.

The presiding justice charged the jury concerning felony murder. This portion of the charge was predicated on that part of the case having to do with the arrest of Snow by the respondent. The State's contention was that if the respondent exceeded his authority in the arrest and apprehension of the deceased by using undue force amounting to an assault and battery and that the deceased died as a result of the unlawful action and that action amounted to a felony, then the respondent would be guilty of murder.

The respondent contends that the instruction was inadequate and that the doctrine of felony murder did not apply.

The instruction given by the court concerns murder as a result of the commission of a felony. The verdict was manslaughter. The respondent cannot properly complain in this instance as the verdict was for a lesser offense than that concerned in the charge of felony murder. Even if we assume, which we do not, that the charge in this respect was prejudicial error, it was cured by verdict. *State v. Carabajal,* 193 P. 406 (N. M.)—17 A. L. R. 1098-1103.

There was nothing in this charge on felony murder, in light of the evidence, calculated to influence the jury to return a verdict of manslaughter.

Respondent was not prejudiced.

Exception 30 overruled.

EXCEPTION 31.

The court instructed as to the right of a property owner to eject trespassers. The instruction explained the law pertaining to the legal right of the respondent to eject from his premises one who is trespassing thereon. Counsel for the respondent agrees with the law as given but contends that this instruction was immaterial and not required by the evidence or by any claim of the respondent and that the giving of the instruction tended to mislead the jury.

The evidence shows that although the deceased had entered upon the respondent's property for the purpose of stealing eggs, that act had been completed and the actions of the respondent which terminated in the death of Snow had nothing to do with the ejectment of Snow as a trespasser.

The question to be determined is whether the giving of this instruction was prejudicial to the rights of the respondent.

The record is so replete with evidence showing in detail all of the action which involved the respondent and the victim Snow culminating in the death of Snow and taking place outside the bounds of respondent's property, that it is proper to say that the giving of this instruction could not have, in any way, prejudiced the minds of the jury to the extent that it rendered a verdict of manslaughter.

People v. *Soules*, 106 P. (2nd) 639, at page 646 (Cal.):

> "A multitude of authorities hold that even though inapplicable instructions are given to the jury regarding a subject upon which there is no evidence, it does not constitute reversible error unless it ap-

pears that the defendant was actually prejudiced thereby."

24 C. J. S., page 1017, Section 1922 C:

"The giving of instructions, whether correct or not, which are abstract or are not authorized by the pleadings and evidence, will not constitute a ground for reversal where, under the circumstances, no prejudice results to accused; and the presumption is that an instruction having no application to the case made by the pleadings and proof does not injure accused. ******"

Respondent takes nothing by this exception.

EXCEPTION 32.

In that portion of the charge concerning accidental killing, the presiding justice said:

"When they were up there at the car and the respondent had the gun in his hands, pressed against the body of the man who is now dead, and he turned and grabbed, if you believe he grabbed, was it accidental killing?"

Respondent contends in this exception that there was no evidence supporting that portion of the instruction concerning the pressing of the gun against the body of Snow and argues that this statement is prejudicial to the rights of the respondent.

Respondent should have made his complaint before the jury retired.

Smart v. *White*, 73 Me. 332, at page 339:

"It is contended that the judge misstated to the jury some of the testimony of the defendant. Were it so, the objection comes too late after verdict. The judge's attention should have been called to the matter before the jury retired, so that he could correct himself, if he had fallen into error."

State v. *Wilkinson,* 76 Me. 317; *Grows* v. *Maine Central Railroad Company,* 69 Me. 412.

Exception 32 overruled.

APPEAL.

The respondent appealed from the denial by the justice below of a motion for a new trial. He contends that the motion should have been granted and in support of his contention argues that the only way the verdict of manslaughter could have been returned by the jury on the evidence was by disregarding the testimony and the drawing of inferences not warranted by the evidence. In further contention, he says that the verdict is against the law because of the improper, unfair and inadequate charge of the presiding justice. He further states that the court in his charge assumed facts not proved and gave undue prominence to the State's theories.

We have disposed of respondent's complaints as to errors in law, which leaves for consideration only the question as to whether or not the verdict was against the evidence.

John Ernst was charged with the crime of murder. On the night of the homicide the respondent went to the Upper Farm, armed with a shotgun, in search of a person or persons whom he had reason to believe were committing burglary on his property. After investigation he left his premises and went some distance to the main highway where his car was parked. There he learned two men had dropped a case of eggs, which they were carrying between them, and ran into the woods. These men were Snow, the victim, and his companion, Owens. It was then he requested Mr. Campbell to procure the gun for him which he had left propped against the car in the yard of Mr. Smalley. The gun was brought to him and he proceeded to use it in connection with the apprehension of both Owens and Snow. The first man to be apprehended was Owens who came out of the

woods, after the respondent had fired a shot or two in that direction, and gave himself into the custody of the respondent. There was testimony that Owens suffered some physical abuse by Ernst when he was using the gun to prod Owens along. Soon after the apprehension of Owens, Snow came out of the woods and was met by the respondent in a clearing a short distance from the road and there he was taken into custody at the point of a gun. There is some evidence that there was the use of the gun as a prodding medium against Snow. The testimony discloses different versions as to what actually took place at the time of the firing of the gun. The respondent, by arming himself with a loaded shotgun, assumed a responsibility to the extent that if he used the gun, he must do so under circumstances legally proper. The jury might well have found from all of the evidence that the respondent was in an angry mood and that death came to Snow by the acts of the respondent under circumstances justifying a verdict of manslaughter as defined by the court. There is much factual evidence in this case upon which to sustain a jury verdict of guilty of manslaughter.

State v. *Smith, et al.*, 140 Me. 44, at page 47:

> "The single question before this Court on appeal '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 respondents were guilty as charged."

State v. *Priest*, 117 Me. 223; *State* v. *Morin*, 149 Me. 279.

We cannot say that the jury was not warranted in believing beyond a reasonable doubt that the respondent was guilty of manslaughter.

Exceptions overruled.
Appeal dismissed.
Motion for new trial denied.
Judgment for the State.

STATE OF MAINE
vs.
ROCH HOUDE

Oxford. Opinion, April 8, 1955.

Criminal Law. Reckless Driving.
Pleading. Constitutional Law.

The core of the offense of "reckless driving" plainly lies not in the act of operating a motor vehicle but in the manner and circumstances of its operation. (R. S., 1954, Chap. 22, Sec. 148.)

A complaint charging merely the operation of a motor vehicle "in a reckless manner" insufficiently informs the accused of the nature and cause of the accusation. (Const. of Maine, Art. I, Sec. 6.)

ON EXCEPTIONS.

This is a criminal action before the Law Court upon exceptions to the overruling of a demurrer. Exceptions sustained.

Henry H. Hastings, for State.

John A. Platz, for respondent.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

WILLIAMSON, J. The issue in this criminal case is whether a complaint that the respondent on a day certain in 1953 at Rumford "did operate a motor vehicle, to wit, an automobile, upon a public way, to wit, U. S. Route No. 2 in said Rumford, in a reckless manner against the peace of the State and contrary to the form of the statute in such case made and provided" is sufficient in law to charge the offense of "reckless driving." The case comes from the Superior Court on exceptions to the overruling of respondent's demurrer.

The pertinent provisions of the statutes and constitution read:

> "Whoever operates any vehicle upon any way or in any place to which the public has a right of access:
>
> I. Recklessly; or
>
> II. In a wanton manner causing injury to any person or property; shall be guilty of reckless driving. . ."

R. S., c. 19, § 119 (1944), now R. S., c. 22, § 148 (1954).

> "In all criminal prosecutions, the accused shall have a right. . .;
>
> "To demand the nature and cause of the accusation, and have a copy thereof; . . ."

Maine Constitution Article I, Section 6.

The constitutionality of the statute is unquestioned. "Recklessly," "in a wanton manner," and "reckless driving" are words sufficiently definite and certain in meaning and descriptive of the prohibited acts to form the basis for the establishment of the offense. See *State* v. *Hamilton,* 56 S. E. (2nd) 544 (W. Va. 1949), 12 A. L. R. (2nd) 573 and Annot.; 5 Am. Jur., Automobiles § 802; 61 C. J. S., Motor Vehicles § 609. Whether this particular complaint meets the constitutional guarantee is a different and distinct question, and it is to this issue that the respondent directs his attack.

The offense is here charged in the statutory language or its equivalent. The words "in a reckless manner" used by the State of course have the same meaning as "recklessly" in the statute. There is, however, no statement whatsoever, apart from date and place, of the facts on which the charge is grounded.

The core of the offense of "reckless driving" plainly lies not in the act of operating a motor vehicle, but in the manner and circumstances of its operation. For example, a particular manner of operation lawful in the daylight, or upon a dry highway, or in the country, may be reckless at night, or under conditions of ice or storm, or on a crowded city street. Until the manner and surrounding circumstances of operation are known, it is impossible to determine whether or not there has been a violation of the statute. From the statement "in a reckless manner" taken alone, as in this complaint, the respondent gains no information of the facts from which the State will seek to prove the ultimate fact of "reckless driving."

In our view the complaint is insufficient under the rule well stated by our court in *State* v. *Strout,* 132 Me. 134, at p. 136, 167 Atl. 859 (1933) arising as here on demurrer, in these words:

> "If the statute does not sufficiently set out the facts which make the crime, so that a person of common understanding may have adequate notice of the nature of the charge which he is called upon to meet, then a more definite statement of the facts than is contained in the statute becomes necessary."
>
> * * * * * * * * * *
>
> "In order to properly inform the accused of the 'nature and cause of the accusation', the commission of the offense must be fully, plainly, substantially, and formally set forth.
>
> "The object of an indictment is, first, (a) to furnish reasonable fulness of recital of the alleged crime, that a defense may not be rested upon the hypothesis of one thing, with the hazard of surprise by evidence, on the part of the government, of an entirely different thing; (b) to enable the defendant to avail himself of his conviction or acquittal, for protection against a further prosecution for the same cause; second, to give the court

> sufficient information to determine whether the facts alleged would support a conviction if one should be had."

See *State* v. *Euart,* 149 Me. 26, 98 A. (2nd) 556 (1953), and cases cited.

Complaints of like nature with the case at bar have been held insufficient elsewhere.

The New Hampshire Court said in *State* v. *Gilbert,* 194 Atl. 728, at 729 (1937):

> "While it is true that recklessness in the operation of a motor vehicle and the resulting death of a person are the sole requirements of the crime of which the defendant is accused, it is equally true that reckless conduct must be inferred from definite overt acts, and that no act on which recklessness could be predicated is here alleged."
>
> * * * * * * * * *
>
> "Furthermore, the material facts which the State seeks to prove at the trial must be substantially the same as those on which the indictment is based, and to hold that the general accusation of recklessness in the operation of a motor vehicle is a sufficient specification of the defendant's behavior at the time of the accident is to open the door to proof of conduct differing in important respects from that on which the grand jury has acted."

In *State* v. *Aaron,* 90 Vt. 183, 97 Atl. 659 (1916), the Vermont Court in passing upon the charge of "carelessly operating," said at 660:

> "So, too, when it is not the act itself, but the manner in which it is done, that makes it criminal, the manner must be set forth. In such cases the particular manner becomes a constituent element of the offense."

See also *People* v. *Green,* 13 N. E. (2nd) 278 (Ill. 1938), 115 A. L. R. 348.

The right of the accused to be informed of "the nature and cause of the accusation" against him is guaranteed by the Constitution. Maine Constitution, *supra.* We must guard against any procedure which tends even slightly to reduce the value of this great right of free men.

The entry will be

Exceptions sustained.

STATE OF MAINE
vs.
ELWIN L. BARNETT

Oxford. Opinion, April 9, 1955.

Criminal Law. Instructions.
Assault with Intent to Kill. Intent.
Circumstantial Evidence.

A presiding justice is not bound to repeat what has been substantially covered in his charge.

One is presumed to intend the natural and probable consequences of his acts.

Intent to kill or do bodily harm may be inferred from circumstances where one acts in a reckless or wanton disregard of the safety of others.

A reckless and wanton disregard of the rights of others may, under some circumstances, be an assault even where no particular person was singled out or aimed at.

ON EXCEPTIONS.

This is a criminal action by indictment charging assault with intent to kill. The case is before the Law Court upon exceptions. Exceptions overruled.

Henry H. Hastings, for State.

William E. McCarthy, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

FELLOWS, C. J. This is an indictment for assault with intent to kill. Trial was had before a jury in the Superior Court for the County of Oxford. The verdict was guilty. The case now comes before the Law Court on exceptions by the respondent to the refusal of the justice presiding to give a certain requested instruction. There were no exceptions taken to the charge as given, and the only question presented is whether there was error in this refusal.

There were conflicts in the testimony, but the jury would be warranted in the belief that on February 18, 1954 the respondent, Elwin L. Barnett, of Upton, Maine with one Annis and one Cooper arrived in Rumford, Maine in an automobile owned by the respondent. During the evening at about 10:30 the respondent and his two friends went into the restaurant known as "Freddies Lunch" in Rumford, owned and operated by Alfred A. Pomerleau, the complaining witness. When the three came into the restaurant they caused a "disturbance" by "staggering in," "swearing and talking loud." Mr. Pomerleau instructed a waitress not to serve them and asked the respondent and his associates to leave. They left, but not until after some words and after Pomerleau went to the phone to call the police, and after the respondent had said to Pomerleau "I will give you one hundred dollars to come out."

When the respondent left the premises of Pomerleau, he and his companions went to another restaurant to eat. About an hour later Mr. Pomerleau went out on the sidewalk in front of his restaurant. It was snowing, and a car

was stuck in the snow in front of the restaurant and some boys were trying to start the car out of the snowbank. Mr. Pomerleau was on the sidewalk and was "joking with them," when the car belonging to the respondent went by. Mr. Annis was driving the respondent's car, and the respondent Barnett was alone on the back seat. Mr. Cooper was on the front seat with the driver. As the respondent's car went by, the respondent fired a shot gun from the window of the rear door. The shot broke the plate glass window beside or near the entrance to the restaurant, and not far from where Pomerleau stood. The respondent's car then proceeded to Bethel, Maine where it was stopped by the highway police.

When first interviewed by police, the respondent denied that he had been in Rumford and denied all knowledge of the affair. At the trial, however, the respondent admitted that he sat alone on the rear seat; that he loaded the automatic shot gun; that he fired the shot from the rear door window; that he had no intention to kill Pomerleau; that he did not even intend to frighten; that he had no reason to fire but "I saw a good chance when nobody would get hurt and I fired." The respondent also said he did not see Mr. Pomerleau; that there was "nobody there;" that there were people in the nearby parked cars but there was "nobody on the sidewalk." The respondent further stated that he had no reason for shooting at Pomerleau, "just drinking that is all."

At the conclusion of the charge to the jury by the presiding justice, the attorney for the respondent requested that the following instruction be given: "If you believe that the respondent did not shoot in the direction of the person of another and under circumstances that he could not strike such person and you satisfy yourself that he did not aim at any person or fire a gun in a manner in which any person could naturally or probably have been injured and therefore

that he could not have intended to shoot at or murder anyone, then you should find the respondent not only not guilty of assault with intent to kill and murder, but also not guilty of assault merely." This instruction was refused, because, as the justice said, "I think I fully covered it in my charge."

Exception was taken by the respondent to the refusal to give this instruction, and this was the only exception taken. There was no request for a directed verdict and no motion for a new trial or appeal. The correctness of a charge is not to be determined from isolated statements, but, rather, from the charge as a whole. *State* v. *Bragg,* 141 Me. 157; *State* v. *Townsend,* 145 Me. 384; *State* v. *Sanborn,* 120 Me. 170; *State* v. *Day,* 79 Me. 120, 125; *State* v. *Benner,* 64 Me. 267.

A presiding justice is not bound to repeat what has already been substantially covered in his charge nor to adopt the language in an instruction if the jury had otherwise been properly instructed. *State* v. *Beane,* 146 Me. 328; *Desmond* v. *Wilson,* 143 Me. 262; *State* v. *Cox,* 138 Me. 151; *State* v. *Pike,* 65 Me. 111; *State* v. *Knight,* 43 Me. 11. A requested instruction which is not, in its totality, sound law, is properly denied. *State* v. *Cox,* 138 Me. 151; *State* v. *McKrackern,* 141 Me. 194, 211.

A man is presumed to intend the natural and the probable consequences of his acts. Intent to kill or to do bodily harm, may be inferred from the circumstances where one acts in a reckless or wanton disregard for the safety of others. The act itself under the existing circumstances may show guilty intention. *State* v. *Sanborn,* 120 Me. 170, 173. See Statutory definitions of assault with intent to kill, Revised Statutes 1954, Chapter 130, Section 6, and Revised Statutes 1954, Chapter 130, Section 21, for definition of assault. See also *State* v. *McKrackern,* 141 Me. 194.

The exceptions present the question of whether the refusal to charge jury as requested was erroneous and neces-

sarily prejudicial. *State* v. *Siddall,* 125 Me. 463; *State* v. *Beane,* 146 Me. 328; *Levine* v. *Reynolds,* 143 Me. 15. The charge is to be taken as a whole and in connection with the evidence. *Desmond* v. *Wilson,* 143 Me. 262, 267; *State* v. *Bragg,* 141 Me. 157; *Labbe* v. *Cyr,* 150 Me. 342, 111 Atl. (2nd) 330.

The instruction asked must be correct, pertinent, not misleading, not already covered, and its refusal would be prejudicial. Where jury has been properly instructed, any amplification, or implication, or further statement, is a matter within the discretion of the presiding justice. *Desmond* v. *Wilson,* 143 Me. 262; *State* v. *Beane,* 146 Me. 328, 333; *State* v. *Cox,* 138 Me. 151; *Mears* v. *Biddle,* 122 Me. 392; *Labbe* v. *Cyr,* 150 Me. 342.

The court is not required to charge the jury in the same language used by counsel in the requested instruction. *State* v. *Smith,* 140 Me. 255; *State* v. *McKrackern,* 141 Me. 194.

It is not the duty of the court to eliminate errors in the requested instructions, nor to clarify or supply omissions. *State* v. *Cox,* 138 Me. 151; *State* v. *Robinson,* 145 Me. 79; *Desmond* v. *Wilson,* 143 Me. 262. If no exceptions to charge as given, and no error in refusal to instruct as requested, the instructions given are to be considered proper and sufficient. *Shannon* v. *Baker,* 145 Me. 58; *Frye* v. *Kenney,* 136 Me. 112.

The charge of the presiding justice as given was a careful and complete statement of the law as applicable to the constitutional rights of the respondent, to the allegations in the indictment, and to the facts in the record that were to be considered by the jury. It was a clear, complete and an orderly presentation of the law that was to be applied, as the jury might find the facts. The respondent was ably represented by very competent counsel. All the rights of the respondent were fully protected. The respondent recog-

nized the validity of the charge, but sought to add other words to instructions already given, and in words that do not fully state the law.

The question of intent was fully covered in the charge. The requested instruction might confuse a jury. It might confuse any person who reads it. The requested instruction does not take into account that a reckless and wanton disregard of the rights and safety of others may, under some circumstances, be an assault, even when no particular person was singled out or aimed at. The requested instruction is not the law. Intent may be inferred and found from circumstances surrounding an act. The circumstances may often be the only proof possible. The admission of a criminal intent is a rarity among the perpetrators of a felony who insist upon trial.

There was no error on the part of the presiding justice in refusing to give the requested instruction.

Exceptions overruled.

Judgment for the State.

STATE OF MAINE
vs.
IRMA MICHAUD
(Two Cases)

Androscoggin. Opinion, April 22, 1955.

Criminal Law. Constitutional Law. Pleading. Indictments. Misprision. Sentence.

A defendant has the constitutional right to know the nature and cause of the accusation against him and the necessary facts must be stated with certainty.

A statutory offense must be charged in the words of the statute or their equivalent. Where the statute does not sufficiently set out the facts a more definite statement is necessary.

R. S., 1954, Chap. 135, Sec. 12 which requires "knowledge of the actual commission of a felony" is not satisfied by knowledge from hearsay, possibilities or probabilities. The knowledge must be actual and personal knowledge and the indictment must indicate what the knowledge was and how it was obtained. (cf. Special concurring opinion by Webber, J.)

The mere omission to disclose knowledge of the commission of a felony, without positive concealment, is not enough under R. S., 1954, Chap. 135, Sec. 12 and while the statute employs the words "conceals or does not . . . disclose" it should be interpreted in the conjunctive (i. e. conceals *and* does not . . . disclose). (cf. Special concurring opinion of Webber, J., comparing misprision of felony and accessory after the fact.)

An indictment under R. S., 1954, Chap. 135, Sec. 12 must set forth the acts of concealment.

An indictment charging that defendant (first count) "did . . . attempt to induce . . . one Blanche Gagnon . . . to become a prostitute by offering to procure for and furnish to the said Blanche Gagnon men who would pay . . . etc." and (second count) that defendant did solicit and attempt to procure one Blanche Gagnon . . . for the purpose of prostitution by offering to procure for and furnish to the said Blanche Gagnon men who would pay . . . etc." is defective in its failure to state to whom the offer was made.

A "blanket" indictment that might cover several offenses is not permissible in a single count. Certainty in pleading is vital in order to enable the court to pronounce a valid judgment on conviction.

ON EXCEPTIONS.

These are criminal actions before the Law Court upon exceptions to the overruling of special demurrers. Exceptions sustained. Indictments adjudged bad.

Edward J. Beauchamp,
Irving Isaacson, for State.

Israel Alpren,
Berman & Berman, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, TAPLEY, JJ. WEBBER, J., concurring specially. BELIVEAU, J., did not sit.

FELLOWS, C. J. This record contains two cases of *State* v. *Irma Michaud,* and consists of two indictments, to each of which indictments the respondent filed a special demurrer. In each case the justice presiding at the January term of the Superior Court for Androscoggin County overruled the demurrer, and in each case the respondent comes before the Law Court on exceptions to the court's ruling. The two cases come forward in the one printed record.

FIRST CASE

This indictment (Law Court Docket No. 53, Superior Court Docket No. 5081) called on the Superior Court docket "Misprision" of felony, alleges in the charging part as follows:

> "That Irma Michaud, of Lewiston in the County of Androscoggin on July 11, 1953 at Lewiston, having knowledge of the actual commission of a felony

> cognizable by the courts of this state in that the said Irma Michaud knowing that one Simonne Lauze of said Lewiston had on July 4, 1953 at said Lewiston feloniously committed the crime of adultery with one Gerard Houle of Brunswick by then and there having carnal knowledge of the body of the said Gerard Houle (the said Simonne Lauze being then and there a married woman and having a lawful husband alive other than the said Gerard Houle) and the said Simonne Lauze and said Gerard Houle not then and there being lawfully married to each other, all of which being then and there known to the said Irma Michaud, the said Irma Michaud did feloniously, fraudulently and wilfully conceal and did not as soon as possible make known the commission of the said crime of adultery as aforesaid to some one of the judges having jurisdiction of such offenses or some officer charged with the enforcement of the criminal laws of the state, with intent thereby to hinder the due course of justice and to cause the aforesaid Simonne Lauze to escape unpunished."

To this indictment the respondent filed a special demurrer, claiming, among many other things, that the indictment failed to disclose what the knowledge of the respondent was or how the knowledge was obtained, and that there was no allegation showing how or in what manner there was a concealment. In brief, that the indictment does not allege sufficient facts to constitute a crime under the laws of Maine.

The indictment was apparently brought under Revised Statutes (1944), Chapter 122, Section 12, now Revised Statutes (1954), Chapter 135, Section 12, which reads as follows:

> "Whoever, having knowledge of the actual commission of a felony cognizable by courts of this state, conceals or does not as soon as possible disclose and make known the same to some one of the judges or some officer charged with enforcement of criminal

> laws of the state shall be punished by a fine of not more than $500 or by imprisonment for not more than 3 years, or by both such fine and imprisonment."

A defendant has a constitutional right to know the nature and the cause of the accusation against him. The necessary facts must be stated with certainty. The description of the criminal offense charged in the indictment must be full and complete. An indictment must charge a crime either under the statute or at common law. It should charge a statutory offense in the words of the statute or equivalent language within the meaning of the words of the statute. If the statute does not sufficiently set out the facts that make the crime, a more definite statement of facts is necessary The want of a direct allegation of anything material in the description of the substance, nature, or manner of the offense cannot be supplied by intendment or implication. *State* v. *Doran,* 99 Me. 329; *State* v. *Strout,* 132 Me. 136; *State* v. *Lashus,* 79 Me. 541; *State* v. *Rowell,* 147 Me. 131; *State* v. *Paul,* 69 Me. 215; *State* v. *Rudman,* 126 Me. 177; *State* v. *Mahoney,* 115 Me. 256; *State* v. *Dumais,* 137 Me. 95; *State* v. *Beattie,* 129 Me. 229; *State* v. *Novarro,* 131 Me. 345; *Smith, Petr.* v. *State,* 145 Me. 313; *State* v. *Papalos,* 150 Me. 46; *State* v. *Maine State Fair Assn.,* 148 Me. 486.

The statute requires "knowledge of the actual commission of a felony." It must be actual and personal knowledge. It must not be knowledge from hearsay, or from possibilities or probabilities. It must be first hand knowledge by the respondent of all facts necessary to know that the alleged felony has been committed. The indictment in this case alleges knowledge of the crime of adultery on July 11, 1953 that occurred on July 4, 1953, but there is no allegation of the facts to indicate how the respondent knew. Allegations of conclusion are not enough. It is "vague and indefinite." *State* v. *Doran,* 99 Me. 329.

The State argues that "knowledge" is a matter of proof and that the allegation of facts constitute a felony and the further allegation "all of which being then and there known" is sufficient, for whatever she knew she "did *** conceal and did not *** make known." This presents a question that has, so far as we can ascertain, never before been presented in this State. The indictment does not indicate what the knowledge was or how obtained. The indictment does not state what the concealment was and does not state how or in what manner the respondent concealed the commission of the felony. How did she have, or obtain actual personal knowledge on July 11, 1953 of a felony committed on July 4, 1953 and how did she conceal it? For these reasons we think the indictment is faulty, and that the demurrer should have been sustained.

The crime early known as "misprision of a felony," has been but little discussed in text books, and few cases have considered statutes similar to our own. It is clearly indicated, however, that a mere omission to disclose knowledge of the commission of a felony, without positive concealment, is not enough.

The ancient Federal Statute of 1790, from which our statute was evidently taken, was "conceals *and* does not as soon as possible disclose." The Maine statute uses the word conceals *or* "does not *** disclose." The crime is to conceal and not disclose, because disclosure is not concealment. The Maine statute should be interpreted, as the State has attempted to plead it, that is, in the conjunctive. "And" and "or" are convertible. *W. S. Libby Co.* v. *Johnson,* 148 Me. 410, 94 Atl. (2nd) 907, 910. The terms are not contradictory. *State* v. *Cushing,* 137 Me. 112; *State* v. *Willis,* 78 Me. 70.

In *Commonwealth* v. *Lopes,* 318 Mass. 453, the opinion states "except when based upon statute, American cases

recognizing the offense of 'Misprision of Felony' are hard to find. . . . A federal statute, first enacted in 1790, provides that 'whoever having knowledge of the actual commission of the crime of murder or other felony, cognizable by the Courts of the United States, conceals and does not as soon as may be, disclose and make known the same to some one of the judges or other persons in civil or military authority, under the United States,' shall be punished. Cr. Code, Section 146, 18 U. S. C. A., Section 251. Under this statute mere omission to disclose without positive concealment is not enough." *Commonwealth* v. *Lopes,* 318 Mass. 453, 61 N. E. (2nd) 849; *Bratton* v. *U. S.* (10 Cir.), 73 Fed. (2nd) 795. See also *People* v. *Lefkovitz* (Mich.), 293, N. W. 642.

The court holds in the *Bratton* case *(supra)* that serious constitutional questions may arise under a statute which could impose penalties for mere knowledge and silence. Chief Justice Marshall once said that a law punishing the mere failure to proclaim every offense that comes to one's knowledge "is too harsh for man." *Marbury* v. *Brooks,* 7 Wheat., 556, 575, 576, 5 L. Ed., 522."

We hold that there must be allegations of complete actual knowledge of all necessary facts, and of positive concealment. The act of concealment must be alleged. Otherwise, a person could be tried and erroneously convicted on slight evidence that was only to the effect that he was in the vicinity of where a felony was "actually" committed, and from that improperly argue that he must have "known," and that he concealed because he knew and did "not disclose." He might not have seen. He might not have known or understood all the facts. The exceptions to the overruling of the demurrer in the first case must be sustained.

SECOND CASE

This indictment (Law Court Docket No. 54—Superior Court Docket No. 5082) is for attempting to "procure," and

the allegations in the first count of the indictment are that the respondent Irma Michaud "did feloniously and willfully attempt to induce, persuade, encourage, inveigle, and entice one Blanche Gagnon of said Lewiston, a female person, to become a prostitute by offering to procure for and furnish to the said Blanche Gagnon men who would pay the said Blanche Gagnon for her engaging in sexual intercourse with them."

The second count alleges that the respondent "did solicit and attempt to procure one Blanche Gagnon of Lewiston, a female person for the purpose of prostitution by offering to procure for and furnish to the said Blanche Gagnon men who would pay the said Blanche Gagnon for her engaging in sexual intercourse with them."

A special demurrer was filed to the indictment "in both and each counts" on the ground of duplicity, that it was indefinite, uncertain, and that it does not inform the respondent of what the respondent should know in order to defend. The right to plead anew was reserved by the respondent and granted by the court. The presiding justice overruled the demurrer. The respondent filed exceptions.

There are apparently three statutory provisions that are, or might be, involved in one or both counts. These statutory provisions are as follows: (1) Revised Statutes (1944), Chapter 121, Section 12, Subsection IV, now Revised Statutes (1954), Chapter 134, Section 12, which makes it illegal "to procure or solicit or offer to procure or solicit for the purpose of prostitution, lewdness or assignation." (2) Revised Statutes (1944), Chapter 121, Section 16, now Revised Statutes (1954), Chapter 134, Section 16 reads "Whoever . . . . . induces, persuades, encourages, inveigles or entices a female person to become a prostitute," shall be guilty of a crime. (3) Revised Statutes (1944), Chapter 132, Section 4, now Revised Statutes (1954), Chapter 145, Section 4

defines an attempt as "Whoever attempts to commit an offense and does anything toward it, but fails or is interrupted or is prevented in its execution," . . . . . shall be guilty of an offense.

The attempt here is alleged in the first count "to induce, persuade, encourage, inveigle and entice" one Blanche Gagnon to become a prostitute," by offering to procure men who would pay the said Blanche Gagnon," etc. The count does not state to whom the "offer" was made. And the second count states, "did solicit and attempt to procure one Blanche Gagnon . . . for the purpose of prostitution by offering to procure for and furnish to the said Blanche Gagnon men who would pay the said Blanche Gagnon," etc. This count also fails to state to whom the "offer" was made.

Recognizing the rule that in an indictment for an attempt, the overt acts must be alleged, *State* v. *Doran,* 99 Me. 329, the State pleaded as overt acts offering to procure for and furnish to the said Blanche Gagnon men, etc. The State sets forth an attempt to commit the crime in language taken from Revised Statutes 1954, Chapter 134, Section 16, and for the overt acts sets forth the language substantially used in Revised Statutes 1954, Chapter 134, Section 12. The indictment, however, fails to state to whom the "offering" was made.

Is this an allegation of an attempt to violate Chapter 134, Section 12, or an attempt to violate Section 16? Or, is it an allegation in one count of an attempt to violate both sections? The count does not clearly and positively state what the crime was that was attempted.

It may be that the State alleges an attempt to violate Section 16 of Chapter 134, and for overt acts alleges the crime proscribed in Section 12. Under such circumstances, what crime was attempted and what crime was committed?

The indictment, and each of the two counts in the indictment, does not positively and clearly state to whom any offer was made. Was it an offer to "men"? Was it an offer by the respondent to some relative of the respondent or relative of Blanche Gagnon? Was it an offer to Blanche Gagnon? If it was an offer to Blanche Gagnon, it does not so state. Nothing must be left to intendment, and nothing must be left to implication. If it was the intention of the State to allege an attempt to procure, who is the respondent procuring? Is it Blanche Gagnon, or men for Blanche Gagnon? See *State* v. *Doran, et als.*, 99 Me. 329, and long list of cases previously cited in the first portion of this opinion.

Every man accused of crime is presumed to be innocent, and for that reason indictments must be drawn so that the innocent may know what charge he is to meet. A "blanket" that might cover several offenses is not permissible in a single count. All lawyers who hold, or have held, the office of the prosecuting attorney know that at a busy session of the criminal court it often happens that little time and opportunity is had to draw an indictment under a new, or a little used, statute. The books contain no tested form. This cannot, however, excuse the necessity for precision. The language used in an indictment is not important, but certainty is vital in order to enable the court to pronounce a valid judgment on a conviction. "The language employed to express the gravamen of the crime ought not to be supplied by intendment." *State* v. *Carkin*, 90 Me. 142, 145.

Both of the counts in this indictment are most indefinite and uncertain. There is no full, formal, and precise accusation. Was this an attempt or was there a completed offense? Does it allege an attempt to solicit or does it allege separate crimes? There is no certainty.

The demurrer in this second case should have been sustained.

In each of the two above named cases, therefore, the entry must be

Exceptions sustained.

Indictment adjudged bad.

SPECIAL CONCURRING OPINION

WEBBER, J. I agree with the results arrived at by the court, but with respect to the indictment charging misprision of felony, I cannot subscribe to the reasons advanced in the opinion for holding the indictment insufficient.

The opinion states that the State should have set forth what the knowledge of the respondent was and how it was obtained. In my view, such a requirement would compel the State to plead mere details of proof. The allegations of the indictment contain the following phrases with reference to knowledge: (1) "Having knowledge of the actual commission of a felony"; (2) "knowing that" followed by a sufficient allegation of adultery; (3) "all of which being then and there known to the said (respondent)." The statutory requirement is "having knowledge of the *actual* commission of a felony." (Emphasis supplied). The word "actual" cannot be ignored. Its obvious intendment is to preclude hearsay, gossip, rumor and the like. Knowledge that one is suspected of crime or is rumored to have been involved in crime is not knowledge that one has actually committed crime. I would assume that the State would be compelled to prove knowledge through personal observation of the criminal act, or knowledge of such circumstantial evidence as would clearly show guilt and effectively eliminate a reasonable hypothesis of innocence, or knowledge by admission establishing guilt made by the guilty party to the respondent. This, as it seems to me, is the sort of knowledge which is charged in the indictment by the words "actual commission" and is the sort of knowledge the State must

prove in support of the allegation. In *State* v. *Wilson,* 80 Vt. 249, 67 A. 533, the allegation as to knowledge was that the respondent "well knew," which was deemed sufficient. In *Bratton* v. *U. S.,* 73 Fed. (2nd) 795, no issue as to the method of alleging knowledge was raised, the allegations being of personal observation of the commission of the crime. In *Commonwealth* v. *Lopes,* 318 Mass. 453, 61 N. E. (2nd) 489, the allegations as to knowledge were "knowingly" and "well knowing that" without detail as to the method or sources of knowledge, and no issue was raised as to any insufficiency of allegation as to knowledge. In *State* v. *Biddle,* 2 W. W. Harr. (Del.) 401, 124 Atl. 804, the language of the indictment with reference to knowledge was "well knowing" and no more. Although the *Biddle* case is limited to the charge of a justice at *nisi prius,* the form of the indictment is at least an interesting precedent. In *State* v. *Neddo,* 92 Me. 71, an indictment directed against an alleged accessory after the fact, where the State was required to aver that the alleged accessory knew the principal felon to be such, the allegation was that the respondent "knew Coro 'to be such principal felon and to have committed the crime aforesaid.' " It would appear that no effort was made to set forth the respondent's *means of knowledge.* The court, although it examined every aspect of the indictment with meticulous care, made no issue as to the sufficiency of the allegation of knowledge. With respect to means of action, the court said at page 77, " 'It is in no case necessary to set forth the means by which the accessory before the fact incited the principal to commit the felony, or the accessory after received, concealed or comforted him; for it is perfectly immaterial in what way the purpose of one was effected, or the harboring of the other secured; *and as the means are frequently of a complicated nature, it would lead to great inconvenience and perplexity if they were always to be described upon the record.*' II Bishop's Crim. Proc. Sec. 8." (Emphasis supplied.) It would seem that the quoted

language might be applied with equal force to allegations as to means of knowledge. I conclude therefore that the allegations before us as to knowledge were adequate and that the means of knowledge become matters of proof.

As to concealment and failure to disclose, the State has treated our statute as requiring pleading in the conjunctive and has so pleaded in the words, "did feloniously, fraudulently and wilfully conceal and did not as soon as possible make known the commission of the said crime." The State has added the words, "with intent thereby to hinder the due course of justice and to cause the aforesaid Simone Lauze to escape unpunished." It is true that in the *Bratton* case, *supra,* it was said that positive acts of concealment must be set out such as "suppression of the evidence, harboring of the criminal, intimidation of witnesses, or other positive act designed to conceal from the authorities the fact that a crime has been committed." It is necessary to distinguish between misprision of felony and the offense of accessory after the fact. If positive acts of concealment are of such a nature as to make the respondent guilty as an accessory after the fact, we have something more than misprision of felony which is essentially a criminal neglect. Bishop's Crim. Law 9th Ed., Vol. 1, page 513, sec. 717, gives this definition: "Misprision, whether of a felony or of treason, is a criminal neglect, either to prevent it from being committed, or to bring to justice the offender after its commission, 'but without such previous concert with or *subsequent assistance to him,* as will make the concealment an accessory before or *after the fact.*'" (Emphasis supplied.)

Our Legislature has seen fit to distinguish and define both the offense of misprision of felony and the offense of being accessory after the fact. The accessory Statute (now R. S., 1954, Chap. 145, Sec. 3) provides: "Every person, not standing in the relation of husband or wife, parent or child to the principal offender, who harbors, conceals, main-

tains or assists any principal felon, or accessory before the fact, knowing him to be such, with intent that he may escape detection, arrest, trial or punishment is an accessory after the fact and shall be punished" etc. The illustrations of positive acts of concealment quoted above from the *Bratton* case would all seem to fall within the scope of harboring or assisting as used by our accessory statute. In short, the practical result of requiring the pleading of positive acts would be to destroy any distinction between misprision of felony and the crime of being accessory after the fact. That this was the practical result of the interpretation of the Federal statute adopted in the *Bratton* case has been noted by some authorities. In *Commonwealth* v. *Lopes, supra,* at page 851 of 61 N. E. (2nd) it is said: "In *State* v. *Graham,* 190 La. 669, 670, 182 So. 711, 714, it was said of that statement (that misprision of felony is obsolete) that 'the reason for that is that, in the modern acceptation of the term, misprision of felony is almost if not identically the same offense as that of an accessory after the fact' as indeed it is under the Federal statute already quoted." Whatever may be the law in other jurisdictions, I cannot agree that the offense of misprision of felony has not been maintained separate and distinct from the offense of an accessory after the fact by our statutes, or that to charge one with the former crime, the State must allege substantially what would be required to charge the latter offense. The key to the distinction lies in the proper interpretation of the word "conceals" in our misprision statute which implies that purposeful, unlawful intent which has been deemed essential to the common law crime of misprision. In both *State* v. *Wilson, supra,* and *Commonwealth* v. *Lopes, supra,* the courts, although primarily concerned with determining whether or not the common law crime of misprision of felony exists in their respective jurisdictions, place their emphasis on whether or not the concealment rests on evil motives and intent. Both of these cases go so far as to require affirma-

tive pleading that the concealment was with evil intent, a requirement which the State has met in the indictment before us. Bishop, *supra,* at page 515, Sec. 721, says: "It would seem in principle that the motive prompting the neglect of a misprision should be in some form evil as respects the administration of justice; for example, to prevent the offender's punishment, or to withhold due aid from the government." If, therefore, these authorities fairly interpret the requisites of the common law offense of misprision of felony, is it not reasonable to conclude that our Legislature in enacting a statute dealing with misprision of felony intended a similar meaning in its statutory use of the word "conceals"? If this be so, it follows that our Legislature has made it unlawful for one with actual knowledge of a felony to remain silent and inactive if in so doing he has a definite and positive intent to hinder and prevent justice and assist the culprit to escape punishment. If in fact the concealment is motivated by some natural reluctance which may stem from timidity or aversion to publicity, or (as in the *Lopes* case) a desire to avoid self-incrimination of another and separate crime, then the nature of the concealment lacks that essential essence of unlawfulness intended by the statute. Protection afforded by such an interpretation to citizens whose failure to act does not rest on an intention to aid the culprit or defeat justice eliminates that "intolerable oppressiveness" referred to in the *Bratton* case. It may be that the statutory offense of misprision is out of tune with our modern concepts of the duty of citizens, or so difficult of proof as to have little efficacy as a practical social discipline, but these considerations, if valid, are matters for legislative rather than judicial action. I question the propriety of destroying the statutory offense of misprision of felony by merging it into the offense of being accessory after the fact by what might be thought by some to be judicial legislation. I conclude therefore that the *unlawful nature* of the concealment should be both pleaded

and proven by the State rather than so-called positive acts of concealment which would tend in most cases to charge the respondent with being an accessory after the fact. The State here has pleaded, (1) the knowledge of the actual commission of the alleged felony; (2) the felony itself alleged to have been known and concealed; (3) the concealment and failure to disclose; and (4) the unlawful nature of the concealment because of the unlawful intent which motivated it. If the indictment was not deficient in other respects, these averments should be sufficient.

There is another reason, however, which renders the indictment vulnerable to demurrer. The indictment alleges the time of the respondent's knowledge as July 11, 1953, and the time of the alleged adultery as July 4, 1953. Thereafter the indictment makes four averments of essential facts alleging as to the time thereof in each instance that they occurred "then and there." Where multiple dates are used in an indictment, the mere use thereafter of "then and there" without specific reference to the selected date is a fatal defect. *State* v. *Day,* 74 Me. 220; see *State* v. *Hurley,* 71 Me. 354 and *State* v. *Dumais,* 137 Me. 95. A basic right of the respondent rather than a mere technicality is involved, for upon a variance as to time between allegation and proof the respondent may claim surprise and prejudice and seek postponement of his trial. See *State* v. *McNair,* 125 Me. 358 and *State* v. *Morin,* 126 Me. 136. For this reason, therefore, I agree that the indictment involving misprision must be adjudged bad.

The reasons for sustaining exceptions with respect to the indictment in the second case are fully and adequately covered by the opinion of the court.

JOSEPH DUBOIS
vs.
MAINE EMPLOYMENT SECURITY COMMISSION

MARIE A. REMILLARD
vs.
MAINE EMPLOYMENT SECURITY COMMISSION

Kennebec. Opinion, April 25, 1955.

Maine Employment Security Commission.
Pensions. Wages. Unemployment Benefits.
Administrative Law. Regulations.
Dismissal Pay.

Pension payments are not "wages" within the meaning of R. S., 1954, Chap. 29, Sec. 3, Subsection XVII.

A pension is a stated allowance or stipend made in consideration of past services or of the surrender of rights or emoluments to one retired from service.

A *pension payment*, characterized as "Retirement Separation pay," does not become a *wage payment* "with respect to" the weeks following retirement, merely because the amount of the pension payment is computed with respect to a contract formula relating to weekly wages during the last week of service. R. S., 1954, Chap. 29, Sec. 3, Subsection XVII.

The regulatory power of the Commission under R. S., 1954, Chap. 29, Sec. 5, may not be exerted to change, modify, extend or limit any law enacted by the Legislature.

Where there is mere passive acquiescence by the employer in a voluntary retirement pursuant to a contractual retirement plan, there is no "dismissal" within the meaning of R. S., 1954, Chap. 29, Sec. 15.

Termination payments *in lieu* of *notice* are payments for the period with respect to which an employer would give advance notice of his intention to dismiss an employee, and are distinguishable from *pension payments.*

The Commission has a duty to determine all of the issues which are properly and adequately raised by the evidence in order that *one* judicial review may terminate the case.

ON EXCEPTIONS.

This is an application for unemployment benefits before the Law Court upon exceptions to a decree of the Superior Court reversing a decision of the Maine Employment Security Commission. R. S., 1954, Chap. 29, Sec. 16, Subsection IX. Exceptions overruled.

Simon Spill, for plaintiff.

Frank G. Harding, Attorney General,
Milton Bradford, Asst. Atty. Gen., for State.

SITTING: FELLOWS, C. J., WILLIAMSON, TIRRELL, WEBBER, BELIVEAU, TAPLEY, JJ.

WEBBER, J. These two cases arise out of claims made for benefits under the Maine Employment Security Law. As both cases raise the same legal issues, they have been heard and may be decided together for convenience.

The claimants here were formerly employees of the Bates Manufacturing Company and the Pepperell Manufacturing Company respectively, and are members of the Textile Workers Union of America, C. I. O., which is the bargaining agent as to Labor-Management relations in both plants. The essential facts are not in dispute. During the negotiations preliminary to a contract between the Union and the Employers in 1953, the Union proposed a conventional pension plan for the Employees. The Employers sought to avoid certain expenses of clerical record maintenance and offered as a compromise substitute the plan of lump sum retirement payment which finds expression in the existing contract. Article XXVIII of the contract entitled "Retirement Separation Pay" provides as follows:

> "The Employer will pay retirement separation pay to employees who, having attained the age of

> sixty-five, voluntarily retire from the employment in the mill and have at the time of their retirement completed fifteen (15) years of service in the mill with an average employment of one thousand (1,000) hours or more for each service year. The amount of the retirement separation pay shall be one week's pay for each service year, with a maximum of twenty weeks' pay.
>
> A week's pay for an hourly worker shall be forty times his hourly rate of pay and for a piece or incentive worker it shall be forty times his average straight time hourly earnings, exclusive of overtime for the Social Security quarter next prior to the quarter in which he retires."

There is no dispute between the contracting parties as to their intention which was to provide a practical and relatively inexpensive substitute for a conventional pension plan, but which was to partake of most of the attributes of a pension plan and which might with some accuracy be described as a lump sum pension. In common with most conventional pension plans, it carried the usual requirements that the claimant must be advanced in years, must have rendered long and continuous service to his employer, and would receive an amount directly related to his earning rate.

Both claimants qualified for "Retirement Separation Pay." Each was experiencing difficulty in doing his usual work as the result of age and infirmity. Each sought from his employer some form of lighter work which would be within the scope of his physical capacity, but no such work was available although it is apparent that each employee was highly regarded by his respective employer. Accordingly, each employee elected to retire and accept the lump sum payment provided by contract. Both employees seasonably registered with the Commission as claimants for unemployment benefits, made themselves available for work within their capacities, and independently made unsuccessful efforts to find suitable employment.

The Commission denied benefits in each case on two grounds, (1) that these claimants could not be deemed "totally unemployed" as required by the Law, and (2) that the lump sum payments constituted "dismissal wages" disqualifying the claimants for benefits. This decision was reviewed in the Superior Court pursuant to the provisions for judicial review (now R. S., 1954, Chap. 29, Sec. 16, Subsec. IX) and there reversed. Exceptions thereto raise the legal issues for our consideration.

Sec. 13, Subsec. II of the Act *(supra)* provides for benefits to be paid to "each eligible individual who is totally unemployed in any week." Sec. 3, Subsec. XVII provides in part: "A. An individual shall be deemed 'totally unemployed' in any week with respect to which no wages are payable to him and during which he performs no services."

Obviously these claimants performed no services during the weeks immediately following their retirement, but they must also show that no wages were paid to them "with respect to" those weeks, and upon this issue the Commission contends that they failed to qualify. Under the contract formula, one of these claimants received the equivalent of eighteen weeks' pay based on eighteen years of employment, while the other claimant received the equivalent of twenty weeks' pay, the maximum allowable, based on many more than twenty years of employment. The Commission contends that these payments were remuneration in the form of wages properly and legally allocable to, and paid "with respect to," the eighteen and twenty weeks respectively immediately following the separation from work. Neither the research of able counsel nor our own has disclosed any case in any jurisdiction squarely deciding this issue or dealing with a modified or lump sum pension plan such as is here involved, and it is presently our understanding that the case is one of novel impression.

We do not think these lump sum payments were "wages" paid "with respect to" the weeks following separation. Sec. 3, Subsec. XIX provides in part, " 'Wages' means all remuneration for personal services including commissions and bonuses and the cash value of all remuneration in any medium other than cash." No personal services were performed after retirement. Thus it follows that if the payment was for personal services, it was necessarily for past personal services without any relationship to the weeks following retirement, but it does not seem to us that the payment was for "personal services" at all in the sense that the Legislature used the phrase in defining "wages." The employee had for many years performed daily assigned tasks which made up the manual routine of his job. For this he had been fully paid week by week the "wages" which he earned by this "personal service." Now upon retirement, having attained the age of at least sixty-five years, and having worked at least fifteen years, he received something more which is called "Retirement Separation Pay." This is of a somewhat different character. It is a recognition and reward for certain intangibles which are of very real worth and value to the employer who desires a stable labor force. These intangibles have to do with the long continuation of the employee's service to, and cooperation with, his employer, his faithfulness, loyalty and dependability, and the relative freedom from interruption of that relationship. There is also here a recognition of the fact that the employee has in a sense grown old in the service of a single company. Such employees set an example for younger employees which the employer has reason to hope may be emulated. They tend to create stability and diminish such problems as job training and irresponsibility which constantly harass management. Here is recognition then of both a quantity and a quality of service. It is just such a concept which underlies the conventional pension plan and the Commission concedes that it does not construe the re-

ceipt of a conventional pension as disqualifying the beneficiary for unemployment benefits. It was obviously the intent of the Employers and the Union here to provide such a reward for intangibles in the form of a modified pension plan. Such plans, where they are financially possible and practicable for the parties to labor-management contracts, tend to foster good will and sound employer-employee relations. The construction put upon the Act by the Commission would tend to destroy their efficacy and we see nothing which directly or indirectly suggests that such was the intention of the Legislature.

We think the Commission has taken too literally the use of the word "weeks" in the contract formula used to compute the lump sum payment. It has assumed that the reference must be to some particular weeks, specifically the weeks immediately following retirement. The manifest purport of the formula is otherwise. Properly interpreted, the formula produces an arbitrary lump sum reward for the quality of the whole service of the employee, a sum which is fixed in a range of from fifteen to twenty times the weekly pay received in the last week of that service. The payment is not related or made "with respect to" any particular weeks, either past or future. It is doubtful if the problem would have arisen if the contract had established some arbitrary fixed sum such as $1,000 rather than to provide a computation by formula, yet the intention would have been the same.

"It is safe to assert that pension payments are not wages within the meaning of the Law, * * * * and that their receipt will not disqualify an employee who meets the other requirements of the Law." *Keystone Mining Co.* v. *Unemployment Comp. Bd. of Rev.*, 167 Pa. Super. 256, 75 A. (2nd) 3 at 5. In *Krauss* v. *A. & M. Karagheusian, Inc.*, 13 N. J. 447, 100 A. (2nd) 277, where claimant received a monthly pension, the court seems to have assumed that

such conventional pension payments would not disqualify and the case was decided on other issues. The Commission, however, appears to place great reliance on the case of *Kneeland* v. *Adm. Unemployment Comp. Act,* 138 Conn. 630, 88 A. (2nd) 376, in which claimant received a conventional weekly pension, and the court held that he was thereby disqualified for benefits. The case, however, is readily distinguishable. The Connecticut law contains a provision that a claimant shall be ineligible for benefits "during any week with respect to which the individual has received or is about to receive remuneration in the form of * * * * *any payment by way of compensation for loss of wages.*" (Emphasis supplied.) The court found that pension payments fell within this category. Whether we would find the reasoning of this decision sufficiently compelling to adopt it if occasion should arise, we need not determine here. Suffice it to say that no such provision appears in our Maine Law. We note the following at page 377 of 88 A. (2nd): "A pension is a 'stated allowance or stipend made * * * * in consideration of past services or of the surrender of rights or emoluments, to one retired from service.' Webster's New International Dictionary (2nd Ed.). *It is not wages as that word is used in our Unemployment Compensation Act.* Wages are there defined as 'all remuneration for employment' * * * *. When a man is retired, his employment ceases. Anything paid to him on account of his retirement *is not remuneration for employment.*" (Emphasis supplied.)

In *Western Union Tel. Co.* v. *Texas Emp. Com.,* 243 S. W. (2nd) (Tex.) 217, where an employee's job was abolished and by Union contract the employee received lump sum severance pay, it was held that the payment was pursuant to the contract and was earned during the entire period of employment. Thus it was not paid "with respect to" the weeks following separation.

We conclude that the first ground relied upon by the Commission is untenable and that in the weeks following separation these claimants were "totally unemployed," and were then neither performing any personal services nor receiving any wages or remuneration "with respect to" those weeks.

The second ground relied upon by the Commission relates to the legal interpretation of the phrase "Dismissal wages." Sec. 15 provides in part that, "An individual shall be disqualified for benefits: * * * * V. For any week with respect to which he is receiving or has received remuneration in the form of: A. * * * * dismissal wages or wages in lieu of notice." Sec. 1, Subsec. IX of the Regulations promulgated by the Commission defines the phrase "dismissal wages" as used in Sec. 15 above as "any remuneration, accrued or otherwise, paid or payable to an individual at the time of his separation from work." The Commission determined that the "Retirement Separation Pay" received by these claimants constituted "dismissal wages" as defined by the Regulation.

Sec. 5 of the Act empowers the Commission to adopt, amend or rescind such regulations as may be required in the administration of the Act. That the Commission may not exert its regulatory power to change, modify, extend or limit any Law enacted by the Legislature is undoubted. 42 Am. Jur. 358 (Pub. Adm. Law) Sec. 53. In *Anheuser-Busch, Inc.* v. *Walton, et al.*, 135 Me. 57, we said at page 66: "No principle is more firmly imbedded in our concept of government than that the laws under which we live shall be enacted by the people or by their representatives in legislature assembled"; and at page 67, "Its (the Commission's) power to make rules and regulations extends only to such details of administration as are necessary to carry out and enforce the mandate of the legislature."

The word "dismissal" as used in the phrase cannot be arbitrarily disregarded. It connotes an affirmative action on the part of the employer in initiating the separation. The verb "dismiss" as related to employment has been defined as "to send or remove from office, services or employment; discharge." Webster's New Collegiate Dictionary. Where there is mere passive acquiescence by the employer in a voluntary retirement pursuant to a contractual retirement plan such as occurred here, there is no "dismissal" within the purview of the Act.

Where an employee was displaced by technological changes which eliminated his job but by Union contract was entitled to several options including "severance pay" payable in a lump sum, the employee was deemed eligible for unemployment benefits. The Act contained a similar disqualifying feature for "dismissal payment or wages in lieu of notice," but the court did not view the severance pay as a "dismissal payment." *Ackerson* v. *Western Union Tel. Co.*, 48 N. W. (2nd) (Minn.) 338. In a similar situation, the court in *Krupa et al.* v. *Western Union Tel. Co.*, 90 Ohio App. 90, 103 N. E. (2nd) 784, in a split decision, held that the lump sum severance pay was "remuneration in lieu of notice" which disqualified the claimant for benefits. In so holding, the majority relied upon "some evidence from which it may be inferred that the severance pay was remuneration for the period of unemployment" after the separation. In a vigorous and well reasoned dissent, Carpenter, J., pointed out that there was no such evidence, but that pursuant to the Union contract claimant was being compensated, not for her work for which she had been paid wages, but for the loss of seniority and pension rights which she had built up much as one builds up the cash surrender value of a policy of a reserve life insurance company. He concluded that such a payment would not be disqualifying.

In *Schenley Distillers* v. *Review Bd. of Ind. Emp. Sec. Div.*, 123 Ind. App. 508, 112 N. E. (2nd) 299, the lump sum payment was a "termination payment in lieu of notice," and thus disqualifying. At page 302 of 112 N. E. (2nd) the court said: "The term 'termination payments *in lieu of notice,*' has an accepted usage as follows:

> 'Dismissal notice may be defined as advance notice given by the employer of his intention to dismiss the employee. Sometimes in lieu of such notice the employee's salary is paid for the period which would otherwise be covered by the notice. * * * *.' 147 A.L.R. 154."

Such dismissal payments are quite distinguishable from either conventional pension payments or "Retirement Separation Pay" such as we are here considering.

The Commission cites the case of *Fazio* v. *Unemployment Com. Bd. of Review,* 164 Pa. Super. 9, 63 A. (2nd) 489. In this case, however, the employer dismissed the employee and, although not legally required to do so, gave him a check for his pay for the two months following the separation. The check bore the notation "Salary for February and March." The court held this dismissal payment disqualified the claimant from benefits for the period covered by the check under the wording of the Pennsylvania Act. We see little or no resemblance between this situation and the one at Bar in which there was no dismissal and no allocation by the parties themselves of the lump sum payment to the weeks following separation.

The decree of the learned justice below stated: "It is the conclusion of this court that the regulatory definition of 'dismissal wages' goes beyond the legislative intent in the Act, is inconsistent with the terms of the Act it purports to supplement administratively, and is therefore invalid, insofar as it includes retirement separation pay under the facts of the instant cases." With this conclusion we agree.

The Commission suggests that if the basic legal issues already discussed should be decided in favor of the claimants, the matter should be remanded for further proceedings before the Commission to determine whether or not the claimants complied with all requirements as to "availability for work." We can conceive of cases in which a manifest lack of essential evidence might make such a remand essential, but we would be most reluctant to lend encouragement to any form of procedure which might tend to produce piecemeal judicial review and an unnecessary duplication of costly and time-consuming litigation. The Commission has a duty to determine all of the issues which are properly and adequately raised by the evidence in order that one judicial review may effectively terminate the case. In the instant cases, the Commission had sufficient evidence before it upon which to make a determination of "availability." If it desired further investigation or corroboration, it had ample opportunity and facilities for procuring the same. Sec. 5, Subsec. XIV provides in part: "Upon the motion of any party to the review, the court may order additional testimony or evidence to be offered and upon the basis of all the evidence before him shall determine the issues." Apparently the Commission did not deem it necessary to make such a motion. The Commission seems arbitrarily, albeit sincerely, to have concluded that its determination of the legal issues now before us was essentially correct and not vulnerable to judicial review and no necessity existed for considering seriously the question of "availability." In this view, it now appears that the Commission was mistaken. A remand at this time, if it resulted unfavorably to claimants, would necessitate a further petition by them for another judicial review. Such practice is unduly burdensome to parties and should be avoided if possible.

Sec. 14 provides in part: "An unemployed individual shall be eligible to receive benefits with respect to any week

only if the commission finds that: * * * * II. He has registered for work at, and thereafter continued to report at, an employment office in accordance with such regulations as the commission may prescribe, * * * *; III. He is able to work and is available for work and * * * * is himself making a reasonable effort to seek work at his usual or customary trade, occupation, profession or business or in such other trade, occupation, profession or business as his prior training or experience shows him to be fitted or qualified; * * * *."

Sec. 15 provides in part: "An individual shall be disqualified for benefits: * * * * III. If the Commission finds that he has failed, without good cause, either to apply for available, suitable work when so directed by the employment office or the commission or to accept suitable work when offered him. * * * *. A. In determining whether or not any work is suitable for an individual, the commission shall consider the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence."

The Commission's findings of fact, when supported by any credible evidence, are conclusive. Judicial review is limited to the correction of errors of law. When the Commission decides facts contrary to all of the credible evidence in the case, it has committed an error of law. *N. E. Tel. & Tel. Co.* v. *PUC,* 148 Me. 374; *Central Maine Power Company* v. *PUC,* 150 Me. 257. When no dispute as to the facts exists or is possible upon all the evidence, the question becomes one of law. So here there is no dispute as to the facts. The employers, the union, the claimants and the representatives of the Commission all agree that the claimants were no longer physically able to perform their customary tasks, but

they were able and anxious to perform lighter work. They were seeking work from their employers and from others. They were registered and reporting regularly at the employment office and had not refused any offer of employment. For the time being, no suitable jobs were available but they evinced a genuine attachment to the labor market. "The test is met if it appears that the 'individual is willing, able and ready to accept suitable work which he does not have good cause to refuse, that is when he is genuinely attached to the labor market.' * * * * The determination entails primarily a probe of the claimant's good-faith intention to work * * * *." *Krauss* v. *A. & M. Karagheusian, Inc., supra,* at page 282. Where a condition precedent to the receiving of a pension is that the recipient withdraw from all gainful labor, he is of course not "available" for employment and is disqualified for benefits. See *Keystone Mining Co.* v. *Unemployment Comp. Bd. of Rev., supra,* but no such condition was imposed in the cases before us. In *Campbell Soup Co.* v. *Bd. of Rev.,* 13 N. J. 431, 100 A. (2nd) 287, the claimant was compelled by the terms of a collective bargaining agreement to retire on pension at age 65. He was held to be involuntarily unemployed and entitled to benefits where he was genuinely attached to the market for common labor, even though contractually barred from employment by the pensioning employer. With respect to the "availability" of a man of his years, the court said at page 291 of 100 A. (2nd): "But the witness (employment officer) also testified that unskilled workers 65 years or older found it 'very difficult' to find jobs. This, however, is an inadmissible consideration in the inquiry whether there is a labor market for skills of the type being offered by the claimant. The claimant's age is properly a consideration upon the issue of his availability only as it relates to his ability to work, or is tied to restrictions which materially limit his capacity for employment. The primary determinant of the existence of a labor market is whether there is a

market in the geographical area in which the claimant is willing to work for the services which he is able to perform." In the instant cases, we think the claimants were, if anything, more "available" as they were not barred from seeking and did in fact seek other work from their employers as well as in the general labor market. Claimants may not impose unreasonable restrictions which in effect destroy the market for their services. *Goings* v. *Riley*, 98 N. H. 93, 95 A. (2nd) 137; *Robinson* v. *Maryland Emp. Sec. Bd.*, 97 A. (2nd) (Md.) 300. There is no suggestion in the evidence here that these claimants did not meet these tests adequately.

We therefore conclude that the uncontroverted evidence requires determination that these claimants, having voluntarily left their employment, not merely to secure "Retirement Separation Pay," but for good cause, and having demonstrated their ability and willingness to accept suitable work from their original employers or in the general labor market, were "available" for work within the meaning of the Act. Not being otherwise disqualified, they were eligible for benefits. A contrary finding on the issue of "availability" would constitute an error of law as being unsupported by any evidence, and there is therefore no occasion to remand these cases to the Commission for further consideration.

The entry will be,

Exceptions overruled.

IN MEMORIAM

Memorial Exercises before the Maine State Bar Association on August 19, 1953 and Washington County Bar Association before the Superior Court October Term 1953 in Commemoration of

HONORABLE HAROLD H. MURCHIE

The Nineteenth Chief Justice of the Supreme Judicial Court of Maine

Born March 8, 1888 Died March 7, 1953

Honorable Raymond Fellows, Associate Justice Supreme Judicial Court before Maine State Bar Association.

Mr. President:

The members of the Maine State Bar Association hold it most fitting that as professional brethren we pay special tribute to the worth of Hon. Harold H. Murchie, by commemorating his rare gifts of knowledge and his sterling qualities. He was born in Calais, Me. in 1888, graduated from Dartmouth 1909, Harvard Law 1912, Asst. Attorney General 1913-1914, Legislature (House) 1919-21, County Attorney of Washington County 1925-26-27, Maine Senate 1929-31-33, President of Maine Senate 1933, Legislative Committee on Revision of the Statutes 1929-30, President of Maine State Bar Assn. 1939-40, Associate Justice Supreme Judicial Court 1940, Chief Justice March 3, 1949. He died March 7, 1953. These milestones mark his successful career and testify to his abilities. The love of all who knew him testify to his individual worth.

He was clean and upright, loyal to his friends, and would have been just to his enemies had it been possible for him to have had any. He had and used great and capable mental activity with tremendous energy. He worked constantly and hard. He accomplished much. He was more than just. He was kind. He won the love of his fellow men, not by

seeking, but simply by living his natural and generous life. To those who enjoyed his intimate companionship, the simplicity and refinement of his nature brought to him implicit trust and appreciation.

He was social and benevolent, as his elections to high offices in clubs, secret orders and charitable organizations bear witness. He was modest. We have heard him say in speaking of deceased members of the Court that "no Judge is indispensable because the Maine Bar has within its membership as capable future members of the Bench as Maine ever had in all its years of Statehood."

His family was to him a sacred trust and all those who composed it returned in full measure the love and thoughtful care that he so lavishly bestowed.

When death consents to let us live a long time, it takes successively as hostages men like Harold Murchie whom we love. I miss him. We all miss him. We miss him not as a brilliant Chief Justice, but as a real friend. He never did a wrong in his lifetime for us to forgive. The only thing we cannot forgive is that he left us, and took with him a rare, charming and delightful personality.

It is, therefore, unanimously

Resolved by members of the Maine State Bar Association that in the loss of the Honorable Harold H. Murchie, late Chief Justice of the Supreme Judicial Court of Maine and a former President of this organization, there is an indescribable vacancy left in our hearts which neither time nor absence can ever efface. We loved him living, and we will love his memory while life lasts.

RAYMOND FELLOWS
CARROLL N. PERKINS } *Committee*
EDWARD F. MERRILL

Upon motion, duly seconded, the resolutions were unanimously adopted.

Honorable Hubert E. Saunders, President of Washington County Bar Association, before the Superior Court, October Term A. D. 1953, Honorable Granville C. Gray, presiding.

RESOLUTION OF THE
WASHINGTON COUNTY BAR ASSOCIATION

RESOLVED that in the death of Harold H. Murchie, Chief Justice of the Supreme Judicial Court of Maine, we of the Washington County Bar Association have lost an outstanding member and fellow attorney. We have further lost a friendly adviser who was ever ready to listen patiently and counsel wisely on perplexing legal matters. Modest and humble even after elevation to his high and honorable position at the head of our judicial system, he was a true Christian gentleman. In his passing the people of the State have lost a splendid citizen and a dignified and learned jurist. His memory will remain long in the minds and hearts of those of us who were privileged to know him. Through his written opinions first as an Associate Justice and later as Chief Justice of our highest state court, he has left a permanent record and memorial for posterity.

RESOLVED that these resolutions be presented to the Court with the request that they may be entered upon its permanent records and that a copy thereof be sent to his widow in token of our respect and sympathy.

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ARBITRATION

One acting as attorney, agent, and arbitrator under an arbitration agreement in inducing the other arbitrators to defer decision beyond the contract time limit cannot complain because the time limit has expired, since such conduct results in a waiver.

The common law had recognized that arbitration agreements may be revoked at any time before final award.

Under no circumstances will revocation of the submission of labor management contracts to arbitration be effective when the revoking party fails to act in good faith.

Shoeworker Ass'n v. *Fed. Shoe, Inc.*, 432

ASSAULT

A presiding justice is not bound to repeat what has been substantially covered in his charge.

One is presumed to intend the natural and probable consequences of his acts.

Intent to kill or do bodily harm may be inferred from circumstances where one acts in a reckless or wanton disregard of the safety of others.

A reckless and wanton disregard of the rights of others may, under some circumstances, be an assault even where no particular person was singled out or aimed at.

State v. *Barnett*, 473.

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The cashing of a check by a village corporation bearing the notation "appropriation 1952 in full" does not preclude its rights to further payment from the town even though the village assessors knew of the town's intent, since the town could not place a condition upon its statutory obligation to make payment.

In computing an appropriation payable by a town to a village corporation, a charter provision requiring a deduction of the village "*corporation's proportional part, based on valuation and poll tax assessment of the whole annual town levy* x x x *for state, county and school taxes, salary of town officers* (etc.) x x x *and any and all other town charges*," requires a deduction of the "proportional part" of listed or common town expenses and not merely a deduction of the village property and poll taxes assessed.

See R. S., 1944, Chap. 19, Sec. 45.

York Beach v. *Inh. of York*, 1.

Under Sec. 14, Chap. 174, R. S., 1944, the person in possession of a negotiable instrument, when such instrument is wanting in any material particular he, the person in possession, has a *prima facie* authority to complete it by filling up the blanks.

Reasonable time under R. S., 1944, Chap. 174, Sec. 14, is a mixed question of law and fact.

Prima facie imports that the evidence produces for the time being a certain result, but that result may be repelled.

A jury verdict based on evidence on both sides should not be disturbed, unless so manifestly erroneous as to make it apparent that it was produced by prejudice, bias, or mistake of law or fact.

Giles v. *Putnam*, 104.

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Under Maine practice the competency of an accused depends upon R. S., 1944, Chap. 135, Sec. 22; he may testify "at his own request but not otherwise."

R. S., 1944, Chap. 135, Sec. 22 is applicable to a joint trial of co-indictees.

One co-indictee is not an interested party in the refusal of the court to direct a verdict for the other co-indictee.

Whether the respondent intended to agree to a bribe of a public official is a question of fact.

In Maine concurrence between the giver and taker is not required to establish the substantive crime of bribery. Where concurrence and agreement, essential to conspiracy but not to bribery, are shown to exist between prospective givers, the crime is properly charged as conspiracy.

A motion for new trial in criminal cases raises the question whether in view of all the testimony the jury were warranted in believing beyond a reasonable doubt that respondent was guilty. It is only where injustice would inevitably result that the law of the case may be examined.

Recantation by a witness subsequent to trial is not sufficient evidence upon which to base a new trial where such would not result in a different verdict.

Concealment of immunity by a witness cannot be based upon the fact that several persons and the witness relied upon different interpretation of R. S., 1944, Chap. 122, Sec. 8 (immunity statute).
State v. *Papalos*, 370.

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CORPUS DELICTI

To sustain the burden of proving guilt beyond a reasonable doubt it is necessary to establish the *corpus delicti* by *some proof* independent of extra judicial statements or confessions.

Some proof means such credible evidence as standing alone to create a really substantial belief that a crime had actually been committed.

State v. *Hoffses*, 147 Me. 221, distinguished.

To justify a conviction on circumstantial evidence alone, the circumstances must point to the respondent's guilt and be inconsistent with any other reasonable hypothesis.

State v. *Jones*, 242.

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DAMAGES

The court has no right to substitute its judgment for that of the jury in matters of disputed questions of fact.

There is no law in Maine requiring a split verdict as to damages allocating an amount as compensatory and another amount as to punitive damages. A verdict which fails to so allocate is not defective as a matter of law, especially where the record does not disclose special findings were requested.

It is the duty of the court in case of excessive or inadequate damages to set aside the verdict if the jury disregards the evidence, or acts from passion or prejudice.

Chizmar v. *Ellis*, 125.

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EVIDENCE

To justify a conviction on circumstantial evidence alone, the circumstances must point to respondent's guilt and be inconsistent with any other reasonable hypothesis.

The rule that a party cannot impeach his own witness does not prevent him from showing that a hostile witness testified falsely.

False statements and false explanations of what took place made by a prisoner after his apprehension are a strong indication of guilt.
State v. *DeBery*, 38.

EXCEPTIONS

When a verdict is directed and exceptions taken, all of the evidence necessarily becomes a part of the case on exceptions, whether it is mentioned in the Bill of Exceptions or not.

The burden is upon the excepting party to show that the verdict is erroneous and that he is aggrieved.

Failure to include evidence requisite to show error is not cured by the granting of permission by the Trial Court to omit such evidence.

A party is estopped by the application of the doctrine of *res judicata* from further proceeding where the final result of two previous actions effectively resolved the issues of the case.
Carey v. *Bourque-Lanigan Post No. 5, et al.*, 62.

With relation to exceptions in a case before a presiding justice without a jury, the statute does not provide for the procedure.

It is a rule of practice in Maine that where a cause is tried by a presiding justice without the intervention of a jury, under R. S., 1944, Chap. 94, Sec. 17, exceptions to the judge's rulings in matters of law do not lie, unless there has been an express reservation of the right to except.

The certification of a presiding justice that exceptions are allowed is conclusive even though (1) the certificate states that they are "allowed, if allowable" (2) though the docket shows no reservation of the right to except and (3) even though plaintiff objected on the ground of no reservation.

Allowable means "not forbidden," "not unlawful," "not improper."

A record account book copied from day to day from motel registration cards is properly admitted into evidence under R. S., 1944, Chap. 100, Sec. 133 where the presiding justice could properly find that the entries were made in good faith in the regular course of business and before suit.

An auditor's report is *prima facie* evidence which may be impeached, controlled, or disproved by competent evidence.

An auditor is part of the court itself. He has the power to pass upon the facts in controversy.

The exclusion of evidence of total costs and expenses offered to show the improbability that defendant entered into a certain agreement was discretionary.

A motion for new trial cannot be considered in a case heard by the presiding justice without a jury.

Ouelette v. *Pageau, et al.*, 159.

A bill of exceptions must be presented to the presiding justice in accordance with R. S., 1944, Chap. 94, Chap. 14.

State v. *Johnson*, 172.

A bill of exceptions is insufficient which merely states that the court was in error as a matter of law.

The action of commissioners in partition will not be set aside on the ground of unequal allotments except in extreme cases.

The Legislature has placed in the commissioners and not in the court, the responsibility for deciding questions relating to the valuation and division of real estate.

The court may confirm, recommit, or set aside, but may not alter or change a commissioners' report.

Commissioners must follow the warrant, and failure so to do is good ground for objection to the confirmation of the report. There must be no irregularities of procedure.

The court in considering objections to a commissioners' report is limited to a consideration of the evidence as may be introduced upon the issues raised by the objections. In such proceedings the evidence before the commissioners is not presented to the court and the evidence heard by the court upon the interlocutory judgment not considered by the commissioners.

If the commissioners reach their result through bias or prejudice, or gross error clearly and unmistakably shown, the report should be set aside or recommitted.

Morse v. *Morse*, 174.

A bill of exceptions excepting to findings of a Presiding Justice that (1) a certain lease provision is not ambiguous, and (2) that parol evidence is inadmissible, do not properly present to the Law Court questions (a) whether defendant was a tenant at will (b) whether defendant is entitled to a new lease and (c) whether proper notice was given, since the latter questions have no possible bearing upon those presented by the bill of exceptions.

EXECUTORS AND ADMINISTRATORS

Actions against sureties on administrator's or executor's bonds must be commenced within 6 years from the time of breach. It is only when the breach is fraudulently concealed that action may be commenced later; and then it must be commenced within 3 years from the date of discovery. (R. S., 1944, Chap. 151, Sec. 9.)

Dunton v. *Maine Bonding*, 205.

EXEMPTIONS

EXPERTS

FISH AND GAME

The word "owner" in R. S., 1944, Chap. 34, Sec. 121, as amended, has a broad application and includes a finder of a lost lobster trap with possession and control good against all the world, except the rightful owner.

R. S., 1944, Chap. 34, Sec. 121 is designed to punish interference with traps set for lobster fishing and is aimed at protecting the possession and control of the one who has set the traps.

The problems of the lobster industry are of a nature peculiar to itself and the statutes are designed and enacted with reference thereto.

State v. *Mitchell*, 396.

FOOD

FORCIBLE ENTRY

FRANCHISES

All ferries in Maine are governed by general or special statute, and the Legislature has the right to grant an exclusive franchise.

A franchise is an incorporeal hereditament.

The rights, powers, liabilities, duties and boundaries of Municipal Corporations are within legislative control.

The granting of a ferry franchise to a town with authority to "employ such persons as may be necessary for x x x the operation of the ferry" or "to lease the right to operate the ferry x x to x x residents" of the town is not constitutionally objectionable as an improper delegation of power to the town nor as being discriminatory legislation.

Inh. of Beals v. *Beal*, 80.

FRATERNAL LODGES

GRAND JURY

The grand jury is a judicial body whose finding, properly presented to the court and duly endorsed as a true bill, is conclusive as to the regularity of the finding.

A pension is a stated allowance or stipend made in consideration of past services or of the surrender of rights or emoluments to one retired from service.

A *pension payment*, characterized as "Retirement Separation pay," does not become a *wage payment* "with respect to" the weeks following retirement, merely because the amount of the pension payment is computed with respect to a contract formula relating to weekly wages during the last week of service. R. S., 1954, Sec. 3, Subsection XVII.

The regulatory power of the Commission under R. S., 1954, Chap. 29, Sec. 5, may not be exerted to change, modify, extend or limit any law enacted by the Legislature.

Where there is mere passive acquiescence by the employer in a voluntary retirement pursuant to a contractual retirement plan, there is no "dismissal" within the meaning of R. S., 1954, Chap. 29, Sec. 15.

Termination payments *in lieu* of *notice* are payments for the period with respect to which an employer would give advance notice of his intention to dismiss an employee, and are distinguishable from *pension payments*.

The Commission has a duty to determine all of the issues which are properly and adequately raised by the evidence in order that *one* judicial review may terminate the case.

Dubois v. *M.E.S.C.*, 494.

MALPRACTICE

See Negligence, *Cyr* v. *Giesen*, 248.

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MONUMENTS

See Trespass, *Sherman* v. *Gray*, 13.

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See Conditional Sales, *Universal C. I. T.* v. *Lewis*, 337.

MUNICIPAL CORPORATIONS

Whatever may be the character of a ridge of ice or snow in a roadway, as distinguished from a sidewalk, as a defect therein, if the same be created by act of those having charge of the streets and allowed to remain therein, the statute relieves a municipality from liability to an action for damages to any person on foot, on account of snow or ice, on any sidewalk or crosswalk. (R. S., 1944, Chap. 84, Sec. 91.)

Independent of the statutes there is no liability whatever on the part of municipalities for injuries caused by defective highways.

R. S., 1944, Chap. 81, Sec. 91 cannot be avoided even if the snow or ice on the sidewalk constitutes a public nuisance. R. S., 1944, Chap. 128, Sec. 16.

R. S., 1944, Chap. 84, Sec. 91 is not unconstitutional as being in violation of Sec. 1 of the Fourteenth Amendment to the Constitution

of the United States nor Article I, Sec. 1 of the Constitution of Maine.

The denial of recovery to persons on foot for injuries caused by snow and ice or the slippery condition of sidewalks or crosswalks is not an arbitrary discrimination between those persons on foot using sidewalks and crosswalks and those persons on foot using other parts of the highway.

Verreault v. *City of Lewiston*, 67.

The provisions of our State Constitution are not of a broader scope than the 14th Amendment to Constitution of U. S. with respect to the scope of "public use."

The Legislature may entrust the power of eminent domain to instruments of its choosing, as here a public body corporate and politic exercising public and essential governmental functions.

Whether the public exigency requires the taking of private property for public uses is a legislative question. Whether the use for which such taking is authorized is a public use is a judicial question. Whether a given use of public moneys is public in nature is a judicial question.

There is a strong presumption that a statute is constitutional.

Slum clearance of blighted areas for the public health, morals, safety and welfare is a "public use" within the meaning of the constitution. (P. and S. L., 1951, Chap. 217.)

It is not necessary that an active use be contemplated in the taking by eminent domain. The use may be negative in character. The prevention of evil may constitute a use.

The constitutionality of P. and S. L., 1951, Chap. 217, Sec. 9 is not passed upon.

Taken alone, the redevelopment of a city is not a "public use" for which either taxation or taking by eminent domain may properly be utilized.

Crommett v. *Portland*, 217.

See Bills and Notes, *York Beach* v. *Inh. of York*, 1.
See Districts, *Carlisle et al.* v. *Bangor Rec. Center*, 33.

MURDER

The law is well settled that the mere fact a photograph is gruesome is not a reason for its non-admission. A presiding justice has great latitude and discretion in determining the admissibility of photographs.

The admissibility of a photograph does not depend upon its verification by a photographer, provided it is shown to be an accurate representation by one competent to speak from personal observation.

Evidence relating to tests and experiments concerning the firing capacity of a gun are relevant where a defendant in a murder charge takes the position that deceased caused the gun to be fired by grabbing it and trying to pull it from defendant's hands.

A party excepting to the exclusion of evidence has the burden of showing affirmatively that the exclusion was prejudicial.

A presiding justice is not bound to repeat what had been substantially covered in his charge.

It is unnecessary to give a requested instruction on circumstantial evidence where there is no such evidence as would require the instruction.

It is unnecessary to give a requested instruction on killing by misadventure where respondent's own testimony makes it clear that such is not in issue.

Where none of the testimony has the quality of intentional falsity instructions on false testimony are unnecessary.

Instructions concerning killing while in the commission of a felony are not prejudicial where the verdict is manslaughter and the charge contained nothing, in the light of the evidence, which would influence the jury to return a manslaughter verdict.

An instruction concerning trespassers does not amount to legal error where it could not have prejudicated the minds of the jurors.

An objection that a presiding justice misstated some of the testimony in his charge to the jury comes too late after verdict.

State v. *Ernst*, 449.

NEGLIGENCE

A verdict should be directed when, giving the evidence introduced full probative force, it is plain that a contrary verdict could not be sustained.

One who steps backward without paying attention to where she is stepping is not in the exercise of due and reasonable care as a matter of law.

Olsen v. *Portland Water Dist.*, 139.

The recognized and accepted rule is that expert evidence is essential to sustain an action for malpractice against a physician or surgeon except where the negligence and harmful results are sufficiently obvious as to lie within common knowledge.

A physician contracts with his patient that he has the ordinary skill of members of his profession in like situation, that he will exercise ordinary care in treatment and his best judgment in the application of his skill.

A physician is not an insurer.

A scintilla of evidence will not support a factual finding.

Cyr v. *Giesen*, 248.

A can of peas purporting to bear defendant's label is not admissible in evidence in and of itself to prove that the defendant manufactured, packed and distributed the peas.

The general principle has been enforced that a writing purporting to be of a certain authorship cannot go to the jury as possibly genuine, merely on the strength of this purport; there must be some evidence of the genuineness (or execution) of it.

Keegan v. *Green Giant Co.*, 283.

No negligence can be predicated on the furnishing of kerosene for the purposes of filling lanterns, flares, and for lighting fires.

Even though the defense that the employee was negligent is not available to a non-assenting employer under the Workmen's Compensation Act, where the employee's negligence is not only contributory but is the *sole proximate cause* of injury such negligence is conclusive.

A non-assenting employer has no duty to anticipate an employee's negligence.

Investigatory or settlement talk is not equivalent to an admission of liability.

It is a beneficent and desirable rule which permits an employer to pay expenses of his employee or assist the family during incapacity without thereby admitting liability or fault.

NUISANCE

See Municipal Corporations, *Verreault* v. *City of Lewiston*, 67.
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See Directed Verdict, *Jordan* v. *Portland Coach Co.*, 149.

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See M.E.S.C., *Dubois* v. *M.E.S.C.*, 494.

PERJURY

The essentials of an indictment, even though set forth in prescribed form by the Legislature, must comply with constitutional limitations and contain every averment that is necessary to inform the defendant of the particular circumstances of the charge against him. (R. S., 1944, Chap. 122, Sec. 4.)

An indictment for perjury, relating to a proceeding adversary in character, which fails to designate and identify a specific particular proceeding *by naming the parties* thereto would be fatally defective not only at *common law*, but even under the statute.

The allegation in an indictment for perjury that the Grand Jury was "then and there engaged in hearing testimony relative to the commission of crime in the County of Kennebec" does not identify the particular proceeding or inquiry by which the materiality of the testimony may be adjudged.

In a perjury indictment the purpose of identification must be fulfilled and cannot be dispensed with when statutory form is adapted to cover a proceeding which is not adversary in nature and which lacks parties such as a Grand Jury inquiry.

The possibility of materiality of the alleged false testimony must be apparent *from the face of the indictment* alone; although the indictment need not specify the manner in which the testimony becomes actually material.

State v. *Papalos*, 46.

PERPETUITIES

See Trusts, *Belfast, in Eq.* v. *Goodwill et al.*, 17.

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See Negligence, *Cyr* v. *Giesen*, 248.

PLEADING

It is well known that permission to withdraw a plea of guilty and plead anew is wholly within the discretion of the justice, and a refusal to permit a withdrawal will not be overruled where there is no abuse of that discretion or the action is not arbitrary.

State v. *Wing*, 290.

Specifications voluntarily attached to money counts are no part of the count and do not make the count demurrable regardless of the extent to which the action may appear self defeating.

A different rule obtains where specifications are ordered by the court to be filed to supplement a declaration sounding in tort.

Beals v. *Montgomery Ward*, 360.

The core of the offense of "reckless driving" plainly lies not in the act of operating a motor vehicle but in the manner and circumstances of its operation. (R. S., 1954, Chap. 22, Sec. 148.)

A complaint charging merely the operation of a motor vehicle "in a reckless manner" insufficiently informs the accused of the nature and cause of the accusation. (Const. of Maine, Art. I, Sec. 6.)

State v. *Houde*, 469.

A defendant has the constitutional right to know the nature and cause of the accusation against him and the necessary facts must be stated with certainty.

A statutory offense must be charged in the words of the statute or their equivalent. Where the statute does not sufficiently set out the facts a more definite statement is necessary.

R. S., 1954, Chap. 135, Sec. 12 which requires "knowledge of the actual commission of a felony" is not satisfied by knowledge from hearsay, possibilities or probabilities. The knowledge must be actual and personal knowledge and the indictment must indicate what the knowledge was and how it was obtained. (cf. Special concurring opinion by Webber, J.)

The mere omission to disclose knowledge of the commission of a felony, without positive concealment, is not enough under R. S., 1954, Chap. 135, Sec. 12 and while the statute employs the words "conceals or does not . . . disclose" it should be interpreted in the conjunctive (i. e. conceals *and* does not . . . disclose). (cf. Special concurring opinion of Webber, J., comparing misprision of felony and accessory after the fact.)

An indictment under R. S., 1954, Chap. 135, Sec. 12 must set forth the acts of concealment.

An indictment charging that defendant (first count) "did . . . attempt to induce . . . one Blanche Gagnon . . . to become a prostitute by offering to procure for and furnish to the said Blanche Gagnon men who would pay . . . etc." and (second count) that defendant did solicit and attempt to procure one Blanche Gagnon . . . for the purpose of prostitution by offering to procure for and furnish to the said Blanche Gagnon men who would pay . . . etc." is defective in its failure to state to whom the offer was made.

The "current value" factor must include a proper consideration of reproduction cost less depreciation.

Statutes relating to procedure or remedies not affecting substantive rights operate retroactively.

The words "current value thereof less depreciation" in R. S., 1944, Chap. 40, Sec. 16 and 17 as amended by P. L., 1953, Chap. 377 apply only to "original cost" and "prudent acquisition cost" factors and not to "current value" which is and of itself reflect depreciation.

In dealing with estimates and matters of judgment the Commission is justified in subjecting the proferred evidence to very close scrutiny and critical analysis. The weight to be given it is for the Commission, but the assessing of weight can only be done properly in a spirit which is not arbitrary or capricious or founded on immovable preconceptions.

Where "current value" is the only factor which in any way reflects the greatly increased costs which seem to have become implemented into our economy, it is not enough to give mere token recognition of such a factor imposed by legislative mandate. The factor, properly determined, must find appreciable reflection in the end result.

The principle that judges are not necessarily ignorant in court of what everybody else, and they themselves, out of court are familiar with is applicable to justices of the Law Court.

It is error for the Commission to disregard an annual amortization of pension premium charge for pension payment as part of an amortization and general expense where the amortization program was set up over a ten year period under the Internal Revenue Code and constituted fair method of spreading the past service costs.

Where part of the subsidiary property is not devoted to operations of the Company and is subject to rights of long term leasees who are third parties, prejudicial error cannot properly be predicated upon the failure of the Commission to include the subsidiary property in the rate base.

The Commission is justified in not giving approval to the distribution of the undistributed property account where the delay in distribution was the fault of the company and the work not completed until the pendency of the rate case.

There is no error in the Commission's determination that income tax accruals should provide for working capital needs after proper deduction for materials and supplies used for new construction.

Central Maine Power Co. v. *P.U.C.*, 257.

PUNITIVE DAMAGES

See Damages, *Chizmar* v. *Ellis*, 125.

RAPE

To prove rape of a female of the age of sixteen years, the State must prove beyond a reasonable doubt that respondent carnally knew the prosecutrix by force, without her consent or against her will.

It is well settled that a verdict based on the uncorroborated testimony of a complainant will not be disturbed on the mere fact of lack of corroboration.

Where corroboration is lacking to any reasonable degree, it becomes necessary to scrutinize and analyze the testimony of the prosecutrix with great care.

RULES OF COURT

RULES OF COURT—EQUITY

SALES

SALES TAXES

Food products which are neither meals nor furnished for consumption at or from facilities of the retailer under Sec. 10 III (c) of the Sales Tax Law are exempt, and a mere presumption of taxability for such food products under Sec. 10 III (d) cannot breathe the life of taxability into products clearly within the exemption. R. S., 1944, Chap. 14-A.

Disposal straws, spoons or containers do not have the permanence associated with "trays, glasses, dishes or other table ware" within the meaning of the exclusion from exemption provisions of Section 10 III (c).

The provisions of Sec. 10 III (d) (prior to the 1953 amendment—P. L., 1953, Chap. 146) providing for a mere presumption of taxability cannot create a new class of taxable sales for products clearly within the preview of other exemption provisions of the statute even though the conditions which give rise to the presumption have been met—since the presumption is overcome by the exemption.

Sales of Dairy Queen products in cones and open containers are not "packaged" or "wrapped" within the meaning of Sec. 10 III (d).

The Superior Court has no jurisdiction to entertain an appeal from a refusal of the State Tax Assessor to rebate tax payments made, and such jurisdiction does not arise from statutory provisions allowing appeals from decisions denying "reconsideration of assessments" under Secs. 29 and 30.

Fortin v. *Johnson*, 294.

The "reasons for appeal" required by Sec. 30 of the Sales Tax Law must be filed prior to the reporting of a case to the Law Court since such "reasons" are essential to a determination of the legal questions involved.

The record in a case entered before the Law Court cannot be corrected by the parties.

Whether jurisdiction depends upon the timely filing of "reasons for appeal" and "affidavit" under Sec. 30 is not decided.

Ice cream in small covered cups, chocolate coated ice cream bars, hot dogs in individual rolls, napkins, or small cardboard open top trays, popcorn in boxes, coffee in individual cups sold at the drive-in for consumption upon the theatre premises are taxable under the 1953 Amendment. (P. L., 1953, Chap. 146, Sec. 8, effective August 9, 1953.)

Food products sold for consumption upon the premises of a drive-in

STATUTORY CONSTRUCTION

See Inheritance Taxes, *Thirkell, Exr.* v. *Johnson*, 131.
See Liquor, *State* v. *Ouellette*, 44.

SURETIES

See Executors and Administrators, *Dunton* v. *Maine Bonding*, 205.

TAXATION

The filing of a Tax Lien Certificate under R. S., 1944, Chap. 81, Sec. 98, creates a mortgage to the town which under P. L., 1945, Chap. 274 shall be *prima facie* evidence in all proceedings by and against the town its successors and assigns of the truth of the statements therein.

In an action of forcible entry and detainer, where defendant pleads title, the title is the only issue, and the burden is on the defendant.

Under R. S., 1944, Chap. 155, Sec. 15 wills do not become operative or "effectual to pass real or personal estate" until proved and allowed in the Probate Court.

The title of a devisee dates from the date of a testator's death only after a will has been proved and allowed, and an assessment against decedent's heirs is valid when made prior to the proof and allowance of a will. To hold otherwise would permit one to escape taxation by failure to file a will or complete probate proceedings.

Reference to buildings is not demanded in a lien certificate under R. S., 1944, Chap. 81, Secs. 37 and 97.

Gray v. *Hutchins*, 96.

A Tax Lien Certificate under R. S., 1944, Chap. 81, Secs. 97 and 98, as amended, is *prima facie* evidence of title, therefore it is unnecessary for one asserting such title to lay a foundation for introduction into evidence of the certificate by first proving the proper steps in the tax procedure. (P. L., 1945, Chap. 274, Sec. 1.)

An injunction has been well described as a judicial process whereby a party is required to do or refrain from doing a particular thing.

A restraining order is a form of injunction issued *ex parte* for the purpose of restraining the defendant, for what should be a very brief period pending notice and hearing on application for a temporary injunction.

An *ex parte* restraining order issued during the redemption period of a tax lien foreclosure restraining the town and its officers from "acquiring title, conveying or alienating said property" and later vacated, cannot operate to toll the statutory period of redemption.

Injunction and restraining orders operate *in personam*.

Where a valid legislative act has determined the conditions on which rights shall vest or be forfeited, and there has been no fraud in conducting the legal measures, no court can interpose conditions or qualifications in violation of the statute.

Estoppel cannot be raised against a town in the exercise of its taxing power.

A judgment of a court having jurisdiction, no fraud or collusion appearing, cannot, at the instance of a party to it, be impeached collaterally by proof of errors.

A decree in accordance with the decision and certificate of the Law Court, which effectuates its mandate is sufficient. (Equity Rule 28.)

Inh. of Lincolnville v. *Perry*, 113.

The Sales and Use Tax Law, P. L., 1951, Chap. 250, Sec. 1, as amended, places a tax upon the retailer, the incidence of which falls upon the consumer.

W. S. Libbey Co. v. *Johnson*, 148 Me. 410 affirmed.

State v. *Hiscock*, 147.

A petitioner for an abatement of taxes must prove his case. He must show that his property is overrated, that valuation with relation to just values is manifestly wrong, or that an unjust discrimination exists. He must establish that he is aggrieved.

The value of real estate and personal property for taxation purposes, the Legislature has declared, must be fixed by the individuals who have been elected as assessors. It is their opinion and their judgment that controls.

It was proper for the assessors to determine value by taking the information of values in 1940 as a starting point and by adding 25% as the amount that the assessors decided was the increase in value in the year 1953, then with adjustments for applicable or known facts (such as depreciation) that might affect value, to make an assessment.

The law requires equality and that real estate and tangible personal property be valued "according to the just value thereof," and that a percentage of true value taken for tax purposes, be uniform and equal on all real and tangible property. Article XXXVI, Article IX, Section 8, Constitution of Maine, XIV Amend. Const. U. S.

Sears, Roebuck v. *Presque Isle*, 181.

The question whether assessors have done their duty with respect to the amount of an assessment is one of fact which will not be set aside unless it appears that the taxpayer has been deliberately forced to pay more than his just share of the tax burden or that the assessors have intentionally violated the essential principle of practical uniformity.

Mere error of human judgment will not support a claim of overrating.

Gaston v. *Townsend, et al.*, 292.

The findings of fact of a single justice are final and binding if supported by any credible evidence.

Taxation is the rule and exemption the exception.

Exemption is not defeated by the fact that the use by the charitable institution for its own purpose is seasonal.

Tax exemption will not be defeated by occasional or purely incidental letting or renting of property where the dominant use by such institution is for its own purposes.

The amendments to R. S., 1944, Chap. 81, Sec. 6 were not intended to change or alter the well defined rules of exemption.

Where exemption is claimed there should be a careful examination to determine whether (1) in fact the institution is organized and conducting its operation for purely benevolent and charitable purposes in good faith (2) whether there is any profit motive revealed or concealed (3) whether there is any pretense to avoid taxation and (4) whether any production of revenue is purely incidental to a dominant purpose which is benevolent and charitable.

Green Acre Baha'i Inst. v. *Eliot*, 350.

See Bills and Notes, *York Beach* v. *Inh. of York*, 1.
See Districts, *Carlisle et al.* v. *Bangor Rec. Center*, 33.
See Municipal Corporations, *Crommett* v. *Portland*, 217.
See Sales Taxes, *Fortin* v. *Johnson*, 294.
See *Inh. of Owl's Head* v. *Dodge*, 112.
See also, Inheritance Taxes.

TAX LIENS

See Taxation, *Gray* v. *Hutchins*, 93.

TITLE

See *Farrington* v. *Merrill*, 400.
See Taxation, *Gray* v. *Hutchins*, 96.
Inh. of Lincolnville v. *Perry*, 113.

TOWNS

See Trusts, *Belfast, in Eq.* v. *Goodwill et al.*, 17.
See Taxation.

TRESPASS

The Law Court will not decide a case upon report and agreed statement where insufficient facts are reported and the case does not present questions of law of sufficient importance to justify reporting the same.

Trespass quare clausum may be maintained for the unauthorized invasion of a cemetery lot.

Permission to bury a body in the cemetery lot of another when exercised constitutes an irrevocable license in the licensee for at least so long as the premises continue to be used as a cemetery.

The right of sepulture in a burial lot carries with it the right to erect suitable monuments, markers, or memorial tablets at the graves of those buried therein.

Sherman v. *Gray*, 13.

Negligence rests upon duty. It is not enough to aver that a duty exists. There must be an allegation of facts sufficient to create the duty.

No implied invitation will arise without some mutuality of interest.

Where one enters a part of premises reserved for use of the occupant and his employees and to which there was no express or implied invitation to go, there can be no recovery for resulting injury, even though he is an invitee to other parts of the premises.

There is no obligation of due care on the part of a property owner to protect a trespasser, even though the trespasser is a child of tender years.

The legal duty of restraining children from going into unsafe places is imposed by law upon their parents and those who stand in *loco parentis*, and is not imposed upon strangers.

The "attractive nuisance" doctrine has been repudiated by Maine Courts.

Lewis v. *Mains*, 75.

TRIAL JUSTICES

The jurisdiction of trial justices is statutory and cannot be enlarged by presumption or implication.

Jurisdictional facts in proceedings before trial justices must appear of record.

Failure of the record to show that there was no trial justice at Falmouth where the alleged offense occurred, or that the trial justice at Gray had a "usual place" of holding court "nearest to where the offense is alleged to have been committed" is alone sufficient to arrest the proceedings under R. S., 1944, Chap. 133, Sec. 10.

WARRANTS

WASTE

WATER RIGHTS

There is a public or natural right in and to a water course which belongs to all persons whose lands are benefited by it, and it cannot be stopped up, or diverted, to the injury or other proprietors.

To constitute a water course it must appear that the water in it usually flows in a particular direction by a regular channel having a bed with banks and sides, and usually discharging itself into some other body or stream of water.

It is an established principle that parol evidence is inadmissible to explain, enlarge, vary or control a written instrument.

The doctrine of equitable estoppel is recognized in Maine in instances where one knowingly suffers another to purchase and expend money on land under an erroneous opinion of title without making known his claim.

To create an estoppel, the conduct, misrepresentation, or silence of the person claimed to be estopped must be made to or in the presence of a person who had no knowledge of the true state of facts, and who did not have the same means of ascertaining the truth as did the other party.

Permanent damages to real estate cannot be recovered in an action on the case for the obstruction of a water course where the cause of damage may be abated or removed.

Card v. *Nickerson*, 89.

WILLS

WITNESSES

The interest of a witness, and its extent, may always be shown on cross-examination, and the limit of such inquiry is within the discretion of the court.

It is well established that the limits to collateral cross-examination lie within the discretion of the trial justice, and his exercise of this discretion is not ordinarily reviewable.

To constitute error in a ruling involving the exercise of legal discretion it must be shown that the ruling constituted a clear abuse of discretion and that it was prejudicial.

It is recognized law of this state that grounds for exception must be stated and exception taken at the time of the ruling.

R. S., 1944, Chap. 100, Sec. 105 relates to expressions of opinion on "issues of fact."

Where a judge's charge taken as a whole is sufficient and proper and the elements of the law have been fully and adequately covered, further instructions on the point are not required.

Page v. *Hemingway Bros.*, 423.

WORDS AND PHRASES

WORKMEN'S COMPENSATION

WRITINGS