MAINE REPORTS

151

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

MAY 4, 1955 to FEBRUARY 28, 1956

PROBATE RULES EDITION

[RULES EFFECTIVE APRIL 1, 1956]

Index to Rules follows Table of Cases

MILTON A. NIXON

REPORTER

AUGUSTA, MAINE
DAILY KENNEBEC JOURNAL
Printers and Publishers

1956

DAILY KENNEBEC JOURNAL
AUGUSTA, MAINE

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

HON. RAYMOND FELLOWS, *Chief Justice*
HON. ROBERT B. WILLIAMSON
[1]HON. FRANK A. TIRRELL, JR.
HON. DONALD W. WEBBER
HON. ALBERT BELIVEAU
HON. WALTER M. TAPLEY, JR.
[2]HON. PERCY T. CLARKE

1 Died June 4, 1955
2 Qualified June 29, 1955

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

ACTIVE RETIRED JUSTICES
OF THE
SUPREME JUDICIAL COURT

HON. EDWARD P. MURRAY
HON. SIDNEY ST. FELIX THAXTER

JUSTICES OF THE SUPERIOR COURT

HON. FRANCIS W. SULLIVAN
HON. GRANVILLE C. GRAY
HON. HAROLD C. MARDEN
HON. RANDOLPH WEATHERBEE
HON. CECIL J. SIDDALL
HON. LEONARD F. WILLIAMS
HON. ABRAHAM M. RUDMAN
[1] HON. F. HAROLD DUBORD

1 Qualified June 29, 1955

Attorney General

HON. FRANK G. HARDING

Reporter of Decisions

MILTON A. NIXON

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

OPINION

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

* * * * * *

QUESTION PROPOUNDED BY THE HOUSE IN AN ORDER
DATED MAY 4, 1955
ANSWERED MAY 11, 1955

HOUSE ORDER PROPOUNDING QUESTION

STATE OF MAINE

In House, May 4, 1955.

ORDERED,

WHEREAS, a bill has been introduced into the Senate and is now pending in the House and it is important that the Legislature be informed as to the constitutionality of the proposed bill, and

WHEREAS, it appears to the House of Representatives of the Ninety-seventh Legislature that it presents important questions of law and the occasion is a solemn one;

NOW, THEREFORE, BE IT ORDERED, that in accordance with the provisions of the Constitution of the State, the Justices of the Supreme Judicial Court are hereby re-

spectfully requested to give this Legislature their opinion on the following question:

Has the Legislature the right and authority under the Constitution of Maine to enact a law according to the terms of the following bill?

S. P. 551—L. D. 1489

AN ACT Relating to the Hospitalization of the Mentally Ill.
Name: Mr. Earles of South Portland

Passed.

A true copy. Attest:

HARVEY R. PEASE,
Clerk of the House.

NEW DRAFT OF S. P. 480—L. D. 1349

NINETY-SEVENTH LEGISLATURE

Legislative Document **No. 1489**
S. P. 551 In Senate, April 22, 1955

Reported by Senator Reid of Kennebec from the Committee on Judiciary and printed under Joint Rules No. 10.
CHESTER T. WINSLOW, Secretary

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED FIFTY-FIVE

AN ACT Relating to Hospitalization of the Mentally Ill.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. R. S., c. 27, §§ 103-A - 103-F, additional. Chapter 27 of the revised statutes is hereby amended by adding thereto 6 new sections to be numbered 103-A to 103-F, to read as follows:

'Sec. 103-A. Hospitalization; emergency procedure. When any blood relative, husband or wife, or any municipal or state police officer, or sheriff or justice of the peace has reason to believe that a person is mentally ill and requires emergency hospitalization, he shall immediately sign a petition so stating addressed to the superintendent of the Augusta State Hospital or the superintendent of the Bangor State Hospital or to the Veterans Administration or other agency of the United States Government, requesting immediate admission and acceptance of said alleged mentally ill person into his hospital for the purpose of observation and treatment. Said petition shall be immediately presented to the city or town clerk or to a member of the city council or member of the board of selectmen in the town where the alleged mentally ill person resides or is found, and upon receipt of said petition said municipal official shall promptly inquire into the facts set forth in said petition and if he is satisfied that the said person requires immediate admission to one of the said State or Federal mental hospitals, he shall so state on the said petition and join therein by affixing his signature. The petition shall be accompanied by a certificate signed by a physician qualified to practice medicine or osteopathy in this State, stating that he has examined the said person within the previous 5 days or that the person has refused to submit to examination, and that in his opinion the said person is mentally ill and, because of his illness is likely to injure himself or others if not immediately restrained, and giving the reasons for his opinion. Following the signing of the petition and the certificate as aforesaid, the municipal official shall forthwith order the alleged mentally ill person to be taken to such State hospital as he may properly designate or, upon receipt of a certificate from the Veterans Administration or other agency of the United States Government showing that facilities are available and that such person is eligible for care and treatment therein, to said Veterans Administration or other agency, and at the

expense of the town or city. The said person shall be accompanied by true copies of the petition and the physician's certificate together with a statement of facts satisfactory to the Department in regard to the financial ability of such patient or any of his relatives legally liable for his support. Any petition or physician's certificate bearing a date more than 10 days prior to the date of arrival of the said petition at the hospital for admission shall be void and no physician's certificate shall be valid or accepted if signed by a physician employed by the hospital for the mentally ill to which said person is admitted. No feeble-minded person shall be accepted by any State hospital for the mentally ill.

Sec. 103-B. Preliminary observation; emergency procedure. The superintendent or head of the hospital to which the alleged mentally ill person is sent or his duly appointed substitute shall receive and detain such person for observation and treatment for a period of not more than 35 days, provided that such person is accompanied by the said petition and certificate. Prior to the expiration of 25 days of the observation period the superintendent, head of the hospital or his duly appointed substitute may request in a petition addressed to the probate court situated in the county in which is located the mental hospital in which the said person is being detained, that the court decide that the said person requires hospitalization for an indefinite period. If the superintendent, head of the mental hospital or his duly appointed substitute shall find that the alleged mentally ill person is not in need of further care and treatment and should be discharged as soon as practicable, he shall so state in a certificate, a true copy of which shall be sent to the municipal official who joined in the original petition for emergency hospitalization. A true copy may also be sent to a spouse, relative or other person if it is so deemed proper and advisable. Attached to the true copy sent to the municipal official, the superintendent, head of the mental hospital or

his duly appointed substitute, may send an order requiring the municipality to transport the said person from the hospital to the municipality. This order shall be enforceable by mandamus.

Sec. 103-C. Hearing in probate court following emergency detention. The petition for involuntary hospitalization in the foregoing section shall state that the alleged mentally ill person is being detained in the mental hospital for observation and treatment and that the said person has designated certain relatives or husband or wife or other person to receive notice of hearing, that in the opinion of the undersigned, the appearance of the said person at the hearing would or would not be detrimental to the mental health of the said person, and that in the opinion of the undersigned, the said person is mentally ill, and because of his illness is likely to injure himself or others if allowed to remain at liberty, or is in need of custody, care or treatment in a mental hospital and, because of his illness, lacks sufficient insight or capacity to make responsible decisions with respect to his hospitalization. The said petition shall be prima facie evidence of the facts stated therein. Upon receipt of the said petition, the judge of probate in the county in which is located the hospital in which the said person is being detained shall immediately appoint a time and place for hearing. The judge of probate shall cause to be given in hand to the person so alleged to be mentally ill, at least 48 hours prior to the time appointed for hearing, a notice stating the time and place and purpose of the said hearing, and that the person has a right to be present and to be heard at the hearing, and to be represented by counsel if he so desires. A copy of the petition and notice of the time, place and purpose of the hearing shall be sent by registered mail to both the municipal official and the person signing the petition requesting emergency detention.

Sec. 103-D. Probate court proceedings. The hearing may be conducted in as informal a manner as may be con-

sistent with orderly procedure and in a physical setting not likely to have a harmful effect on the mental health of the proposed patient. The court shall receive all relevant and material evidence which may be offered and shall not be bound by the rules of evidence. The court shall have the authority to summon such witnesses as shall be necessary for a full understanding of the case. If the judge of probate is satisfied that the condition of the person is such that his appearance at said hearing would be harmful to his mental health, then he shall not be required to be present. An opportunity to be represented by counsel shall be afforded to every person alleged to be mentally ill and if neither he nor others provide counsel, the court shall appoint counsel. The testimony of 2 reputable physicians shall be required for a person to be declared to be mentally ill. If upon completion of the hearing and consideration of the evidence, the court finds that the person is mentally ill, and because of his illness is likely to injure himself or others if allowed to remain at liberty, or is in need of custody, care or treatment in a mental hospital and, because of his illness, lacks sufficient capacity or insight to make responsible decisions with respect to his hospitalization, it shall order him to be placed, for care and treatment, for an indeterminate period, in the custody of the superintendent of said State hospital or in custody of the Veterans Administration or other agency of the United States Government and shall direct the superintendent or the Veterans Administration or other agency of the United States Government to receive and detain him until he no longer has need for treatment or is discharged by law or by the superintendent, or Veterans Administration or other agency of the United States Government.

Sec. 103-E. Jurisdiction of probate courts and municipal officers; standard procedure. The probate court in the county where a person resides or may be found, or the municipal officers of the municipality where a person resides or

may be found, or a committee of not less than 3 thereof, shall have jurisdiction to order a person to be hospitalized for an indeterminate period where it shall be found that the person is mentally ill, and because of his illness is likely to injure himself or others if allowed to remain at liberty, or is in need of custody, care or treatment in a mental hospital and, because of his illness, lacks sufficient insight or capacity to make responsible decisions with respect to his hospitalization. Proceedings may be commenced by the filing of a petition for hearing by a blood relative, husband or wife, municipal or state police officer, sheriff, justice of the peace, superintendent, head of a mental hospital or his duly appointed substitute, in which such mentally ill person may be, with the probate court or municipal officers, stating that a person is mentally ill and requesting care and treatment for an indeterminate period. The petition shall be accompanied by a certificate signed by a reputable physician stating that he has examined the person within the previous 5 days or that the person has refused to submit to examination and that in his opinion the person is mentally ill and requires care and treatment in a mental hospital. Upon receipt of the petition and certificate, which shall not have been dated more than 10 days prior to receipt, the probate court or the municipal officers shall immediately appoint a time and place for hearing, and shall cause to be given in hand to the person alleged to be mentally ill at least 48 hours prior to the time appointed for hearing a notice stating the time and place and purpose of the hearing and that the person has a right to be present and to be heard at the hearing, and to be represented by counsel, if he so desires. A true copy of this notice shall be sent by registered mail to the person signing the petition.

Sec. 103-F. Procedure before probate court or municipal officers. The hearing before the probate court or municipal officers shall be as in the case of hearing before the probate

court following emergency detention as provided in sections 103-C to 103-D. If the person alleged to be mentally ill refuses to submit to examination by 2 physicians, then the court or the municipal officers shall so order him.

If upon completion of the hearing and consideration of the evidence, the probate court or the municipal officers find that the person is mentally ill, and because of his illness is likely to injure himself or others if allowed to remain at liberty, or is in need of custody, care or treatment in a mental hospital and, because of his illness, lacks sufficient capacity or insight to make responsible decisions with respect to hospitalization, the court or municipal officers shall forthwith order the alleged mentally ill person to be taken to such State hospital as it or they may properly designate or, upon receipt of a certificate from the Veterans Administration or other agency of the United States Government showing that facilities are available and that such person is eligible for care and treatment therein, to said Veterans Administration or other agency and at the expense of the municipality in which he resided or was found.

The court or the municipal officers shall direct the superintendent of said State hospital, or the Veterans Administration, or other agency of the United States Government to receive and detain him until he no longer has need for treatment or is discharged by law, or by the superintendent, or Veterans Administration or other agency of the United States Government. He shall be accompanied by a true copy of the order of the probate court or municipal officers and, where ordered to be taken to a State hospital, a statement of facts satisfactory to the Department in regard to the financial ability of such patient or any of his relatives legally liable for his support, and, wherever ordered to be taken, a brief report of any facts regarding the behavior of the person which would be of value to the hospital in treating him.

The municipal officers of a town or city are hereby con-

stituted a court of record when acting pursuant to the provisions of this section.'

Sec. 2. R. S., c. 27, §§ 104-113, repealed. Section 104 to 113, inclusive, of chapter 27 of the revised statutes are hereby repealed.

ANSWER OF THE JUSTICES

To the Honorable House of Representatives of the State of Maine:

In compliance with the provisions of Section 3 of Article VI of the Constitution of Maine, the undersigned Justices of the Supreme Judicial Court, having considered the question submitted by the foregoing Order of the House of Representatives, answer as follows:

In *Sleeper, Applt.*, 147 Me. 302, we had occasion to pass upon the constitutionality of certain sections of P. L., 1951, Chap. 374, which substantially changed the methods of commitment of persons alleged to be mentally ill. We then declared that the procedure inaugurated in the 1951 law failed to meet constitutional requirements in that (1) it permitted the commitment of persons for a period limited to thirty-five days without notice or hearing, whether or not there existed any immediate danger that they might cause injury to themselves or others, and (2) it failed to provide such persons with any method of instituting proceedings within the period of restraint to test the necessity of their commitment.

Upon perusal of S. P. 551, L. D. 1489 now before us for examination, it becomes apparent that by the proposed draft, an attempt is made to remedy only the first of these defects. Unlike the 1951 law, the new bill limits emergency commitment to persons who are certified by a physician to be mentally ill and who "because of (their) illness (are)

likely to injure (themselves) or others if not immediately restrained." There is no language in the new bill which attempts in any way to provide any method by which the person under temporary restraint may test the necessity thereof. Without intimating what would be our view if appropriate language were inserted to cure the noted defect, we deem that the proposed bill tends to deprive persons of their liberty without due process of law in contravention of Section 6 of Article I of the Constitution of Maine. Accordingly, we answer the submitted question in the negative.

Dated at Augusta, Maine, this 11th day of May, 1955.

Respectfully submitted:

RAYMOND FELLOWS
ROBERT B. WILLIAMSON
FRANK A. TIRRELL, JR.
DONALD W. WEBBER
ALBERT BELIVEAU
WALTER M. TAPLEY, JR.

IDA M. PRESCOTT, WIDOW OF
FRED A. PRESCOTT
vs.
OLD TOWN FURNITURE COMPANY
HOME INDEMNITY COMPANY

Penobscot. Opinion, May 13, 1955.

Workmen's Compensation. Cerebral Hemorrhage. Death. Evidence.

The commission is made the trier of facts and its findings should not be disturbed unless they are founded in whole or in part upon incompetent or illegal evidence.

Whether the work that the claimant was doing caused the hemorrhage resulting in death is a question of fact in the instant case.

Prejudice is not to be presumed in Workmen's Compensation cases from the receipt of inadmissible testimony where there is sufficient competent evidence upon which the findings may rest.

ON APPEAL.

This is an appeal from a *pro forma* decree of the Superior Court confirming a decision of the Industrial Accident Commission.

Appeal dismissed. Decree affirmed. Allowance of $250.00 ordered to petitioner for expenses of appeal.

Abraham J. Stern, for claimant.

Clyde L. Wheeler, for respondent.

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

TAPLEY, J. On appeal. This matter is before the Law Court on an appeal by the Old Town Furniture Company and the Home Indemnity Company from a *pro forma* decree

of a Justice of the Superior Court confirming a decision of the Industrial Accident Commission. Fred A. Prescott was employed by the Old Town Furniture Company of Old Town as a general utility man. His employment with this company covered a period of twenty-five years. On March 13, 1954, Mr. Prescott who was then about 68 years of age, and in apparent good health, was directed by the owner of the Old Town Furniture Company to go to the freight shed and "to see about them mattresses and springs and boxes down there." His regular job was to go to the freight house every morning, check the freight shed and if there was any freight there he was to load it onto the truck and transport it to the store. He was noticed at the freight shed about 8:30 or 9:00 o'clock that morning by a railroad employee and at that time seemed to be in normal health. Another employee of the railroad who came on duty about 10:00 o'clock that morning testified that the Old Town Furniture Company truck was backed up to the freight shed; that one mattress was on a hand truck not far from the rear end of the furniture truck. There is further testimony by another employee of the railroad company who says that he noticed three mattresses leaning against the freight shed opposite the freight car door and that this particular car had been resealed by the same seal that was given to Mr. Prescott earlier in the morning. Mr. Prescott was discovered by Mr. Prouty, a railroad employee, in a small office in the freight shed and when found was lying on the floor in a very serious physical condition. He was taken to the hospital and in the matter of a few hours passed away.

The Industrial Accident Commission found as a fact that Fred A. Prescott received a personal injury by accident arising out of and in the course of his employment which resulted in his death. The appellants take the position that the evidence upon which the Commission based its decision is insufficient in law; that the findings were based

upon inadmissible testimony allowed over the objection of the appellants and, further, were based on inferences which were not supported by facts.

The principle involved governing the Law Court in arriving at a decision in a case of this sort is well founded. The Commission is made the trier of facts and its findings should not be disturbed unless they are founded in whole or in part upon incompetent or illegal evidence.

Robitaille's Case, 140 Me. 121, at page 125:

> "The Commission, by the Act, is made the trier of of facts and its findings thereof, whether for or against the claimant, are final; but in arriving at its conclusions it must be guided by legal principles. Failing in this it commits error of law and it is the function of the Court to correct such error. For this purpose the Court will examine the evidence set forth in the record. A finding for the moving party must be founded upon some competent evidence.****** But it must be wholly upon such evidence. If the finding is founded in whole or in part incompetent or illegal evidence error has been committed and the finding will not be sustained. ****** If there is any evidence in support of such finding it cannot be set aside. ****** The sufficiency of the evidence will not be passed upon, but it must be competent and have probative force."

Albert's Case, 142 Me. 33; *Lee E. J. Ross' Case,* 124 Me. 107.

The question involved is: Was there sufficient evidence of probative force to substantiate the Commissioner's finding that Mr. Prescott received a personal injury by accident arising out of and in the course of his employment and, if so, did this injury result in his death?

This case presents a good example of the determination of a question of fact on circumstantial evidence in so far as

the matter of injury by accident arising out of and in the course of employment is concerned. The chain of circumstances is complete without a link missing. The evidence shows that the deceased, Mr. Prescott, was employed by the Old Town Furniture Company and on this day of March 13, 1954 he was directed by his employer to go to the freight shed and if there was any merchandise there to bring it back to the store. He did as he was directed and found that there was a freight car on the siding adjacent to the unloading platform. He obtained a seal to reseal the car after breaking the original seal. There was a mattress on a hand truck placed not far from the rear end of the furniture truck which he had taken with him to the station. There were three other mattresses leaning against the freight shed directly opposite the freight car door and the car door had been resealed. All of these circumstances point conclusively to the fact that Mr. Prescott was doing work in the course of his employment when he was fatally stricken. There is competent evidence, exclusive of speculation, surmise or conjecture, to support the findings of fact in this aspect of the case.

Mailman's Case, 118 Me. 172, at page 177:

> "There must be some competent evidence. It may be 'slender.' It must be evidence, however, and not speculation, surmise, or conjecture. Von Ette's Case, 223 Mass., 60. Sponatski's Case, 220 Mass., 528. While no general rule can be established applicable to all cases, certain principles are clear: If there is direct testimony which, standing alone and uncontradicted, would justify the decree there is some evidence, notwithstanding its contradiction by other evidence of much greater weight.
>
> If the case must be proved wholly or in part circumstantially and there is a dispute as to what the circumstances are the determination of such dispute by the commissioner is final. It is for the trier of facts who sees and hears witnesses to

> weigh their testimony and without appeal to determine their trustworthiness. But the inferences which the commissioner draws from proved or admitted circumstances must needs be weighed and tested by this court. Otherwise it cannot determine whether the decree is based on evidence or conjecture. In other words, the court will review the commissioner's reasoning but will not, in the absence of fraud, review his findings as to the credibility and weight of testimony."

Did Mr. Prescott on March 13, 1954 receive a personal injury by accident arising out of and in the course of his employment resulting in his death? Does the record disclose sufficient medical evidence to support the Commissioner's finding in this respect?

The evidence shows that Mr. Prescott died as a result of a cerebral hemorrhage and much medical testimony was devoted to this phase of the case. The record demonstrates sufficient competent evidence, both medically and legally, to support the medical findings of the Commissioner.

Patrick v. *J. B. Ham Company, et al.*, 119 Me. 510, at page 519:

> "That Patrick was suffering from diseased arteries predisposing him to cerebral hemorrhage is of no consequence in the case. That he might have died, or would have died in his bed, of cerebral hemorrhage, in a year or a week is immaterial.
>
> The question before the Commission was whether the work that he was doing on the afternoon of October 13th, 1919, caused the cerebral hemorrhage to then occur. If so, we think it was an accident arising out of and in the course of his employment.
>
> This was a question of fact. The Industrial Accident Commission through its chairman has decided this question of fact in favor of the claimant. The finding is, we believe, supported by rational and natural inferences from proved facts."

The appellants took exceptions to the admission of testimony concerning a freight car door and to the allowance of an answer to a hypothetical question.

A careful scrutiny and review of the record evinces the fact that there is sufficient competent evidence, exclusive of the testimony, to which objection was made, upon which the Commissioner could have based his findings. *Larrabee's Case,* 120 Me. 242, at page 244:

> "we do not think in this class of cases it is to be presumed that prejudice resulted from the receipt of inadmissible testimony, if there is sufficient competent evidence in the case on which his findings may rest."

In *Lee E. J. Ross' Case,* 124 Me. 107, at page 110, the court said:

> "That hearsay was improperly allowed into the record is not overlooked, but it did not come essentially into the finding and the decree, so reversible error was not done."

Larson's Workmen's Compensation Law, Vol. 2, Page 288, Sec. 79.10:

> "True, there is much talk of admissibility in compensation cases, but close examination will usually reveal that the underlying issue is the extent to which the 'inadmissible' evidence figured in the production of the commission's decision. Probably the only way in which a mistake on admissibility as such could amount to reversible error would be by the exclusion of admissible evidence, rather than by the admission of incompetent evidence."

Larrabee's Case, 120 Me. 242.

The exceptions have no force in disturbing the findings of the Commissioner.

There is no reversible error in this case.

Appeal dismissed.

Decree affirmed.

Allowance of $250 ordered to petitioner for expenses of appeal.

ALICE MUNSEY, PETITIONER IN REVIEW

vs.

PUBLIC LOAN CORPORATION, RESPONDENT IN REVIEW

Sagadahoc. Opinion, May 17, 1955.

Review. Attorney at Law. Negligence. Agreement for Judgment. Foreclosure. Chattel Mortgages.

There are three things which a petitioner must prove to justify the granting of a review under R. S., 1954, Chap. 153, Sec. 1, namely: (1) that justice has not been done; (2) that the consequent injustice was through fraud, accident, mistake, or misfortune, and (3) that a further hearing would be just and equitable.

A petition for review will be denied if the attorney was negligent, for his negligence unexplained is the negligence of his client.

A petition for review under R. S., 1954, Chap. 153, Sec. 1, is addressed to the judicial discretion of the court and must rest upon proven facts.

Where an agreement for judgment upon a promissory note does not indicate that there is to be a hearing on damages, there remains nothing to be done but the filing of the note, the computation of interest and entry of judgment.

Where a petitioner's claim for review is based solely upon an unsupported assertion that he was given an inadequate credit for a re-

possessed truck, there is no fraud, accident or mistake which the statute requires.

ON EXCEPTIONS.

This is a petition for review before the Law Court upon exceptions to the granting thereof by a Justice of the Superior Court. Exceptions sustained.

Harold Rubin, for petitioner.

Basil A. Latty, for respondent.

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

FELLOWS, C. J. This case comes to the Law Court from the Superior Court of Sagadahoc County on exceptions by the respondent to an order of the presiding justice granting the petition of the plaintiff for a writ of review.

Briefly, the agreed facts are as follows: The plaintiff in review (defendant in the original case) had paid to the respondent corporation the sum of $210.59 towards principal and interest on an $800 note up to January 19, 1952. The defendant Public Loan Corporation (which was the plaintiff in the original action) also repossessed from the makers of the note a 1946 Chevrolet truck, which truck was given as security for the note. The repossession took place prior to the date of the suit by the Public Loan Corporation against this petitioner on April 21, 1954. By agreement between counsel for this plaintiff in review and the defendant corporation, at the June term, 1954 of the Superior Court for the County of Sagadahoc, the following docket entry was made: "Judgment for the plaintiff by agreement." Subsequent to the making of such docket entry the plaintiff (now the defendant in review) presented to the Clerk

of the Superior Court the original note signed by the plaintiff in review, on which there appeared the principal sum due of $800. No credits appeared, and no additional information was furnished to the clerk with reference to any credits. Pursuant to the terms of said original note, the clerk entered judgment for the principal amount of the note and in addition computed interest and charges as called for in the note, and as a result entered judgment for $982.83 and costs of court in the sum of $15.31, and execution was issued for these sums.

The writ brought by the defendant in review, with declaration inserted in the writ, set forth the recital of said note and alleged therein that there was then and there payable at the date of said writ the sum of $853.33, with $128.00 attorney's fees in accordance with the terms of said note. It was agreed that the defendant in review in computing this amount due had given credit to the plaintiff in review the sum of $210.59 representing cash payments made to the defendant in review, and in addition had given her credit for the sum of $100.00 which represented the amount received on the sale of the 1946 truck repossessed and sold in accordance with the terms of the mortgage on said truck.

The Clerk of the Superior Court in entering up judgment on the note, endeavored to compute the amount of interest due on the note in accordance with the terms of the note as alleged in the declaration, but it is agreed that the clerk did not compute the correct amount as called for in the note, and it is admitted that the amount of judgment entered by the Clerk of Courts in the sum of $982.83 was in error. The error, however, was trivial (approximately $1.50) and in favor of this petitioner, Alice Munsey.

The foregoing facts were agreed to by counsel in the statement of facts submitted, and show that the parties

agreed to a judgment for the plaintiff, and that the defendant Loan Corporation gave to the Clerk of Courts the note as declared on in its writ.

The issue presented is whether the presiding justice was in error when he granted the plaintiff's petition for review.

The right of a party to review, and the authority of a court to grant such review, is based upon the statutory authority enacted by the Legislature of Maine. The law upon which this petition is founded is set forth in Chapter 123, Section 1, Subsection 7, Revised Statutes 1954, wherein it is stated: "A review may be granted in any case where it appears that through fraud, accident, mistake or misfortune justice has not been done and that a further hearing would be just and equitable, if a petition therefor is presented to the court within six years after judgment."

There are three things which the petitioner must prove in order to justify the granting of review, (1) that justice has not been done, (2) that the consequent injustice was through fraud, accident, mistake or misfortune, and (3) that a further hearing would be just and equitable. *Donnell* v. *Hodsdon,* 102 Me. 420; *McDonough* v. *Blossom,* 109 Me. 141; *Thomaston* v. *Starrett,* 128 Me. 328; *Thompson* v. *American Agricultural Chemical Co.,* 134 Me. 61; *Dupont* v. *Labbe,* 148 Me. 102.

A petition for review will be denied if the attorney was negligent, for his negligence unexplained is the negligence of his client. *First Auburn Trust Co.* v. *Baker,* 134 Me. 231; *Leviston* v. *Historical Society,* 133 Me. 77; *Richards Co.* v. *Libby,* 140 Me. 38.

It is well settled that judicial discretion must be exercised soundly, according to the well established rules of practice and procedure, a discretion guided by the law. It is magisterial and not personal discretion. *Dupont* v. *Labbe,*

148 Me. 102; *Donnell* v. *Hodson,* 102 Me. 420; *Summit Thread Co.* v. *Corthell,* 132 Me. 336; *Bourisk* v. *Mohican Co.,* 133 Me. 207; *Charlesworth* v. *American Express Co.,* 117 Me. 219; *Fournier* v. *Tea Company,* 128 Me. 393; *Chasse* v. *Soucier,* 118 Me. 62. Each petition for review under this section of the statute is addressed to the sound discretion of the court and must rest upon proven facts. *Richards Co.* v. *Libby,* 140 Me. 38.

In the case at bar, was there negligence on the part of the attorney for this petitioner at the time of his agreement for judgment for the plaintiff corporation? Was there evidence of fraud, accident, mistake or misfortune?

The real complaint in this case seems to lie in the fact that Alice Munsey now claims she was not allowed sufficient credit from the repossession of the truck by Public Loan Corporation. She evidently claims in her brief and in her petition that she was entitled to have the fair value of the truck determined, and that the fair value was in excess of the $100 actually credited.

It is agreed that there should be judgment for the plaintiff. The action was upon a note with a statement in the declaration of the amount due thereon. Under ordinary practice on filing a note with the clerk there remains nothing to be done but the computation of interest and entry of judgment. The judgment entered is that of the court, although the clerical work is done by the clerk. See Spaulding's Practice, Chapter XXV, "Judgments."

The clerk in this instance incorrectly computed the amount of the note as declared on. It appears, however, from the facts agreed that the judgment so computed was less than that to which the Public Loan Corporation was entitled. We have at best an error in computation. Such an error may be corrected if necessary by the Superior Court. See *Lewis* v. *Ross,* 37 Me. 230.

If Alice Munsey had been defaulted for lack of appearance in the Superior Court, the judgment would have been entered for the amount stated in the writ, plus interest and costs, upon delivery of the note to the clerk. Spaulding's Practice, *supra.*

In the instant case it was agreed that credit had been given for payments made and to the extent of $100 received for the truck. The agreement for judgment does not say and does not indicate that there would be a hearing before the clerk on damages. This action is not comparable to a tort case in which evidence is usually heard as to the damages. Here the amount due on the note is set forth as completely as would be a statement of the balance due for goods or services on an account annexed, and this was known to both parties when the agreement was made that judgment was to be entered for the plaintiff. Spaulding's Practice *supra.*

If Public Loan Corporation had in its writ set forth the agreed payment of $210.59 and the agreed credit of $100 for the truck, thus setting forth in detail how the amount of $981.33 was arrived at, there would have been nothing further to be done by the clerk than to enter judgment for the amount stated in the writ, plus interest and costs.

If the petitioner claimed at the time of the agreement for judgment that the $100 actually credited for the truck was not sufficient, the attorney should have made no agreement for entry of judgment for the plaintiff, and perhaps the case should have been tried.

There was no fraud suggested or proved. There was no evidence of accident. There was no legal misfortune. If there was a mistake in the amount of interest figured by the clerk, it was trivial and in favor of the claiming petitioner. If, as a matter of fact, the repossessed truck was worth more than the $100 received by Public Loan Corporation

and a larger value could have been proved, the only "mistake" was that there was an agreement for judgment on the writ. The record is barren of any evidence that the truck was worth any more than the $100 received for it, although the petitioner now says (without evidence to show it) that more should have been credited.

It is clear that the real claim of the petitioner relates to her supposed value of the truck when repossessed, and it was evidently this claim that unduly influenced the decision of the justice who heard the case. It is often an impossibility not to have a natural and blinding sympathy for one who, in order to secure a small loan, has been obliged to promise to pay what may seem to be an unreasonable rate of monthly interest, even if the loan company has a statutory right to demand it. There was no evidence, however, before the justice presiding, and none before us, that the truck was worth more than the amount it sold for and which the agreed facts show was credited.

The record does not show evidence of fraud, accident, or mistake that the statute requires. The entry must be

Exceptions sustained.

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

* * * * * *

QUESTION PROPOUNDED BY THE SENATE IN AN ORDER

DATED MAY 18, 1955

ANSWERED MAY 20, 1955

SENATE ORDER PROPOUNDING QUESTION

STATE OF MAINE

In Senate, May 18, 1955

WHEREAS, it appears to the Senate of the Ninety-Seventh Legislature that the following is an important question of law and the occasion a solemn one, and

WHEREAS, there is pending before the Senate of the Ninety-Seventh Legislature a Bill (Senate Paper 551, Legislative Document 1489) entitled, AN ACT Relating to the Hospitalization of the Mentally Ill, and

WHEREAS, the Honorable Justices of the Supreme Judicial Court, under date of May 11, 1955, have given their opinion to the House of Representatives of the Ninety-Seventh Legislature that said Bill, as written, does not provide a method of hospitalizing the mentally ill that is in accord with Section 6 of Article I of the Constitution of Maine, and

WHEREAS, it is the desire of the Ninety-Seventh Legislature to enact legislation that will facilitate the orderly hospitalization of the mentally ill within the protection afforded to all citizens by the Constitution of the State of Maine, and

WHEREAS, the Senate has accepted Senate Amendment "A" to Senate Paper 551, Legislative Document 1489, which is Exhibit A attached hereto, to provide the hospitalized patient an immediate method of instituting proceedings within the period of restraint to test the necessity of the involuntary hospitalization, and

WHEREAS, it is important that the Legislature be informed as to the constitutionality of the proposed Bill, as amended,

ORDERED, that in accordance with the provisions of the Constitution of the State, the Justices of the Supreme Judicial Court are hereby respectfully requested to give the Senate their opinion on the following question:

Would Senate Paper 551, Legislative Document 1489, "AN ACT Relating to the Hospitalization of the Mentally Ill," as amended by Senate Amendment "A", if enacted by the Legislature in its present form, be constitutional?

In Senate Chamber
May 18, 1955
READ AND PASSED

CHESTER T. WINSLOW,
Secretary.

Reid
Kennebec

A true copy. Attest: CHESTER T. WINSLOW

NEW DRAFT OF S. P. 480—L. D. 1349

NINETY-SEVENTH LEGISLATURE

Legislative Document **No. 1489**

S. P. 551 In Senate, April 22, 1955

Reported by Senator Reid of Kennebec from the Committee on Judiciary and printed under Joint Rules No. 10.

CHESTER T. WINSLOW, Secretary

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED FIFTY-FIVE

AN ACT Relating to Hospitalization of the Mentally Ill.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. R. S., c. 27, §§ 103-A - 103-F, additional. Chapter 27 of the revised statutes is hereby amended by adding thereto 6 new sections to be numbered 103-A to 103-F, to read as follows:

'Sec. 103-A. **Hospitalization; emergency procedure. When any blood relative, husband or wife, or any municipal or state police officer, or sheriff or justice of the peace has reason to believe that a person is mentally ill and requires emergency hospitalization, he shall immediately sign a petition so stating addressed to the superintendent of the Augusta State Hospital or the superintendent of the Bangor State Hospital or to the Veterans Administration or other agency of the United States Government, requesting immediate admission and acceptance of said alleged mentally ill person into his hospital for the purpose of observation and treatment. Said petition shall be immediately presented to the city or town clerk or to a member of the city council or member of the board of selectmen in the town where the alleged mentally ill person resides or is found, and upon receipt of said petition said municipal official shall promptly inquire into the facts set forth in said petition and if he is satisfied that the said person requires immediate admission to one of the said State or Federal mental hospitals, he shall so state on the said petition and join therein by affixing his signature. The petition shall be accompanied by a certificate signed by a physician qualified to practice medicine or osteopathy in this State, stating that he has examined the said**

person within the previous 5 days or that the person has refused to submit to examination, and that in his opinion the said person is mentally ill and, because of his illness is likely to injure himself or others if not immediately restrained, and giving the reasons for his opinion. Following the signing of the petition and the certificate as aforesaid, the municipal official shall forthwith order the alleged mentally ill person to be taken to such State hospital as he may properly designate or, upon receipt of a certificate from the Veterans Administration or other agency of the United States Government showing that facilities are available and that such person is eligible for care and treatment therein, to said Veterans Administration or other agency, and at the expense of the town or city. The said person shall be accompanied by true copies of the petition and the physician's certificate together with a statement of facts satisfactory to the Department in regard to the financial ability of such patient or any of his relatives legally liable for his support. Any petition or physician's certificate bearing a date more than 10 days prior to the date of arrival of the said petition at the hospital for admission shall be void and no physician's certificate shall be valid or accepted if signed by a physician employed by the hospital for the mentally ill to which said person is admitted. No feeble-minded person shall be accepted by any State hospital for the mentally ill.

Sec. 103-B. Preliminary observation; emergency procedure. The superintendent or head of the hospital to which the alleged mentally ill person is sent or his duly appointed substitute shall receive and detain such person for observation and treatment for a period of not more than 35 days, provided that such person is accompanied by the said petition and certificate. Prior to the expiration of 25 days of the observation period the superintendent, head of the hospital or his duly appointed substitute may request in a petition addressed to the probate court situated in the county

in which is located the mental hospital in which the said person is being detained, that the court decide that the said person requires hospitalization for an indefinite period. If the superintendent, head of the mental hospital or his duly appointed substitute shall find that the alleged mentally ill person is not in need of further care and treatment and should be discharged as soon as practicable, he shall so state in a certificate, a true copy of which shall be sent to the municipal official who joined in the original petition for emergency hospitalization. A true copy may also be sent to a spouse, relative or other person if it is so deemed proper and advisable. Attached to the true copy sent to the municipal official, the superintendent, head of the mental hospital or his duly appointed substitute, may send an order requiring the municipality to transport the said person from the hospital to the municipality. This order shall be enforceable by mandamus.

Sec. 103-C. Hearing in probate court following emergency detention. The petition for involuntary hospitalization in the foregoing section shall state that the alleged mentally ill person is being detained in the mental hospital for observation and treatment and that the said person has designated certain relatives or husband or wife or other person to receive notice of hearing, that in the opinion of the undersigned, the appearance of the said person at the hearing would or would not be detrimental to the mental health of the said person, and that in the opinion of the undersigned, the said person is mentally ill, and because of his illness is likely to injure himself or others if allowed to remain at liberty, or is in need of custody, care or treatment in a mental hospital and, because of his illness, lacks sufficient insight or capacity to make responsible decisions with respect to his hospitalization. The said petition shall be prima facie evidence of the facts stated therein. Upon receipt of the said petition, the judge of probate in the county in which is lo-

cated the hospital in which the said person is being detained shall immediately appoint a time and place for hearing. The judge of probate shall cause to be given in hand to the person so alleged to be mentally ill, at least 48 hours prior to the time appointed for hearing, a notice stating the time and place and purpose of the said hearing, and that the person has a right to be present and to be heard at the hearing, and to be represented by counsel if he so desires. A copy of the petition and notice of the time, place and purpose of the hearing shall be sent by registered mail to both the municipal official and the person signing the petition requesting emergency detention.

Sec. 103-D. Probate court proceedings. The hearing may be conducted in as informal a manner as may be consistent with orderly procedure and in a physical setting not likely to have a harmful effect on the mental health of the proposed patient. The court shall receive all relevant and material evidence which may be offered and shall not be bound by the rules of evidence. The court shall have the authority to summon such witnesses as shall be necesary for a full understanding of the case. If the judge of probate is satisfied that the condition of the person is such that his appearance at said hearing would be harmful to his mental health, then he shall not be required to be present. An opportunity to be represented by counsel shall be afforded to every person alleged to be mentally ill and if neither he nor others provide counsel, the court shall appoint counsel. The testimony of 2 reputable physicians shall be required for a person to be declared to be mentally ill. If upon completion of the hearing and consideration of the evidence, the court finds that the person is mentally ill, and because of his illness is likely to injure himself or others if allowed to remain at liberty, or is in need of custody, care or treatment in a mental hospital and, because of his illness, lacks sufficient capacity or insight to make responsible decisions with re-

pect to his hospitalization, it shall order him to be placed, for care and treatment, for an indeterminate period, in the custody of the superintendent of said State hospital or in the custody of the Veterans Administration or other agency of the United States Government and shall direct the superintendent or the Veterans Administration or other agency of the United States Government to receive and detain him until he no longer has need for treatment or is discharged by law or by the superintendent, or Veterans Administration or other agency of the United States Government.

Sec. 103-E. Jurisdiction of probate courts and municipal officers; standard procedure. The probate court in the county where a person resides or may be found, or the municipal officers of the municipality where a person resides or may be found, or a committee of not less than 3 thereof, shall have jurisdiction to order a person to be hospitalized for an indeterminate period where it shall be found that the person is mentally ill, and because of his illness is likely to injure himself or others if allowed to remain at liberty, or is in need of custody, care or treatment in a mental hospital and, because of his illness, lacks sufficient insight or capacity to make responsible decisions with respect to his hospitalization. Proceedings may be commenced by the filing of a petition for hearing by a blood relative, husband or wife, municipal or state police officer, sheriff, justice of the peace, superintendent, head of a mental hospital or his duly appointed substitute, in which such mentally ill person may be, with the probate court or municipal officers, stating that a person is mentally ill and requesting care and treatment for an indeterminate period. The petition shall be accompanied by a certificate signed by a reputable physician stating that he has examined the person within the previous 5 days or that the person has refused to submit to examination and that in his opinion the person is mentally ill and requires care and treatment in a mental hospital. Upon receipt of the

petition and certificate, which shall not have been dated more than 10 days prior to receipt, the probate court or the municipal officers shall immediately appoint a time and place for hearing, and shall cause to be given in hand to the person alleged to be mentally ill at least 48 hours prior to the time appointed for hearing a notice stating the time and place and purpose of the hearing and that the person has a right to be present and to be heard at the hearing, and to be represented by counsel, if he so desires. A true copy of this notice shall be sent by registered mail to the person signing the petition.

Sec. 103-F. Procedure before probate court or municipal officers. The hearing before the probate court or municipal officers shall be as in the case of hearings before the probate court following emergency detention as provided in sections 103-C and 103-D. If the person alleged to be mentally ill refuses to submit to examination by 2 physicians, then the court or the municipal officers shall so order him.

If upon completion of the hearing and consideration of the evidence, the probate court or the municipal officers find that the person is mentally ill, and because of his illness is likely to injure himself or others if allowed to remain at liberty, or is in need of custody, care or treatment in a mental hospital and, because of his illness, lacks sufficient capacity or insight to make responsible decisions with respect to hopitalization, the court or municipal officers shall forthwith order the alleged mentally ill person to be taken to such State hospital as it or they may properly designate or, upon receipt of a certificate from the Veterans Administration or other agency of the United States Government showing that facilities are available and that such person is eligible for care and treatment therein, to said Veterans Administration or other agency and at the expense of the municipality in which he resided or was found.

The court or the municipal officers shall direct the superintendent of said State hospital, or the Veterans Administration, or other agency of the United States Government to receive and detain him until he no longer has need for treatment or is discharged by law, or by the superintendent, or Veterans Administration or other agency of the United States Government. He shall be accompanied by a true copy of the order of the probate court or municipal officers and, where ordered to be taken to a State hospital, a statement of facts satisfactory to the Department in regard to the financial ability of such patient or any of his relatives legally liable for his support, and, wherever ordered to be taken, a brief report of any facts regarding the behavior of the person which would be of value to the hospital in treating him.

The municipal officers of a town or city are hereby constituted a court of record when acting pursuant to the provisions of this section.'

Sec. 2. R. S., c. 27, §§ 104-113, repealed. Section 104 to 113, inclusive, of chapter 27 of the revised statutes are hereby repealed.

SENATE AMENDMENT "A" to S. P. 551, L. D. 1489, Bill, "An Act Relating to Hospitalization of the Mentally Ill."

Amend said Bill by striking out all of the amending clause of section 1 and inserting in place thereof the following:

'Sec. 1. R. S., c. 27, §§ 103-A - 103-H additional. Chapter 27 of the revised statutes is hereby amended by adding thereto 8 new sections to be numbered 103-A to 103-H, to read as follows:

Further amend said Bill by renumbering those parts designated **"Sec. 103-E"** and **"Sec. 103-F"** to be **'Sec. 103-G'** and **'Sec. 103-H'**

Further amend said Bill by inserting after Sec. 103-D thereof, the following underlined sections:

'Sec. 103-E. **Right to release: application for judicial determination. Any patient hospitalized under the provisions of section 103-A who requests to be released or whose release is requested by his legal guardian, spouse, adult next of kin or friend, in writing addressed to the superintendent of the hospital in which the patient is detained, shall be released within 48 hours after receipt of the request, except that upon application to the judge of probate in the county where the hospital is located, supported by a certification by the superintendent of the hospital that in his opinion such release would be unsafe for the patient or for others, release may be postponed for such period not to exceed 5 days as the judge of probate may determine to be necessary for the commencement of proceedings for a judicial determination pursuant to sections 103-B to 103-D.**

The superintendent of the hospital shall provide reasonable means and arrangements for informing involuntary patients of their right to release as provided in this section and for assisting them in making and presenting requests for release. The provisions of this section shall not be available to a patient who has been duly committed by a court or the municipal officers of a town or city.

Sec. 103-F. Detention pending judicial determination. Notwithstanding any other provision of sections 103-A to 103-H, inclusive, no patient with respect to whom proceedings for judicial hospitalization have been commenced shall be released or discharged from a mental hospital during the pendency of such proceedings unless ordered by the judge of probate in the county where the hospital is located upon the application of the patient, or his legal guardian, parent, spouse, adult next of kin or friend, or upon the report of the head of the hospital that the patient may be discharged with safety.'

Further amend said Bill by adding at the end thereof a new section 3, as follows:

"**Sec. 3. R. S., c. 27, § 134, repealed and replaced.** Section 134 of chapter 27 of the revised statutes is hereby repealed and the following enacted in place thereof:

'**Sec. 134. Inquiry into cases of alleged unreasonable detention. Any person adjudged insane and committed to either state hospital, or his legal guardian, spouse, adult next of kin or friend, thinking that the patient is unreasonably detained, may apply in writing to any Justice of the Superior Court, in term time or vacation, who shall inquire into the case and summon before him such witnesses as in his judgment may be necessary, and upon such application may vacate such commitment, and if such person was committed under a sentence following conviction for crime and the sentence has not expired, remand him to the proper custody; and if the original sentence has expired, discharge such person. He shall tax costs and shall decide whether they shall be borne by the petitioner or by the State.**' "

Name: Reid.

County: Kennebec.

In Senate Chamber
May 18, 1955

READ AND ADOPTED

CHESTER T. WINSLOW,
Secretary.

ANSWER OF THE JUSTICES

To the Honorable Senate of the State of Maine:

In compliance with the provisions of Section 3 of Article VI of the Constitution of Maine, the undersigned Justices of the Supreme Judicial Court, having considered the ques-

tion submitted by the foregoing Order of the Senate, answer as follows:

The issue here presented is whether or not proposed Senate Amendment "A" to Senate Paper 551, Legislative Document 1489, provides adequate methods by which persons committed as mentally ill under the so-called "Emergency Procedure" therein provided may institute proceedings within the period of restraint to test the necessity of their commitment.

Senate Amendment "A" does in fact provide two prompt and effective methods, by either of which such proceedings may be instituted by the person alleged to be mentally ill or persons acting in his interest. We deem that thereby the constitutional rights of citizens are adequately protected. Accordingly, we answer the submitted question in the affirmative.

Dated at Augusta, Maine, this 20th day of May, 1955.

Respectfully submitted:

RAYMOND FELLOWS
ROBERT B. WILLIAMSON
DONALD W. WEBBER
ALBERT BELIVEAU
WALTER M. TAPLEY, JR.

Justice Frank A. Tirrell authorizes the statement that he concurs in the foregoing answer.

RAYMOND FELLOWS

THEODORE PAPPAS

vs.

CHARLES STACEY AND WILLIAM WINSLOW

Cumberland. May 31, 1955.

Labor. Picketing. Equity. Injunctions. Strike.

In an equity appeal involving no oral testimony the Law Court is not bound by the findings as to matters of fact of a single justice.

A strike solely for organizational purposes is unlawful and picketing in pursuance thereof even though peaceful may be enjoined.

A strike is a concerted refusal by employees to do any work for their employer, or to work at their customary rate of speed, until the object of the strike is attained, that is, until the employer grants the concession demanded.

The statutory right to organize free from "interference, restraint and coercion by their employers *or other persons*" protects the employees from the coercive force generated by picketing and applied to the employer to urge his employees to join the union to save his business and their livelihood.

Freedom to associate of necessity means as well freedom not to associate.

"Other persons" referred to in R. S., 1954, Chap. 153, Sec. 1, includes "labor union officials".

A state may, without abridging the right of free speech restrain picketing for a purpose unlawful under its laws and policies.

(Const. U. S. First and Fourteenth Amendments.)

ON APPEAL.

This is an appeal in equity from a permanent injunction against picketing for organizational purposes. Appeal dismissed. Decree affirmed.

Bernstein & Bernstein,
James Connellan, for plaintiff.

Berman, Berman and Wernick, for defendants.

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

WILLIAMSON, J. This is an appeal in equity from a permanent injunction against picketing for organizational purposes. The case was heard on bill, answer, replication, and an agreed statement of facts. The defendants are officials of Local 390, Hotel and Restaurant Employees and Bartenders International Union, which for convenience may be referred to as "Local 390."

The agreed statement of facts is here set forth in full:

> "1. (That) the said, Plaintiff is the operator and owner of a certain restaurant or eating establishment known as and called Theodore's Lobster House, located at 123 Commercial Street in said Portland.
>
> "2. (That) the said Defendants and their agents and servants have been and are conducting picketing at the place of business of your Plaintiff.
>
> "3. The said picketing has been at all times peaceful picketing.
>
> "4. At least three employees of the Plaintiff are on strike, two of whom have been participating in the picketing and the third of whom has been present at the site of the picketing. All three are members of the union, Local #390 of the Hotel and Restaurant Employees and Bartenders International Union.
>
> "5. The defendants and the three employees aforesaid who are on strike have been conducting the picketing for the sole purpose of seeking to organize other employees of the Plaintiff, ultimately to have the Plaintiff enter into collective bargaining and negotiations with the Union, this being done as a preliminary for attempting to organize restaurant employees in other establishments throughout the State of Maine.

"6. The Plaintiff employs on an average thirty persons who would properly be subject to organization and of this thirty at least five are sporadic or transient employees.

"7. The business of the Plaintiff is a lawful business and if the picketing is illegal, the Plaintiff has been suffering and will continue to suffer damage in the conduct of his business which is irreparable and for which there is no adequate remedy at law."

There are, in our view, two issues: (1) Does the law of Maine prohibit peaceful picketing for organizational purposes under the circumstances of this case? (2) If so, is such picketing protected under the "free speech" provision of the Federal Constitution?

In ascertaining the law, or broadly speaking the public policy, which governs in this situation, we must consider the case of *Keith Theatre* v. *Vachon, et al.,* 134 Me. 392, 187 A. 692 (1936), and the statute first enacted in P. L., 1941, c. 292, now R. S., c. 30, § 15 (1954), reading:

"Workers shall have full freedom of association, self organization and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection, free from interference, restraint or coercion by their employers or other persons. . ."

The parties are in accord that *Keith Theatre* v. *Vachon, et al., supra,* is the only decision of our court touching the issues. No question arises whether jurisdiction of the case lies in the federal or state courts.

We are free to find the facts in this appeal without reference to the findings of the single justice. The firmly established principle "that his decision, as to matters of fact, should not be reversed, unless it clearly appears that such decision is erroneous" found in *Young* v. *Witham,* 75 Me.

536 (1884), is not here applicable. "The claim has no merit in a case which involves no oral testimony." *Mellen, Jr., et al., Tr.* v. *Mellen, Jr., et al.*, 148 Me. 153, 90 A. (2nd) 818 (1952).

There are certain facts stated in or inferred from the agreed statement to be discussed before turning to the precise issues.

(1) The picketing is peaceful and effective. In a sense the picket line is a wall erected between the plaintiff's restaurant and the public. We may fairly infer that the public, or those who supply the needs of plaintiff's business, or more likely persons in both categories, refuse to cross the picket line or scale the wall.

At the moment we are not considering the objective of the picketing. If the purpose were to secure higher wages, or shorter hours, the immediate damage from the picketing would be like in kind and perhaps in degree to that suffered by the plaintiff.

(2) The plaintiff has not interfered with organizational activities by Local 390 or the striking employees among the other employees, apart from seeking injunctive relief against picketing. There is no suggestion that the plaintiff has objected to or interfered with the persuasion of the employees to join Local 390, except in this action.

(3) The objective of the strike of three union employees is not specifically stated. The picketing, however, has been conducted by the defendants and by the striking employees "for the sole purpose of seeking to organize other employees of the Plaintiff. . . ." It is apparent, therefore, that the strike of the three employees and the picketing are being conducted for the same objective.

(4) There are no grievances existing between the plaintiff and the employees, including the three on strike, relat-

ing to wages, hours, and conditions of employment. The defendants alleged such grievances in their answer. There is, however, a total lack of such claims in the agreed statement. On the record the grievance (if it may be called such) of the defendants is not with the plaintiff, but with the employees for not joining Local 390.

We are here concerned, as we have seen, with picketing solely for organizational purposes. Whether the labor-management relationship in the plaintiff's restaurant "ultimately," to quote from the agreed statement, shall take the form of a closed, union, preferential union, or nonunion shop, or any other type, is not the point at issue. Our question remains whether the defendants may press for their immediate purpose "of seeking to organize other employees" by peaceful picketing at the plaintiff's place of business.

(5) The fact that the picketing is part of a plan for the organization of restaurant employees throughout the State, is not of weight in the case. If the picketing is lawful for organizational purposes at the plaintiff's restaurant, it does not become unlawful from the stated broader purpose. It is enough that we here consider picketing for organizational purposes among the twenty-seven nonunion employees of the plaintiff.

We are of the opinion that the strike by the three union employees for organizational purposes is an unlawful strike. It follows that picketing in support of such strike, although peaceful, is likewise unlawful and may be enjoined.

In *Keith Theatre* v. *Vachon, supra,* at p. 397, a strike has been defined to be "a combined effort among workmen to compel the master to the concession of a certain demand, by preventing the conduct of his business until compliance with the demand." In Restatement, Torts, § 797, comment *a* (1939) we find: *"Definition of strike.* A strike is a concerted refusal by employees to do any work for their em-

ployer, or to work at their customary rate of speed, until the object of the strike is attained, that is, until the employer grants the concession demanded."

The purpose of the strike, we repeat, is "for the sole purpose of seeking to organize other employees of the Plaintiff. . . ." A strike for organizational purposes is by definition a strike to obtain from the employer a concession which he may grant. "A strike necessarily assumes the existence of a grievance. To right the asserted wrong is its purpose." *Keith Theatre, supra* at p. 398. In this instance the purpose of the strike necessarily is to compel the employer to bring pressure upon the employees to join Local 390. For what other purpose under the circumstances of this case are the employees on strike?

Under the statute enacted in P. L., 1941, c. 292, *supra,* the employee, or worker, is protected from "interference, restraint or coercion by their employers or other persons. . . ." The worker must be left free from interference by employer or other persons in reaching a decision whether to join or refrain from joining a union. It follows necessarily that pressure cannot lawfully be directed against the employer to force him to interfere with the free choice of his employees. The plaintiff cannot lawfully be placed in a position where compliance with the strikers' demands requires action in violation of the law of the State.

This is, however, precisely what the strikers here seek to accomplish. In brief, the strike for organizational purposes is unlawful for it is by its very nature destructive of the protection for the employees provided by the statute of 1941, *supra.*

We do not base our decision, however, solely upon the fact of an unlawful strike. Treating the case as if only picketing were involved, we reach the same result.

In our view peaceful picketing for organizational purposes is unlawful under our law, and may be enjoined. For the moment we approach the problem, having in mind the "labor-relations" principle in distinction from the "picketing-free speech" principle. Although there is no dispute between the plaintiff and his employees, yet the employer, on the defendants' theory, may be subjected to irreparable loss from action directed in terms to the persuasion of nonunion employees to join a union.

A coercive force is generated by the picketing to secure new members for the union. It is apparent that this force is applied to the employer to urge his employees to join the union to save his business, and to the employees to join to save their livelihood.

In reaching for the employees, there is a steady and exacting pressure upon the employer to interfere with the free choice of the employees in the matter of organization. To say that the picketing is not designed to bring about such action is to forget an obvious purpose of picketing—to cause economic loss to the business during noncompliance by the employees with the request of the union.

We turn again to the statute, *supra,* protecting the worker in his unquestioned right to organize and bargain collectively free from "interference, restraint or coercion by their employers or other persons. . . ." We have discussed the problem with particular reference to the strike and the employer. The employer may neither interfere nor be compelled to interfere with his employees in matters of organization. He cannot lawfully stop *his loss* from picketing by denying full freedom of association to his employees. Freedom to associate of necessity means as well freedom not to associate.

The same restraints are applicable to "other persons." They are likewise forbidden to interfere. We see no reason

why labor union officials, as here, are not included within the definition of "other persons." Granted the organization sought by the defendants (and by the strikers) may be in the best interests of the employee, it yet remains his privilege to accept or reject the proposal. He may for example have no desire for union affiliation, or he may have a preference for a union other than that represented by the defendants. In either case, the choice rests with the employee. The freedom of the employee thus remains a reality.

The employee cannot escape a share of the irreparable damage admittedly caused to the business on which his livelihood depends. Irreparable damage to employer must in any appreciable period be like damage to the employee. The defendants say in substance to the twenty-seven nonunion workers "join with us or we will continue to harm the business in which you are employed."

The picketing is at least an act of interference with the employee in the exercise of his personal rights. It violates the language and the purpose of the statute, *supra,* and it is unlawful.

The defendants urge that the *Keith Theatre* case, *supra,* does not control the decision and that the 1941 statute, *supra,* has no force as the expressed public policy of the State. In the *Keith Theatre* case, *supra,* the court enjoined stranger picketing, in which no employee took part. A principal purpose of the picketing was to compel the Theatre "to adopt the so-called closed shop agreement. . . ." The decision was placed on the ground that stranger picketing was unlawful. The ruling by the Supreme Court of the United States to the contrary in *American Federation of Labor* v. *Swing,* 312 U. S. 321, 61 S. Ct. 568 (1941) had not then been made. Our court refused to decide whether a strike or picketing by employees to secure unionization for their own benefit would have been lawful. The court said on

page 400 with apparent approval in what may be regarded as dictum:

> "While we need not go so far in this case as to hold that the employees themselves could not picket peaceably * * * to secure unionization, yet there is much eminent authority to that effect."

and again on page 403:

> "But be it as it may (as to whether *employees themselves* can lawfully strike or picket peaceably to secure unionization), we do not think that it was lawful for *these defendants* to picket even peaceably to secure unionization by the employer of its satisfied and non-striking employees."

The defendants argue that, assuming the rule is established by the dictum, *Keith Theatre* and the instant case are distinguishable on the ground that the former involves unionization and the latter organization only.

It is unnecessary in our view of the case to discuss distinctions between the "unionization" of the *Keith Theatre* case in 1936, and the attainment of a union or closed shop or any other form of conditioning employment on union membership. The purpose of the picketing here, that is the immediate purpose, is solely to bring employees into Local 390. We are not interested in the ultimate form of the relations between the plaintiff and his employees.

There is a clear difference between the attainment of an agreement for employment conditioned in some form on union membership, and the persuasion of employees to join a union. In the former case, action is required by the employer. Only with agreement of union and the employer can the objective be reached. In the latter case, however, no connection between employer and employee necessarily exists. The union may reach and persuade the employee to join without directly touching or affecting the interests of the employer.

We direct our decision to the case of picketing solely for organizational purposes. We need not, nor do we, pass upon the lawfulness of a strike or picketing for other purposes.

The second question is whether the picketing is protected as "free speech" under the Federal Constitution. "The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state." *Thornhill* v. *State of Alabama,* 310 U. S. 88, 60 S. Ct. 736, 740 (1940). The Supreme Court has developed and applied the "picketing-free speech" principle in a series of cases since the *Thornhill* case. See annotations of Supreme Court cases in 94 L. Ed. 976, 977, and cases cited in *Building Service Employees Internat'l Un.* v. *Gazzam,* 339 U. S. 532, 70 S. Ct. 784 (1950). For our purposes the governing principles sufficiently appear in the cases discussed below.

In the *Gazzam* case, *supra,* it was held that a state may without abridging the right of free speech restrain picketing for a purpose unlawful under its laws and policies, even though a statute expressing such policy has no criminal sanctions.

The purpose of the picketing in *Gazzam, supra,* was to compel the proprietor of a hotel to coerce his employees, no one of whom was a member of a union, in the choice of a bargaining representative. The union insisted the employer sign a contract requiring his employees to join the union.

The court said, at p. 787:

> "This Court has said that picketing is in part an exercise of the right of free speech guaranteed by the Federal Constitution."
>
> * * * * *
>
> "But since picketing is more than speech and establishes a *locus in quo* that has far more po-

tential for inducing action or nonaction than the message the pickets convey, this Court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity."

* * * * *

"The State of Washington has by legislative enactment declared its public policy on the subject of organization of workers for bargaining purposes . . . Under the so-enunciated public policy of Washington, it is clear that workers shall be free to join or not to join a union, and that they shall be free from the coercion, interference, or restraint of *employers of labor* in the designation of their representatives for collective bargaining. Picketing of an employer to compel him to coerce his employees' choice of a bargaining representative is an attempt to induce a transgression of this policy, and the State here restrained the advocates of such transgression from further action with like aim. To judge the wisdom of such policy is not for us; ours is but to determine whether a restraint of picketing in reliance on the policy is an unwarranted encroachment upon rights protected from state abridgment by the Fourteenth Amendment.

"Petitioners insist that (American Federation of Labor v. Swing, 312 U. S. 321, 61 S. Ct. 568) is controlling. We think not. In that case this Court struck down the State's restraint of picketing based solely on the absence of an employer-employee relationship. An adequate basis for the instant decree is the unlawful objective of the picketing, namely, coercion by the employer of the employees' selection of a bargaining representative."

* * * * *

"The Washington statute has not been construed by the Washington courts in this case to prohibit picketing of workers by other workers. The construction of the statute which we are reviewing only prohibits coercion of workers by employers."

The Washington statute, quoted in *Gazzam, supra,* provides for freedom of "the individual unorganized worker . . . from interference, restraint, or coercion of employers of labor, or their agents. . . ." The language comes from the Norris-LaGuardia Act of 1932. 29 U. S. C. A. § 102. Our statute significantly reads *"employers or other persons."*

In *Local Union No. 10, Etc.* v. *Graham,* 345 U. S. 192, 73 S. Ct. 585 (1952), the court upheld an injunction against peaceful picketing when carried on for purposes in conflict with the Virginia Right to Work Statute. A substantial purpose was to prevent nonunion employees from working on the project. The court said, at p. 589:

> "The immediate results of the picketing demonstrated its potential effectiveness, unless enjoined, as a practical means of putting pressure on the general contractor to eliminate from further participation all nonunion men or all subcontractors employing nonunion men on the project."

The Massachusetts Court, through Justice Wilkins, has stated in apt language our position taken in light of the decisions of the Supreme Court in *Colonial Press* v. *Ellis,* 321 Mass. 495, 74 N. E. (2nd) 1 (1947), at p. 4:

> "The defendants rely upon certain of the more recent cases in the Supreme Court of the United States. . . We do not understand, however, that that court has held that picketing in support of an unlawful objective cannot be enjoined. . . . Until there is an unequivocal pronouncement to that effect we adhere to the view of the law laid down in our own decisions."

The 1941 statute, *supra,* is a solemn declaration of the public policy of our State. It is the law, duly enacted by the Legislature, which must govern the decision in this case. Within the plain and clear meaning and intent of the statute we find, as we have indicated, a public policy against peaceful picketing at the place of business for organizational pur-

poses. In our opinion the restraint of such picketing does not abridge the right of free speech under the decisions of the Supreme Court.

There was no error in the issuance of the injunction.

The entry will be

Appeal dismissed.

Decree affirmed.

STATE OF MAINE

vs.

PAUL F. GOODCHILD

Androscoggin. Opinion, June 6, 1955.

Criminal Law. Indictments. Pleadings.
Intoxicating Liquor. R. S., 1954, Chap. 22, Sec. 150.
Words and Phrases.

The allegation in a warrant that the defendant "operated a motor vehicle . . . upon the premises of the Ancient York Lodge . . . said premises being located in the village of Lisbon Falls, (etc.) . . ." meets the requirement of R. S., 1954, Chap. 22, Sec. 150 that the illegal operation occur "upon any way or *in any other place.*"

The word "place" has reference to locality; the word "premises" signifies a distinct and definite locality.

ON EXCEPTIONS.

This is a criminal action charging the operation of a motor vehicle while under the influence of intoxicating liquor. The case is before the Law Court upon exceptions to the overruling of a demurrer. Exceptions overruled. Demurrer overruled. Remanded to Superior Court.

William D. Hathaway,
Gaston Dumais, for State.

Harold L. Redding, for defendant.

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

TIRRELL, J. This case is here on exceptions to the overruling of a demurrer filed in the Superior Court for the County of Androscoggin.

The case originated by complaint in the Municipal Court for the town of Lisbon in the County of Androscoggin. The body of the complaint is as follows:

> ". . . . on the Fourteenth day of June in the year of our Lord one thousand nine hundred and fifty-three at Lisbon, in said County of Androscoggin, operated a motor vehicle, to wit a passenger automobile in said Lisbon to wit upon the premises of the Ancient York Lodge No. 155 F. & A.M. while under the influence of intoxicating liquor, said premises being located in the village of Lisbon Falls in said Town of Lisbon against the peace of said State, and contrary to the form of the Statute in such cases made and provided."

On this complaint the respondent was arrested and brought before the Judge of the Lisbon Falls Municipal Court. The respondent pleaded *not guilty*, and after the hearing, was adjudged *guilty* by said court and was sentenced to pay a fine of One Hundred Dollars and Costs. Respondent took an appeal from the sentence to the next Term of the Superior Court in September 1953.

At the September 1953 Term of Superior Court held in the County of Androscoggin the respondent came into court and filed a general demurrer in which the respondent reserved the right to plead anew should the demurrer be overruled. The County Attorney for the County of Androscoggin joined in the demurrer and prayed for judgment, asking that said Paul F. Goodchild be convicted of the complaint specified. The presiding justice overruled the demurrer and granted the respondent the right to plead anew.

This is the ruling to which the respondent excepts and the exceptions were allowed by the presiding justice.

As we stated in *State* v. *Schumacher,* 149 Me. 298, at page 300:

> "The general rule in criminal cases is that upon an appeal from a magistrate or lower court to the Superior Court the matter comes before the Superior Court for trial *de novo.* This means that the matter comes forward on the complaint and further upon the plea of the respondent, the words "*de novo*" applying to the actual trial of the case. The withdrawal of the plea made in the lower court must be by and with the consent of the presiding justice."
>
> "In the instant case the presiding justice did not directly give to the respondent leave to withdraw his former plea, the county attorney stood by, made no objections to the filing of the demurrer, and as a matter of fact joined it and made that the issue. The presiding justice took before him the merits of the demurrer and ruled thereon. In doing this this court holds that he, the justice presiding, impliedly gave his consent to the respondent to withdraw the former plea of not guilty."

In our opinion the proper rule to follow when the respondent attempts to change his plea after an appeal is as set forth in *State* v. *Schumacher, supra,* and cases therein cited.

The only question involved in the instant case is whether the complaint on which the warrant was issued sets forth any violation of law inasmuch as it is not charged therein that the vehicle was operated upon *any way or in any other place.* R. S., 1944, Chap. 19, Sec. 121 (now R. S. 1954, Chap. 22, Sec. 150), under which the complaint was drawn, and which has not been amended with regard to the point in question, reads as follows:

> "Whoever shall operate or attempt to operate a motor vehicle upon any way, or in any other place when intoxicated or at all under the influence of intoxicating liquor or drugs . . . upon conviction, shall be punished . . ."

It is the contention of the respondent that the words "place" and "premises" are not in common parlance synonymous. While the word "place" has several meanings, it ordinarily has reference to locality. The word "premises" signifies a distinct and definite locality. It may mean a room, shop, building or any definite area. We cannot extend the statute by construing it beyond the plain significance of the language used. It is our opinion that the word "place" in the statute cannot, by any reasonable interpretation, exclude the word "premises." *State* v. *Fezzette,* 103 Me. 467; *State* v. *Grames,* 68 Me. 418.

On reading the statute it will be noted that it first applies to the operation of motor vehicles upon a *way.* It then applies to operation of automobiles in any other *place.* To us this means any other place than a *way.* Indictments and complaints should be so worded that the respondent is sufficiently apprised of the crime with which he is charged so that he may properly prepare his defense and so that he will be protected against double jeopardy. *State* v. *Munsey,* 114 Me. 408, 96 A. 729; *State* v. *Cormier,* 141 Me. 307, 43 A. (2nd) 819.

R. S., 1954, Chap. 22, Sec. 150 should be interpreted with the idea in mind of reducing the hazard created by operating under the influence of intoxicating liquor. *State* v. *Roberts,* 139 Me. 273, 29 A. (2nd) 457.

Scrutinizing the complaint in question with the foregoing principles of law in mind, it appears that all of the essential elements have been clearly spelled out. The date of the offense is unambiguously stated as follows:

> ". . . . on the fourteenth day of June in the year of our Lord one thousand nine hundred and fifty-three . . . ."

The operation is also clearly stated, as follows:

> "operated a motor vehicle, to wit, a passenger automobile . . ."

The condition of the respondent at the time of operation is also clearly stated, viz:

> ". . . while under the influence of intoxicating liquor . . .";

and the place where the respondent allegedly committed the offense is spelled out, as follows:

> ". . . at Lisbon, in said County of Androscoggin . . . in said Lisbon, to wit, upon the premises of the Ancient York Lodge No. 155 F. & A. M. . . . . said premises being located in the village of Lisbon Falls in said Town of Lisbon . . .".

Presumably respondent's contention is that the complaint fails to allege an offense in that the foregoing description of the locale of the alleged offense vitiates the entire complaint.

In regard to this point the statute, R. S., 1954, Chap. 22, Sec. 150, provides in part as follows: "Whoever shall operate . . . in any other place . . .".

Certainly the word "premises" is included in the word "place". While the word "place" has several meanings it ordinarily has reference to locality. The word "premises" signifies a distinct and definite locality.

The question of whether or not the statute here applies to this particular case is thoroughly discussed in *State* v. *Cormier, supra.* The court shows the historical development of the statute with particular reference to the phrases, "upon any way, or in any other place" and concludes that

the statute is applicable to anyone who operates or attempts to operate a motor vehicle while under the influence of intoxicating liquor regardless of where the operation took place. The court says, on page 313:

> "Evidently the intoxicated driver is to be regarded as one who should be denied *wholly* the right to operate a motor vehicle while in such condition."

In the phrase "upon any way, or in any other place" the word "way" obviously denotes a class or genus. Nothing remains *ejusdem generis*. Consequently, unless the word "place" is to be rendered meaningless it must be construed to cover everything to which the word "place" ordinarily refers.

The purpose of the statute is to protect persons and property from loss or injury by the movement of a motor vehicle operated by a person while intoxicated or at all under the influence of liquor or drugs.

We rule that for the foregoing reasons the complaint in this case is sufficient in law.

The entry must be

Exceptions overruled.

Demurrer overruled.

Remanded to Superior Court.

CLIFTON THOMPSON
vs.
MARY C. FRANKUS

ANNA B. THOMPSON
vs.
MARY C. FRANKUS

Androscoggin. Opinion, June 15, 1955.

Landlord and Tenant. Common Stairways. Repairs. Invitees. Negligence. Lighting. Proof. Probable Cause.

A landlord who has retained control of common stairways owes to his tenants and their invitees the duty of exercising ordinary care to keep such stairways reasonably safe for their intended use.

The doctrine that a landlord owes no duty to tenants to make the structural design or plan (such as installing gutters over stairways or changing the steepness of stairs) any more safe than it was at the time of letting does not apply to repairs made necessary by wear, breaking or decay.

Whether there existed a landlord's duty to light the common stairway is a jury question in the instant case.

A plaintiff may under many circumstances be completely unable to remember or recount or explain an accident, but may nevertheless recover if the deficiency is met by other reliable evidence.

Injury must be the natural and probable consequences of negligence.

ON EXCEPTIONS.

This is a negligence action before the Law Court upon exceptions by the plaintiff to the granting of a directed verdict for defendant. Exceptions sustained.

Frank M. Coffin, for plaintiff.

Powers & Powers, for defendant.

SITTING: FELLOWS, C. J., WEBBER, BELIVEAU, TAPLEY, JJ. WILLIAMSON, J., did not sit. MR. JUSTICE TIRRELL sat on

this case and participated in conferences, but died before the opinion was submitted to him.

WEBBER, J. In these two cases, considered together for convenience, husband and wife seek damages for injuries to the wife. These same cases were before us on a general motion for new trial after plaintiffs' verdicts in *Thompson* v. *Frankus,* 150 Me. 196, 107 A. (2nd) 485. In granting new trial we did so solely upon the ground that no instructions whatever were given the jury as to the duty of a landlord to light common stairways within his control. We neither held nor intimated that there was not sufficient evidence favorable to the plaintiffs to warrant submission to the jury under adequate instructions. Upon the retrial, the evidence presented differed not materially from that which appeared in the first record. Nevertheless at the close of the evidence the presiding justice directed verdicts for the defendant and plaintiffs' exceptions bring the matter before us for the second time.

The facts were fully stated in our prior opinion. Briefly stated, the evidence now before us, viewed in the light most favorable to plaintiffs, would have justified jury findings that the plaintiff wife was injured while attempting to descend an unlighted stairway controlled by the defendant landlord and maintained for the common use of her tenants; that this plaintiff was an invitee of a tenant; that the linoleum stair covering was badly torn, loose and full of holes, which condition was known to the defendant; that the plaintiff lighted a match before stepping from a stair covered with the defective linoleum and stumbled or tripped and fell to the foot of the stairway; and that there was no other means of egress available to the plaintiff who sought to leave the premises to return to her home. Both plaintiffs showed resulting damages.

It is almost universally held that a landlord who has retained control of common stairways owes to his tenants and

their invitees the duty of exercising ordinary care to keep such stairways reasonably safe for their intended use. 32 Am. Jur. 561, Sec. 688 (Note 9 and cases cited); *Sawyer* v. *McGillicuddy,* 81 Me. 318; *Austin* v. *Baker,* 112 Me. 267; *Toole* v. *Beckett,* 67 Me. 544; *Miller* v. *Hooper,* 119 Me. 527; *Robinson* v. *Leighton,* 122 Me. 309; and *Smith* v. *Preston,* 104 Me. 156. "The opinion in *Smith* v. *Preston, supra,* states the rule of liability thus: 'in all cases the criterion of liability is the obligation to maintain and repair with the right of control for that purpose.' " *Jacobson* v. *Leventhal,* 128 Me. 424 at 426.

In Massachusetts, the duty is limited to maintaining the premises in as good condition as they were or appeared to be in at the inception of the tenancy. 32 Am. Jur. 572, Sec. 696. Cases assembled in the footnote include *Rosenberg* v. *Chapman National Bank,* 126 Me. 403. It is thereby suggested that Maine has adopted the minority doctrine of Massachusetts. The holdings of the *Rosenberg* case go no farther than its facts. The case holds that in the absence of contract or agreement, the landlord owes no duty to tenants to remove natural accumulations of snow and ice from outside common stairways. It further holds that no duty is owed to tenants to make *the structural design or plan* any more safe than it was at the time of letting. Specifically, the structural plan having included no gutter over the stairway at the inception of tenancy, the tenants could not demand that one be added during the tenancy. The distinction, however, was clearly made in *Miller* v. *Hooper, supra,* at page 529: "As applied to the *plan of construction* this position is sound. An owner may build a tenement house with stairways which because of steepness or for other obvious structural reasons are inconvenient or even unsafe. The tenant cannot exact any change. If such stairways need to be repaired or rebuilt, the owner is not required to make them safer or more convenient. But the application of this doc-

trine to repairs made necessary by *wear, breaking or decay* is opposed to the great weight of authority. *We conceive the true rule to be that the owner must exercise due care to keep in reasonably safe repair, stairways and passage ways which remain under his own control.*" (Emphasis supplied.) A like duty was of course owed by the landlord to the tenants' invitees.

There is evidence in the record before us upon which the jury could have found that the defendant had negligently failed to repair the worn and torn linoleum stair covering which had become dangerously defective by reason of "wear, breaking or decay." The evidence would have further supported a jury finding that the dangerous condition thus created by the negligence of the landlord was so enhanced and aggravated by a complete absence of lighting as to give rise to a further duty owed by the defendant to the tenant's invitees to light the stairway. *Thompson* v. *Frankus, supra.* The defendant's negligence, or lack of it, was therefore a jury question upon this evidence.

Likewise the issue of the contributory negligence of plaintiff wife was a jury question. She was under some urgency to return home. No other means of egress was available. She lighted a match which enabled her to look where she was going before taking the step which resulted in her fall. She did not wait for the tenant to bring a light. She proceeded over an unlighted stairway. It is for the jury to say whether she used that care and caution which an ordinarily prudent person would have exercised under the same circumstances and having the same urgency to leave the premises. We cannot say that she was guilty of contributory negligence as a matter of law. Our court has frequently recognized that "urgency" is a factor which may be considered in appraising the care exercised by a party. In *Rosenberg* v. *Bank, supra,* at page 408 it was said: "Under some circumstances of emergency or urgency a model of

prudence and care might knowingly use or attempt to use a stairway negligently made or left very slippery. But the evidence in this case discloses no emergency and no urgency." Again in *Temple* v. *Congress Square Garage, Inc.,* 145 Me. 274 at 277 we said: "No urgency existed so far as the record discloses that compelled her (plaintiff invitee) to proceed from the elevator to the friend's room." See also *Agosta* v. *Granite City Real Estate Co.,* 116 Vt. 526, 80 A. (2nd) 534 at 536, wherein emphasis was placed on the fact that "the plaintiff necessarily had to return home and had no alternative but to proceed." *Bailey* v. *Fortugno,* 151 A. (N. J.) 484.

The defendant contends that there is no evidence upon which the jury could have found that any negligence of hers was the proximate cause of the plaintiff's fall. Plaintiffs' counsel suggests that in directing a verdict for defendant the presiding justice below was persuaded to that action by the failure of the plaintiff wife to state specifically what caused her to stumble as, for example, that she slipped on loose linoleum or caught her foot on torn linoleum or in a hole in the stair covering. The record is silent as to the reasons which weighed in the mind of the justice below. However, defendant's counsel contend that "if the plaintiff, who knew and could see what she was doing, cannot tell the jury what caused her to fall, how can a jury answer this question without speculation, conjecture or guessing?" The fallacy of this argument is readily apparent. A plaintiff may under many circumstances be completely unable to remember or recount or explain an accident, but may nevertheless recover if the deficiency is met by other reliable evidence. Such evidence may be direct or circumstantial. It may come from eye witnesses or known physical facts. It may raise reasonable inferences which satisfy the burden of proof. *Pauley* v. *Brockton Savings Bank,* 26 N. E. (2nd) (Mass.) 345. "There was no direct evidence as to the cause of decedent's

fall. The sole claim of the defendant is that in the absence of other evidence than that stated, the jury could not find that the fall of the deceased was caused by the defective condition of the stairway. A jury cannot base their conclusions upon guess or speculation, but they are entitled to draw reasonable inferences and their verdict must stand if the evidence is such as to justify in their minds 'a reasonable belief of the probability of the existence of the material facts.' " *White* v. *Herbst,* 128 Conn. 659, 25 A. (2nd) 68. To hold otherwise would be but to invite perjury on the part of plaintiffs who in all honesty do not know or cannot recall exactly what did happen. An examination of cases where the plaintiff's inability by his own testimony to make out a case has defeated recovery will disclose that the deficiencies in proof were not supplied by other independent evidence. So here there was evidence of stair covering upon the stair where plaintiff tripped (as well as other stairs) which by reason of tears and holes might, especially in darkness, cause one to trip. There is evidence that the plaintiff, proceeding slowly and cautiously by the light of a match, did stumble and trip and fall. The jury might reasonably infer that she stumbled or tripped *over* the defective covering and *because* of the defects. In a legal sense, the consequences of such a hazardous condition were readily foreseeable. "The universal rule is that if the defendant is to be held answerable in damages to the plaintiff, the negligence must be the proximate cause of the injury suffered. To lay down a general definition of proximate cause, which will furnish a solvent for all cases, is, however, well nigh impossible. Each case presents its own problem. *Page* v. *Bucksport,* 64 Me. 51; *Fairbanks* v. *Kerr,* 70 Pa. 86. The most usually cited rule is that the injury must be the natural and probable consequence of the negligence. *Marsh* v. *Great Northern Paper Co.,* 101 Me. 489, 502. But even this formula has its limitations and exceptions, as is pointed out by Judge Smith in an article in 25 Harv. L. Rev. 103, 115. As he shows, a

wrong-doer may in some instances be liable for a probable consequence because it was foreseeable, even though it may not have occurred in the ordinary course of nature. This phrase, however, does furnish a reasonable guide for the solution of the vast majority of cases. It is not necessary that injury in the precise form suffered should have been foreseen; it is only essential that, viewing the occurrence in retrospect, the consequences appear to flow in unbroken sequence from the negligence." *Hatch* v. *Globe Laundry Co.*, 132 Me. 379 at 382. Applying these basic rules to the evidence before us, it was for the jury to determine whether or not the defendant's negligence was the proximate cause of the plaintiff's fall.

It remains only to examine some of the cases on which the defendant relies.

Olsen v. *Portland Water District,* 150 Me. 139, is readily distinguishable. Here the plaintiff stepped backward without looking onto a perfectly obvious manhole covering in broad daylight. No negligence of the defendant was shown. There was no evidence of knowledge of the defendant that the manhole cover had become raised. Upon the evidence, a jury could not properly have reached any other conclusion than that the accident was caused entirely by the thoughtless inattention of the plaintiff.

Deojay v. *Lyford,* 139 Me. 234, was a case in which no affirmative acts of negligence of the defendant were shown and it was held that *res ipsa loquitur* could not be applied to airplanes while landing merely because they deviated somewhat in course.

In *Winterson* v. *Pantel Realty Co.*, 282 N. W. (Neb.) 393, the evidence offered no explanation as to how the plaintiff fell. As the court said on page 396: "For aught we know she (the plaintiff) may have done any number of things that would have caused the accident and for which the de-

fendant would not have been liable." This is quite different from a situation where a disinterested witness saw the plaintiff trip on a stair where a dangerous condition likely to cause tripping was observed. If the jury elected to believe the plaintiff and her eyewitness, they might properly have found upon this evidence that the plaintiff here did *not* do any of the things which might otherwise have caused her to fall quite apart from the negligence of the defendant.

In *Alling* v. *Northwestern Bell Tel. Co.*, 194 N. W. (Minn.) 313, plaintiff advanced the theory that lightning had hit a tree, jumped to a car and thence to a wire and thence to the decedent. The wire remained intact. Several experts testified that it was impossible for the wire to have carried the charge. The plaintiff's expert admitted that no one could say what lightning would do or where it would go. The court properly held that plaintiff's claim advanced no further than speculation or conjecture. The court well stated the rule at page 314, which we believe is applicable: "The burden is on plaintiff to show that it is more probable that the harm resulted in consequence of something for which the defendant was responsible than in consequence of something for which he was not responsible. If the facts furnish no sufficient basis for *inferring* which of several possible causes produced the injury, a defendant who is responsible for only one of such possible causes cannot be held liable." (Emphasis supplied). In the case now before us, an inference drawn by a jury that plaintiff's fall resulted directly from a defective stair covering coupled with the absence of lighting would rest upon credible evidence rather than upon mere conjecture, surmise and speculation.

We therefore conclude that there was evidence which, if believed by the jury, would have sustained plaintiffs' burden of proof on each essential issue. The cases should have been submitted to jury determination under proper instructions.

Exceptions sustained.

STATE OF MAINE
vs.
HENRY P. MCPHEE

Franklin. Opinion, June 16, 1955.

Fish and Game. Corpus Delicti. Confessions. Evidence. Admissions.

In order to prove a violation of Section 88 of the 11th Biennial Revision of the Inland Fish and Game Laws the State must prove (1) the killing of the deer, (2) the leaving of the woods without taking the deer and (3) 12 hours elapsing after leaving the woods.

An extra-judicial confession or admission by the respondent is not admissible until some independent evidence has been legally admitted.

The burden of proving notice to the game warden under Section 88, *supra*, is upon the respondent.

The question whether there was sufficient evidence to establish the corpus delicti is for the court in the first instance.

ON EXCEPTIONS.

This is prosecution by indictment for violation of the Inland Fish and Game Laws. After a jury verdict of guilty the case is before the Law Court upon exceptions. Exceptions sustained. Verdict set aside. New Trial ordered.

Joseph F. Holman, for State.

John A. Platz, for respondent.

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

TIRRELL, J. On exceptions. The respondent was indicted for violation of Section 88 of the 11th Biennial Revisions of the Inland Fish and Game Laws, which provides as follows:

> "If any person leaves the woods without taking a deer which he has killed with him, he shall notify a warden in writing within 12 hours as to location of the deer and the circumstances necessitating his leaving the same in the woods."

The substance of the testimony of the witnesses for the State is that on *November 11, 1953* a dead deer was found lying in the woods at Eustis, Maine. The witnesses knew nothing of the circumstances surrounding the particular deer and the killing thereof.

On *November 15, 1953* the evidence introduced is that the respondent appeared at the home of Horace E. Crocker, a game warden. On this date Mr. Crocker learned for the first time from the respondent that he had been hunting in the woods at Eustis. The admissions of the respondent were allowed in evidence over objections of counsel for the respondent and to which exceptions were duly taken and noted.

Horace E. Crocker, witness for the State, upon direct examination was asked the following questions relative to his conversation with the respondent, to wit:

Q. What day?
A. That was on Sunday.

Q. What—that would be what date?
A. About the 15th.

Q. What did Mr. McPhee say to you?

Counsel for respondent objected to the admissibility of any admission of the respondent on the basis that no corpus delicti had been established. The court allowed the witness to answer, which he did, as follows:

> A. He said he understood I had his deer. I showed him the deer. He looked it all over and recognized it as his deer.

The respondent took exception and the same was duly noted.

Crocker, upon direct examination, was asked the following question:

> Q. What time, and first of all, did he tell you what day he shot the deer?

Counsel for respondent objected, and seasonably excepted, to the admissibility of any admission of the respondent on the basis that no corpus delicti had been established. The court allowed the witness to answer, and he did, as follows:

> A. Yes.
>
> Q. What day?
> A. November 11th.

At the conclusion of the State's case the defense rested, and moved the court to direct a verdict for the respondent on the ground that the State had failed to prove the offense with which the respondent was charged. Respondent claimed the State's case, at best, was based on circumstantial evidence which could not be relied upon because it was not consistent with the sole conclusion of respondent's guilt and inconsistent with a rational hypothesis of innocence. The presiding justice denied the respondent's motion for a directed verdict of not guilty.

To the ruling of the presiding justice refusing to grant the motion for a directed verdict of not guilty, and refusing to exclude respondent's admission, the respondent, claiming to be prejudiced and aggrieved thereby, excepted and prayed that his exceptions be allowed. The verdict of the jury was *guilty*.

The third exception of the respondent as to the denial of his motion that a verdict be directed is predicated upon the basis that no crime was established by the evidence. In a prosecution such as the one in the present case, the State must offer evidence with respect to each element of the crime, namely (1) the killing of a deer, (2) leaving the

woods without taking the deer, and (3) notification in writing to a warden within 12 hours after leaving the woods, etc. Failure of proof relative to all or any one of the requisite elements is fatal and will not warrant a conviction.

Any statement by the respondent was not admissible until some evidence independent of such extra-judicial admission or confession had been legally admitted. The meaning of "some evidence" has been held to be such credible evidence as, standing alone, will create a really substantial belief that a crime had actually been committed. The entire case of the State is based upon conjecture, suspicion and guess. For reference as to the establishment of a corpus delicti, extra-judicial admissions or confessions see *State* v. *Jones,* 150 Me. 242; *State v. Hoffses,* 147 Me. 221. See also *State* v. *Morton,* 142 Me. 254, the opinion of this court having been written by Mr. Justice Fellows, now Mr. Chief Justice Fellows.

After the State had rested its case and the respondent likewise, a motion was made to the presiding justice by the respondent that a verdict be directed in his favor. This motion the presiding justice denied and the respondent seasonably excepted thereto.

It sometimes happens that requirements placed upon the State as to proof seem very burdensome, but that does not mean they can be dispensed with. This is especially apt to be true when the State has little or no evidence of an unlawful act other than by the admission of the respondent. The State would have had no difficulty if it had had *direct* evidence of respondent's killing and leaving the deer and leaving the woods. In enforcing the requirement of proof of corpus delicti before admissions are received, we are in fact holding the line against proof of crime by admissions alone, however obtained. Such a rule is bound to protect some guilty people, but it is justified in that it also *protects the innocent.* Hindsight is better than foresight and we must

not judge the sufficiency of proof by the corpus delicti in the light of what is subsequently disclosed by the admission.

There is not a scintilla of evidence that respondent left the woods at any time or for any period. The wardens inspected the deer and left. They did not inspect the area near the deer even within a 100 foot radius. There is no description in the record of the area or the nature and extent of the woods. The Legislature could easily have made the offense "leaving the deer" or "leaving the deer untagged," but it did not do so. It made the offense "leaving the woods." The State argued orally that the motive one might have for leaving a deer might be that because the deer was small, one might prefer to hunt for a better one. This is quite probable, and if so, it would lead to the conclusion that the respondent would *not* depart from the woods but would *stay* in the woods hunting the larger deer. If respondent had had a camp 200 yards from the deer, there is nothing in the record to indicate that the wardens would have known it. They made no search or examination of the area and had no knowledge as to who was in the woods or where they might be. Respondent admitted killing the deer on November 11th, and no more. He did not admit leaving the woods and for aught that appears to the contrary might have come from the woods an hour before going to the warden's to claim his deer. Obviously respondent had no sense of wrong doing else he would not have disclosed his identity. This may have stemmed from his ignorance of the law or it may have stemmed from his knowledge that he had not left the woods. This alternative must be resolved by the presumption in favor of the respondent. He admitted a lawful act but not an unlawful one. After the admission was received, the State had still failed to prove beyond a reasonable doubt or even to offer any evidence at all that respondent "left the woods" for twelve hours without reporting.

With the time of leaving the woods established, the burden of proving that notice was given within the twelve hour period would be upon the respondent. To require the State to prove that a notice was not received by any warden in the State would be placing an impossible burden on the State. Compare absence of license—a negative fact. See 20 Am. Jur., Evidence, Sec. 150; 153 A. L. R., 1250; Underhill Criminal Evidence (3rd Ed.), Sec. 52. Defendant relying on license for sale of liquor has burden of proof. See *State* v. *Woodward,* 34 Me. 293; *State* v. *Crowell,* 25 Me. 171; *State* v. *Churchill,* 25 Me. 306; *State* v. *Webber,* 125 Me. 319; Lawrence Digest, Criminal Process (19).

Whether there was sufficient evidence to establish the corpus delicti so that the case should have been sent to the jury in the first instance is for the court. However in the instant case it is our opinion that there *was not sufficient proof* of the corpus delicti as a matter of law to render the admission of the respondent admissible. It necessarily follows that the extra judicial confession or the admissions of the respondent against his interest were not admissible and the exceptions are sustained. Such being the case under the view we take of the proof of the corpus delicti, it was error not to direct a verdict for the respondent. See *State* v. *Carleton,* 148 Me. 237.

The entry therefore must be

Exceptions sustained.

Verdict set aside.

New trial ordered.

EVERETT T. CHAPMAN, RE: PETITION TO AMEND COMMON CARRIER CERTIFICATE NO. 71. CONGDON TRANSPORTATION, INTERVENOR.

Kennebec. Opinion, June 16, 1955.

Public Utilities Commission. Trucks.
Public Convenience and Necessity.
Words and Phrases. Proof.

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.

"Public Convenience and Necessity" as set forth in R. S., 1954, Chap. 48, Sec. 20 means the convenience and necessity of the public, as distinguished from that of any individual or group of individuals and proof thereof requires evidence of a substantial nature pointing to the convenience and necessity of the public.

ON EXCEPTIONS.

This case is before the Law Court upon exceptions to a decree of the Public Utilities Commission allowing an amendment to petitioner's common carrier certificate. Exceptions sustained. Case remanded to the Public Utilities Commission for a decree upon the existing record in accordance with this opinion.

Robert B. Dow,
Paul A. Choate, for petitioner.

Raymond E. Jensen, for intervenor.

Frank M. Libby, for Public Utilities Commission.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, TAPLEY, JJ. MR. JUSTICE TIRRELL sat at the time of argument and took part in conferences but died before writing of opinion.

WILLIAMSON, J. This case arises on exceptions to a decree of the Public Utilities Commission. R. S., c. 40, § 66 (1944), now R. S., c. 44, § 67 (1954). The petitioner sought and obtained, insofar as we are here interested, an amendment to his common carrier certificate "to authorize service from and to Portland-South Portland to and from Raymond, South Casco and Naples. . . ." Congdon Transportation, a common carrier serving the same points, was permitted to intervene.

In its decree the Public Utilities Commission found:

> "After a consideration of all the evidence we are of the opinion that a public necessity exists for this later scheduled (the petitioner's) service and that public convenience will be promoted thereby, and that the granting of the authority herein requested will not seriously affect the existing transportation facilities."

Exceptions taken by the intervenor to the findings and to the amendment of the decree based thereon raise one issue: Are the findings of fact supported by any substantial evidence, that is, by such evidence as taken alone would justify the findings?

The pertinent part of the statute relating to operation of motor trucks for hire reads:

> "After such hearing, the commission shall have the power to issue to the applicant a certificate in a form to be prescribed by the commission, declaring that public convenience and necessity require the operation for which application is made, or refuse to issue the same, or to issue it for the partial exercise only of the privilege sought. . . In determining whether or not such a certificate shall be granted, the commission shall take into consideration the existing transportation facilities and the effect upon them, the public need for the service the applicant proposes to render, the ability of the applicant efficiently to perform the service for which author-

> ity is requested, conditions of and effect upon the highways involved and the safety of the public using such highways. No such certificate shall be issued unless and until the applicant has established to the satisfaction of the commission that there exists a public necessity for such additional service and that public convenience will be promoted thereby. . ."
>
> R. S., c. 44, § 19 (1944), now R. S., c. 48, § 20 (1954).

The rule of law governing our consideration of the exceptions was settled at an early date in the history of utility regulation.

> "The facts on which the rulings of the Commission are based must be either agreed to by the parties or be found by the Commission. Facts thus determined upon are not open to question in this court, unless the Commission should find facts to exist without any substantial evidence to support them, when such finding would be open to exceptions as being unwarranted in law." *Hamilton* v. *Power Co.*, 121 Me. 422, 424, 117 A. 582 (1922).
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> "Questions of fact pertaining to a case are for consideration and decision by the Public Utilities Commission.
>
> "If a factual finding, basic of an order of the Commission, is supported by any substantial evidence, that is, by such evidence as, taken alone, would justify the inference of the fact, the finding is final. *Hamilton* v. *Caribou, etc., Company,* 121 Me. 422, 424. Here, as with a jury verdict, a mere difference of opinion between court and commission, in the deductions from the proof, or inferences to be drawn from the testimony, will not authorize the disturbance of a finding." *Gilman et al.* v. *Somerset Farmers Co-operative Tel. Co., et al.*, 129 Me. 243, 248, 151 A. 440 (1930).

See also *Public Utilities Comm.* v. *Johnson Motor Trans.*, 147 Me. 138, 84 A. (2nd) 142 (1951); *O'Donnell, Petitioner*, 147 Me. 259, 86 A. (2nd) 389 (1952); *Public Utilities Comm.* v. *Gallop*, 143 Me. 290, 62 A. (2nd) 166 (1948); *Utilities Commission* v. *Water Commissioners*, 123 Me. 389, 123 A. 177 (1924).

"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." *Central Me. Power Co.* v. *Public Utilities Comm.*, 150 Me. 257, 261, 109 A. (2nd) 512 (1954); *N. E. Tel. & Tel. Co.* v. *Public Utilities Comm.*, 148 Me. 374, 377, 94 A. (2nd) 801 (1953).

The issue may be narrowed to whether the findings of public convenience and necessity are based on any substantial evidence. Other findings are not questioned by the intervenor. The meaning of the phrase "public convenience and necessity" has been stated by our court in these words:

> ". . . the convenience and necessity, proof of which the statute requires, is the convenience and necessity of the public, as distinguished from that of any individual, or group of individuals." *Re: John M. Stanley*, 133 Me. 91, 93, 174 A. 93 (1934).

In an opinion rendered before the inclusion of "public convenience and necessity" in the statute, the court held the act "to vest in the Commission a broader discretion, having in view not only the necessity and convenience, but the general welfare of the public." *Motor Coaches* v. *Public Utilities*, 125 Me. 63, 66, 130 A. 866 (1925). See also 60 C. J. S., Motor Vehicles § 90; 37 Am. Jur., Motor Transportation § 12.

The facts are not seriously in dispute. The difficulty lies in the application of the law to the facts. The petitioner in his testimony throws no light on the proposed service. In substance he testified that he desired a certificate, and that

is the total extent of his contribution to the picture. The petitioner then produced a witness or witnesses from each of the towns for which he was granted a certificate.

Mr. Fortier from Casco runs a summer hotel or resort in South Casco. Sometimes he needs supplies for an evening meal, and it would be a convenience to his business if there was a transportation service available for this need. In answer to the question, "How often would you need that service, Mr. Fortier?" he replied, "That is hard telling. Not too often, I don't think." Mr. Crockett, operator of a summer resort in South Casco, testified in substance that he was not satisfied with the existing schedules of Congdon Transportation, the intervenor, and Bartlett, another carrier serving Casco in some degree. He believed with the petitioner in the field he could order goods from Portland as late as 1:30 P.M., instead of 10:00 A.M., and obtain them by 4:30 P.M., instead of 5:30 or 6:00 P.M. The witness did not know what kind of a schedule the petitioner would maintain. His complaint against the intervenor was stated in these words: "If we require service we should have service. What service you give is perfectly all right but your schedule doesn't work out to our advantage." There is nothing in the record to show that the witness ever complained to the intervenor, the Commission or anyone prior to the hearing.

We are left with evidence, taken most favorably to the Commission, that shows no more than the inability of two summer resort proprietors to obtain more expeditious delivery service on occasional small shipments. This evidence in our opinion lacks the substance required to form the basis of a finding of public convenience and necessity.

In the case of Raymond, the only witness, treasurer of a company manufacturing products for the electronics industry, testified in substance that their shipments both incoming and outgoing are almost entirely interstate and not

intrastate. Shipments originating at or destined for Portland are few in number, and are "negligible so far as total amount of freight goes." The witness also testified in substance that "the only service that was available that was at all reliable would entail a delay of some one to three days in transportation—a difference from what it was if we hauled our stuff to Portland and shipped direct."

How the proposed service by the petitioner would relieve this situation of days of delay was not stated. The evidence lacks substance. As in the case of Casco, the Commission erred in finding the elements of public convenience and necessity.

In the case of Naples, a witness engaged in a construction and garage business testified for the petitioner. In answer to the question, "Do you feel at the present time there are adequate facilities for trucking your supplies in and out of Naples?" he replied, "The answer could be yes or no. If you want it soon, the answer is no." He believed that if the petition was granted, "Certainly if we needed anything (from Portland) before noontime we would get it late in the afternoon which would be quite an advantage." Most of his shipments originate in Portland, with less than 5% from Naples. Only once in a while does he need anything in a hurry in his construction business. The petitioner did not tell the witness what service he would offer, "but I could see where it could be very beneficial."

Letters from a business man in Naples and a wholesale automotive business in Portland in favor of the petitioner were introduced by agreement in the record. In eight years in the garage business the witness had never talked with any of the carriers serving Naples, except the petitioner, who had an interstate service. In particular, he had never talked with the intervenor about adequacy of service.

In Naples, as in Casco and Raymond, we are left with a record which falls short of establishing that the proposed

service would serve the public convenience and the public necessity. At most, it would be more convenient should the interstate trucks of the petitioner stop to take and deliver the intrastate goods. It may be noted that in Casco, the evidence related to the summer resort business, and in Naples largely to the garage business. We may fairly assume that the garage business reaches a peak in this area in the summer months. The evidence touches, not at all, or at best very lightly, year around business in the several towns. In Raymond, as we have indicated, the complaint chiefly relates to interstate business.

It will serve no useful purpose to discuss the evidence in greater detail. There is no mathematical formula to be applied by the Commission, or by the court, in reaching or passing upon findings of public convenience and necessity.

Without question, the proposed service of the petitioner would be of some convenience to the hotel proprietors, to a lessor degree to the garage in emergencies, and to the manufacturing plant in Raymond, and no doubt to others as well. We are unable to find any evidence of a substantial nature pointing to the convenience and necessity of the public. Accordingly, we conclude that the Commission erred in making their decree.

Exceptions sustained.

Case remanded to the Public Utilities Commission for a decree upon the existing record in accordance with this opinion.

LARRY JOHN HARRISON PRO AMI
vs.
STANLEY WELLS

Somerset. Opinion, June 21, 1955.

New Trial. Negligence.
Newly Discovered Evidence.

There are five requisites to a new trial for alleged newly discovered evidence: (1) the new evidence must be such that it will probably change the result upon new trial, (2) it must have been discovered since the trial, (3) it must appear that it could not have been discovered before the trial by the exercise of due diligence, (4) it must be material to the issue, (5) it must not be merely cumulative or impeaching. Rules 16 and 17 Revised Rules of Court. R. S., 1954, Chap. 106, Sec. 15.

There are three important questions in every negligence action—how, when, and where, did the negligence occur.

ON MOTION FOR NEW TRIAL.

This is a negligence action before the Law Court upon motion for new trial. Motion for new trial denied.

Ames & Ames, for plaintiff.

Perkins, Weeks & Hutchins, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, TAPLEY, JJ. MR. JUSTICE TIRRELL sat at the time of argument and took part in conferences but died before writing of opinion.

FELLOWS, C. J. This case for alleged negligence causing injury to a three year old child comes to the Law Court on motion for new trial, based on claim of newly discovered evidence. The action was tried at the May 1954 term of the Superior Court for Somerset County, before a jury, which resulted in a directed verdict for the defendant. Exceptions

were taken, but not completed as required by the docket entry, and judgment was ordered for the defendant by the presiding justice at the September term, 1954. During the September term, 1954, and before judgment, the plaintiff filed this motion for new trial on grounds of alleged evidence newly discovered.

The plaintiff's declaration alleged that while delivering fuel oil at a dwelling house from a tank truck, the defendant "in turning said truck around for the purpose of leaving said driveway, after delivering said oil, then and there so carelessly and negligently managed and drove said truck that while backing or otherwise driving said truck for the purpose aforesaid of leaving said driveway, said truck violently hit or struck the plaintiff." The declaration further alleged due care on the part of the infant plaintiff Larry John Harrison, due care on the part of Theresa Harrison the mother of the plaintiff, and due care on the part of Mrs. Stanley Costello the plaintiff's grandmother.

No witness was presented at the trial who saw the car when it struck the plaintiff (if it did strike the plaintiff). No witness saw the child until the truck was gone, and the child was found lying in the road cut and bruised, but with no broken bones.

The record shows that the testimony offered by the plaintiff at the trial tends to prove that the infant plaintiff, then three years old, was in the care of his maternal grandmother, Anna Costello, with two other small children aged five and four, while the parents were away at work. Mrs. Costello lived in a house near to the Harrison house. Stanley Costello the grandfather ordered oil to be delivered, and then left for a walk. Mrs. Costello went from the Harrison house to her own house, stopping at a hen house for eggs. Two children ran ahead and the third (a girl) stayed with her. One boy ran back to her, and she then saw the three

year old plaintiff, Larry John Harrison, lying on the ground. She picked the child up and ran with him to the home of Dorothy Grendle who was a near neighbor, and who telephoned for the police, and for a car to take the child to a hospital. At this time the grandmother first saw a truck on the highway which she assumed had been in her driveway.

The only witness who placed the truck in the Costello driveway was Frederick H. Gould, Chief of Police, Fairfield, Maine. Gould received the phone call about 11 A.M., from the neighbor and took the child to the hospital. He later interviewed Stanley Wells, the defendant. The testimony was principally the police blotter which the Chief of Police read as follows: "I have two items in regards to this injury to this boy on the police blotter on December 11th, 1952. The first item is regarding receiving the call and responding to the call and taking the child to the hospital, but the latter part of that first item might apply to my conversation with Stanley Wells. It reads: Chief on return from hospital checked and found that an oil truck owned by Omar Champine, the proprietor of the Esso Service Sta. on Main Street, Fairfield, had made a delivery of oil at the Costello place that morning. The driver had no knowledge of striking the child. Driver was Stanley Wells. That was in the forenoon. At 2:30 P.M. to 3 P.M. inclusive Chief interviewing driver of truck that possibly struck John Harrison. Also boy's parents and other reports. Child was in hospital in an oxygen tent under care of Doctor Greenlaw. Driver of truck said that he noticed three children on lawn of Costello place when he entered driveway to make a delivery. He said that he delivered his oil stopping his truck in the driveway in front of the house. He said that before he started to drive off that he cautioned children to watch out for the truck, and that when he last observed them that they were running away from the truck in between the buildings. He then said that he drove ahead in the

driveway and then had to back up in order to head truck toward road. After backing up he drove off out of the driveway and did not strike anything to his knowledge. The child was found by Mrs. Annah Costello, the boy's grandmother."

At the close of the evidence, defendant's counsel moved for a directed verdict which was ordered, and properly. There was no evidence to show that the truck struck the plaintiff or that there was any negligence on the part of the defendant. It was only conjecture and supposition.

After the plaintiff's counsel filed this motion for a new trial, on the ground of newly discovered evidence, a hearing was held on December 20, 1954 before a Justice of the Superior Court and one witness, only, was called. The witness to show this alleged new evidence was Dorothy Grendle, who was the person who had telephoned for the police on the day the child was injured December 11, 1952. Mrs. Grendle, who lived approximately 150 feet from the Harrison and Costello homes, testified that the injured plaintiff was brought to her house by Mrs. Costello. Before the child was brought to her house she had been doing housework in the bedroom, and casually saw an oil truck in the Costello yard. There was no name on the truck, but she had seen the same truck on previous occasions. She saw the Harrison children playing in the yard while the truck was there. She saw the driver of the truck but was not acquainted with him and did not know his name. She only saw him standing with the hose in his hand. She did not see the truck leave the yard. A short time afterwards Mrs. Grendle met the grandmother at her door with the injured child and telephoned. Mrs. Grendle is friendly with the Costellos and Harrisons and talked with them several times. In fact, she called Mrs. Harrison to tell her that her infant son had been hurt, and that he was being taken to the hospital and for her to go there. Mrs. Grendle talked with the attorney for the plain-

tiff one day prior to the trial, when he came to her house to see how the houses were located. She testified as follows:

"Q. That morning that Larry John was brought to your house injured had you seen the Harrison children playing out there in the dooryard that morning?
A. Yes, they were.

Q. Whether or not you had seen them around in the dooryard about the same time that the oil truck was there?
A. Yes, I noticed them.

Q. Where did you notice them? Where were they?
A. They were playing around. There is a little garage just off the barn a little. The garage sits just off, and it is a house now, but it has been a garage before, and they were playing around in front of the barn and in front of the little garage there.

Q. Do you know whether or not Mr. and Mrs. Harrison were at home that day?
A. No, they were both at work.

Q. Do you know whether or not Mrs. Costello was at home that morning?
A. Yes, she was keeping the children.

Q. Did I understand you to say that you didn't see the truck as it left the yard?
A. I didn't.

Q. And you don't know on this particular morning whether it had to back up or not in order to turn, of your own knowledge?
A. No, I don't.

Q. Did you say you didn't see the machine leave the yard?
A. No, I didn't."

Mrs. Grendle also testified:

"A. I called Mrs. Harrison from Costellos at Hathaways where she worked to tell her Johnnie

had been hurt and they were taking him to the hospital, and for her to go there.

Q. That was on December 11th, 1952?
A. Yes.

Q. So that you did talk with her directly by telephone immediately after the accident?
A. Yes, I informed her of the accident.

Q. She knew that you had had some part in this transaction, this episode?
A. Yes.

Q. Now, did you ever talk with the attorneys or the Attorney Mr. Ames in regard to this accident?
A. Mr. Ames came down to my house one afternoon to see how the houses were situated. Other than that I hadn't.

Q. But you did talk with him at that time?
A. Yes, I did.

Q. And that was prior to this last hearing when he was looking the situation over?
A. Yes.

Q. So you did talk to Mr. Ames prior to that hearing?
A. Yes.

Q. Do you recall at that time whether you mentioned the fact that Mrs. Costello and the child had been over to your house?
A. Yes, I think I did mention it.

Q. You mentioned that to Mr. Ames?
A. I think so.

Q. And do you recall whether you stated you had gone to Costellos house?
A. I don't remember.

Q. You may or may not have?
A. I may have.

Q. Do you recall whether you mentioned anything regarding an oil truck in the yard?
A. Yes, I am quite sure I mentioned it."

The present motion for new trial on the ground that this evidence of Dorothy Grendle was newly discovered raises the questions of whether this claimed new evidence is such that it would probably change the result if a new trial was granted, and whether this evidence should have been discovered before the trial.

The law and rules of practice relating to a new trial for alleged newly discovered evidence are well established. Five things must appear (1) that the new evidence is such that it will probably change the result upon a new trial, (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. Applications for new trials on the ground of newly discovered evidence are not favored by the courts. Proof must be convincing. *London* v. *Smart,* 127 Me. 377; *State* v. *Casale,* 148 Me. 312; *Linscott* v. *Insurance Co.,* 88 Me. 497; *State* v. *Stain et al.,* 82 Me. 472; *Smith* v. *Booth Brothers,* 112 Me. 297; *Parsons* v. *Railway,* 96 Me. 503. It was early held in Maine, and consistently followed, that where there is a motion for new trial on ground of newly discovered evidence there "must be an end to litigation" and "the evidence must be very strong." *Snowman* v. *Wardwell,* 32 Me. 275.

The rules of court 16 and 17 printed in 147 Me. 470 state procedure and may require an affidavit to the motion. See also Revised Statutes, 1954, Chapter 106, Sec. 15, relative to criminal cases.

The plaintiff in his brief cites many cases which hold in effect that a child is bound to exercise only that degree of care which prudent children of his age are accustomed to use, and cases holding that a motor vehicle operator must see what he should see, in the exercise of reasonable care. All of which cases give well known rules that require no citation of authorities. There was no evidence, however, to

show what the child was doing when he was struck by the truck, if in fact he came in contact with the truck, and nothing to show the actions of the operator, from which a jury could decide whether there was care or negligence. If the child was hit, cut and bruised by the truck, and not by some other means while at play, he might have run into the side of the truck, as in *Greene, Admr.* v. *Willey,* 147 Me. 227.

The three all important questions asked in every negligence action—how, when, where—are not answered. The new witness does not answer. No witness (including the new witness Dorothy Grendle) saw the truck strike the plaintiff, if in fact it did strike the plaintiff. If the truck did strike the plaintiff, did it run into, or did it back into, the plaintiff? If it struck the plaintiff, did the plaintiff, at play, suddenly and without warning run into the path of the moving vehicle? All these are conjecture. There is no proof. The testimony of Mrs. Grendle adds nothing more to the nothing that was known. If her testimony be added to the testimony taken at the trial, the result would necessarily be the same, and a verdict would, on motion, have to be directed for the defendant. There is no evidence of either negligence on the part of the defendant or care on the part of the plaintiff. See *Bernstein* v. *Carmichael,* 146 Me. 446.

There is no need to consider whether due diligence was used to discover the evidence of Mrs. Grendle, or whether the rule of court was complied with, or any other necessary requirement. The motion must be denied, because the evidence of Mrs. Grendle that was presented would not change the result at another trial.

Motion for new trial denied.

CONSUMERS FUEL COMPANY
vs.
WILLIAM PARMENTER

Waldo. Opinion, June 22, 1955.

Exceptions.

When a trial by jury is waived and the parties submit their cause to a single justice, the Law Court has nothing to do with the facts found.

ON EXCEPTIONS.

This is an action upon an account annexed. This case is before the Law Court upon exceptions to the findings of a single Justice of the Superior Court.

Exceptions overruled.

Lorimer K. Eaton, for plaintiff.

Christopher S. Roberts, for defendant.

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

BELIVEAU, J. On exception. This case was heard by the presiding justice at the April Term 1954, Waldo County, by agreement of the parties, without the assistance of a jury. The right of exception was reserved by both parties as to questions of law. Verdict was for the plaintiff. The defendant excepted to the decision of the presiding justice.

There is no question about the items in the account annexed to the plaintiff's writ or the amounts charged therefor. The controversy is whether or not these items were a charge against William Parmenter or Parmenter Poultry Co., Inc.

The plaintiff offered evidence to substantiate that it was a proper charge against William Parmenter, who, prior to the incorporation of the Parmenter Poultry Co., Inc., conducted his business as an individual under the name of Parmenter Poultry Co.

This was the sole and only issue for the justice to determine on the evidence submitted to him, and he found for the plaintiff in an amount less than that declared on. The issue raised nothing more than a question of fact.

In his decision the justice accepted the plaintiff's version. The exception does not pretend, as we read the record, to raise any question of law but is based on the contention that the evidence was not properly interpreted by the court because there is not in the case enough evidence to warrant or justify a verdict for the plaintiff. This court may not interfere when the issue is one of fact. The finding of the justice is final.

> "When a trial by jury is waived and the parties submit their cause to a single Justice, 'this court has nothing to do with the facts as found. Its only duty is to determine whether the law has been rightly applied to those facts as found by the judicial referee.'
>
> *Kneeland* v. *Webb,* 68 Me., 540. *Reed* v. *Reed,* 70 Me., 504, 507."

To the same effect

Haskell v. *Hervey,* 74 Me. 192, 195; *Frank* v. *Mallett,* 92 Me. 77, 79, 42 A. 238, 239; *State* v. *Intox. Liquors,* 102 Me. 385, on Page 390, 67 A. 312, 314.

Exception Overruled.

CARL R. WRIGHT, ADMR.
ESTATE OF GEORGE A. LIBBY
vs.
RICHARD BUBAR

Somerset. Opinion, July 1, 1955.

Accounts. Affidavits. Rules of Court.
Minors. Ratification. Agency.
R. S., 1954, Chap. 113, Sec. 132.
R. S., 1954, Chap. 119, Sec. 2.
Exceptions.

Exceptions to the admission of testimony will be sustained only when the specific grounds of the objections are stated in the trial court.

The suppletory oath has no part in the evidence introduced in a case through the statutory affidavit and the objection that affiant administrator had no personal knowledge of the account does not effect the evidential force of the affidavit which the statute provides.

Whether a wife was duly authorized to ratify in writing the infant contract of her husband is a question of fact in the instant case.

ON EXCEPTIONS AND MOTION FOR NEW TRIAL.

This is an action upon an account annexed before the Law Court upon defendant's exception to the refusal to direct a verdict, exceptions to the admission of certain testimony, and upon general motion for new trial.

Exceptions overruled. Motion for new trial denied.

Carl R. Wright,
Eames & Eames, for plaintiff.

Anthony J. Cirillo, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, TAPLEY, JJ. MR. JUSTICE TIRRELL sat at the time of argument and took part in the conference but died before writing of the opinion.

WILLIAMSON, J. This is an action upon an account annexed to recover for goods sold by the plaintiff's intestate to the defendant. The case is before us on exceptions to the introduction of evidence, and to the refusal of the presiding justice to direct a verdict for the defendant, and also upon a general motion for a new trial on the usual grounds.

The defendant pleaded the general issue with a brief statement setting forth the defense of infancy and lack of ratification after reaching twenty-one years of age. The plaintiff filed a replication alleging such ratification. The plaintiff abandoned his contentions that the defendant was not a minor at the time of the contract and that the suit was for necessaries. The auditor appointed by the court found $648.31 was due on the account, which amount was stipulated by the parties to be the true balance for purposes of the action. The jury returned a verdict for $642.62. No question arises from the small difference between the stipulated amount and the verdict.

FIRST EXCEPTION

The defendant excepted to the admission of the statutory affidavit of the plaintiff, commonly used to prove an itemized account. The statute reads, in part:

> "In all actions brought on an itemized account annexed to the writ, the affidavit of the plaintiff, made before a notary public using a seal, that the account on which the action is brought is a true statement of the indebtedness existing between the parties to the suit with all proper credits given and that the prices or items charged therein are just and reasonable shall be prima facie evidence of the truth of the statement made in such affidavit and shall entitle the plaintiff to the judgment unless rebutted by competent and sufficient evidence."
>
> R. S., c. 100, § 132 (1944); now R. S., c. 113, § 132 (1954).

The record reads:

> "THE COURT: Do you care to give the reason or reserve your rights?
>
> "MR. CIRILLO: I will reserve my right.
>
> "THE COURT: Plaintiff's exhibit No. 1 admitted over the objection."

It is not clear what court and counsel had in mind in the reservation of rights. Thus we are left with no stated grounds of objection. The exception must be overruled for failure to meet the test that "Exceptions to the admission of testimony will be sustained only when the specific grounds of the objections are stated in the trial court." *State* v. *Budge,* 127 Me. 234, 241, 142 A. 857 (1928); *Rawley* v. *Palo Sales,* 144 Me. 375, 70 A. (2nd) 540 (1949); *Booth Bros.* v. *Hurricane Island Granite Co.,* 115 Me. 89, 97 A. 826 (1916); *McKown* v. *Powers,* 86 Me. 291, 29 A. 1079 (1894). "The rule is well established that 'objections to evidence should be stated at the time it is offered, and with sufficient definiteness to apprise the court and the opposite party of the precise grounds of the objection; and all objections not thus specifically stated, should be held to be waived.' *State* v. *Savage,* 69 Me. 112, 114." *Monroe Loan Society* v. *Owen,* 142 Me. 69, 70, 46 A. (2nd) 410 (1946).

If we treat the exception as properly before us, the defendant would gain no advantage. The objections in argument are that the plaintiff administrator did not have personal knowledge of the items charged and that there was no suppletory oath. The statute carefully provides for the evidential force of the affidavit. There are no objections to the form or content of the affidavit before us. The suppletory oath, whatever function it may perform elsewhere in the law, has no part in the evidence introduced into the case through the statutory affidavit.

In *Mansfield* v. *Gushee,* 120 Me. 333, 114 A. 296 (1921), our court discussed the use of the affidavit and its weight in evidence when offered by a representative party. Under the rule there stated, the affidavit was admissible and the jury was entitled but not compelled to accept it as proof of the facts there stated.

SECOND EXCEPTION

In considering the second and the remaining exceptions we must consider the statute, which reads:

> "No action shall be maintained on any contract made by a minor, unless he, or some person lawfully authorized, ratified it in writing after he arrived at the age of 21 years, except for necessaries or real estate of which he has received the title and retains the benefit."
>
> R. S., c. 106, § 2 (1944); now R. S., c. 119, § 2 (1954).

The point at issue is whether the contract was ratified in writing by some person lawfully authorized. The defendant was born May 15, 1930. Accordingly, it appears that the contract was made when he was a minor, and that the letters, later discussed, were written and this action was brought after he reached his majority. There is no contention that the defendant ratified the contract in writing by his own hand.

The following letter, which is the subject of the second exception, dated July 11, 1952 and addressed to the plaintiff, was offered in evidence during the cross-examination of the defendant:

> "In regards to your letter of the 24th of June. It is impossible for me to pay the bill at this time in full.

"If it is okey I could pay five dollars a week on it until I have the money to finish paying in full.

Very truly yours,

M.B. Richard Bubar"

The defendant testified that the letter was in his wife's handwriting. He objected to its admission on the ground that it was "a letter written by somebody else," not the defendant. The letter was an essential part of the evidence by which the plaintiff proposed to show ratification in writing by a person authorized by the defendant. The letter was properly admitted. The exception is overruled.

THIRD EXCEPTION

The third exception raises precisely the same issue as the second exception. It relates to the following letter dated July 19, 1952, and addressed to the plaintiff:

"It is impossible for me to pay the bill in full as I said before because I haven't the money at present.

"However if you don't think $5.00 a week is satisfactory. What is? It seems as though we could come to an agreement to some kind of payments.

Very truly yours,

M.B. Richard Bubar"

The letter was properly admitted. The exception is overruled.

FOURTH EXCEPTION AND GENERAL MOTION

The same questions are presented by the exception to the refusal to direct a verdict for the defendant and the motion for a new trial. *Tibbetts* v. *Central Maine Power Co.*, 142 Me. 190, 49 A. (2nd) 65 (1946). The basic question in our view of the case is whether the jury could properly find that

the defendant's wife was authorized by the defendant to send the letters mentioned above. In other words, was she "some person lawfully authorized"? If the letters, or either of them, had been signed by the defendant, they would have constituted the ratification necessary to support the plaintiff's action.

From the record the jury could well find as follows:

Between July 31, 1952 and January 9, 1953, payments from defendant's earnings in the amount of $120.68 were made by defendant's wife. In answer to the question, "How did she get the money to send to Mr. Wright?" the defendant replied, "Well, she gets my check Saturday and she pays the bills with it." He also testified in part, as follows:

"Q. She (the wife) took care of the money matters for the Richard Bubar family, is that the situation that existed?
"A. Well, more or less. I had something to say about it.

"Q. Certainly, and she tried to take care of this back bill didn't she that you owed the George Libby estate?
"A. Yes.

"Q. You were trying to clear it up?
"A. Yes.

"Q. You had given her the authority to pay that bill hadn't you?
"A. No.

"Q. You didn't object when she made the payments certainly?
"A. Well no, not much to say.

"Q. You knew they were being made?
"A. No."

* * * * * *

"Q. Your wife went ahead and answered this letter on her own?
"A. Yes.

"Q. She signed your name though?
"A. Yes.

"Q. Why did she do that?
"A. I don't know.

"Q. It was the practice in your family though wasn't it?
"A. Yes, it might have been the practice."

The jury was not obliged to accept the defendant's repeated denials of authority in his wife to ratify his contract in writing. He would have it that his wife, who transacted the business affairs of the family, went beyond her authority, not to be sure in spending his money and not in paying on the plaintiff's account, but in ratifying it.

Further, the defendant's wife, who was obviously a key witness on the existence of agency, did not testify. Her absence was unexplained. The jury if they so chose were entitled to infer that the tenor of her evidence would have been unfavorable to her husband. See *Look* v. *Watson & Sons,* 117 Me. 476, 104 A. 850 (1918); *Berry* v. *Adams,* 145 Me. 291, 75 A. (2nd) 461 (1950); 2 Wigmore, Evidence § 285 *et seq* (1940).

We are of the view that the evidence warranted a finding that defendant's wife was authorized to write the letters and that the liability of the defendant upon his contract made during minority was established. Recent statements of the familiar rules are found in *Fossett* v. *Durant,* 150 Me. 413, 113 A. (2nd) 620 (1955), and *Robichaud* v. *St. Cyr,* 150 Me. 168, 107 A. (2nd) 540 (1954).

The entry will be

Exceptions overruled.

Motion for new trial denied.

THE BURROWES CORPORATION
vs.
JAMES W. READ, ET AL.

Cumberland. Opinion, July 19, 1955.

Contracts. Evidence. Parol. Effective Date.

The parol evidence rule is a rule of substantive law, not a rule of evidence.

Where parties to a writing which purports to be an integration of a contract between them orally agree before or contemporaneously with the making of the writing, that it shall not become binding until a future day or until the happening of a future event, the oral agreement is operative if there is nothing in the writing inconsistent therewith.

ON EXCEPTIONS AND MOTION FOR NEW TRIAL.

This is an action of assumpsit before the Law Court upon a general motion for new trial and exception to the refusal of the presiding justice to direct a verdict for plaintiff.

Exceptions overruled. Motion for new trial denied.

Herbert H. Bennett, for plaintiff.

Paul T. Powers, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, JJ. THAXTER, A. R. J. TAPLEY, J. did not sit.

WILLIAMSON, J. This is an action of assumpsit to recover for the sale of fifteen aluminum combination windows manufactured by the plaintiff. The jury found for the defendant. The case is before us on exceptions to the admission of evidence, and to the refusal of the presiding justice to direct a verdict for the plaintiff; and also on motion for new trial. The issue is whether under the parol evidence

rule the defendant was prohibited from showing an oral agreement that a written order would not be effective unless the defendant so notified the plaintiff within thirty days.

The evidence may be summarized as follows:

Plaintiff's salesman approached the defendant at his home in Bowdoinham, made measurements for the windows and submitted to him a printed order blank for his signature.

The order blank, which is the written contract on which the plaintiff bases its case, was directed to the plaintiff, and read in part: "Manufacture and ship . . . to (naming defendant with address) 15 windows for the sum of $459.00 . . ." The instrument was signed by the defendant after the printed word "Purchaser." There followed the printed words "The above order to fabricate said combination units is hereby accepted," with the signature of the salesman, whose authority to accept the order is not questioned.

A paragraph of printed "TERMS" was struck from the order blank by pen by the salesman. They referred to time and place of payment, acceptance of the contract by plaintiff at Portland, delays beyond plaintiff's control, and in particular included a sentence reading "As the material necessary to fill this order is custom made, it is understood and agreed that this order is not subject to cancellation."

It was contemplated by the parties that the purchase would be financed by a Federal Housing Administration property improvement loan at a bank. An application for this purpose, and a note, both undated, were signed by the defendant with the order blank. The order blank dated "April 1954" was in fact signed on April 14, 1954.

On April 29 the defendant's wife, for the defendant, wrote the plaintiff "You told us to let you know one way or the other within a month or so. We have decided not to

have your combination windows." In the meantime the plaintiff had manufactured the windows. On the refusal of the defendant to accept them, the plaintiff brought suit on the contract.

The defense is in substance that the salesman and the plaintiff agreed that the order would not become effective until the defendant so notified the plaintiff. This agreement, made orally at the time the order blank was signed, the defendant urges created a condition precedent to the coming into existence of the contract evidenced by the order blank.

There was testimony from the defendant to the following effect:

"Q. Didn't he tell you that the order wouldn't be effective until you let the company know within thirty days whether or not you wanted the windows?
A. Yes."

* * * * * *

"Q. Now as I understand your statement, he said at that time that you could cancel the order any time within thirty days?
A. Yes, sir.
Q. That they wouldn't go ahead and make the windows until you told them to go ahead; is that correct?
A. That is correct."

Mrs. Read, defendant's wife, testified:

"A. They (the salesmen) said that we could look around, and there was a number of houses in Bowdoinham that we could look around and see the windows before we signed as long as we let them know within thirty days whether we wanted them or not."

* * * * * *

"Q. Now my question is this: That if you wouldn't take his (the salesman's) word as to

cancellation within a thirty-day period, why did you take his word that he wouldn't submit this order blank to the Burrowes Corporation within thirty days?

A. He told us he wouldn't. He wouldn't submit the order until we had let him know one way or the other. Then they was going to manufacture the windows."

* * * * * *

"Q. Now Mrs. Read, can you tell me why you bothered signing the contract on that day, why you didn't tell him that when you made up your mind you will notify him?

A. Because he said he wasn't in that territory very often."

A third party testified:

"A. The salesman asked Mr. Read if he knew (a person nearby who had plaintiff's windows) personally, and he says, 'Why don't you go over and look around before you make your mind up and let us know within a month or two what you have decided, and they measured a few more windows to get the measurements outside.

Q. You heard Mr. Carey (the salesman) say to them, 'Why don't you look around? When you make your mind up let us know within thirty days'?

A. Yes, sir; that is right in the same room; very close to me."

There can be no question of the sufficiency of the evidence to establish the oral agreement as a fact. The issue lies not in the sufficiency of the evidence to prove an agreement outside of the written order blank, but in determining whether the conditions may be attached to the written order.

The parol evidence rule is a rule of substantive law, not a rule of evidence. *Spaulding* v. *American Realty Co.*, 121 Me. 493, 118 A. 322 (1922). "It is a rule of substantive

law which, when applicable, defines the limits of a contract." 3 Williston, Contracts § 631 (rev. ed. 1936.) If excluded by the parol evidence rule, then such evidence could not be properly considered by the jury even in the absence of objection. *Goddard* v. *Cutts,* 11 Me. 440 (1834).

The contract for the purchase of the windows was apparently integrated in the order blank. In any event, neither party suggests that the contract fails by reason, for example, of lack of a more particular description of the windows to be manufactured, or of the necessity of filling in blanks in the papers relating to the financing.

The governing principle to the effect that the parol evidence rule is not applicable in the case before us is found in Restatement, Contracts § 241, as follows:

> "Oral Agreements That Writings Shall Not Become Binding Until a Future Event.
>
> "Where parties to a writing which purports to be an integration of a contract between them orally agree, before or contemporaneously with the making of the writing, that it shall not become binding until a future day or until the happening of a future event, the oral agreement is operative if there is nothing in the writing inconsistent therewith."

Professor Williston states the rule in these words:

> "The parol evidence rule does not become applicable unless there is an integration of the agreement or contract, that is, unless the parties have assented to a certain writing or writings as the statement of the agreement or contract between them. Accordingly, it may be shown by parol evidence not only that a writing was never executed or delivered as a contract, or that the validity of the agreement was impaired by fraud, illegality, duress, mistake, insufficiency of consideration, or failure of consideration, rendering it void or voidable; but also (if the writing is unsealed) that the

> parties agreed by parol that the writing in question should not become effective until some future day or the happening of some contingency, if this is not inconsistent with the express terms of the writing." 3 Williston, Contracts § 634.

See also 9 Wigmore, Evidence § 2410 (3d Ed.); 20 Am. Jur., Evidence § 1095; 32 C. J. S., Evidence §§ 935, 938.

The principle is well illustrated in *Rivard* v. *Casualty Company,* 116 Me. 46, 100 A. 101 (1917), in which it was held that an oral agreement whereby the plaintiff was given thirty days for approval of an insurance policy was not barred by the parol evidence rule. The court said, at page 48:

> "The rule excluding parol evidence to contradict a written instrument is not infringed by the admission of evidence to show that the instrument was not delivered as a completed contract."

See *Kuhn* v. *Simmons,* 126 Me. 434, 139 A. 474 (1927), and *Reed* v. *Reed,* 117 Me. 281, 104 A. 227 (1918).

In *Allen* v. *Marciano,* 84 A. (2nd) (1951), the Rhode Island Court held that the purchaser, in an action to recover a binder payment on real estate, could show an oral agreement made before the written sales contract to the effect that the sale was dependent upon obtaining a G. I. loan.

In *Miner Rodelius Co.* v. *Lysen,* 277 N. W. 523 (1938), the Minnesota Court upheld the admission of evidence of oral understanding with reference to a written contract to purchase an automobile. The court said, at page 524: "From the facts here appearing it seems plain that there were representations made by plaintiff's agent, relied upon by defendant, that there was not to be a deal at all if within the time limited he should conclude not to go through with the trade."

As we have indicated, the evidence was sufficient to establish the oral agreement. It is not inconsistent with the

terms of the written order. The jury could properly consider such evidence and reach the conclusion therefrom, not that the written order was changed or altered, but that the written order never in fact became a completed contract between the parties.

The entry will be

Exceptions overruled.

Motion for new trial denied.

RUDOLPH A. MICHALKA

vs.

GREAT NORTHERN PAPER COMPANY

Aroostook. Opinion, July 21, 1955.

Negligence. Dams. Riparian Rights. Water.

The owner of a dam is entitled to permit the natural flow of water to pass and the lower riparian owner is entitled thereto unless a legislative charter authorizes otherwise.

Negligence must be alleged and proved to render a dam owner liable to a lower riparian proprietor; and the negligence must be the proximate cause of the injury.

Negligence consists in a failure to provide against the ordinary occurrences of life.

Without knowledge of damage the duty to use ordinary care arises from probabilities rather than possibilities.

To render liability without negligence the act must be shown to be wrongful as against the plaintiff.

ON EXCEPTIONS.

This is a negligence action before the Law Court upon exceptions by the defendant to the refusal to direct a verdict.

Exceptions sustained.

Scott Brown, for plaintiff.

Louis C. Stearns,
Louis C. Stearns, 3rd, for defendant.

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

FELLOWS, C. J. This case comes to the Law Court from Aroostook County Superior Court on exceptions by the defendant after jury verdict for the plaintiff.

The bill of exceptions states that "this was an action in negligence wherein it was alleged that defendant maintained and controlled a dam at the outlet of Mooseleuk Lake; that defendant negligently released impounded water from Mooseleuk Lake, thereby causing ice to be dislodged in Mooseleuk Stream and Aroostook River, thereby causing ice to jam adjacent to and below land of plaintiff in Oxbow Plantation approximately 30 miles from Mooseleuk Dam, thereby causing water and ice to overflow on land of the plaintiff, and thereby causing damage to the real and personal property of the plaintiff."

Exceptions were taken by the defendant company to the denial by the presiding justice of its motion for a directed verdict and three other exceptions relative to admissibility of a letter written by the Vice President of the company, and certain testimony.

The evidence, looked at in the plaintiff's favor, as is required of us after verdict, shows that the plaintiff, Rudolph A. Michalka was the riparian owner of a farm and buildings on the Aroostook River in Oxbow Plantation in Aroostook County. The defendant Great Northern Paper Company maintained a dam in Piscataquis County, thirty miles above

the plaintiff's farm at Mooseleuk Lake, and the water from this lake, together with the water from numerous other lakes and streams flowed into the outlet of Mooseleuk Lake known as Mooseleuk Stream, and thence approximately thirty miles through and across five or six unorganized townships of heavily wooded wildland to the Aroostook River, gathering in its course the water from many streams that run into it.

The record discloses that the supply of water in the Aroostook River above the plaintiff's farm is furnished by Munsungan Lake, Millinocket Lake, Millimagasett Lake, and Mooseleuk Lake. There was a dam at the outlet of Millinocket and Mooseleuk Lakes, the former being controlled by Maine Public Service Company and the latter by the defendant. There was no controlled flowage of the other outlets.

The dam maintained by the defendant at the outlet of Mooseleuk Lake thirty miles above, or northerly, of the plaintiff's farm, was about one hundred feet long and with the crib work about 150 feet. It had five gates with flash boards on one spillway. Four of the gates were eight feet six inches in height, and seven feet four inches in width. The spillway was two feet below the crest of the dam. This space of two feet was filled by flashboards. The dam created a head of water approximately eight feet, six inches in depth. The natural head before the dam was built was from two to three feet. Mooseleuk Lake before the dam was built was about a mile and a quarter long by one-half mile wide. Each of the four larger gates would discharge, if opened, 444 cubic feet of water per second. The drainage area of Mooseleuk Lake was ninety-nine square miles.

On March 31, 1953 after one of our severe winters of much cold and snow when many streams freeze deep, and after spring rains and the beginning of "spring break-up" in the locality, the plaintiff heard the rushing of water and

the breaking up of the ice in the river, and saw obstructions in the river caused by the piling up and jamming together of the ice cakes. The plaintiff testified that some of these ice cakes were from two feet to thirty inches thick, and varied in surface area from small cakes to twenty square feet, and one that he saw in particular "was a good sixty feet across." This ice piled up in the Aroostook River near and below the farm, and caused the water to be temporarily dammed up and overflow the plaintiff's property, causing severe damage to buildings, farm machinery, fertilizer, motor vehicles and other personal property.

On April 2, 1953 another flood occurred, piling up ice on the river bed, and floating large ice cakes onto the plaintiff's farm, and moving some small buildings from foundations and flooding his barn and bungalow. Two witnesses for the plaintiff, each more than seventy years old, testified that they had never seen the river at this point in such a flood condition.

There was no evidence offered by the plaintiff that any water in excess of the natural flow was released by the defendant at its dam. The letter written by William Hilton, the defendant's Vice President, who was manager of defendant's woodlands April 23, 1953, in response to a letter and a visit of the plaintiff to Mr. Hilton, offered by the plaintiff (subject to objection and exception) stated that "we have two dams which could effect the flow of the Aroostook River by your farm, namely, the Munsungen Dam and the Mooseleuk Dam. The Munsungen Dam gates have been wide open all the spring. The Mooseleuk gates—of which there are three—on March 26th the first gate was opened 5 feet and the flash boards taken off the spillway, and on March 31st the second gate was raised all the way up, and the third gate was not raised at all. They have remained in these positions ever since. Just one and one-half gates extra water, with the flood that you had on that river,

would hardly be noticed. I do not see where it could possibly be any fault of ours in handling the water that caused the big flow of ice and water that did occur in the Aroostook River.

According to the government measurements, the top flow of the river measured down around Washburn, which was considerably below your part of the country, was 30,000 second feet and the one and one-half gates up at Mooseleuk would add but little to the natural flood flow at that time."

The foregoing letter was the only bit of evidence to show what the defendant did with relation to the operation of its dam. The plaintiff in this regard depended on possibility and conjecture. There was no evidence of any negligent act. From anything that appears in the record, the opening of the gates as stated by Mr. Hilton would be only to care for the natural flow. There was no evidence of the release of impounded water, and on the contrary there is evidence that after the raising of the dam gates the height of the pond behind the dam increased. It did not diminish.

The plaintiff alleged in his declaration that the defendant: "prematurely opened the gates of said dam, well knowing that the ice in said Mooseleuk Stream and Aroostook River was fast and anchored, thereby releasing the abnormal head of water in said Mooseleuk Lake in enormous quantities," but there is not a scintilla of credible evidence to support this allegation. The plaintiff argues that because there was an unprecedented flood at this particular place on or near the plaintiff's farm on the Aroostook River, that his allegation must be so.

The plaintiff's evidence shows that there were five discharge gates in this dam, and his evidence indicates one and one-half gates had been opened, and only a small portion of the total discharge capacity of the dam. This water after passing the dam had to travel down Mooseleuk Stream

through an uninhabited and wooded area nineteen miles to join the Aroostook, some portion of this water would be normally and naturally absorbed and dispersed in the pools, back eddys and area of Mooseleuk Stream. After joining the Aroostook River it then had to travel eleven miles through uninhabited woodlands before it reached the plaintiff's land. The evidence indicates that Mooseleuk Dam is capable of holding a head of eight and one-half feet at the dam and the flowed lake approximates one square mile, and that by comparison this is a very small dam and a very small reservoir of water in a large watershed, and a small fraction of this small pond passed through the defendant's dam during this period of time. To defendant's knowledge there was no ice in Mooseleuk Stream to be disturbed or dislodged. The water had been running over the spillway of the dam all winter and defendant's agent could only reasonably anticipate that this water had followed the channel of Mooseleuk Stream and the Aroostook River as it normally should.

The record shows that the dam maintained at Mooseleuk Lake by the defendant company was authorized by legislative charter for log driving purposes. Its maintenance and operation for log driving purposes was lawful as against all lower riparian owners. Its use for log driving purposes necessarily involves the storage and discharge of water.

The owner of a dam is entitled to permit the natural flow to pass. This common law right is recognized by both counsel in their briefs. The lower riparian owner is entitled to the natural flow, unless of course a legislative charter authorizes otherwise. *Phillips* v. *Sherman,* 64 Me. 171, 174; *Pearson* v. *Rolfe,* 76 Me. 380; *Brooks* v. *Cedar Brook Co.,* 82 Me. 17; *Lumber Co.* v. *Electric Co.,* 121 Me. 287.

There must be negligence alleged and proved to make a defendant dam owner liable to a lower riparian proprietor,

and the defendant's negligence must be the proximate cause of the plaintiff's injury. "To render the defendant liable without negligence, his act must be shown to be wrongful as against the plaintiff." *Frye* v. *Moore,* 53 Me. 583 quoted in *Reynolds* v. *Hinman,* 145 Me. 343, 359.

Negligence consists in a failure to provide against the ordinary occurrences of life, and the fact that plaintiff's land was flowed by ice and water once in 66 years, as testified by plaintiff's witnesses, does not make out a case of negligence. Without knowledge of danger the duty to use ordinary care arises from probabilities rather than possibilities of danger. *Birmingham* v. *Railroad,* 128 Me. 264; *Edwards* v. *Power Co.,* 128 Me. 207; *Melanson* v. *Reed Bros.,* 146 Me. 16. See also 38 Am. Jur. 665, "Negligence," Secs. 23, 24.

In *Rockford Paper Mills* v. *Rockford,* 18 N. W. (2nd) 380 (Mich.) the plaintiff was owner of a dam on the Rogue River, which dam stored water for power purposes for making paper products. Defendant owned a dam two miles above on the same river. During a period of flood the defendant opened the gates and released water from its dam, but at no time while any of these gates were opened was there a material lowering of the water in the pond above the dam. The court held that the proprietors of the upper dam were not the insurers of the strength or stability of a lower dam and before they could be held responsible, there must have been negligence or some intention on their part to suddenly release impounded waters so that the damage on the lower dam would follow. They could not be held responsible for a superfluity of waters coming from a flood condition arising above their dam without any negligent act on their part. See also *Iodice* v. *State,* 102 N. Y. Supp. (2nd) 742.

A "scintilla of evidence" will not support a verdict. *Bernstein* v. *Carmichael,* 146 Me. 446; *Beaulieu* v. *Portland Co.,*

48 Me. 291; *Connor* v. *Giles*, 76 Me. 132; *Nason* v. *West*, 78 Me. 253.

The causal connection between defendant's acts of omission or commission, complained of, and the plaintiff's injury must not be left to conjecture or surmise. If the evidence leaves it uncertain as to the real cause of injury sympathy for his misfortune cannot supply necessary evidence. *Loring* v. *Railroad Co.*, 129 Me. 369.

The burden is upon the plaintiff to prove that the injury suffered by the plaintiff was the proximate result of acts by the defendant. It is a fundamental principle of law that in order to maintain an action for negligence, the injury of which the plaintiff complains must have been natural probable consequences of the wrongful act. The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the result would not have occurred. The question of proximate cause is ordinarily for the jury, but where the evidence discloses no connection between the injury and the negligence charged, except a bare possibility that the former resulted from the latter, there is nothing for the jury, if it is also possible that the injury may be due to other causes.

In applying the general principles of proximate cause to this case, it is apparent from the evidence that the plaintiff's injury did not result from the defendant's discharging water from Mooseleuk Lake; it resulted from an entirely different cause. The appearance of an ice dam below the plaintiff's property was the efficient cause, and without the creation of this ice dam the water would not have overflowed the banks of the Aroostook River, and ice and water would not have been cast onto the plaintiff's property.

The plaintiff and the plaintiff's witnesses had never seen anything like it. The evidence, however, does not disclose

any connection between the release of water at Mooseleuk Lake and the formation of an ice jam in the Aroostook River more than thirty miles away. The jury's finding that the acts were connected is based entirely on speculation and sympathy, and not on evidence. There is no evidence as to how long a period of time it would take the water released at Mooseleuk Dam to reach the Oxbow flats where the damage occurred. The plaintiff's evidence establishes two rates of flow. The plaintiff's evidence indicates the first gate was raised March 26, and the ice jam appeared March 31—five days later—in the vicinity of the plaintiff's property. If this first released water had any connection with the ice jam, the water used five days to move thirty miles, an average of one quarter of a mile an hour. The plaintiff's evidence indicates that the ice jam and water overflow increased substantially on April 2 and the second gate of the dam was raised March 31. This time the ice and water moved the same thirty miles and consumed three days. In either situation the rate of flow is incredibly slow. From this evidence it is obvious that the ice jam and overflow was caused by the seasonal mild weather and the natural movement of ice and water in the entire Aroostook River water shed with its many streams, and the water coming from Mooseleuk Lake was only one of the natural conditions.

In the instant case the small amount of water that the evidence indicates passed through Mooseleuk Dam, could not materially increase the volume of water and ice at Oxbow flats thirty miles below, and thus it is a situation where the court may say with almost certainty that the injury suffered by the plaintiff was not the natural and probable consequence of any acts (whatever they were) committed by this defendant's agents.

The defendant's motion that a verdict be directed for the defendant should have been granted because the defendant may rightfully permit water to pass over or through its dam

in such quantities as the water is flowing into Mooseleuk Lake, and the plaintiff failed to show that impounded water was released. On the contrary, the evidence clearly shows that the defendant impounded and restrained a portion of the natural flow coming into Mooseleuk Lake. Also the evidence does not support negligence by the defendant, for no reasonable man could have foreseen that the release of water through Mooseleuk Dam would cause this damage to any person or property 30 miles below. The evidence produced is so slight that it can be considered only a scintilla of evidence and not sufficient to support a verdict for the plaintiff. Further, the defendant's alleged negligence was not the proximate cause of the plaintiff's damage, and his injury resulted from other causes in which the defendant in no part contributed and over which the defendant had no control.

The exception to the refusal to direct a verdict must be sustained. It is therefore unnecessary to consider the other exceptions.

The entry will be

Exceptions sustained.

HELEN L. MARTIN *vs.* ELEANOR ATHERTON
MORRIS A. MARTIN *vs.* ELEANOR ATHERTON
WAYNE L. MARTIN, PRO AMI, BY
MORRIS A. MARTIN *vs.* ELEANOR ATHERTON

Penobscot. Opinion, August 1, 1955.

Negligence. Pedestrians. Judge's Charge. New Trial. Exceptions. Minors. Jurors.

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

Exceptions must be taken to that part of the judge's charge which is not satisfactory. It is only where manifest error has occurred and injustice inevitably results that alleged error in the charge will be considered on general motion.

A child injured while in the arms of a pedestrian crossing the street can recover only by showing due care of the custodian.

The taking of notes by jurors is not illegal.

The procedure for challenging alleged irregularities of jurors is (1) a motion for mistrial addressed immediately to the presiding justice, or (2) a motion to the Law Court under R. S., Chap. 113, Sec. 59.

A party cannot take his chances on a favorable verdict and then, if it is adverse, object because of facts known before it was rendered.

ON MOTION AND EXCEPTIONS.

These are negligence actions before the Law Court upon plaintiffs' general motion for a new trial and exceptions. Motion and Exceptions overruled.

Pilot & Pilot,
Gerard Collins, for plaintiffs.

James W. Gillin,
David W. Fuller,
Harold A. Towle, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, TAPLEY, JJ. MR. JUSTICE TIRRELL sat at the time of argument and took part in conferences but died before the writing of the opinion.

BELIVEAU, J. These tort cases are each before us first, on a general motion for a new trial on the usual grounds addressed to the Law Court and second, on exceptions to the denial of special motion filed with the presiding justice after verdict and before judgment alleging misconduct of jurors in taking notes, and praying (1) that the jurors might be examined and compelled to show cause why they were not biased and prejudiced and to show that they rendered a true and just verdict, and (2) that a new trial might be granted, presumably because of the alleged misconduct.

The facts show that on September 30, 1952, at about three o'clock in the afternoon, Helen L. Martin and her son proceeded on foot to the intersection of Forest Avenue and Garland Street in the City of Bangor, where Mrs. Martin planned to cross Garland Street at the intersection, with the home of her sister-in-law as her destination. A passenger bus stationed at the intersection was put in motion when Mrs. Martin arrived at that point. She took the child in her arms and started across Forest Avenue to reach the northerly side of that highway. As she neared the opposite side, the collision complained of occurred. She was severely injured as was the child she carried in her arms.

The plaintiffs in their declarations alleged, as was necessary, that they were exercising due care and that the collision was due wholly to the negligence of the defendant. Not only were these allegations necessary but in order to be successful these two elements in the case had to be resolved in favor of the plaintiffs by the jury. This the jury failed to do.

The reading of the record discloses these salient facts.

Mrs. Martin as she reached the intersection, with the child, waited for the bus, then parked, to move along. She then made her way across Garland Street with the child in her arms, as before stated. The defendant was operating her automobile in Mrs. Martin's direction and the two came together on the further or northerly side of Garland Street. There is no evidence that the defendant was violating any municipal ordinance or the laws of this State relating to the operation of a motor vehicle. Neither Mrs. Martin nor her witness, Mrs. Botzko, testified as to the manner in which the defendant was operating the car. The record discloses that the first knowledge either one of them had was the instant the car struck Mrs. Martin.

It is true Mrs. Martin testified that when she crossed the highway she looked in both directions, on her left and on her right, and saw no car coming. In this she was wrong, as it is obvious the defendant's car was on that highway coming in her direction in close proximity to her. It was there for her to see.

> "Mere looking is not sufficient. One is bound to see what is obviously to be seen."
>
> *Clancy* v. *Cumberland County Power & Light Co.*, 128 Me. at page 278.

The jury apparently found that the defendant's car was visible to the plaintiff and could have been seen by her if she had exercised that ordinary care which it was her duty to exercise in that situation and under those conditions.

The defendant testified that she first saw Mrs. Martin and her baby directly in front of the car and could not stop in time to avoid a collision. There is other testimony that Mrs. Martin proceeded to cross immediately in back of the bus without paying any attention to the traffic. From this and other evidence the jury concluded Mrs. Martin was guilty of contributory negligence.

While the plaintiffs took no exceptions to the charge by the presiding justice they now complain that the following instructions, part of the charge, were not proper and can be considered on their general motion, to wit:

> "He (meaning the plaintiff) cannot justify such action, that is, walking into a position of danger on his part, by showing that he looked for danger, which was apparent, and did not see it. Mere looking will not suffice. A pedestrian in such a situation is bound to see what is obviously to be seen."

As authority for the propriety of raising this objection in their brief, for the first time, they rely on *Cox* v. *Metropolitan Life Insurance Company,* 139 Me. 167.

It is true that in some instances the court has considered matters on general motion which should have been excepted to during the trial.

> "A general motion ordinarily does not reach a defect in the judge's charge. Where, however, manifest error in law has occurred in the trial of a case and injustice inevitably results, the law of the case may be examined on a motion for a new trial on the ground that the verdict is against the law."
>
> *Springer* v. *Barnes,* 137 Me., page 20.

The situation here is not comparable to the one which the court discusses in the above-cited case, and in other cases in Maine. While in some instances where grave injustice might result the court has considered on a general motion that which ordinarily should have been taken care of by exceptions, the cases here do not come within that category. It is still the rule that exceptions must be taken to that part of the charge which is not satisfactory. Exceptions or requested instructions, where the law has been unintentionally misstated in the charge, gives the presiding justice an opportunity to correct such errors before the jury retires. While it is not necessary to so rule, that part of the

charge was not exceptionable. It merely gave the correct rule of law as it applies to a pedestrian about to cross a highway. This was one of the important issues of these cases.

Wayne L. Martin, one of the plaintiffs, was two years old at the time of the accident, and because of his age, was *non sui juris.* He can only recover by showing due care of the custodian.

Gravel v. *Leblanc,* 131 Me., Page 330.

It was wholly a question of fact for the jury to determine and there is ample evidence in the case to justify the verdicts.

Sometime during the charge the presiding justice noticed that two of the jurors were taking notes. He immediately asked them to desist and gave the reasons why. This apparently took care of the situation as far as the parties were concerned and nothing more was said or done about this before the jury retired. Some few days after the verdicts, and during the term, the plaintiffs filed motions in each case, all identical, which consisted of two parts—one asking for examination of the jurors and the other for a new trial.

The purpose of this motion was to allow the plaintiffs' attorney to examine the jurors who took the notes and, as argued by the plaintiffs in their brief, to show:

> "Why they were not prejudiced, biased and partial so far as such evidence related to the plaintiffs ....."

Hearing was had on this motion and the motion denied. Exception was taken to this ruling.

By the great weight of authority, the taking of notes by jurors is not illegal. We agree with that rule.

Commonwealth v. *Tucker,* 189 Mass. 457 at Page 497; 53 Am. Jur., Sec. 851, Page 623.

There were two methods of procedure opened to the plaintiffs. One was to immediately address a motion to the presiding justice for a mistrial and the other a motion to this court, as provided by Section 59 of Chapter 113 of the Revised Statutes.

Rioux v. *Portland Water District,* 132 Me. 307, recognizes that both methods can be employed simultaneously. Regardless of the fact that the alleged injured party followed one or both of the recognized methods, his objections should have been noted, immediately, at the time the act complained of occurred. The plaintiffs should have protected their rights in that manner when the presiding justice cautioned the jurors against taking notes.

Our court in *State of Maine* v. *Rheaume,* on a motion for a mistrial on the grounds that a juror had been unable to comprehend all of the testimony, because of alleged physical disability, filed after verdict, the court there held "that the motion should have been made immediately on discovery of the juror's alleged incapacity."

The court further said:

> "Under such circumstances as these, a party is not permitted to take his chance of a favorable verdict, and then, if it is adverse, interpose an objection to it based on facts which were known to him before it was rendered."
>
> *State of Maine* v. *Rheaume,* 131 Me. Page 261; *McGuffie* v. *Hooper,* 122 Me. 118.

Motion and exceptions overruled.

MILDRED COBB ALBISON
vs.
ROBBINS & WHITE, INC.

PERCY G. FREEMAN
vs.
ROBBINS & WHITE, INC.

MAXWELL S. SHAW
KATHRYN L. SHAW
vs.
ROBBINS & WHITE, INC.

ROBERT F. WEBBER
LINNIE A. WEBBER
vs.
ROBBINS & WHITE, INC.

Kennebec. Opinion, August 2, 1955.

Negligence. Blasting. Insurance. Evidence. Common Knowledge.

Reynolds v. *Hinman Co.*, 145 Me. 343, distinguished.

Negligence must be alleged and proved.

Care must be taken by a defendant in proportion to the danger involved. Ordinary care depends on the circumstances of each particular case. When the risk is great a person must be especially cautious.

The continued use after notice of the same amounts of dynamite that caused and continually caused increasing injury is compelling evidence of negligence.

Statements relative to the fact that the defendant was protected by insurance are not proper.

The proof of negligence in blasting cases does not require evidence by eye witnesses or experts nor that methods other than those used by defendant could have been used.

It is error for referees to fail to take into consideration what is common knowledge.

ON EXCEPTIONS.

This is a negligence action before the Law Court upon exceptions by the plaintiff to allowance of a majority report of the referees. Exceptions sustained.

The four cases remanded to the Superior Court for further proceedings.

Joly & Marden,
F. Harold Dubord, for plaintiff.

Locke, Campbell, Reid & Hebert, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, TAPLEY, JJ. MR. JUSTICE TIRRELL heard arguments of these cases and took part in conferences but died before the opinion was written.

FELLOWS, C. J. These cases come before the Law Court on plaintiffs' exceptions to the allowance by the Kennebec County Superior Court of a majority report of three referees.

These cases are four tort actions heard together by agreement in which the plaintiffs sought to recover damages for injuries to their respective houses resulting from blasting operations. The defendant was engaged in the construction of a certain tunnel for the Waterville Sewerage District located in close proximity to property owned by the plaintiffs and each of them, and during the course of the construction job, plaintiffs' properties were damaged as a result of blasting. The cases were referred to three referees with the right of exceptions reserved in matters of law.

After a full trial, two of the referees filed a report that in their opinion there is "no proof" that the defendant was

acting in a negligent manner, and found for the defendant. One of the referees filed a more comprehensive report and showed clearly that negligence had been established, and that there was liability on the part of the defendant. The defendant filed a motion with the presiding justice of the Superior Court asking that the majority report be accepted, which motion was granted and the majority report allowed. Exceptions by the plaintiffs were taken and allowed. Plaintiffs filed a motion that the minority report be accepted which was denied and exceptions taken.

During the progress of the trial, plaintiffs offered evidence to the effect that the defendant's employee in charge of the blasting, after being told that the first blast or blasts had caused serious damage, had informed the plaintiffs, or several of them, that they had no cause to worry about the damage which was manifestly and admittedly being caused because the defendant was covered by liability insurance, and that the plaintiffs would surely be compensated. The purpose of offering this evidence was stated by plaintiffs' counsel as being to show that because the man in charge of the job felt that all damage would be compensated by an insurance carrier, he did not exercise the degree of care which he should have exercised, and therefore was negligent. This evidence was excluded by the referees, and exceptions taken.

The plaintiffs in objecting to the acceptance of the majority report, and in support of their objection, set forth the following specific grounds of objections.

1. The majority of the referees erred in finding that the evidence did not support a verdict for the plaintiffs.
2. The majority of the referees erred in finding that the plaintiffs had not proved the negligence of the defendant.
3. The majority of the referees erred in finding that the defendant absolved itself of liability

because of the testimony of the superintendent that he was using the least amount of dynamite that was possible to get the rock out.

4. The majority of the referees erred in their conclusion that there was a burden on the part of the plaintiffs to show that the use of smaller charges of dynamite was reasonable and proper under the particular circumstances.

5. The referees erred in excluding the evidence offered by the plaintiffs concerning statements made by the defendant's superintendent to the effect that the defendant was covered by liability insurance and that the insurance company would pay for any damage caused by the explosions, the plaintiffs having offered this evidence as bearing upon the question of defendant's negligence.

The record shows that the defendant had about 150 feet of ledge excavation for a sewage tunnel to be made six feet square, and constructed to hold sewer disposal pipe. The tunnel excavation was a part of an extensive general contract in the city of Waterville, and the entire contract was to be completed within a year from the time the contract was signed.

At the first blasts, when the excavation was started, serious damage was done to the houses of the plaintiffs, and several plaintiffs went to the defendant's superintendent in charge and told him his blasting was seriously damaging their property. The superintendent told them that he was using the smallest amount of dynamite possible to get the work done, but he did not ever attempt to use a smaller amount to ascertain whether he could get rock out with the lesser charge. He continued to use the same methods as at first. The same charges of dynamite were used continually thereafter, causing great and continuing damage to the plaintiffs' properties with each blast.

The superintendent further said "when we are through we will take care of all damage," with further statements relative to insurance, which statements relative to insurance were excluded.

The defendant's superintendent said that he was using sixty sticks of dynamite, setting off twelve at a charge at one-fifth of a second intervals. When asked if he could not decrease the charge "he said that he couldn't."

The plaintiffs' houses and each of them were so shaken that ceilings and walls were cracked, dishes broken and thrown about and off shelves; ceilings fell; paper and paint injured; foundation walls were cracked; stairways damaged and torn from the wall; fireplaces and chimneys cracked and warped out of line and otherwise injured; openings made over windows and doors; large cracks opened in hardwood floors, and floors "buckled." In one instance the witness said his house "dropped," affecting all floors and staircases.

The majority report signed by two of the three referees citing the case of *Reynolds* v. *Hinman Co.*, 145 Me. 343, stated that "there was no other evidence submitted as to whether this particular ledge in this tunnel could be broken with less dynamite, or by detonations over a longer period of time, or by use of some other precautions to prevent damage to property in the near vicinity, or by other explosives or instruments than dynamite. On this basis we are forced to conclude that there is no proof that the defendant was acting in a negligent manner." The two referees found for the defendant.

The minority report by one of the three referees stated: "I believe that as a referee, I can make certain assumptions based on the common knowledge and experience of everyone. It is not always necessary to introduce testimony to place certain evidence properly before a referee, juror or

court. I know and believe I am entitled to consider in this case that the principal explosive ingredient in dynamite is nitroglycerin. A certain amount of dynamite will fracture a certain type of ledge. Varying the charge will vary the amount of ledge broken. Rock or ledge is rendered or fractured by the tremendous expansion of the gas released when the charge is exploded. The greater the charge, the greater is the expansion and the rendering and fracturing effect; the smaller the charge, the smaller is the expansion and the rendering and fracturing effect. These explosions cause more or less shock vibration in the area depending in some part on the size or quantity of the charge used. Less dynamite could have been used and less or no damage would have resulted and still rock and ledge in smaller quantities would have been rendered and fractured. The excavation would proceed at a slower pace but it could proceed.

A contractor who undertakes to blast a tunnel 150 feet in length through ledge within a prescribed period of time should know he can complete his work within the prescribed time without damage to dwelling houses in the area. He should know the geological formation. Disregard of the nature of the formation and reliance on the unrestrained use of dynamite to complete his work in the prescribed time, regardless of damage to nearby buildings, would not be exercising due care.

In any particular type of ledge, the power to fracture and break up a yard of ledge with one blast and the power to fracture and break up a foot of ledge with one blast depends mostly on the amount of dynamite used. This is all common knowledge.

I believe jurors or referees would be obligated to take into account all of the foregoing in considering the question of liability, provided they had before them the pleadings and evidence we have before us.

In this case, the superintendent of the blasting operation was quoted as describing his method and the quantity used as follows:

'Q. Did you have any talk with him about the amount of dynamite he was using?

A. Yes. He gave me a description of how he was doing it and the amount of dynamite he was using.

Q. Did he tell you how many sticks he was using?

A. Yes, he mentioned he was using sixty sticks of dynamite, setting off 12 at a charge at a fifth of a second intervals.

Q. Did you have any conversation with him as to whether or not the amount of dynamite could be lessened?

A. Yes. I asked if he could not decrease the charge, and he said that he couldn't. They had to get the job done so they would meet the other interceptor by June.'

The superintendent used the same quantity and method in blasting throughout the entire length of the tunnel. He was warned that the shock and vibration was doing damage to the dwelling houses of the plaintiffs in the neighborhood when he was just starting in the tunnel, after he had probably constructed the first fifteen or twenty feet of its length. The superintendent was quoted as saying that he would not decrease the charge because he had to get the job done by June. He did not attempt to lessen the shock and vibration by decreasing the charges he knew were repeatedly causing damage. I cannot believe that he should be excused for demolishing a house on the ground he had taken a contract to do the job in too short a time and therefore had to use charges calculated and known to be of demolition severity.

I would find for the plaintiff in this and the other similar companion cases, as I believe the conduct of the defendant, to say the least, was negligent, and resulting damage has

been demonstrated. There is no suggestion of negligence on the part of those whose property was damaged.

I do not construe the opinion in the case of *Reynolds* v. *Hinman Co.* as controlling these cases in view of the factual situation presented to us here. I do not interpret the *Hinman* case to hold that a dwelling house may be damaged or demolished by blasting with impunity under all circumstances. I feel the findings and conclusions of the other referees over-extend the application of the decision in the *Hinman* case. That case was decided solely on demurrer to the declaration. It appears not to have been charged that the defendant knew it did cause or was causing damage against the complaints of the residents in the neighborhood. Further, it did not appear whether two blasts occurred or whether there were numerous and long continued blasting over a period of months against repeated notices that damage was being done. In the case before us there is no demurrer. There was no request for particulars. The parties proceeded under the declaration as originally drawn and made full presentation of the facts as they saw them. In reaching my decision, I am not unmindful that negligence is not to be presumed in law merely because vibration and shock from the explosion of dynamite causes damage to nearby structures.

It may be that some damage was caused before defendant should be charged with negligence and liability. However, it is clear to me that after adequate warning other and further damage was caused. With the before and after damage blended, it may be difficult to distinguish between the former and the latter. I do not conceive this to be a reason for absolving the defendant from responsibility for all damage."

The court is of the opinion that the foregoing findings of the minority referee, under the circumstances of this case,

are correct and that the majority findings are clearly erroneous.

In the case of *Reynolds' et al.* v. *W. H. Hinman Company,* 145 Me. 343, 75 Atl. (2nd) 802, 20 A. L. R. (2nd) 1360, which came before the Law Court on demurrer to the declaration, it was held that negligence on the part of a defendant, in a blasting case, must be alleged and proved. In the *Hinman* case this court, quoting the words of Professor Jeremiah Smith, said: "Assuming that there are no degrees of care as matter of law, yet there must obviously be a great difference in the amount of care required in various cases as matter of fact. A jury will be told, and will usually find, that the amount of care required in fact will increase in proportion to the danger to be apprehended in case of neglect. Hence they will generally find that the amount of care required of a blaster is in fact very great."

Care must be taken by a defendant in proportion to the danger involved. In other words, ordinary care depends on the circumstances of each particular case. Where the risk is great a person must be especially cautious. In fact a person might be and should be restricted in the use of an instrumentality if dangerous to person or property. *Simonton* v. *Loring,* 68 *Me.* 164; *Bacon* v. *Steamboat Co.,* 90 Me. 46; *Chickering* v. *Power Co.,* 118 Me. 414; *Edwards* v. *Power Co.,* 128 Me. 207, 212.

The continuation of blasting in the same manner as before, after warning, constitutes negligence under the circumstances of this case. See cases cited in annotation to the *Hinman* case where it is reported in 20 A. L. R. (2nd) 1360, and following pages.

In the case at bar, there is evidence, and to us, compelling evidence of negligence, because after being notified that serious damage was being caused to property of the plaintiffs by the first blasting, the defendant did not attempt to try

out lesser charges of dynamite. It did not attempt to determine for a certainty whether lesser amounts would "get the rock out." It continued to use the amounts of dynamite that caused and continually caused increasing injury. The defendant knew it. The superintendent said that he was going to continue and he did continue as before. The superintendent said he was using the smallest amounts possible in order "to get the rock out." His attitude showed not only negligence but also planned and determined disregard of property rights, and perhaps life or personal injuries.

The State of Maine and its people have for generations removed much rock and cut out untold numbers of ledges. The State is now blasting miles of ledge for new highways. It is rare, indeed, for damages such as in this case to be caused where the user has the knowledge he should have, and when proper care is exercised. This is well and commonly known. Our grandfathers who used black powder did efficient careful work, and why not here? Is it because the powder method is more expensive due to wages, and is a slower method? Is it an excuse for negligent use of dynamite, that it is quicker, less expensive, and in the opinion of a superintendent, if used in substantial quantities, that it can remove the ledge to "meet the interceptor by June?"

The plaintiffs offered evidence during the trial many times from several of the plaintiffs concerning statements made to them by the superintendent, to the effect that the defendant was covered by liability insurance and that there was no cause for worry on the part of the plaintiffs and that he (the superintendent) would continue to use the same charges, because the insurance company would pay for any damage caused by the explosions. This evidence was objected to by the defendant's counsel and was excluded. Exceptions to the exclusion were taken by the plaintiffs. We think the exclusion was correct. We know that there are some cases in other jurisdictions like the New Hampshire

case of *Herschensohn* v. *Weisman,* 119 Atl. 705, annotated in 28 A. L. R. 514, holding that where a person asked to be careful replied "don't worry, I carry insurance for that," the New Hampshire Court held the statement admissible because it implied that he would exercise and did exercise a lesser degree of care than the law required. The Maine Court, however, has several times considered the admissibility of similar evidence and has uniformly held that statements relative to the fact that the defendant was protected by liability insurance were not proper. See reasons stated in *Sawyer* v. *Shoe Company,* 90 Me. 369; *Richie* v. *Perry,* 129 Me. 440; *Skillin* v. *Skillin,* 130 Me. 223.

The question presented to this court is whether or not the Superior Court was correct in accepting the majority report of the referees. Considering the first and second objections to acceptance, as raised by the plaintiffs, in the light of this record, we are of opinion that it was error for the court below to accept the report.

The majority of the referees erred in their construction of the opinion in *Reynolds* v. *Hinman Co.,* 145 Me. 343, 75 Atl. (2nd) 802, 20 A. L. R. (2nd) 1360 and note, in holding "that there is no proof that the defendant was acting in a negligent manner," because the referees in effect erroneously held that the plaintiffs did not show by eye witnesses or by experts the methods used, and did not show that other methods would be proper, and further, that plaintiffs did not prove that smaller charges of dynamite could have been used to get the work done under the contract.

There is no absolute liability for damage by blasting. There is liability for damage which takes place from blasting carried on in a negligent manner. The test in this case is whether there is credible evidence to sustain the findings of the majority of the referees. We think not. The plaintiffs were admittedly in the exercise of due care. The defendant

was negligent, and from the statements and actions of its superintendent, recklessly negligent. The defendant was indifferent to probable consequences, which is the highest form of negligence, and is the antithesis of due care. The majority of the referees failed to take into consideration, what is common knowledge, that a slower method with more moderate charges of the explosive, would (if it had been tried) have caused little or no damage.

It was error for the presiding justice to accept the majority report of the referees. These exceptions to the acceptance must be sustained.

The exceptions of the plaintiffs to the refusal of the presiding justice to accept the minority report are not necessary to be considered, as the cases must go back to the Superior Court for further proceedings.

Exceptions sustained.

The four cases remanded to the Superior Court for further proceedings.

BERNARD R. CRATTY
vs.
SAMUEL ACETO & CO.

Kennebec. Opinion, August 4, 1955.

Negligence. Blasting. Evidence. Res Ipsa Loquitur. Burden of Proof. Due Care.

Referees are the sole judges of the weight and credibility of the evidence before them.

Negligence in blasting cases need not be proved by affirmative or direct evidence.

It is error to conclude that regardless of the factual showing the doctrine of *res ipsa loquitur* never has application in blasting cases.

The doctrine of *res ipsa loquitur* is a rule of evidence which warrants but does not compel an inference of negligence. It does not effect the burden of proof; it merely shifts the burden of evidence.

The doctrine of *res ipsa loquitur* applies where the accident is unexplained and the instrument causing the injury was under the management and control of the defendant, and the unexplained accident is one which does not ordinarily occur if due care is used.

If a defendant wishes to avoid the inference of negligence that is authorized by the doctrine of *res ipsa loquitur*, he should explain.

ON EXCEPTIONS.

This is a negligence action before the Law Court upon plaintiff's exceptions to the allowance of a referee's report. Exceptions sustained. Case remanded to Superior Court for further proceedings.

Cratty & Cratty, for plaintiff.

Locke, Campbell, Reid & Hebert, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, JJ., THAXTER, A. R. J. TAPLEY, J., did not sit.

FELLOWS, C. J. This section for alleged negligence in blasting comes to the Law Court on plaintiff's exceptions to the acceptance of a report of three referees by the Justice of the Superior Court for Kennebec County.

The record shows that it was stipulated and agreed that the defendant Corporation did the blasting in connection with the laying of a sewer along the bank of the Messalonskee Stream in Waterville for the Waterville Sewerage District; that the plaintiff's house is located approximately two hundred (200) feet westerly of the situs of said blasting, and that the plaintiff was in the exercise of due care.

The plaintiff testified "I noticed a crack in my foundation wall after the blasting commenced, and I felt I could attribute it to the blasting, but I wasn't sure at that particular time. However, I was put on guard and I was upset to a certain degree. It happened just a few days thereafter that I was home early, around eleven o'clock one noon, as I had to go somewhere in the afternoon, for an early lunch. And, at 11:30 there was a particularly large blast, and I immediately went down cellar to look at this crack in the wall to see if it had gotten any larger, and I saw a difference in the crack, which developed right at the foot of the stairs, in that it is and it was still in the process of developing this second crack. It was not in the same place as the first one was, and it was of a nature whereby there was many small cracks at one point, and the strain of these small cracks created a larger crack in the top of the wall. And, this particular crack I know was caused by the blasting because I was there and I saw it, and I saw the defendant working out there, looking out of the window of my house, continuing their operations. And, after that they picked up their tools and went and had their lunch. Now, by way of establishing the damage caused by the defendant company, I also experienced and saw damage in other houses relatively close to mine, and in one house in particular, the house belonging

to Frank Hubbard, which was within a hundred feet of my house. I was in it when a blast went off, and the land tiles in the basement shook and rattled against the foundation, and plastic tile popped off the bathroom wall as a result of this blast. I was in when a connection gave way between his furnace and his oil tank on the occasion of one of these blasts. I think I can testify to the fact that this last foundation, in Waterville, runs in an east-west direction, approximately, rather than a north-south direction, and the shock of these explosions followed the line of this slate under the foundations of the various homes and caused the damage."

The report of the referees was as follows: "The evidence established that the residence of the plaintiff in Waterville, Maine had been damaged by shocks and vibrations caused by the blasting operations of the defendant in the construction of a trench for the Waterville Sewerage District. The damage consisted of cracks in the foundation of the dwelling. Reasonable compensation for the damage would be $100.00. The dwelling is located on the same slate ledge foundation on which the blasting was done. This ledge formation runs east and west and the shock and vibrations followed the ledge. Plaintiff saw damage to other nearby dwellings caused by the same blasting operations, which began in January, 1952.

The plaintiff introduced no evidence as to the amount of explosive being used nor as to the method or manner of its use. He relies wholly on the 'res ipsa loquitur' doctrine to sustain the allegation of negligence. The plaintiff has established that the knowledge on the part of the defendant as to the cause of the damage was superior to his. As previously noted, direct evidence of negligence is absent. There is obviously a duty on the part of the defendant to use great care in blasting ledge in the residential area where the dwellings of the plaintiff and other people were located.

It is established that the injury to the property of the plaintiff was caused by the blasting of the defendant, that the plaintiff was wholly a stranger to that operation and that the plaintiff had neither control nor knowledge of the method or manner adopted by defendant.

In view of the decision in the case of Reynolds vs. Hinman Co. 145 Maine, 343, we hold it to be established in Maine that in a blasting case there is no absolute liability and negligence on the part of the defendant must be alleged and proved. In the case before us, it is alleged but not proved by any affirmative or direct evidence. On the facts before us we cannot find the defendant was negligent simply by the application of the *res ipsa loquitur* doctrine. In our opinion, for these reasons, judgment should be for the defendant."

The plaintiff filed in the Superior Court as objections to the acceptance of the report of the referees that (1) the referees erred as a matter of law in finding that there was no evidence of negligence on the part of the defendant in conducting blasting operations which damaged the said plaintiff's house, (2) the said referees erred as a matter of law in not finding the defendant had violated its duty of great care in the said blasting operation, (3) the said referees erred as a matter of law in that 145 Me. 343, *Hinman* v. *Reynolds* does not establish the law that there is no absolute liability in blasting cases in Maine, (4) the said referees erred as a matter of law in that they found no negligence on the part of the defendant in the conducting of the said blasting operation, (5) the said referees erred as a matter of law in that they did not find the rule of *res ipsa loquitur* did apply to the facts of the plaintiff's case as they appear in the record and as they were set forth in the said referees' report, (6) the said referees erred as a matter of law in that the referees did not apply the rule of *res ipsa loquitur* to the plaintiff's case, (7) the said referees erred as a matter of law in that 145 Me. 343 does not hold as a

matter of law that the plaintiff must prove specific acts of negligence on the part of the defendant and that as a matter of law, this is his only mode of proving the defendant guilty of negligence.

We find some ambiguity in the working of the referees' report. If the report went no further than to find the facts adversely to the plaintiff, we would feel constrained to approve the acceptance of the report as the referees were the sole judges of the weight and credibility of the evidence before them. But upon examination of the language of the whole report, we can only conclude that the referees found for the defendant, not upon the facts, but upon their understanding and interpretation of the law applicable in such cases. We think the report clearly discloses the application by the referees of two propositions of law: (1) That negligence in blasting cases must be proven by affirmative or direct evidence, and (2) that, regardless of the factual showing, the doctrine of *res ipsa loquitur* never has application in blasting cases. The issue here presented is, therefore, whether or not these propositions of law which appear exclusively to have governed the decision of the referees are sound. These legal principles were apparently drawn from the referees' interpretation of the case of *Reynolds et al.* v. *W. H. Hinman Co.*, 145 Me. 343, 75 A. (2nd) 802, 20 A. L. R. (2nd) 1360, cited by them in their report. If misinterpretation has resulted from any of the language used in dicta in that opinion, then we hasten to clarify the intended scope of the holding therein. The *Hinman* case came before the Law Court on demurrer. This court held that negligence on the part of a defendant in a blasting case must be alleged, and the negligence proved. There is no absolute liability from the mere fact that there was a blast of explosives and that as a result there was damage. The referees, however, are in error as a matter of law in holding that negligence must be proved by "affirmative or direct evidence."

Negligence may always be proved by any evidence that is relevant and material, although it may be circumstantial. It may not be necessary for a plaintiff to show, as the report erroneously asserts, "evidence as to the amount of explosive being used" or "the method or manner of its use." Evidence of the "amount" of explosive and how it was used is only within the knowledge of the defendant or the defendant's agent. If the defendant in a blasting case is not inclined to truthfully give this information, how can a plaintiff obtain it unless he watches continually or employs others to watch, while a blasting operation is in progress, and even then the prospective witness could not safely get near enough to certainly ascertain the facts. He might even be ejected as a trespasser.

The geological formations in the State of Maine have made it necessary through the generations for much blasting to be done in order to aid in economic progress. Blasting is necessary and proper in the construction of untold numbers of building structures and in the making of highways. It is nevertheless rare that damage is caused to adjoining property, if the blaster uses the reasonable care that the law requires that he should use. This is common knowledge to every school boy and to every adult citizen. Dishes may rattle on our shelves and our house may slightly shake if the blast is heavy and a short distance away, but substantial damage is very unusual.

There are no degrees of care. "Ordinary care" or "due care" is the legal rule, and the amount of care depends on the circumstances, and must be commensurate with the danger involved. *Simonton* v. *Loring*, 68 Me. 164; *Bacon* v. *Steamboat Co.*, 90 Me. 46; *Chickering* v. *Power Co.*, 118 Me. 414; *Edwards* v. *Power Co.*, 128 Me. 207 *(res ipsa loquitur)*; *Reynolds* v. *Hinman Company*, 145 Me. 343, 75 Atl. (2nd) 802, 20 A. L. R. (2nd) 1360.

It is stated in *Reynolds et al.* v. *W. H. Hinman Company,* 145 Me. 343, 75 Atl. (2nd) 802, 20 A. L. R. (2nd) 1360, "Not only is great care in fact required of the blaster. In addition the plaintiff is much aided, as to the method of proving defendant's absence of care, by the application of the doctrine of *res ipsa loquitur.*

This rule, *res ipsa loquitur,* taken literally and without explanation, is liable to misapprehension. The doctrine does not dispense with the requirement that the party who alleges negligence must prove the fact, but relates only to the *mode of proving* it. The isolated fact that an accident has happened does not afford prima facie evidence that the accident was due to the negligence of the defendant. But if the accident, viewed in the light of the surrounding circumstances, is one which 'commonly does not happen except in consequence of negligence,' then if no explanation is offered, the jury may find that it was due to the negligence of the defendant."

The doctrine of *res ipsa loquitur* is not substantive law. It does not need to be alleged in the declaration. It is a rule of evidence which warrants, but does not compel an inference of negligence. The doctrine does not affect the burden of proof. It merely shifts the burden of evidence. The defendant, who knows or should know, must explain. The rule applies where the accident is unexplained and the instrument causing the injury was under the management and control of the defendant, and the unexplained accident is one which does not ordinarily occur if due care is used. *Reynolds* v. *Hinman Co.,* 145 Me. 343, 75 Atl. (2nd) 802, 20 A. L. R. (2nd) 1360 and note; *Stodder* v. *Coca Cola, Inc.,* 142 Me. 139; *Winslow v. Tibbetts,* 131 Me. 318. The rule does not apply where accident is in part the fault of the plaintiff, or if nothing is left to inference. *Moose-A-Bec Quarries Co.* v. *Tractor Co.,* 139 Me. 249; *Shea* v. *Hern,* 132 Me. 361.

The doctrine of *res ipsa loquitur* is proper to be considered by the trier of facts where the circumstances are, as here, most uncommon, unusual, unexpected and extraordinary, and the damage is such that it would not ordinarily have occurred if the user of the dangerous instrumentality had the required knowledge, and proper care had been exercised in its use.

The burden of evidence shifts to the defendant to explain his actions and his methods. The burden of proof remains with the plaintiff on the whole evidence to prove negligence, but if the defendant wishes to avoid the inference of negligence that is authorized by the doctrine of *res ipsa loquitur*, he should explain.

If it is considered that the circumstantial evidence presented by the plaintiff is not sufficient and that the damages are "unexplained," then under the doctrine of *res ipsa loquitur* the burden of explanation is upon the defendant. The defendant in a blasting case has the management and control. It alone may know the formation of ledge. It alone may know how much explosive was being used, and how and why it was used. Would it be due care for the defendant to use an atomic bomb if it thought it necessary in order to remove the ledge? Could it not have used black powder or some other method? If the contract, which the defendant signed, demanded that the ledge be excavated before a certain time or in a certain manner, the very act of the defendant in making the agreement might, if the contract was followed, show negligence.

While the doctrine of *res ipsa loquitur* is a rule of evidence, which warrants but does not compel a finding of negligence, the inference of negligence is authorized. *Chaisson* v. *Williams*, 130 Me. 341; *Quarries Co.* v. *Tractor Co.*, 139 Me. 249; *Reynolds* v. *Hinman Co.*, 145 Me. 343.

When the referees state without qualification in their report that they could not find the defendant was negligent by the application of the *res ipsa loquitur* doctrine, it was error. The referees were not compelled to find negligence but they could do so. The unusual damage that occurred, which would not have happened in the ordinary case where reasonable care is exercised, authorized a finding of negligence. If the plaintiff's evidence was not believed, or did not convince, or if the defendant had satisfactorily explained, the trier of facts is not obliged to infer negligence. He may do so. The error here lies in the apparent holding of the referees that where there was no direct evidence, they could not find the defendant negligent by application of *res ipsa loquitur*, which is the very essence of the doctrine. The burden of proof is on the plaintiff under all the evidence. The burden of explanation, however, is on the defendant, if the defendant fears that the inference of negligence may be accepted, when the defendant and only the defendant has the control and knowledge.

To hold, as does the report of the referees, that the plaintiff must prove directly those unusual things that only the defendant knows, is to put a premium on undisclosed negligence, and to make a mockery of the reasonable care customarily used by blasters for many generations in the State of Maine.

Attention is called to the fact that this court had before it, at the previous term, four cases of blasting in this same sewerage district. See *Maxwell Shaw et al.* v. *Robbins & White, Inc.*, recently decided and not yet reported, where rules of negligence in blasting are discussed, but negligence was proved directly, and there was no occasion to consider *res ipsa loquitur*.

It appears in this case and by the report of the referees that the damage was caused to the plaintiff's property by

the blasting by defendant. The plaintiff had no control or knowledge of the acts of the defendant. From common knowledge and understanding the damage was unusual and would not have occurred had due care been used by the defendant. The doctrine of *res ipsa loquitur* applies. The decision of the referees was erroneous as a matter of law. The report should not have been accepted by the Superior Court.

The entry will be

Exceptions sustained.

Case remanded to Superior Court for further proceedings.

STATE OF MAINE
vs.
GEORGE WHITEHEAD

York. Opinion, August 8, 1955.

Night Hunting. Justification. Appeal. Exceptions. Cross Examination. Judges Charge. Record. Briefs.

A person who seeks to justify the killing of a deer in close time under R. S., 1954, Chap. 37, Sec. 94 for the reason it is doing crop damage must show by a preponderance of evidence, (1) that he owned or occupied the land on which the deer was killed, and (2) that "substantial damage" was being done by the deer at the time.

On appeal a respondent is tried and judgment rendered *de novo* upon both law and fact. R. S., 1954, Chap. 146, Sec. 23.

Each ruling objected to must be clearly and separately set forth in the bill of exceptions.

How far or how long counsel may proceed with a witness to test memory or show lack of veracity, bias, prejudice, etc., is a matter of the trial court's discretion.

The court is not bound to state a requested instruction in the words of the request in regard to anything properly covered in the charge as given.

"Briefs" of counsel are not "writings" within the meaning of R. S., 1954, Chap. 146, Sec. 23 and need not be forwarded to the appellate court on appeal.

ON EXCEPTIONS.

This is a criminal action for violation of R. S., 1954, Chap. 37, Sec. 77. The case is before the Law Court upon exceptions following a jury verdict of guilty. Exceptions overruled.

William P. Donahue, for State.

Elton H. Thompson, for respondent.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, JJ., THAXTER, A. R. J. TAPLEY, J., did not sit.

FELLOWS, C. J. This is a complaint against George Whitehead before a Trial Justice in York County for night hunting. After hearing, the respondent was found guilty by the Trial Justice and appealed to the Superior Court for the County of York. He was tried in the Superior Court before a jury, found guilty, and a fine of $300 imposed. The case is now before the Law Court on exceptions relative to certain evidence admitted or excluded during the trial, and on a motion of the respondent to establish exceptions which were stated in the bill of exceptions but disallowed by the presiding justice.

The testimony is conflicting but in substance the story is this: On or about September 18, 1954, a complaint was made by a State Game Warden in a Trial Justice Court for York County alleging that "George Whitehead of Hollis, York County, Maine, on the sixteenth day of September in

the year of our Lord one thousand nine hundred and fifty-four, at Waterboro, in said county, did then and there unlawfully hunt certain wild animals, to wit: deer in closed season, between the hours of one half hour after sunset and one half hour before sunrise of the following morning against the peace of the State, and contrary to the form of the Statute in such case made and provided."

The respondent was found guilty by the Trial Justice and appeal taken. Upon appeal the evidence heard by the jury shows that three deer were killed by the respondent in the night time, during closed season, at the Waterboro farm of Benjamin Hamilton, September 16, 1954. The killing of the three deer took place between one half hour after sunset on the sixteenth and one half hour before sunrise of the following morning. These facts appear in the testimony of the respondent.

The respondent claimed, however, that he was an employee of Hamilton, and that he had complied with the provisions of the statute that permitted the killing of deer by the owner or his employee while substantial damage was being done by the deer to the owner's crops.

Game Warden Mahaney testified that Mr. Hamilton called at his home in Saco on September 17, 1954, and reported that he (Hamilton) had shot three deer. The warden went to the Hamilton home in Waterboro and saw three deer hanging from a beam in the cellar and learned from Mrs. Hamilton that the respondent Whitehead, and not Hamilton, had shot the deer. Mahaney went down the road to a field owned by Hamilton and from circumstances ascertained that two of the deer had been shot in the field and dragged across the field, and that the third deer had jumped over a stone wall into another field.

Supervisor Marsh, of the Department of Inland Fish and Game, testified that he questioned the respondent, and that

the respondent said that he was not related to Hamilton or employed by Hamilton, and further that he (the respondent) was to have some of the deer meat. The respondent also told the Supervisor that Hamilton was an old friend and former neighbor, that Hamilton was having trouble with deer in his garden; that Hamilton being elderly was not able to kill the deer himself, so the respondent went for the purpose of doing it for him. The respondent exhibited a .32 Remington automatic and a five cell flashlight that he had used. The respondent said that he fired three shots and got the three deer. The respondent stated that it was agreed with Hamilton that Hamilton was to assume responsibility for the killing and to report to the warden. Respondent stated that the deer were shot before midnight on the 16th.

Hamilton testified that he had a garden of beans planted in the spring, and that deer destroyed the first planting. He planted again, and on September 16th the deer were still damaging the garden. Another garden of vegetables was also damaged and was continually being damaged. Hamilton testified that he then went with his son to see the respondent Whitehead. "Q. Did you ask him anything about helping you in any way? A. Well, we talked the situation over. I don't remember whether I ever said to him directly, 'Will you come up?' or, 'I want to hire you.' By the Yankee's trade, we came to a mutual agreement that he was going to come and do the job if he could."

On the evening of the 16th, Hamilton said he drove his car to a field, taking the respondent Whitehead with him. Whitehead went towards the garden. Whitehead fired, and they found the three dead deer in Hamilton's fields. Hamilton also testified: "Q. And when all three of them were shot at, were they in the vicinity of the garden or in the garden? A. I couldn't say as to that, but from the sound, it was in the vicinity or in the garden so far as I could tell."

Whitehead dressed the three deer after they were "dragged out." Hamilton then went to wardens to report that he (Hamilton) shot the three deer. Hamilton had never notified wardens before this killing that deer were injuring his garden. On September 16th all that was left in the gardens were beans, tomato plants, kohlrabi, lettuce, cabbage, and endive. "We had enough garden left for our own use." "I felt that if I got this man (Whitehead) into a scrape, it was up to me to assume the responsibility for it all." When the deer were shot, Hamilton said that he did not know "for sure" whether they were in the garden or in the fields. There was no understanding that Whitehead would be paid for killing the deer. "He did something for me, and I did something for him; I'd tell him what I'd need, what my trouble was, and he'd come down and do it." "Swap favors all the time."

Respondent Whitehead testified that some time before, Hamilton told him that deer were damaging his crops and asked him to come and "help him shoot them." There was no "specific trade" made as to what the respondent was to receive for going. One or two nights Hamilton and respondent went out, but deer were in the fields and not in the garden, and respondent returned home. On the night that he shot the deer, he testified they went out about ten o'clock, but the deer were in the fields and they went back to the house and watched television until later. About midnight, "it could have been before, and it could have been after, I don't know." "I looked up in the garden and there is a bunch of deer in the garden, and I went up and shot at those." The respondent testified he "spotted" the deer with a flashlight that he held against the gun. Respondent fired three shots. The deer were "found one in the field, another one over the wall, and another one we didn't find that night. We found it the next morning."

The following statutory provisions are applicable. "It shall be unlawful to hunt wild animals from ½ hour after

sunset until ½ hour before sunrise of the following morning." Revised Statutes 1954, Chapter 37, Section 77.

I. Any person may take or kill deer, night or day, on land owned or occupied by him, where substantial damage is being done by deer to a fruit tree or a crop, including legumes, except grass; and he may authorize a member of his family or a person employed by him to take such deer. A person by whom, or under whose direction, such deer is wounded or killed shall within 12 hours report all the facts relative to such act to a fish and game warden. Such report shall state the time and place of such wounding or killing. A person who kills such deer shall immediately properly dress the carcass or carcasses and care for the meat. The fish and game warden shall immediately investigate the case and if he is satisfied that the deer was taken as herein provided, he shall give the person a certificate of his finding in the matter. Such certificate shall entitle such person to the ownership of the carcass or carcasses. Revised Statutes 1954, Chapter 37, Section 94.

Under the foregoing statute, if the respondent who had killed a deer in close time, seeks to justify his act, he must show by a preponderance of evidence that he owned or occupied the land on which the deer was killed, that "substantial damage" was being done by the deer to a fruit tree or a crop (except grass) *at the time.* If the respondent was not the owner or occupant of the land, he must show authorization as a member of the owner's or occupant's family, or an employee. The important thing is, what was the deer in the act of doing when killed. Was the deer in the garden doing "substantial damage," or was the deer out of the garden, or leaving the garden, when shot? If not in the act of doing substantial damage there is no justification. See *Chapman* v. *Decrow,* 93 Me. 378. A report within 12 hours to a game warden must also be made, and the carcass dressed, as the statute requires.

On appeal, the judgment of a lower court is vacated, and the case is removed to the Appellate Court and copy of record forwarded, and respondent is to be tried and judgment rendered *de novo* upon both law and fact. *Willett* v. *Clark,* 103 Me. 22; *State* v. *Houlehan,* 109 Me. 281, 284. Revised Statutes, 1954, Chapter 146, Section 23.

The exceptions taken by the respondent are stated in the bill of exceptions to be as follows:

1. "That the presiding justice erred in not sustaining the respondent's plea to the jurisdiction." There is no copy of the plea or any part of it in the bill of exceptions. A motion to dismiss was filed, according to the testimony, which was denied, but the bill is also barren of a copy of such a motion, and the grounds do not anywhere appear. If the motion to quash, for failure to forward briefs, is referred to, the bill does not so state. This exception does not comply with the rule and cannot be considered. Each ruling objected to must be clearly and separately set forth in the bill of exceptions. *Dodge* v. *Bardsley,* 132 Me. 231; *Bradford* v. *Davis,* 143 Me. 127.

2. Exception was taken to the ruling, that counsel "should confine his questions to facts in the case presently before the jury." This ruling was correct. The record shows that counsel was asking questions of a warden relative to other game cases that the warden had prosecuted or was a witness in. How far or how long counsel may proceed with a witness to test memory or to show lack of veracity, bias, prejudice, etc., is a matter of the court's discretion. We do not find that discretion was abused. *Grant* v. *Libby,* 71 Me. 427, 430; *Lancaster* v. *Water District,* 108 Me. 137; *State* v. *Smith,* 140 Me. 256.

3. This exception was to same effect as the preceding. The warden was being questioned as to his memory of what transpired at the hearing before the trial justice, and

whether or not he (the warden) conducted the examination of a certain witness. After pursuing this line of questioning for some time, the presiding justice thought he had "gone far enough." This was within the court's discretion.

4. Exception was taken to the refusal of the presiding justice to give the following instruction to the jury. "That the ordinary and usual meaning of the words used must be used in the interpretation; and that if any other special qualifying means are included, they should be specifically inserted in the statute involved. That in this instance the word 'employed' means employment of any person to do a specific act, and to shoot the deer would come under such a specific act, whether there was any remuneration or not. That the act of killing the deer must be proved as of a specific date and time of day."

This requested instruction was properly refused. It was only in part correct. The presiding justice had covered the subject in his charge. The words as given by the presiding justice were proper because the presiding justice left the matter of employment to the jury to find as a fact under the conflicting testimony as follows: "The intention of the legislature was that the man who owns or occupies may go and kill the deer if the deer is doing substantial damage at the time. Or, he may delegate one of his employees. I do not believe that the legislature intended that promiscuously owners or occupiers of orchards and crops on the land on which they grow, could likely call anybody in to kill deer for him. It calls for a relationship of members of his family or a relationship of employer and employee. It is for you to say whether or not there was a relationship of employer and employee between Mr. Hamilton and Mr. Whitehead." Later in his charge the presiding justice said, "The owner or occupant of the land, may authorize a person employed by him to take such deer, would include a person whom he employed for that particular work. Normally it would be

some person who worked for him, but he could employ somebody for that particular work."

The last portion of the requested instruction that the killing must be proved as of a specific date and time of day was left to the jury to determine, as a fact, because there was evidence of a specific day and time, but the evidence was conflicting.

The court is not bound to state a requested instruction in the words of the request in regard to anything properly covered in the charge as given. *State* v. *Cox,* 138 Me. 151; *State* v. *McKracken,* 141 Me. 194; *State* v. *Bean,* 146 Me. 328.

5. The fifth exception was not allowed by the presiding justice and counsel filed motion and took testimony to establish its truth. Without deciding whether or not the exception is established, we consider it, and say, if true, it is not ground for exception. It is stated in this claimed fifth exception that the presiding justice erred in not sustaining the motion to dismiss because the trial justice did not send to the Superior Court, as the Appellate Court, a copy of the process and all writing. The "writings" that were not forwarded were a brief of counsel as to the meaning of the word "employed." Briefs are not a part of the process. Briefs are ordinarily not "writings before the magistrate." They are not exhibits. They are not a part of the case or the record of the case. The brief or briefs here were certainly not apart. They were made to aid the trial justice in his determination of what the law was and what were the meanings of the words in the statute. Jurisdiction certainly does not depend on what the lawyer may say in his brief, unless the brief is a correct statement of the law, and is not merely a contention of what the law should be. Jurisdiction depends on what the law is. The fact that a brief in this case (prepared by respondent's counsel, submitted to the trial justice, and read by the trial justice before his de-

cision) was not forwarded by the trial justice to the Superior Court does not cause the Superior Court to lose jurisdiction, as is here claimed. If this were so, attorneys for respondents would make endless numbers of briefs in order that some might be "lost," and not forwarded to the Appellate Court.

6. The sixth exception was that the counsel for respondent, in cross examination of a state's witness, insisted on questioning him relative to the aforementioned brief or briefs, and respondent claimed some agreements with the warden relating thereto that respondent's guilt or innocence depended on the meaning of certain words. The court permitted the questions to test memory, but for no other purpose. The exception taken was not valid. It was within the court's discretion.

We have carefully examined this record, and we do not find any error. The respondent was represented by capable and experienced counsel, and all his rights were well protected. There were no exceptions taken to any refusal to direct a verdict. In fact, no motion to direct a verdict was made. There were no exceptions to any portions of the charge. In fact, the charge impartially and fully covered the conflicting claims. The jury could find under the evidence that the respondent killed three deer; that they were killed on the sixteenth day of September, 1954, before midnight, and that the respondent was (or was not) "employed." The employment might not be material in the jury's estimation, because there is little or no evidence to show what the deer, at the time when they were killed, were then doing. The jury would be justified in finding that the respondent did not sustain his burden to prove justification. We do not find that the jury verdict was "clearly wrong." We are, on the contrary, inclined to the belief that it was clearly right.

Exceptions overruled.

BANGOR ROOFING & SHEET METAL CO.

vs.

ROBBINS PLUMBING CO., INC., T. W. CUNNINGHAM, INC., HAROLD COLBY, RECEIVER, OLD TOWN HIGH SCHOOL DISTRICT, AND BUILDING

Case No. 2011

* * * * * * *

T. W. CUNNINGHAM, INC., HAROLD COLBY, RECEIVER, OLD TOWN HIGH SCHOOL DISTRICT, AND BUILDING

Case No. 2012

Penobscot. Opinion, August 16, 1955.

Liens. Subcontractor. Value. Profits. Commissions. Estoppel.

Profit, overhead, taxes, insurance and transportation, *as such and standing by themselves* are non-lienable.

Where applied to the lien law, the implied contract is not essentially to pay the subcontractor under all circumstances, but rather to subject the owner's property to a lien security for such payment.

When by express contract with the owner of property the parties fix the compensation to be paid for full and complete performance of the contract, they have themselves established the debt to be secured by lien.

When the owner is not a party to a contract the determination must be as to what is the fair and reasonable value of the labor and materials in place.

When a subcontractor has a fixed price contract with another contractor who stands between him and the owner, the price agreed represents a ceiling upon the fair and reasonable value of the labor and materials secured by the lien.

Profits, commissions and transportation may appear in the contract price or the fair and reasonable value of the labor and materials furnished.

Fair and reasonable value must be tested in the light of the probable cost to the owner in a free and open market.

Where a subcontractor's bid is submitted to the owner by the prime contractor and is accepted and approved as representing the fair value of the labor and material to be furnished, the owner is estopped to assert that the fair value is less than the sum agreed upon.

ON APPEAL.

These cases are bills in equity under R. S., 1954, Chap. 178, Sec. 34, *et seq.* The cases are before the Law Court upon appeal. Plaintiff's appeal sustained with costs to plaintiff. Case remanded for further proceedings in accordance with this opinion.

May and May,
Goodspeed & Goodspeed, for plaintiffs.

Pilot & Pilot, for defendant.

SITTING: WILLIAMSON, WEBBER, BELIVEAU, TAPLEY, JJ. FELLOWS, C. J., did not sit. MR. JUSTICE TIRRELL sat on the case and participated in conferences but died before the opinion was submitted to him.

WEBBER, J. These two cases, which for convenience will be referred to by number, arise out of bills in equity brought under the provisions of the Mechanics' Lien Law, now R. S., 1954, Chap. 178, Sec. 34, *et seq.* The plaintiff is the same in both cases. Plaintiff furnished labor and material which went into the erection of a new school building. In case No. 2011 plaintiff acted as a sub-subcontractor and in case No. 2012 as a subcontractor. In case No. 2011 plaintiff attached to its bill in equity an account annexed (Exhibit "A") in which appeared a detailed list of material and labor furnished, priced item by item. These items, totaled at $4470.02, were followed by three others, viz:

"12½%	Tax & ins.	$ 193.19
15%	Overhead	670 50
10%	Profit	447 00
		5780.71"

In case No. 2012, Exhibit "A" set up only "Contract Price — $13,350.00" less certain credits. By amendment further credits were admitted leaving a claimed balance of $6790.00. There was admitted in evidence, however, a breakdown sheet which in similar fashion itemized labor and materials and then included as separate items:

"Insurance	10% of labor	$ 501.98
Overhead	15%	1916 42
Profit	10%	1277 61"

It is not disputed that the itemized list of labor and materials represents the plaintiff's actual cost for those items. The justice below disallowed as non-lienable all of the listed items for taxes, insurance, overhead and profit, and in addition in case No. 2011 disallowed an item: "Transportation —$78.00."

The first issue therefore involves a determination as to the measure of the protection afforded by the lien security. We cannot discover that this question has ever been directly answered by this court.

At the outset, we have no hesitation in saying that such items as profit, overhead, taxes, insurance, and even transportation, *as such and standing by themselves,* are non-lienable. Our statute *(supra)* provides in part: "Whoever performs labor or furnishes labor or materials * * * in erecting * * * any public building * * * by virtue of a contract with or by consent of the owner, has a lien thereon and on the land on which it stands * * * to secure payment thereof, with costs." Obviously such items as these are neither labor nor materials. But it does not follow that they can be completely and summarily disregarded in assessing the whole evidence as to just what the plaintiff has furnished.

We think that there is a clear indication in the previous decisions and language of this court as to the way in which this issue must be resolved. The lien is dependent upon the existence of contract, express or implied, and the obligation of debt. The lien is incident and security to a legal liability to pay. *Cole* v. *Clark,* 85 Me. 336. There may be an express contract creating the obligation of the owner as is usual between him and his prime contractor. Or there may be an implied contract as when labor and materials are furnished with the knowledge and consent of the owner and under such circumstances as would raise a legal and moral duty to pay on the grounds of justice. When applied to the lien law, the implied contract is not essentially to pay the subcontractor under all circumstances, but rather to subject the owner's property to a lien security for such payment. The corner stone of the Mechanics' Lien Law is the prevention of unconscionable and unjust enrichment. "A lien is given upon the ground that the work has been a benefit to the realty, and has enhanced its value." *Hanson* v. *News Pub. Co.,* 97 Me. 99 at 102; *Fletcher, Crowell Co.* v. *Chevalier,* 108 Me. 435. When, therefore the statute *(supra)* speaks of securing "payment thereof," it refers to the debt created by the acts of the parties. When by express contract the parties fix the compensation to be paid for full and complete performance of the contract, they have themselves established the debt to be secured by lien. In a sense they have by binding agreement determined the extent to which the owner's property will be enhanced by the labor and materials to be incorporated in the realty, and to that extent the contractor is protected by lien. When, as here, the owner is not party to the contract, the determination must be as to what is the fair and reasonable value of the labor and materials in place. In what amount has the property been enhanced by the labor and materials furnished? Where, as here, the subcontractor has a fixed price contract with another contractor who stands between him and the owner,

we think the price agreed upon represents a ceiling upon this fair and reasonable value, and it would be inequitable to permit a lien in excess of the subcontract price. But where the fair and reasonable value appears to be less than the subcontract price, the latter must yield to the former in submission to the test as to the extent the property has been enhanced. A subcontractor then cannot assume that he has a lien for the amount of his subcontract in all cases, but he may rely upon the lien security to protect the payment contracted for provided the fair value of what he furnishes at least equals that amount. With specific relation to profits, we think the applicable rule is fairly stated in 57 C. J. S. 540, Sec. 49: "Profits and commissions ordinarily are not lienable items unless included in the contract price or in the reasonable worth of the labor or materials furnished; no lien may be allowed for profits or commissions not earned." See also 36 Am. Jur. 110, Sec. 164. Just as the subcontractor may not always or necessarily have a lien for the full amount of his subcontract price, so also he is not limited to his actual costs. Business is operated for a profit. When a business man's costs are not excessive, the fair value of what he sells, delivered and in place, will ordinarily exceed his own costs. Otherwise business concerns could not long exist. Fair and reasonable value must be tested in the light of the probable cost to the owner in a free and open market. What would others, who presumably would likewise be in business to make a reasonable profit, charge for the same labor and materials incorporated into the owner's realty in the same manner? We think that this was the concept in the mind of our own court when in *Andrew* v. *Bishop et al.*, 132 Me. 447 at 455, it used such phrases as "the object of the statute of liens upon buildings * * * admittedly is, to afford to the materialman every reasonable aid to secure fair and full payment for the materials sold by him and used in the construction of the building," and "But when *only fair and full value* of the materials entering into the struc-

ture makes up the amount for which the lien is found, the owner cannot be held to be a sufferer." (Emphasis supplied.) See also *Laughlin* v. *Reed,* 89 Me. 226, 230.

It is apparent that the learned justice below deemed that he was limited by law to the allowance of no more than plaintiff's actual costs, regardless of the relationship between those costs and the fair and reasonable value of the labor and materials. He made no finding as to fair and reasonable value, although evidence was presented which, if believed, would have supported a finding of value in excess of those actual costs. The determination is primarily one of fact, and one which in such a case as this can best be made at the level where the witnesses are seen and heard. Such a determination can now be made in the light of the applicable law as here announced.

Still another factor arises in case No. 2012 in which plaintiff was subcontractor. The evidence indicates that the prime contractor submitted to the owner a list of his subcontractors and their bids, and that plaintiff and its bid were included. The owner reserved the right to approve or reject the proposed subcontractors and their bids. The owner, tacitly at least, accepted and approved plaintiff's bid as representing the fair value of the labor and materials to be incorporated into its property, and this before plaintiff had begun work. In such a case we think that if the contract be fully and properly performed, the owner is estopped to assert that the fair value is less than the sum approved and agreed upon. The situation is not dissimilar to that which arises upon an express contract between owner and contractor fully performed.

We regard the item for transportation as in the same category as the items above discussed. In and of itself, it is non-lienable. If materials in place at the construction site have in fact a greater value because they have been transported there, the lien will reflect the enhanced value of the

material. Otherwise, transportation is not a factor to be considered.

Cases cited to us which construe lien laws other than the Mechanics' Lien Law are not applicable to or decisive of the issues here. Defendants cite no case holding that actual costs are the measure of lien rather than fair and reasonable value.

The owner is not without protection. He may give the notice provided by R. S., 1954, Chap. 178, Sec. 35. He may insist upon a performance bond. He may control the payments to the prime contractor, or insist upon direct payments made by himself to the subcontractors. In the absence of any of these precautions, he cannot accept the enhancement of his property without submitting it to the lien security afforded by the statute.

The second issue which remains is whether or not the owner consented within the meaning of the lien statute to the furnishing of labor and materials by the plaintiff. In its prime contract the owner consented that others were expected to be employed as subcontractors and material men. The owner was thereby put upon notice. *Norton* v. *Clark,* 85 Me. 357; *White Co.* v. *Griffith,* 127 Me. 516. Consent may be inferred from circumstances. *Shaw* v. *Young,* 87 Me. 271; *Corey & Co.* v. *Cummings Const. Co.,* 118 Me. 34. The evidence discloses ample circumstances to support the finding of the justice below that the owner knew of and consented to the work being done by plaintiff.

For the reasons stated in the discussion of the first issue, the entry in each case must be,

Plaintiff's appeal sustained with costs to plaintiff. Case remanded for further proceedings in accordance with this opinion.

BOSTON SAFE DEPOSIT & TRUST CO. EXECUTOR, ET AL.
vs.
ERNEST H. JOHNSON, STATE TAX ASSESSOR

Knox. Opinion, August 17, 1955.

Inheritance Taxes. Trusts. Powers.

Testimentary power in a widow "to dispose of said trust property at her death" is not "property" or "any interest therein" passing to her within the meaning of the inheritance tax law. R. S., 1954, Chap. 155, Secs. 2 and 43.

Property subject to a power of appointment passes directly from the donor to the appointee or taker in default of appointment. It is not the property of the donee.

ON REPORT.

This is a petition in equity for abatement of inheritance taxes under R. S., 1954, Chap. 155, Sec. 33. Case remanded to the Probate Court for entry of a decree sustaining the petition and for further proceedings in accordance with this opinion.

Perkins, Weeks & Hutchins, for petitioners.

Boyd L. Bailey, Asst. Atty. Gen., for State.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, TAPLEY, JJ. MR. JUSTICE TIRRELL sat at the time of argument and took part in conference but died before writing of the opinion.

WILLIAMSON, J. This petition in equity by the Boston Safe Deposit and Trust Company, executor of the will of Edward K. Leighton, and the Good Will Home Association, and the President and Trustees of Bowdoin College, beneficiaries under the will, for abatement of inheritance tax is before us on report on a question of law from the Probate

Court. R. S., Chap. 142, Sec. 30 (1944) as amended, now R. S., Chap. 155, Sec. 33 (1954).

From the agreed statement of facts we find: Edward K. Leighton domiciled in Rockland, died testate in February 1953, and his will was duly probated in the Probate Court for Knox County. The value of the property passing into the trust under Paragraph Second of his will was $1,104,-979.64.

Paragraph Second of the will, with which we are concerned, provides in part as follows:

(1) A trust of one-half of the probate estate for the benefit of the testator's wife, Winifred S. Leighton, with the net income of the trust to be paid to his wife during her lifetime;

(2) "... and my said wife, Winifred S. Leighton, shall have full right and power to dispose of said trust property at her death in any manner she may choose, but no exercise of this power shall be considered valid unless specific and direct reference is made to this clause in my will."

(3) Upon the failure of his wife so to dispose of the trust property at her death, one-half of the trust property was to be held in trust for the benefit of Good Will Home Association, and the other one-half in trust for the benefit of the President and Trustees of Bowdoin College, the two named beneficiaries, both of which are educational institutions organized and existing under the laws of Maine. Property passing to them is exempt from the inheritance tax.

Mrs. Leighton died in September 1953 without having exercised the testamentary power of appointment given her by Paragraph Second of his will.

The State Tax Assessor certified that an inheritance tax of $96,455.01 subject to federal audit, was due upon the estate. In computing the value of the property passing to Mrs. Leighton, the State Tax Assessor included the following item:

"½ net estate—power of appt. $1,104,979.64."

Thus, the State Tax Assessor taxed the entire value of the trust property under Paragraph Second as property passing from the testator to his widow.

At the testator's death the value of his widow's right to receive the income for life from the trust property under Paragraph Second, computed at her normal life expectancy despite the fact that she died within seven months, was $241,295.70.

As stipulated by the parties, the sole issue is whether or not the testamentary power of appointment contained in Paragraph Second is properly assessed and taxable as "property" or "any interest therein" passing to Mrs. Leighton.

The petitioners contend that the only property passing from the testator to his widow under Paragraph Second was the right to receive income during her lifetime and that the tax should be assessed only upon the maximum value thereof, or $241,295.70, and that the remainder in the trust fund passed to exempt charities. The position of the State Tax Assessor is that the full value of the "right and power" given the widow by Paragraph Second is taxable as property passing to her. In the petitioners' view the tax should be reduced from $77,556.91, representing the tax assessed on all property allegedly passing to the widow under the will, to $23,186.00, subject however to recomputation from circumstances not involved in the controversy.

The pertinent parts of the inheritance tax statute, now found in R. S., Chap. 155 (1954) and unchanged from the

statutes in effect at the date of the testator's decease, read as follows:

> "**Sec. 2. Property taxable; exemptions.** The following property shall be subject to an inheritance tax for the use of the state:
>
> "**I.** All property within the jurisdiction of this state and any interest therein belonging to inhabitants of this state . . . which shall pass:
>
> **A.** By will . . ."
>
> "**Sec. 43. Definitions.** Wherever used in sections 1 to 44, inclusive, . . . the word 'property' shall include both real and personal estate and any form of interest therein whatsoever, including annuities."

We are concerned only with an inheritance or succession tax upon the creation of the power of appointment by the testator's will. The failure of the widow to exercise the power and the passing of the trust property to beneficiaries with a tax exempt status have no bearing on the issue. The test is not what the widow did or failed to do, but whether the power of appointment was an interest in property under the inheritance tax statute. Further, the event which the State seeks to tax is the creation of the power in the widow, not the passing of the property to the beneficiaries taking in default of appointment.

> "It is well recognized that an inheritance tax is not a tax on property, as such, but is a tax on the privilege of receiving property by Will or inheritance."
>
> *MacDonald, Ex'r.* v. *Stubbs,* 142 Me. 235, 240, 49 A. (2nd) 765 (1946).

The common law principles governing disposition of property through powers of appointment are well established. Property subject to a power of appointment passes directly from the donor to the appointee or taker in default of appointment. It is not the property of the donee.

The rule was stated by our court through Justice Thaxter in construing the will in *Moore* v. *Emery,* 137 Me. 259, 274, 18 A. (2nd) 781 (1941) as follows:

> "In attempting to determine the scope of this right, (to appoint by will) we must bear in mind that the donee of a power of appointment does not hold title to the property which is subject to the power, but merely acts for the donor in the disposition of it. In the ordinary case, therefore, the property is regarded as passing from the donor of the power to the person appointed by the donee to receive it."

See also Restatement, Property § 333; *Shattuck* v. *Burrage,* 229 Mass. 448, 118 N. E. 889 (1918); *Farmer's Loan & Trust Co.* v. *Mortimer,* 219 N. Y. 290, 114 N. E. 389 (1916); *R. I. Hospital Trust Co.* v. *Anthony,* 49 R. I. 339, 142 A. 531 (1928); *United States* v. *Field,* 255 U. S. 257 (1921).

In *Emmons v. Shaw,* 171 Mass. 410, 412, 50 N. E. 1033, 1034 (1898), the Massachusetts Court, in holding property subject to a power of appointment was not property of the donee for inheritance tax purposes, said:

> "The Legislature . . . has not attempted, in terms, to deal with property passing under powers of appointment, general or otherwise. It simply has enacted, among other things, that the property of a decedent, passing by will, shall pay a tax, except in certain cases. The construction of the statute must be determined, therefore, by the application to the subject-matter of the ordinary rules of law relating to powers of appointment, and by considering the manner in which those rules have been applied elsewhere to statutes imposing a tax on succession or legacies . . . Generally speaking, what is done under a power of appointment is to be referred to the instrument by which the power is created, and operates as a disposition of the estate of the donor."

In the *Emmons* case the court was construing an 1891 statute on which our first collateral inheritance tax statute of

1893 (P. L., 1893, Chap. 146) was plainly based. Indeed, the present definition of property, Section 43 *supra,* was enacted in like language in 1893, and is almost identical in language with the Massachusetts Act of 1891. *Lederer* v. *Pearce,* 266 F. 497 (C. C. A. 3-1920), 18 A. L. R. 1466 and annot.; *Balch* v. *Attorney General,* 174 Mass. 144, 54 N. E. 490 (1899); *Walker* v. *Mansfield,* 221 Mass. 600, 109 N. E. 647 (1915); *Highfield* v. *Delaware Trust Co.,* 34 Del. 290, 152 A. 117 (1929); *In re Higgins' Estate,* 194 Iowa 369, 189 N. W. 752 (1922).

There is no specific provision in our inheritance tax statute controlling the taxation of powers of appointment. In the absence of statutory authority to tax such powers, we are of the view that the common law principle, namely, that a power is not property, must be given effect. Whether the policy of not subjecting such powers to an inheritance tax is wise is for the legislature, not for the court to consider. Our authority ends with determining the scope of the law enacted by the legislature.

The cases decided by our court and touching the problem do not require the construction of the statute urged by the State Tax Assessor. The statute specifically provides for taxation of property passing "by survivorship in any form of joint ownership." R. S., Chap. 155, Sec. 2-I (C) (1954). We gain no aid from this provision or the cases in which it is discussed in deciding whether a *power* is an *interest in property. Gould, Admr.* v. *Johnson,* 146 Me. 366, 82 A. (2nd) 88 (1951); *Weeks* v. *Johnson,* 146 Me. 371, 82 A. (2nd) 416 (1951); *Hallett* v. *Bailey,* 143 Me. 1, 54 A. (2nd) 533 (1947).

In *Matter of Estate of John Cassidy,* 122 Me. 33, 118 A. 725, 30 A. L. R. 474 (1922), the court, in holding that the tax could not be assessed upon a contingent remainder and also that income payable at the discretion of trustees was taxable only on receipt by the beneficiary, said at page 37:

> "The tax then, let it be said in repetition, must be laid upon and subtracted from a definitely existing interest; the bare possibility of an interest will not suffice. The duty must be upon that which has passed by the will, within the statute's contemplation, and not on that which may never pass. Which is but another way of saying, that where a contingency makes succession uncertain, the tax assessment must be deferred until uncertainty has become certainty, by virtue of a contingent interest becoming vested in possession, or at least vested in right."

and again at page 39:

> "It was not the purpose of the Legislature, . . . to compel the payment of a tax on a privilege which as to vesting, actually or in right, yet remains impossible of determination. One should not be obliged to pay for that which may never be his."

The case does not involve a general power of appointment. The remainder in no way was dependent upon the exercise of a power, and obviously the trustees could not distribute the additional income to themselves. It does, however, illustrate the need of certainty of interest in determining an inheritance tax.

In *Luques, Appellant,* 114 Me. 235, 95 A. 1021 (1915), the court, after finding there was no power of appointment, approved in a dictum the theory that the taxable event occurs at the exercise of the power. In *Chandler* v. *Kelsey,* 205 U. S. 466 (1906), discussed at length in the opinion, it may be noted that New York by statute specifically provided for a tax on the exercise of a power. The *Luques* case in no way stands for the proposition that a power is an interest in property under our statute, or that in the exercise of the power the property passes from the donee to the appointee. See 18 A. L. R. 1472.

Two cases call for further comment: *Estate of Annie E. Meier,* 144 Me. 358, 69 A. (2nd) 664 (1949) and *Richburg,*

Appellant, 148 Me. 323, 92 A. (2nd) 724 (1952). The *Meier* case involved an inheritance tax upon a revocable trust created by the decedent. The issues related to jurisdiction and the effect of time limitations upon the state in seeking a tax.

The property was correctly and without question treated as the property of the decedent. The *Meier* case falls within the principle that a donor with a general power of appointment reserved to himself is the owner for purposes of taxation. Clearly in such instances the donor does not in substance pass effective control from himself. In other words, the donor has given up nothing, and hence what he retains, by whatever name it is called, is the equivalent of ownership.

In the case at bar, by will (and the same result would follow if by deed) the donor placed another in effective control of the disposition of the property. The undetermined fact was whether an appointee of the donee or a beneficiary in default of appointment would take the property of the donor on the death of the donee. *Curry* v. *McCanless,* 307 U. S. 357, 59 S. Ct. 900, 123 A. L. R. 162 (1939) ; *Bullen* v. *Wisconsin,* 240 U. S. 625 (1916).

In the *Richburg* case the will failed for the reason that an executor directed to dispose of personal articles and effects was held "beneficially interested" and hence not a competent witness to the will. R. S., Chap. 169, Sec. 1 (1954). The court considered it immaterial whether the will vested title in the executor for his beneficial use or conferred upon him a power of appointment. The inheritance tax statute was in no way in issue in the case. There is wide difference between the beneficial interest which disqualifies a witness to a will and an interest in property under the inheritance tax statute. The donee of a power is understandably interested in the creation of the power by the donor, whether by deed or by will. The donee gains a power derived from the

donor to control the disposition of the donor's property. To say that a donee is "not beneficially interested under said will" would deny the very existence of the power. It does not follow, however, that the power is an interest in property within the meaning of the inheritance tax statute, and that is the only issue before us.

The issue of whether a power to appoint is an interest in property under the inheritance tax statute is not reached by cases relating to the manner of creating or exercising the power. Whether the will or deed of the donor or donee, as the case may be, is a sufficient instrument, does not determine whether the power is property. For example, an appointment by will is a testamentary act of the donee. In *Thompson* v. *Pew,* 214 Mass. 520, 102 N. E. 122 (1913), the court, in holding the donee was the testator for purposes of the anti-lapse statute, said: "We do not regard this result as in any way inconsistent with that reached in *Emmons* v. *Shaw (supra)* . . ."

We conclude that the testamentary power in the widow was not "property" or "any interest therein" passing to her within the meaning of the inheritance tax law.

We approve of the procedure suggested by the parties in the agreed statement of facts, as follows:

> "If the petitioners prevail the Court may direct that the tax on the widow's share be recomputed by confining the value of the property passing from Edward K. Leighton and taxable to his widow under Paragraph Second of his will to the value of the widow's life estate, and the tax assessed over and above said tax so recomputed shall be abated."

The entry will be

Case remanded to the Probate Court for entry of a decree sustaining the petition and for further proceedings in accordance with this opinion.

CHARLES J. HERSON
vs.
WILLIAM R. CHARLTON

Cumberland. Opinion, August 18, 1955.

Negligence. Intersection. Evidence.

If a plaintiff is guilty of contributory negligence to any degree, he cannot recover.

The vehicle approaching an intersection on the right has the right of way. R. S., 1954, Chap. 22, Sec. 86.

Where physical evidence is available it must, when it contradicts that of eye witnesses and parties interested in the outcome, control and be decisive.

ON EXCEPTIONS.

This case is before the Law Court upon plaintiff's exception to the granting of a directed verdict. Exceptions overruled.

Clifford & Clifford, for plaintiff.

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

SITTING: FELLOWS, C. J., WEBBER, BELIVEAU, TAPLEY, JJ. WILLIAMSON, J., did not sit. MR. JUSTICE TIRRELL sat at the time of argument and took part in conference but died before writing of the opinion.

BELIVEAU, J. On exception. On motion of the defendant, the presiding justice, at the close of the evidence, granted a motion for a directed verdict in his favor, on the ground that the plaintiff was not free of contributory negligence and because of that was not entitled to recover. The ruling was correct.

This is an action to recover damages because of an automobile collision which occurred late in the afternoon of September 29, 1953, in the town of Poland, at the intersection of Routes 11 and 26. The plaintiff was driving westerly on Route 11, coming from Mechanic Falls, and the defendant driving southerly on Route 26 in the direction of the town of Gray. The plaintiff's testimony is that as he approached the intersection, he stopped at the stop sign, about 40 feet from the edge of Route 26 and because his view was obstructed, again started his car, moved to the edge of Route 26, looked northerly a distance of some 250 feet, and did not see anything coming from that direction. He then proceeded to cross.

There is conflict in the testimony as to just where the collision occurred. It is the plaintiff's contention that he crossed the intersection, swung to his left and had gone the distance of three or four car lengths before he was struck in the rear by the truck operated by the defendant.

The defendant stated in his testimony, that the plaintiff had not completed the turn when the collision occurred.

The plaintiff must prove negligence of the defendant and exercise of due care on his part. If he fails in either he cannot recover.

We are concerned solely with the conduct of the plaintiff, which the justice below ruled as a matter of law, was negligent. There is no occasion, or need to discuss the negligence of the defendant. It is well known law that if the plaintiff is guilty of contributory negligence to any degree, then he cannot recover, even though the defendant was also negligent.

We have, first, the admission of the plaintiff that while he stopped at the very edge of the pavement on Route 26, he looked northerly a distance of 250 feet and saw nothing. The only conclusion to be reached is that he failed to look,

or having looked, gambled on crossing the intersection, making the turn and continuing on his way before the defendant reached that point. The defendant was northerly of the intersection on Route 26 somewhere within a distance of at least 250 feet. Plaintiff's attempt to come into the intersection under those circumstances was in and of itself negligent and at least a contributing factor.

The vehicle of the defendant approaching the intersection on the plaintiff's right had the right of way. Section 86 of Chapter 22 of the Revised Statutes.

In *Gregware* v. *Poliquin,* 135 Me. 139, the court in that case stated, as a rule of law, that if there is doubt that a safe crossing may be made, one traveling from the left is required to stop.

As before stated that the plaintiff testified that he had gone three or four car lengths (he estimated the length of his car at from 12 to 14 feet) from the intersection when he was struck—it means the plaintiff had traveled from 42 to 56 feet and probably not more than 75 feet after he entered the intersection. The distance traveled is more evidence of the plaintiff's negligence because 75 feet, in so far as automobiles in motion are concerned, is an exceedingly short distance and allows little if anything for safety.

However, the most damaging evidence of the plaintiff's negligence is in defendant's exhibit No. 7, showing the damage to the plaintiff's car. That clearly shows it was struck at a point immediately in the rear of the right rear tire and no damage to the other side of the rear end. This could not possibly have occurred if the plaintiff was traveling in a straight line on Route 26, with the defendant's truck going in the same direction and striking him as the plaintiff claims, from the rear. It would have been impossible for the defendant to collide with the plaintiff, as he claims, unless that car was at the time of the collision, directly or almost directly across Route 26 at the intersection.

To further support the situation it is admitted that the defendant's truck landed on the left-hand side of the road after the collision and the plaintiff's car to the right.

There was also evidence that the investigating officer found scuff marks directly under the blinker light at the intersection.

Where physical evidence is available it must, when it contradicts that of eye witnesses and parties interested in the outcome, as in this case, control and be decisive. *Esponette* v. *Wiseman,* 130 Me. 297.

The physical evidence demonstrated clearly plaintiff's negligence.

Exception overruled.

ADELARD DULAC
vs.
JEANE J. BILODEAU

Androscoggin. Opinion, August 29, 1955.

Brokers. Deposit. Agency. Judge's Charge.

In testing the refusal to direct a verdict for defendant the evidence must be viewed in the light most favorable to the plaintiff.

The correctness of a charge is not to be determined from isolated statements, but, rather, from the charge as a whole. R. S., 1954, Chap. 113, Sec. 104.

ON EXCEPTIONS.

This is an action of assumpsit before the Law Court upon defendant's exceptions after jury verdict for plaintiff. Exceptions overruled.

Berman & Berman, for plaintiff.

John A. Platz, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, JJ. THAXTER, A. R. J. TAPLEY, J., did not sit.

WILLIAMSON, J. This is an action in assumpsit for money had and received by a prospective purchaser against a part owner to recover an "initial payment" made to a real estate agency. The case is before us on exceptions (1) to the refusal to direct a verdict for the defendant, and (2) to a portion of the charge. Other exceptions were abandoned.

FIRST EXCEPTION

Under the familiar rule, in testing the denial of a directed verdict we take the evidence in the light most favorable to the successful party, here the plaintiff. *Jordan* v. *Portland Coach Company*, 150 Me. 149, 107 A. (2nd) 416 (1954); *Greene, Admr.* v. *Willey*, 147 Me. 227, 86 A. (2nd) 82 (1952).

The parties executed the following written agreement:

"THE LAMARRE AGENCY
54 PARK STREET
LEWISTON, MAINE
DIAL 3-1210 DATE June 13, 1953

I HEREWITH OFFER TO PURCHASE PROPERTY AT 125 Pierce St. Lewiston, Maine (Malo-Property) FOR TEN THOUSAND * * * *00/100 DOLLARS ($10,000.00) SUBJECT TO ACCEPTANCE BY OWNER. TERMS: $500.00 INITIAL PAYMENT HEREWITH MADE TO THE LAMARRE AGENCY. BALANCE AS FOLLOWS: Cash at time of sale

PAYMENT TO BE RETURNED IF OFFER IS NOT ACCEPTED WITHIN 90 DAYS FROM ABOVE DATE

/s/ ADELARD DULAC
PURCHASER

This agreement void if all co-owners do not execute deed within 90 days or if deed free of encumbrances cannot be executed. No liability upon Jean Bilodeau individually of any kind.

THE ABOVE OFFER IS ACCEPTED .....
OWNER
DATE OF ACCEPTANCE /s/ JEAN BILODEAU
June 5-53
COPY OF AGREEMENT (PURCHASER A.D.
RECEIVED (OWNER J.B."
(Printed words are here capitalized.)

On the reverse side "Seller to pay The Lamarre Agency a commission of 5% of the sale price.

/s/ JEANE BILODEAU"

and also an extension of "the within contract . . . to November 23, 1953 . ." signed by the parties, as purchaser and seller.

The agreement ended upon the failure of the defendant to deliver the required deed within the extended period. Upon the refusal of the defendant to repay the "initial payment," which in fact she had never received, the plaintiff brought suit.

The defendant, a part owner of the "Malo Property," listed the property for sale with the Lamarre Agency, duly licensed real estate agents. The plaintiff approached the Agency and after he was shown the Malo Property, executed the above offer prepared by the Agency, and made the initial $500 payment.

The plaintiff's offer and check for $500 were shown by a representative of the Agency to the defendant. After the addition of the "This agreement void . . ." and "No liability . . ." sentences by defendant's attorney, the agreement, including the provision for a commission, was signed by the defendant. Later the agreement was extended by the parties.

Without question, the plaintiff in equity and good conscience is entitled to the return of the $500 payment on the purchase price from either the real estate agency or the defendant, or it may be from both.

The defendant contends that she insulated herself from any responsibility by the express "no liability" terms of the agreement. She would place the liability upon the Agency. On the other hand, the plaintiff asserts that the payment was held by the real estate agency as agent for the defendant, and hence the defendant is under liability as a principal.

The decisive issue is whether the evidence permitted a finding by the jury that the real estate agency held the $500 payment as defendant's agent. If so, whatever may have been the details of their relationship, the defendant would be liable in this action. That is to say, if equity and good conscience require that the agent return the payment, then also they require like action by the principal.

The defendant places great weight on the statement in the agreement, "No liability upon Jean Bilodeau individually of any kind." The defendant was thereby relieved of liability for failure to deliver a conveyance of the property. The plaintiff makes no claim otherwise. Whatever the rights of the defendant to insist upon a completion of the purchase by the plaintiff, or of the plaintiff to insist upon a conveyance from the defendant, we are left with the fact that the sale was not completed. As we have seen, the plaintiff became entitled to the return of the $500 payment from some source.

There is nothing in the record to show that at the time of payment there then existed an express or implied authority in the real estate agency to receive payments on behalf of the defendant. The defendant, however, with the approval of the plaintiff, accepted the offer on the terms indicated with full knowledge of the initial payment on the purchase price. With such acceptance, the receipt and retention of the $500 as a part of the purchase price was ratified and approved by the defendant. The jury was warranted in finding that the agency of the Lamarre Agency

was thereby made complete. *Pease* v. *Shapiro,* 144 Me. 195, 67 A. (2nd) 17 (1949). See also *Dickey* v. *Allen,* 277 Mass. 344, 178 N. E. 544 (1931); *Boles* v. *Johnson,* 205 Okla. 356, 237 P. (2nd) 620 (1951); *Lynn* v. *Northern Federal Sav. & L. Asso.,* 235 Minn. 484, 51 N. W. (2nd) 588, Annot., 30 A. L. R. (2nd) 799 (1952). The first exception is overruled.

SECOND EXCEPTION

The defendant contends that the court erred in expressing an opinion on an issue of fact in the course of the charge. The instruction complained of reads:

> "However, this action does not involve any action for breach of contract involving conveyance nor does it involve any matters that might be in dispute between the principal and the broker, her agent."

We have examined the entire charge and are satisfied that the court presented the issues in the case to the jury plainly and with care. The following extracts illustrate the completeness of the instructions:

> "You will bear in mind that if you have found the Lamarre Agency, Mr. Pelletier to be—that is, his actions to have been ratified and he to be the agent of the Defendant, and that his actions in accepting the money were her actions, then she in fact actually received the money as a matter of law."
>
> * * * * * * * * *
>
> "If you find upon all of the evidence a valid agency existing under which the agent, the Lamarre Agency, Mr. Pelletier, was authorized expressly or by ratification of his conduct in accepting the money by the Defendant with full knowledge of all the facts, then the act of accepting the money becomes the act of the defendant, Mrs. Bilodeau, and she in fact does, in law, have possession of the money, — that is, if you have found a valid ratification."

"The correctness of a charge is not to be determined from isolated statements, but, rather, from the charge as a whole." *State* v. *Barnett,* 150 Me. 473, 476, 114 A. (2nd) 245 (1955). From an examination of the entire charge it does not appear there was error in the instruction given by the court, or that the defendant was aggrieved thereby. *Nielson* v. *Textbook Company,* 106 Me. 104, 75 A. 330 (1909); *Donnelly* v. *Granite Co.,* 90 Me. 110, 37 A. 874 (1897).

The presiding justice did not violate the statute, which reads in part that he, ". . . 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 agrieved thereby and interested desires it; . . ." (R. S., Chap. 113, Sec. 104.)

The entry will be

Exceptions overruled.

MARY E. HAYES

vs.

NEW ENGLAND GREYHOUND LINES, INC.

Cumberland. Opinion, August 31, 1955.

Negligence. Carriers. Buses. Passengers.

The driver or operator of a one man bus, while he must use reasonable care and correct a negligent situation when it is, or should be, known to him, is not required to be constantly on the alert to cope with the negligence of other passengers.

ON EXCEPTIONS.

This is a negligence action before the Law Court upon plaintiff's exceptions to the direction of a verdict. Exceptions overruled.

Oakes & Oakes, for plaintiff.

Berman, Berman & Wernick, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, JJ., THAXTER, A. R. J. TAPLEY, J., did not sit.

BELIVEAU, J. On exceptions. During the trial the plaintiff noted two exceptions to the exclusion of testimony offered by her. These exceptions are now abandoned. The remaining exception is to the direction of a verdict for the defendant.

Late in the afternoon of September 9, 1953, the plaintiff, as a paying passenger, boarded the defendant's bus at Portland with Portsmouth, N. H., as her destination. Some time after the bus had left Portland and while in motion, a small bag fell from the baggage rack, directly over the plaintiff, and she claims, came in contact with her person and caused some physical injuries. The bag was one owned by one Fay Aust who boarded the bus at Portland and who testified that she placed this small bag, weighing 2⅜ lbs. when empty, on top of other luggage already there in the overhead baggage rack. The bus was in charge of a driver who was the only employee concerned with its operation and supervision.

The complaint of the plaintiff, on which she bases her action, is that there was no such inspection as the law requires and failure to so inspect was the negligence which caused her injuries.

The plaintiff does not contend that the baggage rack, so-called, was not of proper construction and not of sufficient size to accommodate such baggage as pasengers saw fit to place thereon.

It appears from the evidence that Miss Aust was one of the very last to board the bus and that, just before, the driver had checked the baggage on the rack.

> "Ordinarily a carrier is not responsible for injury to a passenger from the acts of another passenger unless the circumstances are such that, by the exercise of ordinary care, he could have anticipated the danger and guarded against it. Adams v. Louisville & N.R.Co., 134 Ky. 620, 121 S.W. 419, 135 Am.St.Rep. 425, 21 Ann.Cas. 321; Louisville & N.R.Co. v. Rommele, 152 Ky., 719, 154 S.W. 16, Ann. Cas. 1915B, 267. The duty of caring for small baggage rests primarily upon the passenger to whom it belongs. The negligence, if any, of the carrier rests in the fact that its employee did not, in the exercise of ordinary care, see the precarious or dangerous manner in which baggage was placed and either remove it or secure it. Anno. 37 L.R.A., N.S., 724."

Williams v. *Queen City Coach Co.*, 228 N. C. 191, 44 S. E. (2nd) 883, 885.

> "Liability rests upon failure to act after notice. In order to make it the duty of an employee to act, he must have actual notice that the baggage is placed in the rack in such manner or is of such size or shape that it is likely to fall and injure some passenger, or the condition creating danger must have existed a sufficient length of time to affect him with constructive notice. Greer v. Public Service Coordinated Transport, 124 N.J.L. 512, 12 A. 2nd 844; Burns v. Pennsylvania R. Co., 233 Pa. 304, 82 A. 246, Ann. Cas. 1913B, 811; Adams v. Louisville & N.R. Co., supra."

Williams v. *Queen City Coach Co., supra,* at 886.

The driver or operator of a one-man bus, while he must use reasonable care and correct a negligent situation when it is, or should be, known to him, is not required to be constantly on the alert to cope with the negligence of other passengers.

The only evidence here is that the bag fell and struck the plaintiff. There is nothing to show what caused the bag to disengage itself and fall from the rack. The bus had been

in motion for some time and when this occurred—the operation, speed, etc., was normal.

Under the evidence and the law, the plaintiff has failed to prove any negligence on the part of the defendant and the motion for a directed verdict was properly granted.

Exception overruled.

PYROFAX GAS CORPORATION
vs.
CONSUMERS GAS COMPANY, INC.

PYROFAX GAS CORPORATION
vs.
BERTRAM D. STANLEY

Cumberland. Opinion, August 31, 1955.

Assignment. Pleading. Abatement. Rules. R. S. Chap. 113, Sec. 170. Report Waiver. Guarantee. Consideration. Evidence. Admissions.

The objection that plaintiff assignee did not file with its writ the assignment as required by R. S., 1954, Chap. 113, Sec. 170 must be raised by plea in abatement according to Rule 5 of the Revised Rules of Court.

In cases submitted to the Law Court upon report and agreed statement, technical questions of pleading are waived unless the contrary appears.

The admission by a defendant that he has received "one dollar and other valuable considerations" for the execution or giving of a guarantee overcome the objections that it lacks the element of consideration and is not under seal.

ON REPORT.

This is an action for breach of contract and an account annexed. The case is before the Law Court upon report and agreed statement. Judgment for plaintiff.

Linnell, Brown, Perkins,
Thompson & Hinckley, for plaintiff.

Wilfred A. Hay, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, TAPLEY, JJ. MR. JUSTICE TIRRELL sat at the time of argument and took part in conferences but died before writing of the opinion.

BELIVEAU, J. On agreed statement of facts.

The Consumers Gas Company, Inc., entered into a contract, or franchise, with Union Carbide and Carbon Corporation on the first day of October 1952 and both parties acted under that contract until December 31, 1953, when it was assigned to Pyrofax Gas Corporation, the plaintiff. After this assignment, according to the statement of facts, The Consumers Gas Company, Inc., "continued to deal with, accept deliveries of Pyrofax Gas, and equipment and supplies from the plaintiff, and to make payments therefor until July 7, 1954" when the plaintiff terminated the franchise, as provided by the terms of the contract. At that time, as stipulated, there was due from the Consumers Gas Company, Inc., the sum of $13,500.

The Gas Company, although it admits the sum of $13,500 is due, contends that these actions cannot be maintained because (1) the plaintiff failed to comply with Section 170 of Chapter 113 of the Revised Statutes, in that it did not file with its writ the aforesaid assignment, or copy thereof, and (2) because the contract was of such nature that it

could not be assigned and was not binding on The Consumers Gas Company, Inc.

As to the first contention of the defendant, the answer is that the only procedure available to it was by plea in abatement, which, according to the Revised Rule of Court No. 5, must be filed within two days after entry of the action. The defendant argues that he may at this late date make this objection. The Rule of Court, above mentioned, is specific and we see no reason why the defendant should be allowed to raise that objection here for the first time. There is no mention made of this in the statement of facts, and as our court has said in *Corporation et al.* v. *Bumpus et al.*, 141 Me. 11, the defendant must take advantage of such a situation by a plea in abatement and that —

> "no such plea having been filed in the cause the deficiency was eliminated by the introduction in evidence of all assignments necessary to prove that the plaintiff in question had become the owner of the right to collect that half of the rental applicable to the share of the lessor, Allen E. Cummings, in the property at the time the lease was given, accruing prior to the date of its ownership thereof."

To the same effect:

Littlefield v. *Pinkham,* 72 Me. 369.

> "It is generally considered, when a case is submitted to the Law Court on a report of evidence, or on an agreed statement of facts, that all technical questions of pleading are waived, unless the contrary appears."

Pillsbury v. *Brown,* 82 Me. 450.

The defendant's objection to the assignment cannot be sustained, because of the conduct of the defendant, Consumers Gas Company, Inc., after the assignment. It is not necessary for this court to rule here, whether or not the con-

tract comes within that group or class, which the courts have said are not assignable, and the answer to the defendant, on this score, is that Consumers Gas Company, Inc., after December 31, 1953 "continued to deal with, accept deliveries of Pyrofax Gas, and equipment and supplies from the plaintiff, and to make payments therefor until July 7, 1954." The admitted conduct of the Consumers Gas Company, Inc., after the assignment shows conclusively that it assented to and ratified it.

In view of that conduct it cannot now contend that the assignment had no force or effect insofar as it was concerned. The action here is for the collection of money admittedly due and does not otherwise involve the relationship between these parties as to the performance of other provisions of the contract.

Oak Grove Construction Co. v. *Jefferson County,* 219 Fed. 858.

In the action against Bertram D. Stanley, the plaintiff relies on a guarantee executed by Stanley dated December 24, 1952.

The defense is that the guarantee lacks the element of consideration and not being under seal, it is open to defendant to raise that objection.

While the statement of facts mentions the guarantee without stating any consideration to Stanley, in the document, Stanley states and admits that he has received a "consideration of one dollar and other valuable considerations * * * *" for the execution or giving of the guarantee.

These are not idle or meaningless words and must be interpreted to mean that Stanley received what he then considered was a sufficient consideration.

It must be borne in mind that Stanley, at the time, was president and majority stockholder of the Consumers Gas Company, Inc.

It was stated in *Whitney* v. *Stearns,* 16 Me. 397—

> "If a man will deliberately confess that he has received a valuable consideration for his promise, the *burthen* ought surely to rest on him to *shew* that he was under a mistake. Should he fail of doing so, the consideration is proved."

In *Harris* v. *Firth,* N. J. 68A, 1064, the court there held that "value received" on a promissory note imported the payment of a consideration to the maker by the payee.

It was said in *Lawrence* v. *McCalmont,* 2 How. 452—

> "The guarantor acknowledged the receipt of the one dollar and is now estopped to deny it. If she has not received it, she would now be entitled to recover it. A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract; and this is equally true as to contracts of guarantee as to other contracts. A stipulation in consideration of one dollar is just as effectual and valuable a consideration as a larger sum stipulated for or paid."

See also *Davis Sewing Machine Company of Watertown, N. Y.* v. *Richards et al.,* 115 U. S. Sup. Ct. Reporter 524.

In *Citizens' Sav. Bank & Trust Co.* v. *Babbitt's Estate* where a guarantee was executed "for value received" it imported a consideration and admission of parol evidence was unnecessary.

Citizens' Sav. Bank & Trust Co. v. *Babbitt's Estate,* 44A (Vt.) page 71.

See also 38 *Corpus Juris Secundum* Section 33, Page 1172.

It is evident from a study of the authorities, that the recital of a consideration received is, at least, prima facie evidence of that fact and in the absence of any evidence to con-

tradict or overcome this presumption, the defense of lack of consideration, argued in this court, avails the defendant Stanley nothing.

In the action against Stanley the plaintiff relies on the guarantee given by Stanley and alleges a breach of that contract. Later the plaintiff amended its writ by filing an account annexed which included a copy of the account annexed in the action against the Gas Company, money counts and specification that the plaintiff would prove the defendant had failed to perform a certain contract described in the plaintiff's declaration.

It is argued by the defendant that the plaintiff may not recover from the defendant the amount of the note described in the agreed statement of facts given by the Consumers Gas Company, Inc., and endorsed by Stanley.

As we view the declaration in the plaintiff's writ and amendments thereto, it was not the purpose to declare on the note but rather on a breach of the contract of guarantee, seeking to recover all that was due the plaintiff at the time contractual relations were terminated in accordance with the terms of the contract.

The introduction of the note was to establish that as of its date, the amount represented therein was due the plaintiff under the contract.

Our court has held in *Bean* v. *Camden Lumber and Fuel Company,* 124 Me. 103 —

> "A promissory note may even be introduced in evidence in support of a money count though not specially declared on."

See also *Fairbanks* v. *Stanley,* 18 Me. 296; *Webster* v. *Randall,* 36 Mass. 13; *Payson* v. *Whitcomb et al.,* 32 Mass. 212.

In view of the law established in *Pillsbury* v. *Brown supra,* the technical questions of pleading were waived by

the defendant unless the contrary appears. No reservations were made by either defendant as to these matters. The amount agreed upon in the stipulation as due from the Consumers Gas Company, Inc., is $13,500.

We find for the plaintiff in each case and judgments to issue against each defendant for $13,500 and interest from the date of the writ. Payment in part or in full by either of the defendants shall be credited on the judgment against the other defendant.

Judgment for plaintiff in each action.

STATE OF MAINE
vs.
EARL NORTON

Kennebec. Opinion, September 1, 1955.

Criminal Law. Indecent Liberties. Evidence. Similar Acts. Relevancy. Remarks of Counsel.

In a prosecution for indecent liberties under R. S., 1954, Chapter 134, Section 6, the State may show previous acts of a similar nature to the offense charged for the purpose of showing the relationship between the parties.

The admission of improper evidence that defendant had made improper advances to a third person is cured by being withdrawn or stricken from the record with an instruction given to the jury to disregard it entirely.

Relevancy and materiality are dependent on probative value and rest in the sound discretion of the presiding justice.

It is for the presiding justice to determine, in the exercise of his discretion, whether counsel has transgressed the bounds of professional duty (in remarks to the jury), and whether the misconduct, if any, is prejudicial, and whether a mistrial should be granted.

ON EXCEPTIONS AND APPEAL.

This is a prosecution under R. S., 1954, Chap. 126, Sec. 6. The case is before the Law Court upon exceptions to certain rulings of the presiding justice and upon appeal from the denial of a motion for new trial. Exceptions overruled. Appeal dismissed. Motion for new trial denied. Judgment for the State.

Lewis I. Naiman,
Joseph B. Campbell, for State.

Niehoff & Niehoff,
Bernard F. Cratty, for respondent.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, TAPLEY, JJ. MR. JUSTICE TIRRELL sat at time of argument and took part in conferences, but died before writing of opinion.

TAPLEY, J. On exceptions and appeal. The respondent was indicted under provisions of Sec. 6 of Chap. 121 of R. S., 1944 (now Sec. 6 of Chap. 134 of R. S., 1954) for taking indecent liberties with his stepdaughter, she being of the age of fourteen years. He was tried at the June Term, 1954 of the Superior Court for the County of Kennebec. The jury returned a verdict of guilty. The respondent was sentenced to a term of two years in the Maine State Prison.

During the course of the trial the respondent took exceptions to the admission of testimony and to the refusal of the presiding justice to grant a mistrial.

The respondent seasonably filed a motion for a new trial, which motion was denied, whereupon an appeal to this denial was taken.

EXCEPTION 1.

During the course of the trial the prosecutrix testified in behalf of the State and during the course of her direct examination she was asked the question:

"Q. Was this the first time your stepfather has done anything of this sort?"

whereupon the attorney for the respondent noted an objection. The record of the case speaks in the following language:

"Q. Was this the first time your step father has done anything of this sort?

Mr. NIEHOFF: I object.

Mr. CAMPBELL: If Your Honor please, I press this on the basis that any conduct of the complaint of the same nature prior to the event would be admissible evidence.

Mr. NIEHOFF: I object and state my grounds for objection. This is not the type of crime where intent is a part of it. It is malum prohibitum and therefore any testimony tending to show the commission of any other offense or the same or similar offense is inadmissible and we object on that ground.

Mr. CAMPBELL: If Your Honor please, I am referring to State vs. Berube, 139 Maine 11, holding the testimony of acts of the respondent of earlier happening than the offense charged in an indictment committed on the person named therein as the victim of the alleged crime is admissible to show the relationship between the parties.

The COURT: The question is admitted.

Mr. NIEHOFF: May I have an exception?

The COURT: You may. The Court read that case this morning."

Attorney for the respondent argues that an answer to the question is not admissible because the crime involved is not the type where intent is a part of the crime, while the prosecutor takes the position that an answer to the question is admissible to show the relationship between the parties.

In the Berube case respondent complained as to the admission of testimony that the female child named in the indictment was permitted to testify to previous acts of a similar nature to the offense charged. In the case of *State* v. *Berube,* 139 Me. 11, at page 14, the court said:

> "In the instant case we have no exception to the charge nor could one have been taken, since the testimony was admitted only for the purpose of showing the relationship between the parties, for which it was entirely proper."

State v. *Williams,* 76 Me. 480; 167 A. L. R., 621, 22 C. J. S., page 1161, Sec. 691 (u).

Exception overruled.

EXCEPTION 2.

A girl fifteen years of age and a schoolmate of the prosecutrix testified for the State and during the course of her testimony she was asked by the State's attorney:

> "Q. Has he ever made any indecent advances to you?
> A. Yes, he has."

whereupon an objection was made by defense attorney, who said:

> "Mr. NIEHOFF: I want a ruling because if it is allowed I shall ask that it be stricken and the jury be instructed to disregard it."

The presiding justice sustained respondent's objection, ordered the question and answer stricken from the record and instructed the jury to disregard the question and the an-

swer. The jury was then excused and, in its absence, counsel for respondent moved for a mistrial. The motion was denied and to the denial of the motion the respondent took exceptions.

Concerning mistrials, in *State* v. *Hamilton,* 149 Me, 218, at page 234, the court said:

> "The ordering of a mistrial is discretionary with the Presiding Justice and no exceptions lie to his refusal unless that discretion is abused."

State v. *Rheaume,* 131 Me. 260, at page 261:

> "But beyond this it maybe advisable to point out that such a motion is addressed to the discretion of the presiding Justice -----. He is in contact with actual conditions, and peculiarly qualified to render a decision. Unless there is a clear abuse of such discretion, no exceptions lie to his rulings."

The presiding justice when objection was made sustained it and caused the question and answer to be stricken from the record and promptly instructed the jury to disregard the question and the answer.

McCann v. *Twitchell,* 116 Me. 490, at page 493:

> "The great weight of authorities is in support of the rule that ordinarily the erroneous admission of improper evidence is cured, or so far cured as to be no longer a sufficient ground for a new trial, by being withdrawn or struck from the record and an instruction given to the jury to disregard it entirely."

State v. Kingsbury, 58 Me. 238; *State* v. *Thomas Fortin,* 106 Me. 382.

There appears from the record no abuse of discretion on the part of the trial judge.

The respondent takes nothing on this exception.

EXCEPTION 3.

The State's attorney on cross-examination of the respondent examined as follows:

"Q. Have you ever been drunk in your home on week-ends?

A. No, sir.

Q. Have you ever abused your wife?

A. No, sir.

Q. Never gave her a black eye?

A. No.

Q. Has your wife ever had to call the police?"

Before this last question was answered, counsel for respondent interposed an objection, after which the last question "Has your wife ever had to call the police?" was withdrawn. Counsel for respondent then objected that the questions preceding the last one, having to do with being drunk on week ends, abusing wife and giving her a black eye, were "prejudicial, irrelevant and immaterial to this case." The court then stated "We will let the questions stand at this time, with the understanding if they do not appear relevant we will take it up again." The respondent excepted to this ruling of the court, thus bringing into issue the materiality and relevancy of the testimony. The respondent had previously testified that everybody in his household seemed to be happy and that none of them had ever complained to him. Subsequent to the testimony of the respondent, there is testimony by his wife that she and her husband, the respondent, had been drinking beer at the home; that she and her husband had an argument and that she had left the house; that Chief Grant had been required to go to the Norton home on several occasions because of Mr. Norton's drunkenness and, finally, in the statement made by the prosecutrix, which was admitted as an exhibit, she said that her mother was afraid because the respondent had threatened her mother's life.

The court's ruling was to the effect that if these questions did not appear to be relevant as the case developed, their admissibility would be reconsidered. No reconsideration was ever made so it is proper to assume that these questions and answers became relevant and material in the court's mind.

Relevancy and materiality of testimony rest in the sound discretion of the presiding justice.
Rawley v. *Palo Sales, Inc., et al.*, 144 Me. 375, at page 380:

> "Relevancy and materiality are dependent on probative value. Any evidence tending to prove a matter in issue is admissible within the judicial discretion of the presiding justice, unless it is excluded by some rule or principle of law."

McCully v. *Bessey*, 142 Me. 209.

It can be further said that according to the record, the respondent suffered no prejudice by the admission of these questions and answers. It is so well recognized that exceptions do not lie to admission of testimony unless it is prejudicial that it is unnecessary to cite any authority on this point.

There is no merit in this exception.

EXCEPTION 4.

This exception is based on the refusal of the presiding justice to allow a motion for a mistrial. Counsel for the respondent contends that during the rebuttal argument of the State's attorney, he made a statement to the jury which was prejudicial to the rights of the respondent. The remarks complained of in argument were not recorded by the court reporter and we must depend upon the memory of counsel and the court as to what actually was said. Counsel for respondent contends that during this argument the State's attorney said to the jury: "If I had known he was going to

bring in character witnesses, I could have brought in many witnesses to show his bad character." Counsel for the State was not exactly sure of what he did say but the record discloses that at a conference in chambers State's attorney, upon objection by counsel for respondent during his rebuttal argument, continued with the statement to the effect that had the prosecutor known that respondent's good character was an issue in the case he would have endeavored to produce witnesses to attest to his character. The presiding justice in his charge to the jury obviously having in mind the alleged objectionable statement of State's attorney in his argument spoke to the jury in these words: "It sometimes happens in the course of conversation or remarks that we inadvertently say things that we should not, or make statements that convey the wrong impression. The county attorney in this case in the course of his argument, and here I will not attempt to quote his exact words but you will remember them and you will depend upon your memory, made some statement that indicated that if the State had known that the respondent was to present characer witnesses the State could have produced more character witnesses. This was later corrected by the State's attorney to indicate that he would have tried to locate more witnesses, or witnesses on that point. The court now instructs you that remark must be disregarded. The State has its one witness on this point, and any comment that would indicate the ability to produce any other witness must not be given any consideration."

88 C. J. S., page 306, Sec. 158 (b):

> "The conduct of attorneys in the course of a trial is at all times subject to proper regulation by the presiding judge, who has a wide discretion in this regard. Thus, it is for the judge to determine, *in the exercise of his discretion,* whether counsel has transgressed the bounds of professional duty, and whether the misconduct, if any, is prejudicial, and

whether a mistrial should be granted." (emphasis ours).

88 C. J. S., page 391, Sec. 197:

"Misconduct is generally cured where the trial court, by prompt action, protects the rights of the complaining party; and, where the court instructs the jury in response to an objection to the argument, thereby doing, at least to a certain extent, what was asked, and the sufficiency of the instruction was not questioned, the correction is sufficient."

Objection was noted to a statement purported to have been made by the State's attorney to the jury which respondent claims was prejudicial to him. There was some attempt on the part of the State's attorney to satisfy the objection by another statement to the jury. The court clearly and in unmistakable phraseology instructed the jury to disregard the remark. The presiding justice overruled the motion for a mistrial and in so doing did not abuse his discretionary powers. *State* v. *Hamilton, supra; State* v. *Rheaume, supra.*

APPEAL

The respondent, after verdict and before sentence, filed a motion that the verdict be set aside and a new trial granted. This motion was denied by the presiding justice and an appeal was filed to the denial. This case involves the taking of indecent liberties by the respondent. The victim is his stepdaughter who at the time was fourteen years of age. At the trial of the cause the stepdaughter testified and arrayed against her were the respondent and her own mother who both testified in substance that the act which formed the basis of the indictment never occurred. There is much testimony in the case on the part of the respondent and his wife endeavoring to show that prosecutrix was unruly, disobedient and difficult to discipline. The case was fully tried

and it may be assumed that all the available facts were presented for jury consideration. There is much conflicting testimony. It was for the jury to determine as a question of fact where the truth lies as between the State and the respondent.

Levine v. *Hamlin,* 129 Me. 106, at page 108:

> "Credibility of witnesses is to be appraised by the jury, who observe them as they testify."

There is sufficient evidence in the record upon which the jury could base a finding of guilt and this court under all the circumstances does not find that the verdict of the jury was in error.

Exceptions overruled.
Appeal dismissed.
Motion for new trial denied.
Judgment for the State.

STATE OF MAINE

vs.

HERBERT A. CROMMETT, ADMR. D. B. N.

ESTATE OF ANNA WIENBERG

Cumberland. Opinion, September 1, 1955.

Old Age Assistance. Probate. Executors and Administrators. Limitation of Actions. Statutory Construction.

It is the general rule in Maine that the State is not bound by a statute unless expressly named therein or in some manner specifically so stated. This rule applies to statutes of limitation.

The legislature is presumed to have in mind the decisions of the court.

R. S., 1954, Chap. 165, Sec. 17 which provides that no action shall be maintained against the estate of deceased persons unless commenced and served within twenty months, is not applicable to claims by the State of Maine for Old Age Assistance loans or advances.

The doctrine of "non-claim" which extinguishes the right of recovery rather than merely creating a bar to the recovery, is a doctrine not familiar to Maine and is not applicable where the State is a party and is not specifically referred to in the statutes.

The State may proceed with the enforcement of a claim under R. S., 1954, Chap. 25, Sec. 295 but judgment cannot be enforced against real property so long as the widow or widower occupy it as a home.

ON REPORT.

This is an action of assumpsit for the recovery of Old Age Assistance advances. The case is before the Law Court on report. Judgment for the plaintiff for $1500.00 without interest or costs.

George C. West, for plaintiff.

Arthur A. Peabody, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, JJ., THAXTER, A.R.J. TAPLEY, J., did not sit.

FELLOWS, C. J. This action of assumpsit is brought by the State of Maine against the administrator of an estate, to recover for Old Age Assistance furnished by the State to the deceased at her request during her lifetime. The case comes to the Law Court on report, with an agreed statement of facts.

The declaration alleges "that the said Anna Wienberg in her lifetime at South Portland, County of Cumberland, State of Maine, applied to the Department of Health and Welfare of the State of Maine for Old Age Assistance and was granted said Old Age Assistance by said Department in the month of April, 1939, and the said Anna Wienberg continued to receive said Old Age Assistance through the month of August, 1944, as shown by the itemized account attached hereto and made a part hereof, and that during said period of time the said Anna Wienberg received a total of Fifteen Hundred ($1500.00) Dollars in Old Age Assistance, and that the said Anna Wienberg died on September 7, 1944, whereby and by virtue of the provisions of Section 295, Chapter 25 of the Revised Statutes of 1954 the estate of the said Anna Wienberg became liable and promised to pay to the State of Maine the sum of Fifteen Hundred ($1500.00) Dollars.

And the Plaintiff avers that on the 13th day of June, 1945, being within one year after the date of the appointment of the administrator, aforesaid, and at least thirty days before the commencement of this suit, the claim herein declared on was filed in the Registry of Probate in said County of Cumberland, supported by the affidavit of Jean Lois Bangs, a person cognizant thereof; that neither the deceased in her lifetime nor since her decease has the administrator ever paid the same."

The plea was the general issue with the following brief statement: "The said defendant further says in a plea of confession and avoidance that, if the plaintiff ever had a

right of action, it is barred by the special statute of limitation, to wit, Chapter 165, Sections 17 and 21. For that the said Anna Wienberg died intestate September 7, 1944, that Henry L. Wienberg duly qualified as her Administrator on November 8, 1944, that said Administrator died intestate December 27, 1945, without having fully administered said estate, that this defendant was appointed as Administrator, d.b.n., of said estate on May 27, 1954, and that this suit was commenced March 23, 1955, which date of commencement is more than twenty months after the qualification of said Henry L. Wienberg as Administrator, exclusive of the time when there was no representative of this estate, to wit, twenty-four months, wherefore he prays judgment."

The agreed facts are as follows:

"That the Department of Health and Welfare of the State of Maine granted to Anna Wienberg of South Portland in the County of Cumberland in the State of Maine, in the period of 1939 until her death, Old Age Assistance in the amount of $1500.

That Anna Wienberg of said South Portland died intestate, September 7, 1944.

That Henry L. Wienberg duly qualified as her administrator on November 8, 1944, by decree of the Judge of Probate for Cumberland County.

That on June 16, 1945, the State of Maine duly filed its Proof of Claim in the amount of $1500, at said Probate Court.

That Henry L. Wienberg died intestate December 27, 1945, without having fully administered said estate.

That Herbert A. Crommett, Esq., was appointed Administrator, d.b.n., of the estate of said Anna Wienberg, on May 27, 1954.

That the State of Maine commenced this suit against the estate of Anna Wienberg on March 23, 1955.

That after the qualification of said Henry L. Wienberg as Administrator, suit on this claim was not commenced and served within twenty months exclusive of the time when there was no representative of this estate.

That the parties to this suit are the correct parties and that the form of said suit is good and sufficient.

That Herbert A. Crommett, as Administrator, d.b.n., of said estate has duly filed a plea of the General Issue with a Brief Statement setting up as a special matter of defense, Sections 17 and 21, Chapter 165, R. S., 1954.

It is further agreed that the Supreme Judicial Court sitting as Law Court is to make a final decision in the matter.

It is further agreed that if judgment is for the plaintiff, it shall be for $1500 without interest or costs; if judgment is for the defendant, it shall be without costs."

The applicable statutes are as follows: "All claims against estates of deceased persons, including claims for amounts paid under the provisions of sections 276 to 297, inclusive, of Chapter 25 (Old Age Assistance), and except for funeral expenses, expenses of administration, legacies, distributive shares and for labor and materials for which suit may be commenced under the provisions of section 39 of chapter 178, shall be presented to the executor or administrator in writing or filed in the registry of probate, supported by an affidavit of the claimant or of some other person cognizant thereof, either before or within 12 months after his qualification as such executor or administrator; and no action shall be commenced against such executor or administrator on any such claim until 30 days after the presentation or filing of such claim as above provided. Any claim not so presented or filed shall be forever barred

against the estate." Revised Statutes 1954, Chapter 165, Section 15.

"In an estate where the state has any claim under the provisions of section 276 to 297, inclusive, of chapter 25 (Claim for Assistance money), the claim shall be forever barred unless administration is taken out on such estate within 2 years following the death of the welfare recipient or the surviving spouse, in the event said spouse occupies real estate of said welfare recipient. Revised Statutes 1954, Chapter 165, Section 16.

Actions against executors or administrators on such claims, if brought within 1 year after qualification, shall be continued without cost to either party until said year expires and be barred by a tender of the debt within the year, except actions on claims not affected by the insolvency of the estate and actions on appeals from commissioners of insolvency or other commissioners appointed by the judge of probate. No action shall be maintained against an executor or administrator on a claim or demand against the estate, except for legacies and distributive shares, and except as provided in section 19, unless commenced and served within 20 months after his qualification as such executor or administrator." Revised Statutes 1954, Chapter 165, Section 17.

"Upon the death of a beneficiary, the state shall have a claim against his estate, enforceable in the probate court, for all amounts paid to him under the provisions of sections 276 to 297, inclusive (Old Age Assistance). Such claim shall have priority over all unsecured claims against such estate, except:

I. Administrative expenses, including probate fees and taxes;

II. Expenses of the last sickness and burial expenses.

The attorney general shall collect any claim which the state may have hereunder against such estate. Provided

that no such claim shall be enforced against any real estate while it is occupied as a home by the surviving spouse of the beneficiary and said spouse does not marry again." Revised Statutes 1954, Chapter 25, Section 295.

The defendant contends that this claim of the State of Maine, for money advanced by the State to the deceased in her lifetime at her request is barred by the Statute of Limitations because suit was not commenced and served within twenty months from the qualification of the Administrator. In other words, the question raised here is whether the State having filed a claim in the Probate Court within 12 months must bring an action within twenty months after the appointment of an administrator, when the administrator has failed to pay the State's claim within that period.

It is the general rule in Maine that the State is not bound by a statute unless expressly named therein. *Banton* v. *Griswold,* 95 Me. 445; *Cape Elizabeth* v. *Skillin,* 79 Me. 594; *Goss Co.* v. *Greenleaf,* 98 Me. 436; *Whiting* v. *Lubec,* 121 Me. 124. See generally 34 Am. Jur. 307 "Limitation of Actions," Section 393 and cases cited.

A statute of limitations does not apply against the State unless the State is expressly named therein, or in some manner it is specifically so stated. *Nullum tempus occurrit regi. Topsham* v. *Blondell,* 82 Me. 152; *Estate of Meir,* 144 Me. 364. "The crown is not bound by a restraining statute, unless specifically named." *Cape Elizabeth* v. *Skillin,* 79 Me. 593, 594. As said by the court in *Banton* v. *Griswold,* 95 Me. 445, 450: "In the absence of express words *most explicitly requiring it,* the court cannot hold that the legislature intended to subject the sovereign state to such liabilities." (Emphasis ours)

The foregoing cases decided by this court were known to the legislature, as is indicated by the statutes that have been passed and are cited above. The legislature intended to

place certain limitations upon the State, such as filing claim within twelve months, and to see that administration is taken out within two years, as specifically stated in Revised Statutes, 1954, Chapter 165, Sections 15 and 16, but there was no specific limitation as to the State in regard to suit within the twenty month period, because the State is not specifically referred to. "The legislature is presumed to have in mind the decisions of the Court." *Webber* v. *Granville Chase Co.*, 117 Me. 150, 152. See also *Waken* v. *Van Buren,* 137 Me. 127, 132; *Starks* v. *New Sharon,* 39 Me. 368, 370; *East Livermore* v. *Banking Co.,* 103 Me. 418, 429; 50 Am. Jur. 461, "Statutes," Sec. 442, and cases cited.

The first statute pleaded by the defendant in defense of this action is the statute of limitation that provides that no action shall be maintained unless commenced and served within twenty months. Revised Statutes 1954, Chapter 165, Section 17. The second statute pleaded by defendant is the statute relating to computation of time when there has been an interruption in the administration due to death, resignation, or removal, and a new administrator is appointed. The time of the interruption is not reckoned as part of the twenty months. Revised Statutes 1954, Chapter 165, Section 21. The above second statute pleaded by defendant is admittedly not material under the circumstances of this case.

The counsel for the defendant in a carefully prepared and comprehensive brief, insists that this statute of limitation is a statute of "non claim" and cites decisions from some other jurisdictions to this effect. Statutes of "non claim" not only affect the remedy but extinguish the right of recovery. Maine is not familiar with this doctrine, under such a name as against the State, where the State is not specifically referred to. In view of the many decisions of this court to the contrary, we cannot agree with it.

The Legislature has here specifically limited the State, by requiring the filing by the State of Old Age Assistance

claims within 12 months, with the further limitation that the State's claim is barred unless administration is taken out on the estate within two years following the death of the recipient or the surviving spouse, if the spouse occupies the recipient's real estate.

The only property left by the deceased in assistance cases is usually the homestead property, and as long as this homestead property is occupied as a home by the surviving spouse, and such spouse does not remarry, the Legislature has said that the State cannot enforce its claim. Revised Statutes, 1954, Chapter 25, Section 295 above quoted. The State might proceed with a suit, but judgment cannot be enforced against this real property, so long as the widow or widower occupies it as a home.

The only proper construction of these various statutes in order to carry out the legislative intent, is to hold that the State must file its Old Age Assistance claim within twelve months after the administrator has qualified, which gives notice that the State has a claim against the real estate of the deceased, but the State is not compelled to commence suit within the twenty months period. Further, the State may be obliged to await an opportunity to enforce a judgment, if the surviving spouse occupies the homestead.

The legislature has required, on the part of the State, prompt action by the State in relation to the filing of the State's claim for a return of taxpayers' money which was loaned or advanced by the State at the elderly person's request, under Old Age Assistance Laws. If the legislature had intended, however, that the State must bring action to enforce its claim within twenty months, it would have clearly and specifically so stated.

Judgment for the Plaintiff for $1500 without interest or costs.

F. LUCILLE JOHNSTONE
vs.
CARL E. GARDNER

Cumberland. Opinion, September 19, 1955.

Negligence. Bankruptcy. Automobiles.
Wilful and Malicious Injury.

What constitutes such a wilful and malicious injury as not to be dischargeable in bankruptcy depends upon the facts of the particular case.

Negligent conduct in driving an auto to be wilful and malicious within the meaning of the Bankruptcy Act must be so in disregard of the consequences to another that it can be said to have been wanton as well as wilful.

ON EXCEPTIONS.

This is a negligence action before the Law Court upon plaintiff's exceptions to the direction of a verdict. Exception overruled.

Raymond S. Oakes, for plaintiff.

Harris R. Bullerwell, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, JJ., THAXTER, A.R.J. TAPLEY, J., did not sit.

BELIVEAU, J. On exception by the plaintiff to a directed verdict in favor of the defendant.

This is an action by the plaintiff to recover damages to a certain Ford automobile and to the person of the plaintiff, who was the owner and driver of the car at the time of the collision on May 6, 1954.

The defendant filed a plea of general issue together with a brief statement that the defendant was adjudicated a

bankrupt on the second day of August 1954 and pleads this as a defense to the plaintiff's action. In her declaration the plaintiff makes the usual allegations of negligence and in addition thereto that the negligence of the defendant was willful and malicious, and for that reason was not affected by the bankruptcy proceedings.

It is true that willful and malicious injuries to the person or property of the plaintiff is not affected by bankruptcy—that is the sole issue presented here for discussion.

Am. Jur. has this to say on the subject:

> "What constitutes wilful and malicious injury growing out of an automobile accident, within the provision of the Bankruptcy Act, relating to discharge, depends in each case upon the particular facts, so that it is difficult, if not impossible, to formulate a general rule applicable to all cases. It can, however, be safely asserted that liability for simple negligence in the operation of a motor vehicle which results in an injury to another is not excepted from a discharge in bankruptcy as a wilful and malicious injury. Neither reckless nor unlawful operation of the vehicle brings liability for an injury resulting therefrom within the exception, unless the conduct appears to have been so in disregard of the consequences to another that it can be said to have been wanton as well as wilful."
>
> *6 Am. Jur. 1011, Sec. 786.*

There is not in the reported evidence one iota of testimony to substantiate the allegation of willful and malicious conduct.

The plaintiff puts much reliance on the defendant's testimony as showing malice and willfulness. It appears that prior to the collision, as set out in plaintiff's declaration the defendant had been up day and night for several days; on that morning had gone to a friend's home; had some breakfast and took a nap from 8:00 or 8:15 to 1:30 in the after-

noon; that he felt much better and headed for Yarmouth. He testified that he was "a little faint" and that as he approached the point where the collision occurred "I dozed or blanked out or something" that he sideswiped another automobile and at that point "snapped out of it" because of the loud noise caused by this collision.

The plaintiff testified that after contact with the first car the defendant came head on into her.

These facts, strenuously argued by the plaintiff as showing malicious and willful conduct, prove or show quite the contrary. The collision occurred probably because of the tired and exhausted condition of the defendant, brought on by over work and lack of sufficient sleep.

While this may be negligence, it cannot be construed or considered, in any sense of the word, as malicious and willful conduct but on the contrary, is similar to the many automobile cases which come to our court for adjudication.

"Willful" has been defined and is recognized both by laymen and the law to mean voluntary and intentional doing of an unlawful act.

Webster defines a malicious act as one characterized by, or involving, malice, having, or done with wicked or mischievous intentions or motives.

The plaintiff's declaration alleges no act or acts done by the defendant showing a bad motive, ill will or malice toward her, and, as we have said before, there is nothing in the reported testimony to support this allegation.

In a Tennessee case, a similar situation, the court has the following to say:

> "The words "willful and malicious" used in the Bankruptcy Act hereinbefore set out seem to contemplate some intentional willful act. These words indicate to us the intentional doing of an act which

> must and does result in injury to a plaintiff, or that class of torts in which malice and injury are always implied."
>
> *Marbry* v. *Cain,* S. W. Reporter (2nd) 176 at Page 815.

In *Tinker* v. *Colwell,* a case frequently quoted with approval, the court uses the following language:

> "It is not necessary in the construction we give to the language of the exception in the statute to hold that every wilful act which is wrong implies malice. One who negligently drives through a crowded thoroughfare and negligently runs over an individual would not, as we suppose, be within the exception. True, he drives negligently, and that is a wrongful act, but he does not intentionally drive over the individual. If he intentionally did drive over him, it would certainly be malicious."
>
> *Tinker* v. *Colwell,* 24 Sup. Ct. Rep. at Page 510, and 193 U. S. 473.

We find nothing in the case, other than the allegation in the plaintiff's declaration, that the defendant at any time, in the operation of his automobile, when it collided with the plaintiff's car, acted willfully or maliciously.

There was no error by the presiding justice.

Exception overruled.

W. PHILIP MUNSEY, EXECUTOR U/W OF ALFRED L. GROVES *vs.* JOHN GROVES

Lincoln. Opinion, September 19, 1955

Equity. Jurisdiction. Non-residents. Practice. Exceptions. Special Appearance. Notice. Injunctions. Cloud on Title. Parties. Executors and Administrators. Misjoinder. Pleading. Amendments. Rules of Court.

Ordinarily exceptions will not be entertained in the Law Court before a case in equity comes up for final hearing.

The approved practice in equity for objecting to the jurisdiction of the court over a defendant is for defendant's counsel to appear specially and file a motion in writing to dismiss for want of jurisdiction over the person. Where the facts showing the failure of jurisdiction do not appear on the record they should be set out in the motion and verified by affidavit.

The limitations of Rule 5 of the Revised Rules of the Supreme Judicial and Superior Courts relating to actions at law are not applicable to equity practice.

Once the jurisdictional issue is saved by exception, and at least in the absence of any subsequent manifest intention to waive it, even a later participation upon the merits will not deprive a party of the benefit of his position upon the issue.

An order of notice upon a non-resident defendant is not in itself sufficient to give the court jurisdiction of such defendant if he fails to appear and submit himself to the jurisdiction.

A party in equity may advance his cause by taking appropriate action under R. S., 1954, Chap. 107, Sec. 7.

A bill in equity seeking the *in personam* relief of an injunction should not be converted by amendment into an *in rem* bill to remove an alleged cloud on title since such amendments have the effect of changing completely the equitable cause of action.

The right of amendment is broad in equity and ordinarily rests in the discretion of the presiding justice.

The joining of a residuary legatee and an executor as party plaintiffs in a bill in equity to remove a cloud on title results in a misjoinder since under ordinary circumstances and in the absence of a license to sell an executor or administrator has no title to, or control over, realty of his decedent.

ON EXCEPTION.

This is a bill in equity before the Law Court upon defendant's exceptions. Exceptions sustained. Bill dismissed with costs to defendant but without prejudice to plaintiffs.

James Blenn Perkins, for plaintiff.

John E. Wilson (specially), for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, JJ., THAXTER, A.R.J. TAPLEY, J., did not sit.

WEBBER, J. Plaintiff brought his bill in equity as Executor setting forth that his testator in his lifetime executed a deed of Maine real estate to defendant, which deed, the plaintiff averred, although duly recorded within a few days, was never delivered to the defendant by the decedent in his lifetime. The prayer of the bill was for injunction to restrain the defendant from disposing of the property. Service of notice in the usual form was made, so the parties stipulate, on the defendant in South Carolina, he being resident thereof. Thereafter counsel for defendant appeared specially and subsequently filed motion to dismiss for want of jurisdiction as to the defendant. This motion was denied and exception taken. The residuary legatee was permitted without objection to intervene as party plaintiff. Later defendant renewed his motion stating additional grounds all related to the lack of jurisdiction. This motion likewise was denied and exception reserved. Defendant has never entered a general appearance nor has he ever abandoned his protest with reference to jurisdiction. He has never pleaded to

the merits nor has any hearing on the merits been had. The bill of exceptions informs us that the chief ground of the denial of defendant's motions was that the appearance and pleading through counsel, either specially or generally, to attack jurisdiction automatically gives the court jurisdiction of the person.

We must first consider whether the matter is prematurely before us. Ordinarily exceptions will not be entertained in the Law Court before a case in equity comes up for a final hearing. R. S., 1954, Chap. 107, Sec. 26; Whitehouse Equity Practice, Sec. 617, Page 647; *Stevens* v. *Shaw,* 77 Me. 566; *Bath* v. *Palmer,* 90 Me. 467. Where, however, it is deemed to be more in the interests of justice that the questions involved should now be determined, and the peculiar character of the questions here presented hardly permits of postponement if any benefit is to be derived from it by the moving party, exceptions may be entertained by the Law Court before final hearing. *Stevens* v. *Shaw, supra; Flint* v. *Comly,* 95 Me. 251; *Bean & Land Co.* v. *Power Co.,* 133 Me. 9. Both counsel vigorously urge that here is a case properly within the exception to the usual rule of practice, and we deem it so.

It is not contended here that the service which was made upon the defendant while resident in South Carolina conferred upon the Maine Court any jurisdiction over the person of the defendant such as was requisite to the granting of the injunctive relief sought. See *Pennoyer* v. *Neff,* 95 U. S. 714. The only issue is whether or not by subsequent action and conduct the defendant voluntarily submitted to the jurisdiction of the court. *Devine* v. *Tierney & Findlen,* 139 Me. 50.

It is true that in actions at law, the common law required that pleas to the jurisdiction which were in the nature of pleas in abatement had to be offered by the defendant in

person rather than by attorney. Even in actions at law, however, if the jurisdictional failure was evident upon the face of the record, advantage of the failure could properly be taken by motion to dismiss filed by an attorney under special appearance. *Louisville & N. R. Co.* v. *Industrial Board,* 282 Ill. 136, 118 N. E. 483; *Pratt* v. *Harris,* 295 Ill. 504, 129 N. E. 277. See *Smith* v. *Hunt,* 91 Me. 572; *Emmons* v. *Simpson,* 116 Me. 406; *Mansur* v. *Coffin,* 54 Me. 314; *Thomas* v. *Thomas,* 96 Me. 223; *Mace* v. *Woodward,* 38 Me. 426; *Bryant* v. *Bryant,* 149 Me. 276.

The approved practice in equity is for defendant's counsel to appear specially and file a motion in writing to dismiss for want of jurisdiction over the person. "In either case, a motion seems to be the only safe form of pleading to employ in making a special appearance, and where the facts showing the failure of jurisdiction do not appear on the record, they should be set out in the motion and verified by affidavit." Whitehouse Equity Practice (State and Federal), Vol. 1, Sec. 185, Page 354. In *Flint* v. *Comly, supra,* at page 255, our court said: "If these non-resident defendants had desired to object to the jurisdiction of the court, *they should have entered a special or conditional appearance. Such an appearance, made for the purpose of urging jurisdictional objections, is clearly recognized by all courts and works upon practice.*" (Emphasis supplied.) And at page 256, "The rule is, that when a defendant appears solely for the purpose of objecting to the jurisdiction of the court over his person, such motion is not a voluntary appearance of defendant which is equivalent to service." The practice was followed and approved in the equity case of *Devine* v. *Tierney, supra.* So here the defendant cannot be deemed to have voluntarily submitted to the jurisdiction of the Maine Court by appearing specially by counsel and pressing a motion to dismiss for lack of jurisdiction of the person.

The plaintiff contends that defendant unreasonably delayed filing his motion to dismiss and should be treated as having waived his right to file. He calls attention to the fact that such delay may be fatal in actions of law because of the application of Rule 5 of the Revised Rules of the Supreme Judicial and Superior Courts. *Snell* v. *Snell,* 40 Me. 307; *Mitchell* v. *Union Life Insurance Co.,* 45 Me. 104. We may observe in passing that even in actions at law however, there are exceptions to the application of the Rule in circumstances not unlike these. See *Mace* v. *Woodward, supra; Richardson* v. *Rich,* 66 Me. 249; *Dow* v. *March,* 80 Me. 408; *Central Maine Power Co.* v. *Railroad Co.,* 113 Me. 103. However, the plaintiff cites no case in which a similar limitation has been applied in equity practice and we are aware of none. The plaintiff here cannot attribute inactivity to the defendant alone. If he deemed, as he now contends, that the defendant had appeared and voluntarily submitted to the jurisdiction but had failed to answer, it was open to him to advance the cause by taking appropriate action under the provisions of the Statute (now R. S., 1954, Chap. 107, Sec. 15). The plaintiff did not and cannot now complain if a period of time transpired without action by either party.

We think the rights of the defendant crystallized and were preserved by exception as matters stood when the court below first refused to dismiss the action for want of jurisdiction. The subsequent conduct and participation by defendant's counsel displayed no intention to waive the jurisdictional defect, but on the contrary the lack of jurisdiction was vigorously and consistently asserted at every stage of the proceedings. It has been said that once the point is saved by exception, and at least in the absence of any subsequent manifest intention to waive the jurisdictional issue, even a later participation upon the merits will not deprive a party of the benefit of his position upon the jurisdictional issue. *Citizens' Savings and Trust Co.* v. *Illinois Central Railroad,* 205 U. S. 46; *Walling* v. *Beers,* 120

Mass. 548; *Harkness* v. *Hyde*, 98 U. S. 476; Whitehouse Equity Practice, Sec. 294, Page 335. As the last cited text writer stated in Section 276, page 322, "It must not be supposed, however, that service of such order of notice on defendant is in itself sufficient to give the court jurisdiction over such defendant if he fails to appear and submit himself to the jurisdiction. *If he is the sole defendant and fails to appear the suit cannot go on.* * * * * The notice is simply to enable him to appear if he so desires. It cannot drag him within the limits of the state or subject him to the jurisdiction of the court against his will." (Emphasis supplied.) We think the defendant was aggrieved by the action of the court below in denying the motions to dismiss.

The only question remaining is whether or not the bill should be dismissed only as to the defendant but retained for action upon the res. By a series of amendments the original plaintiff here has sought to convert this equitable action from one seeking *in personam* relief against the defendant to an action *in rem* seeking to remove an alleged cloud on title. In an appropriate case the court will sometimes dismiss the bill as to the defendant but retain it for hearing as an *in rem* proceeding. *DuPuy* v. *Standard Mineral Co.*, 88 Me. 202. But here the present status of the action hardly warrants retention of the bill. There is apparent a misjoinder of parties plaintiff. The executor fails to allege sufficient interest in the real estate to justify action on his part in seeking to remove an alleged cloud on title. "Under the general rule that an executor or administrator has no title to, or control over, realty of his decedent * * * * he ordinarily may not bring an action to quiet, or remove a cloud from, the title to decedent's real estate, at least before he obtains a license to sell * * *." 33 C. J. S. 1265, Sec. 255; see also *Phelps, Adm.* v. *Funkhouser et al.*, 39 Ill. 401; *Roffman* v. *Roffman*, 384 Ill. 315, 51 N. E. (2nd) 560; *Hooker* v. *Porter*, 271 Mass. 441, 171 N. E. 713; *Averill* v. *Cone*, 129

Me. 9; *Crocker* v. *Smith,* 32 Me. 244; *Votolato* v. *McCaull,* 96 A. (2nd) (R. I.) 329.

As has been noted, the amendments already made and those which might be further required to convert this action into one for the removal of an alleged cloud have the effect of changing completely the equitable cause of action. It seems doubtful if the justice below would have allowed the amendments, had he not considered that the defendant had already submitted to the jurisdiction. Whitehouse Equity Practice, Sec. 411, Page 440 states: "To strike out the entire substance and prayer of a bill and insert a new case by way of amendment, leaves the record unnecessarily encumbered with the original proceedings, increases expense and complicates the suit. It is far better to require the complainant to begin anew." Although the right of amendment is broad in equity and ordinarily rests within the discretion of the presiding justice, we deem this an appropriate situation in which to follow the suggestion that amendments which entirely change the cause of action in equity are not to be encouraged.

Exceptions sustained. Bill dismissed with costs to defendant but without prejudice to plaintiffs.

WILLIAM E. BELL
vs.
ANGIE M. BELL

Cumberland. Opinion, September 19, 1955.

Equity. Adverse Possession. Injunction. Contracts. Estoppel. Fraud. Specific Performance. Statute of Frauds. Amendments.

The Law Court will not disturb the findings of a presiding Justice in equity unless "clearly wrong."

One entering upon land under a verbal contract with the owner for the sale of the property by that fact recognizes the title of the grantor and is subservient to that title until he has performed or offered to perform his part of the agreement, fully.

A purchaser having met all the terms of an oral contract for the purchase of land is entitled to a conveyance.

The Law Court on an equity appeal may remand a cause for further proceeding. R. S., Chap. 107, Sec. 21.

ON APPEAL.

This is a bill in equity before the Law Court upon appeal from a finding of a single justice sustaining the bill. Case remanded for proceeding in accordance with this opinion.

Clifford E. McGlauflin, for plaintiff.

Berman, Berman & Wernick,
Sidney W. Wernick, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, TAPLEY, JJ. MR. JUSTICE TIRRELL sat at time of argument, took part in conference but died before writing of opinion.

BELIVEAU, J. This is an equity case heard in the Supreme Judicial Court in Cumberland County and is before

the Law Court on defendant's appeal from a decision sustaining the bill.

The plaintiff is the father of the defendant's husband. On May 23, 1927 the defendant acquired title to the property involved here, by a warranty deed to her from the then owner. The purchase price was $1750. The first or down payment of $400, made by the defendant, was advanced to her by the plaintiff, and a mortgage of $1350 was negotiated. The defendant occupied the premises from that time until about the twenty-fifth day of February 1934, when her husband's employment was transferred to Togus. A home was purchased by the defendant, or her husband, in West Gardiner early in 1934, and again the defendant did not have sufficient funds to make the so-called down payment. The plaintiff advanced to the defendant the sum of $800 to make it possible for her and the husband to acquire this property.

It is the contention of the plaintiff that when he advanced the defendant the sum of $800 in February 1934, it was then agreed between all the parties that he, the plaintiff, was to own the place in West Falmouth, and that the consideration for the sale to the plaintiff was the sum of $400 advanced in 1927, the sum of $800 advanced in February 1934 and an agreement with the plaintiff to meet the monthly payments on the mortgage which covered the premises and pay taxes.

The defendant, and her husband, on the other hand, testified that the only agreement between the parties in 1934, was that the plaintiff might occupy the premises by paying the monthly installments on the mortgage, and at all times the relationship between them was that of landlord and tenant. That clearly was the issue which the justice below decided in favor of the plaintiff.

It has been stated by our court, repeatedly, that this court cannot disturb such a finding unless "clearly wrong." *Wolf*

et al. v. *Jordan Co.*, 146 Me. 374. The appellant "must show the decree appealed from to be clearly wrong, otherwise it will be affirmed." *Morin* v. *Maxim et al.*, 146 Me. 426.

The only question then before this court is to determine if there was enough, or sufficient, evidence to warrant a finding for the plaintiff. While abandonment is alleged in the bill, it is not now relied upon by the plaintiff.

The plaintiff claims and contends that he, in fact, on the twenty-fifth day of February 1934, purchased the property from the defendant, that his occupancy from that time on, was as owner of the property. While the plaintiff's testimony seems, at times, to be somewhat confusing it can be gathered that he, on the twenty-fifth day of February 1934, contracted for the property and while no deed or other writing was passed between the parties, he occupied it exclusively as purchaser. He denied, when asked, that the situation was otherwise.

The unquestioned facts show that originally neither the defendant nor her husband invested any money in the West Falmouth property other than such repairs and improvements as they made during their seven-year occupancy.

Sometime in 1934, as part of the consideration, the defendant and her husband were paid by the plaintiff the sum of $800 over and above the original cost to them. To this purchase price they had contributed nothing more than the small monthly payments on the mortgage. Other than that, the $800 was profit.

The evidence fails to show that the defendant, or her husband, showed any interest in the property during the twenty years, such interest as a landlord is expected to manifest in property occupied by a tenant. They apparently were not interested as to how the property was kept in repair, that the taxes were paid or the monthly payment on the mortgage met. It was not until they were given an oppor-

tunity to dispose of this real estate for the purchase price of $6,000 that they became interested. The plaintiff as before stated in this opinion, paid the defendant in 1934, the sum of $800, over and above the original price and if the defendant were successful she would then make a further profit of $6,000 for the conveyance of this property to the Maine Turnpike Authority. While this situation is not decisive of the case by any means, it is nevertheless a circumstance which tends to corroborate the testimony of the plaintiff, and no doubt influenced the court below in finding that for more than twenty years the plaintiff had been in uninterrupted possession of the property under a claim of ownership.

While we agree with the justice below in his findings, we are not able to concur with his ruling that the occupancy by the plaintiff was adverse to the defendant and that he acquired title to the premises by adverse possession.

The courts have universally held that one entering upon land under a verbal contract with the owner for the sale of the property, by that fact, recognizes the title of the grantor and is subservient to that title until he has performed or offered to perform his part of the agreement, fully.

"*Manning* v. *Kansas & T. Coal Co.*, 181 Mo. 359, 81 S. W. 140."

See also "Annotation 1 A. L. R. 1336."

However, the plaintiff having entered upon the premises under what he claims to be a contract, for the purchase of the property, and having met all the terms thereof is entitled to a conveyance, even tho, as stated before, that contract was oral.

In *Woodbury* v. *Gardner*, 77 Me. at Page 70, our court held that —

> "part performance of an unwritten contract to convey land may authorize a court of equity to compel

specific performance by the other party in contradiction to the positive terms of the statute of frauds. *Foxcroft* v. *Lester,* 2 Vern. 456; *Bond* v. *Hopkins,* 1 Sch. & Lef. 433; *Coles* v. *Pilkington,* L. R. 19 Eq. 174. And the same doctrine has been adopted by all (save three or four) of the states of the Union (Pom. Eq. Jur. Par. 1409), some of them making it an express exception to the statute of frauds. Wat. Sp. Per. Par. 257.

The ground of the remedy is an equitable estoppel based on an equitable fraud. After having induced or knowingly permitted another to perform in part an agreement, on the faith of its full performance by both parties and for which he could not well be compensated except by specific performance, the other shall not insist that the agreement is void. *Morphett* v. *Jones,* 1 Swan. 181; *Buck* v. *Harrop,* 7 Ves. 346; *Potter* v. *Jacobs,* 111 Mass. 32, 37. In other words, the statute of frauds having been enacted for the purpose of preventing frauds should not be used fraudulently. *Mestaer* v. *Gillespie,* 11 Ves. 621; 627; *Whitebread* v. *Brochurst,* 1 Bro. C. C. 417; *Ash* v. *Hare,* 73 Maine, 403; Pom. Eq. Jur. Par. 921."

The court below found that the plaintiff paid for the property, including the mortgages and all taxes since 1934. In other words, that the plaintiff had performed fully his part of the contract. This was not "clearly wrong."

This court shall on appeal such as this —

"affirm, reverse or modify the decree of the court below or remand the cause for further proceedings, as it deems proper."

"Section 21, Chapter 107 of the Revised Statutes."

As we have indicated, the court was in error in finding the plaintiff had acquired title by adverse possession. Hence the decree below cannot stand. The situation disclosed by the record is such, however, that the plaintiff in equity and good conscience should not be denied an opportunity for

seeking equitable relief on other grounds with the protection of the injunction now in force for a reasonable period.

The bill is remanded for entry of a decree dismissing the bill with costs unless within thirty days from the date of the mandate herein the plaintiff shall file a further bill in equity, whereupon a decree shall be entered dismissing this bill with costs without prejudice; and during such thirty day period the injunction hereinbefore issued shall remain in full force and effect.

Case remanded for proceedings in accordance with this opinion.

KENNETH J. WINTLE
vs.
CARL R. WRIGHT, ADMR.
ESTATE OF GEORGE A. LIBBY

Somerset. Opinion, September 20, 1955.

Audita Querela. Judgments. Demurrer. Fraud. Attorneys at Law.

Audita querela is a remedial process to relieve a party who has been injured or who is in danger of being injured from the consequences of a judgment because of some improper action of the party who obtained it which could not have been pleaded in bar to the action.

Payment or part payment of a demand before judgment will not support an *audita querela* because of the neglect of the party in not taking advantage thereof before judgment is rendered.

There are a few instances of allowing an *audita querela* to show defenses which were available before trial where such defense was not offered because of the intervention of fraud and deceit. To support an *audita querela* such fraud and deceit should be active, affirmative, and effectively intervene to prevent the making of the available defense.

A demurrer admits the truth of the allegations for the purpose of determining the legal sufficiency of the declaration; it does not go so far as to admit their truth for other and unrelated purposes.

The power of the court to censure an attorney must be exercised with the greatest of care and restraint and only upon certain knowledge that the attorney merits rebuke.

ON EXCEPTIONS.

This is an action of *audita querela* before the Law Court upon exceptions by plaintiff to the sustaining of a demurrer. Exceptions overruled.

Bartolo M. Siciliano, for plaintiff.

Eames & Eames, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, TAPLEY, JJ. BELIVEAU, J., dissenting. MR. JUSTICE TIRRELL sat on this case and participated in conferences but died before the opinion was submitted to him.

WEBBER, J. We are here asked to examine the sufficiency of the declaration in a writ which invokes the ancient remedy of *audita querela.* Tested by demurrer, the declaration was deemed insufficient by the presiding justice below and exceptions were seasonably taken to his action in sustaining the demurrer.

"The writ (of *audita querela*) is a remedial process to relieve a party who has been injured or who is in danger of being injured from the consequences of a judgment because of some improper action of the party who obtained it which could not have been pleaded in bar to the action." Martin's Notes on Pleading page 87; 5 Am. Jur. 491. "Such process, according to the authorities, is 'in the nature of a bill in equity, to be relieved against the oppression of the plaintiff.' It lies where, *after judgment,* the debt has been paid or re-

leased, and yet the debtor is arrested, or in danger of being arrested, on an execution issued on such judgment; *and where the debtor has had no opportunity to avail himself of such payment or release, in defense;* and in other cases where a defendant had good matter to offer in defense, *but had no opportunity to offer it before judgment against him.*" (Emphasis supplied) *Bryant* v. *Johnson,* 24 Me. 304 at 306. The remedy is preserved by statute, R. S., 1954, Chap. 127. "It is a general and well settled principle that when a party has had a legal opportunity to make his defense, or when the injury of which he complains is to be attributed to his own neglect, he cannot be relieved by an *audita querela.*" 5 Am. Jur. 493, sec. 3; see *Radclyffe* v. *Barton,* 161 Mass. 327, 37 N. E. 373; *Staniford* v. *Barry,* 15 Am. Dec. (Vt.) 692; *Goodrich* v. *Willard,* 77 Mass. 380, 11 Gray 380; *Walter* v. *Foss,* 67 Vt. 591, 32 A. 643; *State* v. *Hall,* 17 S. W. (2nd) (Mo.) 935; *Parker* v. *Murphy,* 215 Mass. 72, 102 N. E. 85. The neglect of the party to make seasonably the defense available to him will defeat his right to the writ of *audita querela* even when that neglect stems from his ignorance of the existence of the defense, where it is apparent that by the exercise of reasonable diligence, he could have ascertained it. *Avery* v. *U. S.,* 12 Wall. (U. S.) 304, 20 L. Ed. 405. "But a payment of a part of a demand, or of the whole of it, made before judgment, could not support * * * * an *audita querela:* because it was the folly of the party, that he had not the advantage of it before judgment rendered." *Thatcher et al.* v. *Gammon,* 12 Mass. 268 at 270. A contrary rule would overlook the necessity of putting an end to litigation, would result in "great confusion" and "perpetuity of disputes," and "would lead to endless embarrassments in the administration of justice." *Thatcher et al.* v. *Gammon, supra,* at page 271; *Avery* v. *U. S., supra,* at page 306.

In a few instances the writ has been allowed where the alleged defense was available at the trial but not made be-

cause of the intervention of the fraud and deceit of the defendant which actively prevented the introduction of the defense. In *Lovejoy* v. *Webber,* 10 Mass. 101, payment was made after suit but before judgment, and the court in determining whether *audita querela* would lie, said at page 104, "Before judgment was entered indeed the adjustment had been made; but with an understanding that the suit was thereby *finally* compromised, *and was to be discontinued by the care of this defendant.* In this the plaintiff was deceived: but the present defendant is not to avail himself of this fraud, which is pointedly, and as he has confessed, truly alleged against him." (Emphasis supplied.) Plaintiff's declaration in the writ of *audita querela* was adjudged sufficient. Likewise in *Bower, Inc.* v. *Silverstein,* 298 Ill. App. 145, 18 N. E. (2nd) 385, payment in full having been made after suit but before judgment, the defendant promised the plaintiff that he would instruct his attorney to dismiss the case, and the plaintiff, in reliance on the promise, left town and disregarded the pending litigation. In his absence, judgment was taken against him. Here also *audita querela* was deemed applicable. We are satisfied, however, that in neither the *Lovejoy* case nor the *Bower* case would the court have allowed the use of the remedy had there not been present active and affirmative fraud and inducement on the part of the defendant which effectively intervened to prevent the making of the available defense.

With these principles in mind, we proceed to a consideration of the averments of the voluminous declaration before us. The declaration discloses that plaintiff owed an interest bearing note to the estate of which defendant was administrator. Suit on the note was instituted and service made on the present plaintiff in December, 1952. His second payment on account was made on January 3, 1953, at which time he received from the defendant a receipt as follows:

"$50.00 January 3, 1953 No. 173
Received of Kenneth J. Wintle
Fifty and OO/xx ---------- Dollars
Payment on note to late Geo. A. Libby, Balance due if paid before January 10, 1953
$159.54

by Carl R. Wright, Adm. Geo. A. Libby est."

On January 9, 1953, plaintiff prepared his check for $159.54 but there is no allegation that it was tendered to or accepted by the defendant on that day. We note that there was no endorsement on the check to indicate that it was tendered in full payment or in discharge of the pending action or the like. On January 10, 1953, the defendant gave the plaintiff his receipt as follows:

"$159.54/100 January 10, 1953 No. 179
Received of Kenneth J. Wintle
One Hundred Fifty-Nine and 54/100 Dollars
Payment on note to late Geo. A. Libby Writ entered in court before received check.

by Carl R. Wright, Adm.
Geo. A. Libby est."

The plaintiff alleges that this payment was "in full of the indebtedness demanded of him by the said defendant." Whether this has reference to the defendant's demand or offer of settlement which expired on January 9, or is intended to allege that the defendant's demand was the same on January 10, is not decisive of this issue. The question is rather whether the defendant fraudulently induced the plaintiff not to appear in court and raise the defense of payment.

The writ was made returnable to the term of court held in January, 1953. The plaintiff here failed to make appearance and judgment was rendered against him by default for $163.94 with costs of $11.95. On a subsequent execution,

credit was given for the payment of $159.54. When cited to disclose, the plaintiff here again failed to appear and was subsequently arrested on a capias execution on which the officer was instructed to collect $28.58.

There are no other material averments bearing on what we deem to be the determinative issue here. It is apparent from the allegations of the declaration that plaintiff was given an opportunity to settle his obligation at any time *"before"* January 10, 1953 for $159.54; that he failed to take advantage of that offer; that on January 10, 1953 he made payment in that amount which, for aught that appears to the contrary, either in the receipt or from the conduct of the parties, was given and accepted as a payment on account; that defendant here neither receipted for the payment as in full discharge of the obligation in suit nor offered or agreed that he would withdraw the writ or dismiss the action. On the contrary, his receipt of that date, inferentially at least, gave warning and notice that his intention was otherwise. The receipt acknowledged payment *"on"* the note, not *of* it. It did not recognize the payment as in full or as in discharge of the pending suit. There is no suggestion in the declaration that the note itself was given to or demanded by the plaintiff. The receipt specifically called attention to the fact that the writ had already been filed in court for entry, without suggestion or commitment as to what further should be done with it. The plaintiff here alleges no act or conduct of the defendant which would tend to induce or entice him to neglect the court action or fail to raise a defense of payment whether in part or in full. Unless fraudulently induced by the defendant, such neglect is fatal to the right to *audita querela.* To hold otherwise would be to destroy the universally accepted limitations upon the use of the remedy, and to invite a flood of litigation attacking the validity of the judgments of our courts.

The defendant here is a practicing attorney while the plaintiff is a layman presumably unskilled in the law. We do not intimate or suggest by this opinion that we condone or approve anything less than the most meticulous care and responsibility on the part of a member of the legal profession when dealing with a layman. We would have no hesitation in expressing in unmistakable language our disapproval of the conduct of any attorney at law who failed in any duty to give full explanation or advantaged himself improperly of the ignorance of a layman as to the legal consequences of any proposed settlement. But this matter is before us on demurrer. This defendant is not denied the use of demurrer in an appropriate case merely because he happens to be an attorney. The technical restrictions upon demurrer are such that it is impossible for the defendant to use it to attack the legal sufficiency of the declaration in the writ and at the same time raise affirmative defenses which might explain or justify his conduct. While a demurrer admits the truth of the allegations for the purpose of determining the legal sufficiency of the declaration, it does not go so far as to admit their truth for other and unrelated purposes. In his use of demurrer the defendant here employs a proper vehicle and says in effect, "Assuming for the moment everything you have alleged, still the remedy of *audita querela* is not a proper one upon the facts alleged and the law applicable thereto." In this legal position the defendant is correct as the presiding justice properly ruled. We think that censorship of the defendant's conduct at this stage and before he has been heard upon the merits would be premature and ill advised. This court has great power to destroy the reputation and confidence enjoyed by a member of the legal profession. That power must be exercised with the greatest care and restraint and only upon certain knowledge that the attorney merits rebuke. Until we have before us legal evidence which demonstrates some failure in the performance of professional duty on the part of the

defendant, we will reserve our judgment as to whether or not his conduct properly subjects him to censure.

The entry will be,

Exceptions overruled.

BELIVEAU, J. (dissenting) It is with regret that I disagree with the majority opinion. While the amount involved is insignificant the principles are of such importance to me I feel constrained to give my reasons for dissenting.

As stated in the majority opinion, this matter is before us on a demurrer by the defendant to the plaintiff's declaration. The defendant may, of course, if he sees fit, take advantage of a defective declaration (one that does not state a cause of action), *but* if the facts alleged are not true, then he, the defendant, as a member of the Bar and as an officer of this court, should have demanded and been given a hearing on the merits. Having deliberately chosen his course of action he may not now complain that the merits have not been passed upon.

In *Lovejoy* v. *Webber*, 10 Mass. 101, *audita querela* was brought by the plaintiff to effect the discharge of a judgment obtained by the defendant after an action on a note had been fully satisfied by the plaintiff. The defendant demurred, and claimed payment might have been pleaded by Lovejoy in bar to the action. On this phase of the case the court said:

> "If the facts averred in the writ are true, and these are now to be understood as confessed, the plaintiff in this action, — defendant in the action wherein a judgment, as he alleges, has been fraudulently recovered against him, — had no opportunity of pleading the payment or discharge of the demand which he had adjusted."

I do not mean to intimate that the defendant, because an attorney, may not contest the action by demurrer, and if

this were an action other than one where the defendant's conduct as an attorney is involved, I would say nothing about it. The demurrer, in this case, and for the purpose of this case only, admits, as the majority readily concedes, the allegations of facts.

While the opinion does not in any way criticise the conduct of the defendant it nevertheless states the court will not "condone or approve anything less than the most meticulous care and responsibility on the part of a member of the legal profession when dealing with a layman." The admitted facts show much "less than the most meticulous care and responsibility" by the defendant and the court should not condone or approve his conduct.

The defendant understood the purpose of a demurrer. Its effect, insofar as this case is concerned, is much the same as if he in a trial on the merits had admitted, under oath, the allegations made against him by this plaintiff. The court, in an imaginary statement attributed to the defendant, quotes him as saying "assuming for the moment everything that you have alleged * * * * *" this remedy does not lie. The time element here is not involved and once the demurrer is sustained it must stand on the records of this court, forever, as an admission of the facts alleged. These admissions are not "for the moment" or any specific length of time.

In *Lovejoy* v. *Webber, supra,* the court has this to say about *audita querela:*

> "The remedy is said to be in the nature of a bill in equity. An allegation of fraud and deceit seems to be essential, and the case supposed must be one where legal process has been abused, and injuriously employed to purposes of fraud and oppression. But allegations of abuse are not to be heard as a ground of complaint, where the party complaining has already had a legal opportunity of defence; or when the injury, if any has been sus-

> tained, is to be attributed to his own neglect; for, otherwise, legal proceedings would be endless. It is a rule, therefore, that an audita querela does not lie, where the party has had time and opportunity to take advantage of the matter which discharges him, and has neglected it."

The admitted facts show that on the 9th day of December, 1952, the defendant, in his capacity as administrator of the estate of George A. Libby, and acting as counsel for himself, brought suit against the plaintiff here and declared on a note dated May 12, 1949 for $200 payable on demand with a credit of $30 on December 10, 1951 and a further credit of $50 on January 3, 1953.

The receipt given the plaintiff by the defendant for the payment of $50.00 on account, January 3, 1953, contained a stipulation that $159.54 was the balance due and would be accepted as such, if paid before January 10, 1953.

On the 10th day of January 1953 the plaintiff tendered, and the defendant accepted a check, dated January 9, 1953, for $159.54 with the notation on the receipt given this plaintiff, "writ entered in court before received check."

January 10th was on a Saturday, three days before the opening of the January term. The plaintiff did not appear, was defaulted and judgment recovered against him for $163.94 and cost taxed at $11.95.

On the 9th day of February the same year, the defendant obtained an execution against the plaintiff for the full amount. Nothing more was done until the 19th day of November of that year when the defendant requested a renewal of the execution and certified that $159.54 had been paid on the first execution. This was false and known by the defendant to be false. The money was paid before entry of the writ and long before judgment.

On the second execution the Clerk of Courts noted that $159.54 was credited on the former execution. On the 11th

day of January 1954, nearly a year after judgment, the defendant here, in his dual capacity as administrator and counsel for himself, petitioned the Judge of the Western Somerset Municipal Court of Skowhegan for a full disclosure of the plaintiff's business and property affairs. In that petition the defendant, knowing the statement to be untrue, alleged there was due him, in his capacity as administrator, $176.89.

The plaintiff did not appear, was defaulted, and a capias for his arrest issued. Nothing more was done until the 23rd day of March 1954, when the defendant returned to the Superior Court the second execution with an endorsement that $159.54 had been paid. The third execution was issued by the court for a total of $175.89 plus $1.50 with a notation "$159.54 credited on former execution."

On March 30, 1954 the defendant gave this execution to an officer with instructions to collect $28.58 plus his fees or otherwise commit the plaintiff.

The plaintiff was arrested on April 27, 1954 and in order to obtain his release from arrest gave a statutory bond to the defendant in the amount of $75.

It is well to point out the parties did not stand on an equal footing and that the advantage was all with the defendant, who was well versed in the law and familiar with judicial procedure. The plaintiff, as a layman, did not have this knowledge, and was without counsel to advise and guide him. This is one of the elements which makes this case important and the conduct of the defendant subject to close scrutiny.

The plaintiff was to pay the defendant $159.54 before the 10th day of January 1953 and that sum was to be accepted in full settlement of the action then pending and returnable in the Superior Court on Tuesday of the next week.

It is significant that the defendant accepted the sum of money, although a day late, which he had agreed to accept, and, as far as the record is concerned, said nothing about prosecuting the action. The plaintiff, a layman, having paid the amount agreed upon, had every right to believe, as any layman would, that the payment settled once and for all his liability on the original note.

It is true that the receipt given by the defendant acknowledged the money as payment on the note with a notation that the writ was entered in court before this payment was received. The majority opinion states that this payment, "for aught that appears to the contrary, was given and accepted as a payment on account;"

I cannot see how the court can come to that conclusion, because all there is in the case bearing on this point is the receipt of January 10, 1953.

The plaintiff having paid the amount which the defendant stated he would accept in full satisfaction had the right to, and would believe there was nothing further for him to do. The notation that payment was "on" the note and that the writ had been entered in court was not the doings of the plaintiff. The receipt did not state that payment was on account and the language used by the defendant was his own and, in my opinion, self serving. Acceptance of the receipt by the plaintiff did not change the picture in the least.

The plaintiff was not informed the writ would be entered and the action prosecuted.

To fortify this further, the declaration alleges that the payment was in full of the indebtedness demanded by the defendant. This allegation is admitted by the defendant's demurrer.

The plaintiff had not on January 10, entered his writ and it could not be entered until the opening of the court, three

days later. Up to that time, the defendant had complete control of the situation and could have disposed of the action without any extra expense or cost to him, by marking the action "mis-entry," which is the custom and practice always resorted to when the situation requires it.

It was the duty of this defendant to inform the court that $159.54 had been paid. The defendant ignored his oath and violated the ethics of our profession when he took judgment for the full amount, without giving full credit for what was paid him the Saturday before. This, of course, done knowingly and with full knowledge of the situation by the defendant, was a fraud on the plaintiff and the court.

In the so-called disclosure petition brought on January 11, 1954, the defendant informed the disclosure commissioner that $176.89 was still due—this too, was glaringly false, as the defendant well knew. The plaintiff here did not appear to disclose, was defaulted, a capias execution issued for his arrest and he was arrested.

The plaintiff has established fraud and deceit which the court in *Lovejoy* v. *Webber, supra,* said was necessary in *audita querela* when legal process has been abused. That decision goes on to say that this process should not be resorted to where the party complaining had a legal opportunity to defend and failure to defend was attributed to his own neglect. It does not apply here because the plaintiff, the defendant in the action on the note, had made a complete settlement on January 10, 1953 and had no reason to suspect or believe that the writ would be entered in court and judgment obtained. He had no notice until January 11, 1954, or nearly a year later, that judgment had been obtained against him, without any credit for the January 10 payment. Why the defendant did not make demand for payment or attempt to collect the execution for a vear, is not established.

The plaintiff was not negligent nor can negligence be attributed to him where he had no knowledge or information of the situation, as it existed.

As I said in the beginning of this opinion, I dislike to disagree with the majority as I have in this dissenting opinion, but a situation such as this must be faced. The public must know and feel that our courts do not and will not hesitate to condemn unprofessional conduct on the part of one of its officers.

I do not agree with the majority opinion that *audita querela* does not lie in this case or that to so hold here would "destroy the universally accepted limitation upon the use of the remedy, and to invite a flood of litigation attacking the validity of the judgment of our courts."

If litigation occurs as a result of an opinion favorable to the plaintiff, our court will not hesitate, as it has done in other cases in the past, to deny this process where a litigant is not entitled to it. That situation must be met when it occurs. This defendant must not be absolved of responsibility with the idea in mind that by so doing, further litigation in this respect will be avoided.

I would sustain the exception to the demurrer and hold the defendant to account.

LYNDON CARR
PLAINTIFF IN ERROR
vs.
STATE OF MAINE

Knox. Opinion, September 27, 1955.

Error. Sentence. Indecent Liberties. Prior Conviction.

The authorizing of a sentence for "any term of years" for a prior conviction in an indecent liberties case does not require the fixing of maximum and minimum terms in the sentence since indecent liberties cases are specifically excepted from the statute requiring maximum and minimum terms and such cases by being prior conviction cases do not become punishable by maximum and minimum terms as "other cases . . . (punishable by) any term of years" outside of the exception. (R. S., 1954, Chap. 134, Sec. 6; R. S., Chap. 149, Secs. 3, 11 and 12.)

The allegation of previous convictions is not a distinct charge of crime; it goes to the punishment only.

ON EXCEPTION.

This is a Writ of Error before the Law Court upon exceptions to the dismissal of a writ of error. Exceptions overruled.

Niehoff & Niehoff, for plaintiff in error.

Roger Putnam, Asst. Atty. Gen., for defendant in error.

SITTING: FELLOWS, C. J., WEBBER, BELIVEAU, JJ., THAXTER, A.R.J. WILLIAMSON, J. and TAPLEY, J., did not sit.

BELIVEAU, J. On exception to a ruling of the court below dismissing a writ of error brought by this plaintiff.

At the September Term 1945 of the Superior Court, for the County of Somerset, an indictment was returned against the plaintiff here which consisted of two counts.

The first count alleged the taking of indecent liberties by the plaintiff, on the 20th of June 1945, with a female person, under 16 years of age, to wit, of the age of 7 years.

The second count alleged the conviction of this plaintiff at the November Term 1936 of the Superior Court, for the County of Knox, for the crime of indecent liberties on which he was sentenced to serve from two to four years imprisonment in the Maine State Prison at Thomaston in the County of Knox.

To this indictment the plaintiff pleaded guilty and was sentenced to serve a definite term of 20 years.

The plaintiff, in his writ of error and in his brief, claims that the sentence was not proper or legal and comes within the provisions of what is now Section 11 of Chapter 149 of the Revised Statutes which provides that a court imposing sentence shall fix minimum and maximum terms.

The next section, Section 12 of Chapter 149, excludes from Section 11, Sections 10, 11 and 12 of Chapter 130 of Section 6 of Chapter 134. The plaintiff here was indicted under said Section 6 of Chapter 134.

Section 3 of Chapter 149 authorizes imprisonment for any term of years where it is alleged "in the indictment and proved or admitted on trial, that he had been before convicted and sentenced to any state prison by any court of this state, or of any other state, or of the United States, whether pardoned therefor or not, *******"

The plaintiff advances the dubious argument that the allegation in the second count, to wit, a prior conviction, brings the case within Section 12 of Chapter 149 of the Revised Statutes, that "in all other cases" the court imposing sentence shall fix both minimum and maximum sentences.

The allegation in the second count has nothing to do with the commission of the crime alleged in the first count. It

does not, in the least, help or assist the State in proving the commission of that crime and cannot be so considered by the jury. It is not "another case" and while the State must prove the second count it may, or may not be considered by the court, in its discretion, when imposing sentence. This statute is not unlike the so-called "habitual criminal" statute which has been upheld repeatedly by the courts throughout the land.

In passing upon the "habitual criminal" statute as enacted in Massachusetts in 1887, the United States Supreme Court said in *McDonald* v. *Massachusetts,* 180 U. S. 311 at 312, 21 Sup. Ct. Reporter 389 at 390:

> "The punishment is for the new crime only, but is the heavier if he is an habitual criminal."

And again:

> "The allegation of previous convictions is not a distinct charge of crimes, but is necessary to bring the case within the statute, and goes to the punishment only."

Exception overruled.

STATE OF MAINE

vs.

A. ALDEN WOODWORTH

Androscoggin. Opinion, September 27, 1955.

Embezzlement. Evidence. Corpus Delicti. Demand. Pleading.

Upon an indictment charging a superintendent of schools with embezzlement of certain funds, it is proper to allow a high school principal to testify (1) concerning directions given to him by the defendant as to the collection of funds and disposition of the same, and (2) the circumstances under which he turned over to defendant the moneys which became the subject of the embezzlement. It is immaterial whether the relationship of the witness to the defendant was principal and agent.

It is proper to admit testimony as to admissions by defendant where the facts show that in all probability the crime of embezzlement had been committed and the *corpus delicti* established to a probability.

It is unnecessary to prove a demand to return the funds where the facts show that a criminal intent accompanies the misappropriation thereof by an agent or fiduciary.

It is only when there is no evidence of a fraudulent conversion that proof of demand is necessary.

The absence of an allegation of the particular description of the money alleged to have been embezzled does not vitiate an indictment where the omission is cured by verdict.

Objections to defects in mere matters of form come too late after verdict.

ON EXCEPTIONS.

This is a criminal action before the Law Court upon (1) exceptions to the admissibility of certain testimony, the refusal to direct a verdict and (2) objections to the sufficiency of the indictment. Exceptions overruled. Judgment for the State.

Edward J. Beauchamp,
Irving Isaacson, for State.

Frank M. Coffin, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, BELIVEAU, TAPLEY, JJ. WEBBER, J., did not sit. MR. JUSTICE TIRRELL sat at time of argument and took part in conferences, but died before writing of opinion.

TAPLEY, J. On exceptions. The respondent, A. Alden Woodworth, was tried for the crime of embezzlement before a drawn jury at the January Term, 1954 of the Superior Court for the County of Androscoggin and State of Maine. The jury returned a verdict of guilty and the respondent was sentenced to not less than one year nor more than two years in the Maine State Prison. The indictment upon which the prosecution was based contained seven separate counts alleging embezzlement. The respondent was Superintendent of Schools in the City of Lewiston, Maine from March 21, 1938 to October 1, 1953. The city conducted an evening school program for which a charge was made to resident students of $1.00 for each course taken and to non-resident students $5.00 per course was charged. The prescribed procedure was that the student paid his tuition to his teacher. The teacher in turn delivered the money collected to the principal of the Lewiston High School who then made delivery of this money to the respondent. The amount of cash turned over by the principal of the high school to the respondent over a period of time amounted to $2083.92.

It was the established accounting procedure of the City of Lewiston that department heads, such as the respondent, were to deposit all revenue from the departments with the City Treasurer.

Although the record discloses a plea of not guilty, the respondent interposed the defense of not being guilty be-

cause at the time of the commission of the crime he was legally insane. The respondent during the course of the trial took exceptions to the admissibility of testimony and to the refusal of the presiding justice to direct a verdict of not guilty. He also attacked the sufficiency of the indictment. The objection was not made until the case reached this court.

Testimony of the State shows that Woodworth was appointed Superintendent of Schools in 1943; that Linwood Kelley, as Principal of the Lewiston High School, turned over to Woodworth a total sum of $2083.92 which Woodworth accepted in his capacity as Superintendent of Schools. This sum of money represented evening school tuitions that came into the hands of Kelley in his position as Principal of Lewiston High School. There are exhibits in the nature of receipts signed by Woodworth for this money acknowledging Woodworth's acceptance, not only of the money, but for the purpose for which it was paid. The only evidence disclosing that any amount of this money had been deposited with the City Treasurer of Lewiston was that of the sum of $240.00 paid December 12, 1949 as tuition, first having been received by Woodworth. Woodworth had been accepting these payments for the period from 1949 to 1953. By this one payment of $240.00 he acknowledged a duty to pay money received by him for tuition to the City Treasurer. It can reasonably be inferred from these facts that Woodworth intended a conversion of these funds to his own use and that these facts constitute the *corpus delicti* providing for acceptance of admissions of the respondent.

EXCEPTION 1.

Linwood Kelley, Principal of Lewiston High School, was called as a witness for the State and testified in part as follows:

"Q. In discussing how it would be run or the night schools would be conducted, do you recall any

instructions or discussion between Mr. Woodworth and yourself as to the fees to be paid and how they were to be collected, for attendance, etc.?

A. There was to be a $1.00 fee - - -."

At this point attorney for the respondent made his objection to the above question, which was allowed over his objection and exception taken. The County Attorney took the position that the question and answer was in reference to any orders or directions that the respondent in his capacity as Superintendent of Schools would give Mr. Kelley, his subordinate, relative to the disposition of night school fees. The answers allowed to be given by the presiding justice show direction as to collection of fees and disposition of same. There appears to be no grounds for exception to the allowance of the questions and answers.

EXCEPTION 2.

Witness Kelley on direct examination was asked:

"Q. In what capacity did you turn these funds over to Mr. Woodworth?

A. Simply as agent, as principal of the High School, working for him."

Counsel for respondent objected to any statements made by Mr. Kelley regarding his authority or his being an agent of the respondent or for the reason for his turning money over to the respondent. Mr. Kelley was merely explaining what his part was and under what circumstances he turned money over to the respondent and it makes no difference what Kelley's relationship was in so far as the respondent is concerned. The important point is that he was instrumental in placing monies in the hands of the respondent which later became the subject of embezzlement as contended by the State. Respondent takes nothing by this exception.

EXCEPTION 3.

Roland Amnott, Chief of Police in the City of Lewiston, was called by the State and testified in part as follows:

"Q. As a result of that did you speak with Mr. Woodworth?

A. Yes, sir.

Q. Was anyone else present when you talked with him?

A. Yes, sir.

Q. Was it Officer Soucy?

A. Yes.

Q. At that time what statement did Mr. Woodworth make to you?

Mr. COFFIN: Your Honor, I object at this point. I suggest possibly it is an appropriate matter to be discussed outside the presence of the jury.

The COURT. We will go in Chambers."

Counsel for respondent objected to any statements made by the respondent to witness Amnott because it is claimed that no *corpus delicti* had been established and, therefore, any admissions made to Officer Amnott would not be admissible.

This brings up the necessity of determining whether up to this point in the case the State had proven to a probability that the crime of embezzlement had been committed. The record discloses that the respondent in 1949 directed the Principal of the High School, Mr. Kelley, to turn in to him, the respondent, all monies collected for high school tuitions and, in pursuance to this direction, a sum of $2083.92 was received by the respondent from 1949 to 1953 inclusive. This money was not the property of the respondent but belonged to the City of Lewiston, which the respondent well knew. The respondent also knew that there

was established at the time he took the money a certain classification by the City of Lewiston under which the money was received for tuition fees. This classification was known as "Departmental Rev. - R-70" because in 1949, on December 12th, the respondent paid into the Treasurer of the City of Lewiston the sum of $240.00 of this amount of $2083.92 and received a receipt upon which appeared the classification to which the payment was credited. The respondent is a man of education, holding a responsible position as Superintendent of Schools and must have known and realized that he was retaining and converting to his own use monies which belonged to the City of Lewiston. By this one payment of $240.00 he recognized his duty to turn over the money to the proper authorities, yet for a period of approximately four years from that original payment he never again made another payment. These recited facts are sufficient to show that in all probability the crime of embezzlement had been committed and, therefore, the testimony of Roland Amnott was properly admitted.

State v. *Hoffses,* 147 Me. 221, at page 226:

> " 'It has been said that the corroboration of an extrajudicial confession is met if the additional evidence is sufficient to convince the jury that the crime charged is real, and not imaginary; and again, that it is sufficient if the independent evidence establishes the corpus delicti to a probability.' "

State v. *Levesque,* 146 Me. 351; *State* v. *Carleton, et al.,* 148 Me. 237; *State* v. *Jones,* 150 Me. 242.

This exception overruled.

The respondent contends that embezzlement does not lie as no demand was ever made of him. Under the circumstances, recited above, a demand becomes unnecessary as Woodworth by his own acts evidenced an intent to convert the money to his own use. 18 Am. Jur., 583, Sec. 23:

> "As a general rule, if a criminal intent accompanies a misappropriation of funds or property held by an agent or fiduciary, the crime of embezzlement is complete and the owner of embezzled property need not make a demand for its return, in the absence of a statute to the contrary. It is only when other evidence to prove a fraudulent conversion is not available that the proof of a demand is necessary."

State v. *Leonard*, 105 P. 163 (Wash.).

In argument, defense attorney stated that although he did not waive Exception 4, he was not pressing it. Under these circumstances we will not consider Exception 4 which relates to the denial of a motion for a directed verdict.

The respondent contends that the indictment does not allege a crime, although no motion was made to this effect by the respondent at the time of trial.

Objection is made to the indictment on the ground that each of the seven counts in the indictment alleges "certain money to the amount of *****" and that there is lacking in each count a more particular description of the money. A reading of the indictment will reveal the fact that it alleges a criminal offense of the nature of embezzlement. The respondent should have attacked the indictment at the time of trial because, other than the alleged defect complained of, there were sufficient allegations in the indictment alleging in substance a criminal offense. The absence of an allegation in this indictment of a particular description of the money alleged to have been the subject of the embezzlement does not vitiate the indictment as this omission was cured by the verdict.

27 Am. Jur., Sec. 191, page 736:

> "It is equally well settled, however, that defects which are merely matters of form and not of substance, ambiguities, etc., in an indictment or in-

formation are cured by verdict; objections to such a defect, if made after verdict, come too late, regardless of the fact that they might have rendered the indictment bad had they been seasonably taken."

Exceptions overruled.

Judgment for the State.

STATE OF MAINE
vs.
WARREN PRATT

Cumberland. Opinion, September 19, 1955.

Crime Against Nature.

The crime against nature (R. S., 1954, Chap. 134, Sec. 3) has been consistently interpreted as being very broad in its scope.

The enticing of a female to perform manual manipulation of male sexual parts is not a violation of R. S., 1954, Chap. 134, Sec. 3.

There must be penetration of a natural orifice of the body to constitute a violation of R. S., 1954, Chap. 134, Sec. 3.

ON EXCEPTIONS.

This is a criminal action before the Law Court upon defendant's exceptions to the overruling of a demurrer. Exception sustained. Indictment adjudged bad.

Frederic S. Sturgis,
Arthur A. Peabody, for State.

I. Edward Cohen, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, JJ., THAXTER, A.R.J. TAPLEY, J., did not sit.

PER CURIAM.

In an indictment in proper form the State alleged that the respondent "did then and there commit the crime against nature with mankind, to wit, did feloniously cause and entice a certain female, to wit, one (naming her) to perform the act of manual manipulation upon the sexual parts of him, the said Warren Pratt, against the order of nature," etc. Respondent seasonably demurred. The presiding justice overruled the demurrer, expressly citing in support of that action *State* v. *Townsend,* 145 Me. 384. Respondent's exceptions test that action.

The indictment does not set forth the age of the alleged victim. We gather from the oral argument of respondent's counsel that he does not press his argument that that omission is fatal to the indictment. The argument, even though pressed, would not avail. Where the crime against nature is charged, the age of the victim or pathic is not material and there is no requirement that it be alleged.

R. S., 1954, Chap. 134, Sec. 3 provides, "Whoever commits the crime against nature, with mankind or with a beast, shall be punished," etc. The Statute is silent as to the particular acts which are thereby forbidden. It has always been recognized that when a statute defines an offense in the generic terms of the common law, without more particular definition, courts must resort to the common law to ascertain the particular acts which may constitute the crime. Very divergent views have resulted when the courts of many jurisdictions have attempted to apply this test to "the crime against nature." Our court has consistently interpreted this statute as being very broad in its scope. It was held to include penetration *per os* (fellatio) in *State* v. *Cyr,* 135 Me. 513; and likewise in *State* v. *Townsend, supra,* to include the equally base and degraded acts which constitute what is known in medical jurisprudence as cunnilingus. The Legislature has not seen fit to amend the act since these

decisions were rendered and may be deemed to have accorded tacit approval to that breadth of definition. But it does not follow that every act of sexual perversion is emcompassed within the definition of "the crime against nature." We are aware of no case in which a statute worded like our own has been interpreted as broad enough to include acts similar to those alleged here. The crime against nature involving mankind is not complete without some penetration, however slight, of a natural orifice of the body. The penetration need not be to any particular distance, and the fact of penetration may be proved by circumstantial evidence as by the position of the parties and the like. Wharton Crim. Law, 11th Ed., Vol. I, Sec. 758, Page 970; 81 C. J. S. 371, Sec. 1 (4); see also *Commonwealth* v. *Bowes,* 166 Pa. Super. 625, 74 A. (2nd) 795; *Roberts* v. *State,* 47 P. (2nd) (Okla.) 607; *State* v. *Gage,* 139 Iowa 401, 116 N. W. 596.

The indictment before us charges acts of vile, unnatural and detestable sexual perversion, but falls short of alleging acts which comprise the crime against nature. The State is not required to specify the acts upon which it will rely, but having done so, it renders the indictment vulnerable to demurrer.

The entry will be,

Exceptions sustained.

Indictment adjudged bad.

JANE WALSH WANING, APPELLANT
FROM DECREE OF THE
HONORABLE NATHANIEL M. HASKELL, JUDGE OF PROBATE
OF THE COUNTY OF CUMBERLAND
ALLOWING THE WILL OF PATRICK M. SILKE,
DATED MAY 17, 1950

Cumberland. Opinion, October 14, 1955.

Wills. Burden of Proof. Words and Phrases. Evidence. Presumptions. Witnesses. Opinion. Exceptions. Probate Courts.

There is no exception or qualification to the requirement that a person must be of sound mind in order to make a valid will (R. S., 1954, Chap. 169, Sec. 1).

The proponents of a will have the burden of proving testamentary capacity. Sanity (in its legal sense) is not to be presumed.

In the legal sense a mind is sound which can reason and will; unsound if it can not.

A "disposing mind" involves the exercise of so much mind and memory as would enable a person to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds.

A "disposing memory" exists when one can recall the general nature, condition and extent of his property and his relation to those to whom he gives, and also to those from whom he excludes his bounty.

The evidence of testator's conduct, emotions, methods of thought, and the like for a reasonable period both before and after the execution of the will is admissible to show his capacity at the moment of making the will.

Proof of insanity of a permanent and progressive kind prior to the making of a will raises a presumption of continuity.

The opinion of an attending physician or family physician is competent as to the patient's mental condition.

Findings of a Justice of the Supreme Court of Probate in matters of fact are conclusive—if supported by evidence.

A decree of the Supreme Court of Probate can be challenged before the Law Court only by exceptions.

The fact that testimony of a party is not directly contradicted does not necessarily make it conclusive and binding upon the court.

ON EXCEPTIONS.

This case comes before the Law Court upon exceptions to a decree of the Supreme Court of Probate sustaining an appeal from the Probate Court.

Exceptions overruled.

Richard E. Poulos, for contestants.

John Bates,
Devine, Devine & Devine, for proponents.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, JJ., THAXTER, A.R.J. TAPLEY, J., and CLARKE, J., did not sit.

FELLOWS, C. J. This case comes to the Law Court on exceptions to a decree of a Justice of the Superior Court, sitting in Cumberland County as the Supreme Court of Probate. The Justice of the Supreme Court of Probate sustained the appeal of Jane Walsh Waning, who appealed from a decree of the Judge of Probate for Cumberland County allowing the Will of Patrick M. Silke, and after hearing, the Supreme Court of Probate sustained the appeal, reversed the Cumberland County Probate Court and disallowed the will.

In the bill of exceptions filed by Thomas J. Silke, and allowed by the court, it is stated that the Reverend Patrick M. Silke, a Roman Catholic priest, pastor for many years of the St. Dominic's Church, Portland, died on September 28, 1953, at the age of 79. On October 8, 1953, Thomas J. Silke

the brother of the deceased and the person named as the executor in the alleged will of the said deceased dated May 17, 1950, presented said alleged will of May 17, 1950, to the Probate Court within and for Cumberland County to be proved and allowed as the Last Will and Testament of Father Silke. Hearing was held before the Judge of Probate of Cumberland County on December 30, 1953. At the Hearing before the Probate Court the three attesting witnesses to the said alleged will of May 17, 1950 testified, and the Probate Court by its decree of December 30, 1953 decreed that said will be approved and allowed as the Last Will and Testament of the deceased, Father Silke.

Thereafter on January 20, 1954, Mrs. Jane Walsh Waning, a grand niece of the late Father Silke, and an interested person, filed an appeal from the decree of the Probate Court, setting forth the following reasons for appeal:

1. At the time the instrument purporting to be the Last Will and Testament of Patrick M. Silke was executed, to wit, on May 17, 1950, the said Patrick M. Silke did not have sufficient mental capacity to make a valid will.
2. On May 17, 1950, the said Patrick M. Silke did not have testamentary capacity.
3. There is no evidence that the said Patrick M. Silke knew that the said instrument purportedly executed by him on May 17, 1950, was his Last Will and Testament.
4. The said Patrick M. Silke was unduly influenced to execute the said instrument purporting to be his Last Will and Testament and dated May 17, 1950.
5. The said Patrick M. Silke was induced to execute said instrument purporting to be his Last Will and Testament and dated May 17, 1950, by fraud.

Hearing was had on the appeal, before a Justice of the Superior Court, at the June, 1954 term of the Superior

Court within and for the County of Cumberland, sitting as the Supreme Court of Probate. Testimony was taken out on June 25, 28 and 29, 1954. The matter was then taken under advisement with the decision reserved to be rendered in vacation. The case was argued in writing by counsel.

On September 3, 1954, being in vacation, the Superior Court sitting as the Supreme Court of Probate issued its decree. It found "as a fact that the late Patrick M. Silke on May 17, 1950, at the time he allegedly executed an instrument purporting to be his Last Will and Testament did not have testamentary capacity."

It was then ordered and decreed that the appeal was sustained; the decree of the Probate Judge allowing the will of May 17, 1950 of Patrick M. Silke was reversed and set aside, and the said will was disapproved and disallowed, and the case was remanded to the Probate Court for further proceedings not inconsistent with the decree.

The Superior Court did not make any finding or ruling on the fourth reason for appeal, which asserted the invalidity of the will of May 17, 1950 on the ground of undue influence, nor upon the fifth reason for appeal which asserted the invalidity of said will on account of fraud.

The bill of exceptions filed by Thomas J. Silke further states that his rights are substantially prejudiced thereby for the reason that the said court erred in finding without the support of any credible evidence, but contrary to all the evidence, that the deceased lacked testamentary capacity at the time of his execution of the said will of May 17, 1950.

The record of evidence taken in the Supreme Court of Probate shows that there was no contest in the Probate Court, and the testimony of the subscribing witnesses only was taken. On appeal, the following facts appear:

It was first stipulated and agreed by the parties that the estate of Rev. Patrick M. Silke is valued "between $150,000

and $160,000." The testimony of the subscribing witnesses to the will was next presented to the Supreme Court of Probate, to prove testamentary capacity and the due execution on May 17, 1950, which date was several months after Father Silke's forced retirement as a priest, due to his mental condition. On May 17, 1950 Thomas Silke telephoned one Walter Steele and asked him to come to his (Thomas Silke) private office at the Grand Trunk Railroad yard to act as a witness to Father Silke's will and to bring his brother John Steele. Thomas Silke arranged also to have Michael McGee who worked under Thomas Silke at the Railroad yard. McGee came "to do Tom Silke a favor." The signing took place between one and two-thirty in the afternoon and the witnesses stated that Father Silke was alone in his brother's private office in the Railroad yard, although Thomas Silke was in the building and came to his office once at least before, or during, the signing.

It does not appear how Father Silke got to the office, nor by whom and under what circumstances the instrument was drafted. There was only evidence that Father Silke was alone, and that the execution took only sufficient time for Father Silke and the attesting witnesses to sign the document. There is no evidence that clearly establishes the fact that Father Silke knew the instrument to be a proposed will, or that he read it, or had had it read to him. The witnesses knew Father Silke as pastor of the Church, but none of the witnesses had seen him for many months. They stated he was in their opinion of sound mind, although they testified that Father Silke made very little if any conversation beyond greetings and asking them to witness his signature.

There was evidence presented at the extended and full hearing in the Supreme Court of Probate, lasting several days, from which the justice presiding could find that Patrick M. Silke, born in 1874, was a Catholic priest and carried on his clerical duties as a priest for many years at various

towns in northern Maine. He came to Portland in 1933 as pastor of St. Dominic's parish. He was quiet, capable, intelligent, and the "soul of kindness." The Church "seemed to come first always with him." His charitable work was extensive, especially with and toward Catholic institutions. He was wealthy and donated large sums to church and individuals. He had previously executed an instrument as his will on November 17, 1932, when 58 years old, in which he stated that his brother Thomas Silke was to receive $4,000, his sister Mary Coyne $2,000, with a discharge of mortgage on her home. Other relatives such as cousins were remembered, as well as certain charities such as the Madigan Hospital at Houlton, and the Holy Innocents Home at Portland. The major portion of his estate was given to a trustee for "the purposes I have expressed to him." The residue was bequeathed to the Holy Innocents Home.

The alleged will of May 17, 1950 gave the brother Thomas Silke, as sole beneficiary, all his property, although it is stated that a mortgage on property at 103 Monument Street in Portland "shall not be called or foreclosed during the lifetime of my sister Mary E. Coyne."

Beginning around 1944, Father Nelligan and Father Houlihan, who were associated with Father Silke, and Mrs. Oliver who did his bookkeeping, among others, began to notice unusual actions on the part of Father Silke which indicated to them that he was breaking down mentally. On a number of occasions, he would stubbornly refuse to sign the weekly checks for various expenses, on the basis that he did not have any money. He would talk about his past days at Houlton, and repeat again and again the story about how one of his eyes froze, which finally necessitated its removal. His condition became such that it was necessary for Mrs. Oliver to handle all his business affairs as well as the administrative matters of the parish. By 1948 he was in semi-retirement. As Father Nelligan testified, "he didn't do many

activities of the parish. The other priests took care of the sick and attended to the other duties in the parish." In August, 1949, at an important church function, he flicked the lights on and off continually throughout the Mass. In this regard, Father Houlihan testified, ". . . the mind was so far gone that it was better that he hadn't gone (to the church)."

Although Father Silke had been a priest for nearly a half century, he would depart from the usual orderly procedure of the Mass, forget to say certain prayers and in general acted completely confused. Sometime in 1948 it became necessary for Bishop Feeney to assign one of the curates to assist and direct him during Mass. In most instances, they had to take complete charge of the Mass—pointing out in detail what had to be done. Father Houlihan remarked that this was most unusual and the first time he ever saw or heard of any such situation.

Dr. Francis M. Dooley, who had known Father Silke personally for years, and who had been his attending physician, testified fully concerning his mental condition. Dr. Dooley said that as early as 1943 or 1944, Father Silke was suffering from the degenerative disease of the arteries known as cerebral arteriosclerosis which is a chronic progressive disease in which hardening and other changes of the artery walls interfere with the blood supply to the cerebral hemispheres of the brain. The resulting brain damage caused an impairment of the intellectual functions—defective attention, disorientation, impaired memory, faulty judgment, poor insight, loss of ability of concentration, loss of logical reasoning and frequent attacks of amnesia. In the fall of 1948 he concluded that the extent of damage to Father Silke's brain was such as to seriously affect his comprehension.

Dr. Dooley was of the opinion that Father Silke was definitely of unsound mind as early as the fall of 1948, more

than a year and a half before the second will was executed, and his condition grew progressively worse.

Although cross examined at length, particularly as to whether Father Silke would have any "lucid intervals" after 1948, Dr. Dooley made it clear that he could not do anything that required a comprehension of various factors—not even a simple business matter. He could, however, do simple things such as putting on his clothes and washing his hands, etc. In response to the following question propounded by the court: "Can you tell me whether that condition which you found would be constant or whether there were periods when you saw him when he appeared to be his normal self?" Dr. Dooley answered: "His condition was one that was more constant in character. The condition got progressively worse."

The mental condition of Father Silke had progressed to such an extent by the fall of 1949 that the curates under him advised Bishop Feeney that something should be done to protect the parish. Compared with his condition in 1946, it was much worse at that time. In October, 1949, Bishop Feeney, in the presence of Father Houlihan and Father Nelligan, made a personal examination of Father Silke. As an outcome of the examination, Father Silke was retired because of his inability to take care of any matters pertaining to the parish. He was prohibited from saying Mass, and Father Nelligan was made the administrator of the parish.

Father Silke's relations with his sister Mrs. Mary E. Coyne were close for many years. Her visits were frequent. She was a widow and received from him financial support, such as paying her taxes, and making frequent gifts of money to her. Mrs. Coyne died after the alleged will was signed and about a month before the death of Father Silke.

After his retirement, Thomas Silke visited Father Silke every night at the rectory for the seven months immediately

preceding the execution of the second will. Previous to his forced retirement, Thomas Silke did not see his brother except on rare occasions a few times each year, and usually on holidays. Since Thomas Silke did not testify, it is not known why the visits became so frequent at the last or what transpired between the two brothers.

On each of the afternoons for seven months before the execution of the alleged will, Father Silke was brought to the home of his housekeeper. There he would have his eye treated by her. He would stay there, three or four hours, playing with toys of the children, go to the telephone and make believe he was calling someone, sit and stare into space, and whatever little conversation he made was confused. On one occasion while he was left alone, he wandered out of the house and was only returned after a search by Mr. and Mrs. Oliver. During these visits he did not recognize people whom he had known for years, such as Mrs. Oliver who had done his daily bookkeeping and Miss King who was his housekeeper for years. He was not capable of transacting the simplest kind of business. His bookkeeper did it for him. Both Mrs. Oliver and her husband testified to facts from which the ordinary person might consider clear evidence of senility.

On May 19, 1950, Father Silke fell and injured his back and was hospitalized for a short time. Dr. Dooley stated positively that Father Silke was not of sound mind on May 19th, or on the day of the execution of the alleged will two days before.

Eleanor McKinnon, a trained nurse, who cared for Father Silke when in the hospital May 19, 1950, and after leaving the hospital up to the date of his death, testified that he always insisted that he had no money and could not pay nurses; that he never recognized his sister who called almost every day; that when the brother Thomas Silke called, Thomas endeavored to impress upon others present

that Father Silke's mind "was as clear as a bell." Father Silke, however, did not recognize his brother and had to be told who he was. He always stated that he was a very poor man. He told Mrs. McKinnon that she could have all his property after his death, including the rectory. "I would give you money, but I never had any, I haven't got a cent."

The evidence offered by the proponent to meet and contradict the testimony offered by the contestant was testimony of Miss Margaret McDonough, a first cousin of the testator and also a first cousin of Thomas Silke, the sole beneficiary under the instrument dated May 17, 1950, Charles M. Murphy, a monument salesman, and Edward R. Twomey who assisted the testator in the preparation of his income tax returns, and Dr. William R. McAdam an eye specialist.

Margaret McDonough testified that she visited Father Silke at intervals of approximately twice a month between October 1949 and May, 1950; that he recognized her; that these visits usually took place in the afternoon and that Father Silke was at home on all of these occasions; that he knew where his sister lived; that she observed him saying Mass privately and never noticed any errors or omissions; that his conversation relative to parish affairs always seemed all right; that she did not notice any mental confusion.

Mr. Murphy testified that on December 12, 1949 at his instigation, Father Silke signed a contract for the purchase of a monument; that Father Silke knew what kind of stone he wanted; that Father Silke told Mr. Murphy that he wanted the names of his father and mother on the stone; that about a week after his visit he had occasion to visit Father Silke, on which occasion Father Silke recognized Mr. Murphy and that mentally Father Silke seemed normal.

On cross examination it developed that prior to Mr. Murphy's visit to Father Silke, he had discussed in detail with

Father O'Toole the kind of monument which Father Silke wanted and that the order was prepared by Mr. Murphy from this conversation with Father O'Toole.

Edward R. Twomey, a Teller at Canal Bank, testified that he had associated with Father Silke for many years in the preparation of his income tax returns; that in 1950 Mr. Twomey went to see him as usual; that the testator recognized him and the purpose of his visit; that Father Silke gave Mr. Twomey the figures; that Mr. Twomey then went home and prepared the return, after which he took the return back to Father Silke, who signed a check for the amount indicated; that in 1950 he talked with him on current events and "small talk" and that Father Silke appeared normal.

On cross examination, and after considerable questioning, Mr. Twomey finally admitted that he did not know who prepared the figures and had no specific recollection of 1950, and that the reason he was sure he went up there in that year was because of the exhibits and copies of exhibits which Mr. Twomey had at home.

Dr. William R. McAdam, an eye specialist who treated Father Silke once in 1948 and once in 1949, found from these two examinations of Father Silke's eyes that he had a "mild arteriosclerosis in keeping with a man of 75 years." He was not confused. He "talked reasonably" when asked questions. "There was not enough that showed in the eye" to indicate arteriosclerosis sufficient to affect the brain.

The certificate of death showed that Patrick M. Silke died September 28, 1953 at the age of 78 years, 11 months, 19 days, and that cause of death was "cerebral arteriosclerosis, senility." The death certificate was signed by Dr. Eugene E. O'Donnell.

Revised Statutes, 1954, Chapter 169, Section 1, provides as follows: "A person of sound mind, and of the age of

twenty-one years, and a married person, widow or widower of any age, may dispose of his real and personal estate by will, in writing, signed by him, or by some person for him at his request, and in his presence, and subscribed in his presence by three credible attesting witnesses, not beneficially interested under said will." There is no exception or qualification to the requirement that a person must be of sound mind in order to make a valid will, and the burden rests upon the proponent of the will to prove affirmatively that the testator was of sound mind when he made the will. Hence in probating a will the sanity of the testator must be proved. Sanity is not to be presumed. The word sanity is used in its legal and not its medical sense.

In law, every mind is sound that can reason and will intelligently, in the particular transaction being considered; and every mind is unsound or insane that cannot so reason and will. The law investigates no further. This definition differentiates the sound from the unsound mind, in the legal sense. A disposing mind involves the exercise of so much mind and memory as would enable a person to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds; and a disposing memory exists when one can recall the general nature, condition and extent of his property and his relation to those to whom he gives, and also to those from whom he excludes, his bounty. Mere intellectual feebleness must be distinguished from unsoundness of mind. The requirements of a "sound and disposing mind" does not imply that the powers of the mind may not have been weakened or impaired by old age or bodily disease. The weakest kind of a sound mind may make a will, but it must be a legally sound mind. *Chandler Will Case,* 102 Me. 72, 73; *Hall* v. *Perry,* 87 Me. 569; *Martin, Appellant,* 133 Me. 422; *Rogers Appellant,* 126 Me. 267; *Pliny Crockett, Aplt.,* 147 Me. 173; *In re Will of Loomis,* 133 Me. 81.

Under these legal principles arises a pure question of fact upon the first proposition, which it is incumbent upon the proponents or appellees in the first instance to prove, namely that the testator on the day and time that he signed the will was possessed of testamentary capacity. *Chandler Will Case,* 102 Me. 72, 89; *Appeal of Packard,* 120 Me. 556; *Pliny Crockett, Aplt.,* 147 Me. 173.

The burden rests upon the proponents to affirmatively prove the capacity to make a will. In probating a will the sanity of the testator must be proved and is not to be presumed. *Chandler Will Case,* 102 Me. 72, 87. *Pliny Crockett, Aplt.,* 147 Me. 173, 179.

The burden of proof is upon the party propounding the will to establish its validity by a fair preponderance of the weight of the evidence. *Rogers, Appellant,* 126 Me. 267, 283.

On the issue of competency to make a will, the burden of proof is upon the proponent. It is for him to substantiate soundness of mind, even though the contestants offer no evidence at all. *Martin, Appellant,* 133 Me. 422, 428.

The value of the testimony of the subscribing witnesses is to be determined with reference to his opportunity for observations, his skill and care in observing, his intelligence and powers of discernment and memory. *Martin Appellant,* 133 Me. 422, 431.

Except in rare instances, the appearance and conduct of the testator at the moment of executing the will does not furnish a sufficient basis for determining the mental condition at that time. This can often be determined only from a consideration of his conduct, behavior, methods of thinking, and the like, extending over a long period of time. Furthermore any other rule would leave those who were present at the time of the execution as the only witnesses whose evidence would be admissible as to capacity, and would render fraud easy and safe. For these reasons a wide range of in-

quiry is presented when the capacity of the testator is involved; and evidence of testator's conduct, emotions, methods of thought, and the like, for a very considerable period before and after the execution of the will, is admissible to show his capacity at the moment of making the will. The evidence must be restricted to a reasonable time on either side of the execution of the will. See *Page on Wills,* Vol. 2, Section 792, and *Chandler Will Case,* 102 Me. 72.

There may be no direct evidence that on the day and at the hour the will was signed, testator was not sane, but it does not follow that proof of incapacity at the very moment must be made by eye witnesses on that occasion. Proof of insanity prior thereto, permanent in kind and progressive, raises a presumption of continuity. *Martin, Appellant,* 133 Me. 422, 434.

An attending or family physician's opinion as to the mental health of his patient is competent; such patient's condition some time before and some time after making the will is relevant as tending to show the conditions of mind when it was executed. *Martin, Appellant,* 133 Me. 422, 433.

The rule is firmly established that upon exceptions to findings of the sitting Justice in the Supreme Court of Probate upon questions of fact, if there is any substantial evidence to support the findings, the exceptions must be overruled. *Appeal of Packard,* 120 Me. 556, 115 Atl. 173.

The findings of a Justice of the Supreme Court of Probate in matters of fact, are conclusive, if there is any evidence to support them. It is only when he finds facts without evidence that his finding is an exceptionable error in law. *In Re Simmons,* 136 Me. 451, 12 Atl. (2nd) 417.

The validity of the decree of the Supreme Court of Probate can be challenged before this court only by exceptions; and the findings of the justice of said court in matters of

fact are conclusive if there is any evidence to support them. *Pliny Crockett, Aplt.*, 147 Me. 173, 84 Atl. (2nd) 808.

Questions of fact once settled by the Justice of the Supreme Court of Probate, if his findings are supported by any evidence, are finally decided. Such justice and he alone is the sole judge of the credibility of witnesses and the value of their testimony. It is only when his findings are made without any evidence to support them that we can disturb them on exceptions as erroneous in law. *Heath et al., Aplts.*, 146 Me. 229, 79 Atl. (2nd) 810.

The credibility of testimony, its capacity for being believed is one of the things to be settled before weighing it. *Weliska's Case,* 125 Me. 147.

The testimony of a witness as to his belief and motive is not usually, if ever, susceptible of direct contradiction. The fact that the testimony of a party to a suit is not directly contradicted does not necessarily make is conclusive and binding upon the court. Of course, it is not to be utterly disregarded and arbitrarily ignored without reason. It should be carefully considered and weighed with all of the other evidence in the case, and with all of the inferences to be properly drawn from facts established by the evidence; but if, on the whole case, it appears that such testimony is untrue, the court is not required to put the stamp of verity upon it, merely because it is not directly contradicted by other testimony. *Mitchell* v. *Mitchell,* 136 Me. 406, 11 Atl. (2nd) 898; cited with approval in *Pease* v. *Shapiro,* 144 Me. 195, 67 Atl. (2nd) 17.

The law relating to testamentary capacity is certain, plain, and easily understood. The difficulty in deciding disputed questions of fact lies in the application of the law to the facts.

It is easy to decide that a person has testamentary capacity when he lives in the bright sunshine of a clear and vigorous mind with a healthy body. It is also easy to decide the fact that capacity is lacking, when the person is in the darkness of unquestioned delirium, imbecility or idiocy. When, however, the vigorous mind of an individual is attacked by a degenerative disease that is progressive and is to end in senility and mental incompetence, and it has reached the twilight zone, it is impossible to ascertain with certainty the time when the light of reason goes out.

We do not and cannot know the true condition of our own minds at any given moment, much less can we hope to know the condition of the mind of another. Insanity or unsoundness of mind, as a practical proposition, is but the apparent inability of a person to wear the veneer of social and business standards which have been established by the customs and actions of the great majority. The law, however, does not expect and does not require the impossible, and the trier of facts in a civil case needs only to accept the probabilities shown by a preponderance of the evidence presented, and if there is sufficient credible evidence on which to base his decision it is final.

In this case, as in all contested will cases, the evidence was conflicting. The burden of proof was upon Thomas J. Silke, the brother and sole legatee, as proponent, to establish by a fair preponderance of the evidence that Patrick M. Silke at the time when he signed the alleged will was of sound mind. It was for him to so satisfy the Justice sitting as the Supreme Court of Probate. Sanity, in a will case, is not presumed.

The undisputed evidence shows Father Silke to be a capable and educated priest, born in 1874, who carried on his duties without question as to his mentality, until about

1943 or 1944 when his actions indicated to his associates some mental disturbance. His friend and physician diagnosed his trouble as cerebral arteriosclerosis and testified that his mental condition grew steadily worse, and that at the time of signing the alleged will he was not capable of conducting even small and ordinary business affairs. This testimony of the doctor was sustained and corroborated by his associate priests, by his bookkeeper, and by others who knew him well and saw him frequently, and who testified to facts that they observed, that indicated an increasingly abnormal and enfeebled mental condition.

The instrument signed on May 17, 1950 might be considered, within itself, as evidence in the contestant's favor. The proponent, Thomas J. Silke, is named the sole beneficiary of a large estate by a brother who in past years he only occasionally saw. The sister (then living) who had to be financially aided by Father Silke over the years, is given nothing. Under the circumstances in this case, such a will is not in keeping with the lifetime habits or inclinations of the priest when he was mentally competent. It might well be argued that such a will made under all the circumstances by such a man "did not show a rational being." Then too, Thomas J. Silke did not testify, and he could probably have told why the alleged will was signed in the railroad yard; whether Father Silke consulted an attorney or any other person about the contents of the proposed will; who drafted the proposed will; who read it to Father Silke if it was read to him; whether Father Silke was apparently normal at the time of signing, and other vital questions that perhaps only the proponent knew.

There was no error. The Justice sitting as the Supreme Court of Probate could well find as a fact, from sufficient

credible evidence, that on May 17, 1950 Father Silke did not have the necessary testamentary capacity.

Exceptions overruled.

The costs and expenses of the parties, including reasonable counsel fees, to be fixed by the Supreme Court of Probate in its decree and paid from the estate of Patrick M. Silke.

HAROLD D. HERSUM, ADMINISTRATOR
ESTATE OF HELEN D. HERSUM
vs.
KENNEBEC WATER DISTRICT

HAROLD D. HERSUM
vs.
KENNEBEC WATER DISTRICT

Kennebec. Opinion, October 19, 1955.

Referees. Findings. Negligence. Proximate Cause. Independent Contractor. Wrongful Death. Evidence. Hearsay. Res Gestae.

Referees like juries, may not base their conclusions on guess and speculation, but they are entitled to draw reasonable inferences from the evidence, and findings will not be upset if the evidence is such to justify a reasonable belief of the probability of the existence of the material facts.

Where there are several possible theories to explain the happening of an event, the evidence must be such as to have selective application to the one adopted by the fact finder.

Reasonable inferences may be drawn under some circumstances from what subsequently occurred.

It is not necessary that the exact injury which results from negligence be forseeable if, in fact, injury in some form should have been anticipated as a probable consequence of the negligence and, viewing the occurrence in retrospect, the consequences appear to flow in unbroken sequence from the negligence.

Where work involves danger to others unless great care is used, an employer has the duty to make provision against negligence as may be commensurate with the obvious danger. This duty can not be delegated to another so as to avoid liability for its neglect.

Due care of the deceased is presumed under R. S., 1954, Chap. 113, Sec. 50 (Wrongful Death).

The test of the admissibility of a *res gestae* statement is that the act, declaration or exclamation must be so intimately interwoven with the principal fact or event which it characterizes, as to be regarded part of the act itself, and also to clearly negative any premeditation or purpose to manufacture testimony.

The form of a *res gestae* statement does not govern its admissibility. It may be in answer to a question.

ON EXCEPTIONS.

This is a negligence action before the Law Court upon exceptions to the acceptance of a referee's report. Exceptions overruled.

Perkins, Weeks & Hutchins, for plaintiff.

Dubord & Dubord, for defendant.

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

WEBBER, J. On exceptions to rulings of referees and to the acceptance of their report. Two cases are here considered together. In one the plaintiff as administrator of his daughter's estate was awarded damages under two counts, one for her conscious pain and suffering and the other for pecuniary loss to her heirs as the result of her

death. In the other case plaintiff was awarded damages for the medical and hospital expenses incurred by him for his daughter and for the destruction of his home and furnishings. No issue is here raised as to the amount of damages.

The referees had before them evidence which would support the following findings of fact. The defendant, Kennebec Water District, is engaged in the business of supplying water in the City of Waterville by means of underground pipes, many of which are laid under existing streets. On April 16, 1953, the defendant had occasion to lay a new water main along Dalton Street upon its southerly side and in close proximity to defendant's old main. The defendant was aware that the Waterville Gas Company also maintains underground pipes as a part of its business of supplying gas. Before starting any excavation of the street, the defendant requested the gas company to furnish assistance by indicating the location of its concealed pipes. Two employees of the gas company went to Dalton Street to supply the requested information. The plaintiff's home was on the northerly side of Dalton Street. Almost directly across the street on the southerly side was the Millett home, which was adjoined on its westerly side by the Kennison home. The representatives of the gas company entered the cellars of the houses on the southerly side of Dalton Street and located the gas service entrances. According to their testimony, there was apparently doubt in their minds as to whether the Millett and Kennison houses were served by one entrance pipe or two, but they informed the defendant's employees that there was one gas service pipe into the Millett house, which they located, and that there might possibly be another pipe into the Kennison house.

The defendant employed one Donald Gurney to furnish a backhoe shovel with an operator. Mr. Gurney is in the sand, gravel and excavating business. Issue is raised as to whether Gurney's shovel operator acted in the role of inde-

pendent contractor or became the agent and employee of the defendant. In any event, the defendant's own employees located the gas pipe leading to the Millett house and carefully dug around it by use of hand shovels. Thereafter the shovel operator continued machine excavating along the line of the water main, moving in a westerly direction in front of the Kennison house. At this point his shovel struck an obstruction in the ground. He immediately ceased excavation and reported the fact to defendant's foreman. One of the defendant's employees then dug around the object with a hand shovel and found it to be a pipe running across the excavated trench and about thirty inches below the surface of the street. Defendant's foreman then entered the trench, examined the pipe and, observing neither the smell of gas nor the presence of water, assumed that it was an abandoned pipe. The water main was eventually laid about two feet below the pipe which had been struck and after about six hours the trench was filled. The gas company was not notified by anyone that any pipe had been struck and had no knowledge thereof.

On June 27, 1953, the plaintiff's daughter entered the Hersum home early in the forenoon. About ten minutes later there occurred an extremely violent explosion in the Hersum house which was of such proportions and so damaging in its effect that the dwelling was subsequently razed to the ground. The neighbor, Mr. Millett, immediately ran to the scene and pulled Helen Hersum from the cellar through a large gap in the wall. She was conscious, although her hair and clothing were in flames. The referees permitted Mr. Millett to testify over objection that he took off his coat and smothered the flames and asked her what happened.

"Q. What was her answer?

A. Her answer was 'I pulled the switch down cellar to turn on the hot water heater and the next thing I knew I was all aflame and found you coming toward me.'

Q. At this point, Mr. Millett, were her clothes still aflame?
A. Yes, and her hair."

The girl was immediately taken to the hospital where she died within a few days as a result of her burns and injuries.

The rest of the Hersum family had been away for about two weeks prior to the date of the accident. The cellar windows were covered with both regular and storm sash. The house was heated by an oil burner located in the cellar which also furnished hot water. Before leaving home, Mr. Hersum had showed his daughter how to control the oil burner switch and had then left it set for manual control in an "Off" position. Helen herself had been away visiting during most of the two week period, but had been in and out of the house on both of the two days before the accident.

The State Director of Fire Prevention was notified and arrived about two hours after the explosion, when he examined the building. He observed that the oil burner switch was in the "On" position. He removed the oil burner, the switch, and the wiring, and had them examined and tested by the mechanical engineering department of the University of Maine, where they were found to be in good operating condition. In the afternoon of the same day an investigation was begun, which was continued and completed two days later, by people with special competence in testing for the presence of escaping gas. In this investigation an apparatus known as an "explosion meter" was used for the purpose of detecting the presence of gas either in limited or explosive quantity. There was a gas service entering the Hersum house, but this had been completely shut off for a considerable period. All tests for leaking gas through or around the gas service were negative. In another part of the cellar, however, there was a hole or opening in the foundation wall on the level of the cellar floor where the water service pipe entered the house. Tests within this opening

disclosed the presence of gas in explosive quantity. A test made under ground outside the foundation wall and opposite the opening likewise disclosed the presence of gas in explosive quantity. A series of underground tests disclosed the presence of gas under ground in explosive quantity in a line which, if projected, would run from the opening in the Hersum cellar toward the street along the approximate line of the water service pipe. The gas main runs along Dalton Street on its northerly side. Further tests disclosed the presence of gas in explosive quantity in the area of this gas main at a point about opposite the Kennison house. By careful hand digging at this point the gas main was exposed and it was found that at this location the gas main was entered by another pipe at right angles by means of a "T" joint. Gas was leaking at this joint and there was present a crack or break in the thread of the feeder pipe which appeared to be fresh. The section of broken pipe is an exhibit. A new excavation was made over the water main in front of the Kennison house and a piece of pipe lying at right angles to the street was removed and is an exhibit. This piece of pipe, although not broken, discloses a substantially bent portion on which appears a shiny area such as might occur if there were fairly recent abrasions. Witnesses who observed the location of the broken joint with reference to the location of the bent pipe and the direction in which both pipes pointed as they lay in the ground testified that each piece was an extension of the other or, in substance and effect, that both pieces were portions of one pipe which was laid across the street to connect with the gas main.

The gas which was being supplied was propane gas. This gas is odorless. When mixed with proper proportions of air, it is highly explosive. With reference to the proportions of gas and air required to render the mixture explosive there are both low limits and high limits. It is therefore manifestly highly dangerous and hazardous and must be handled

and treated with great care and caution. To minimize the danger resulting from the odorless quality of the gas in its pure state and in order to supply a warning of its presence, it is common practice for commercial suppliers to mix with it what is known as ethyl mercaptan, which has an odor which is likened to that of rotten cabbage. This odorant is added in the proportion of one pound to nine or ten thousand gallons of propane gas. Propane is classed chemically as an inert substance and is quite unreactive. Ethyl mercaptan is of an acidic nature and more reactive. Ethyl mercaptan would be adsorbed by other substances with which it might come in contact far more quickly than would propane. The effect of such adsorption of ethyl mercaptan out of its combination with propane would be to diminish the warning odor. Such adsorption might occur if the combined propane and ethyl mercaptan were passing through the soil. Friends of Helen Hersum who were present with her in the cellar of her home on each of the two days immediately preceding the accident testified that there was no odor in the cellar. Neither was there any odor in the cellar when the investigation was being conducted nor even in the area in proximity to the opening in the foundation wall where gas was present in explosive quantity. The odor, however, was very noticeable at the point of the leak in the main. Moreover, a sample of sandy soil taken from the excavation at the site of the leak retained a strong odor of ethyl mercaptan indicating adsorption by the soil at that point.

The referees found for the plaintiff without making specific findings of fact. In so deciding, it is obvious that they deducted from this evidence that the blow given by the backhoe shovel to the gas pipe at the point where it was bent was of sufficient force to damage and break that pipe at the point on the opposite side of the street where it joined the gas main; that gas leaking in substantial quantity from that break found its way under ground and seeped in an easterly

direction until it found a point of escape in the area of the Hersum water service and thence through the opening into the cellar; that while seeping through the soil sufficient quantities of ethyl mercaptan were adsorbed so that the gas lost much or all of its odor; and that the gas accumulated in the cellar until in mixture with the air it had become highly explosive, at which time it was ignited by the act of Helen Hersum in throwing the oil burner switch. The defendant contends that such a theory rests upon nothing more than surmise and conjecture. We have recently had occasion to call attention to the basic differences between surmise and conjecture on the one hand and reasonable inferences upon the other. Referees, like juries, may not base their conclusions on guess or speculation, but they are entitled to draw reasonable inferences from the evidence, and findings will not be upset if the evidence is such as to justify a reasonable belief of the probability of the existence of the material facts. *Thompson* v. *Frankus,* 151 Me. 54; *White* v. *Herbst,* 128 Conn. 659, 25 A. (2nd) 68. Where there are several possible theories to explain the happening of an event, the evidence must be such as to have selective application as to the one adopted by the fact finder. *Jordan* v. *Portland Coach Co.,* 150 Me. 149; *Suburban Electric Co.* v. *Nugent,* 58 N. J. L. 658. In the absence of direct evidence of an element of causation, a reasonable inference may be drawn under some circumstances from what subsequently occurred. *Hatch* v. *Globe Laundry Co.,* 132 Me. 379. Reasonable inferences may be drawn only when they logically flow from the testimony and from physical facts duly proven to have existed. *Cooper & Co.* v. *Can Co.,* 130 Me. 76. The fact finder must ask himself whether one of several possible theories is more rational, logical and probable than the others. If, when examined in the light of the known facts, two or more theories remain equally probable and equally consistent with the evidence, the selection of one to the exclusion of others would rest upon mere surmise and con-

jecture. *Southern Grocery Stores* v. *Greer,* 23 S. E. (2nd) (Ga.) 484; *Houston* v. *Repub. Athletic Association et al.,* 343 Pa. 218, 22 A. (2nd) 715; *Ingersoll* v. *Liberty Bank of Buffalo,* 278 New York 1, 14 N. E. (2nd) 828; *Alling* v. *Northwestern Bell Tel. Co. et al.,* 194 N. W. (Minn.) 313. In making rational and logical deduction from the known facts, both judges and referees may use their own common sense and need not pretend that they do not know that which everyone else knows and which they themselves know outside of court. *Melanson* v. *Reed,* 146 Me. 16; *Lyle* v. *Boston & Aroostook R. R.,* 150 Me. 327.

Applying the foregoing rules to this evidence, we think the referees based their conclusions upon reasonable inferences rather than upon surmise and conjecture. The very nature of the explosion, its violence and destructive force, permitted an inference that gas was a likely cause of this disaster. There was evidence that there were no other highly explosive substances on the premises. Some ammunition and a can of cleaning fluid were found intact. The furnace apparatus was in good condition and there was undisputed evidence that the fuel oil could not and did not cause the explosion. If gas was the explosive agent, how did it enter the cellar? The referees could quite properly find that the tests were efficiently conducted. Those tests eliminated the theory that gas might have entered through or around the gas service entrance. The referees were therefore justified in concluding that it entered through the apertures in the area of the water service where it was, in fact, found in explosive quantity. It may be borne in mind that when these tests were begun there was no knowledge of a gas leak or a broken joint at the main. It is significant that the tests themselves led the investigators along a course to a point where, upon excavation, the gas leak was found. "But it is not necessary that plaintiff should, after establishing that there was a leak in appellant's main in close proximity to the

building with a perfect conduit for the escaping gas to within twelve feet of the building, then follow the escaping gas inch by inch into the basement of the building." *Koch* v. *So. Cities Distributing Co.*, 138 So. (La.) 178, 181. The defendant was unable to suggest any other plausible theory, either as to the nature of the explosive agent or the source of escaping gas. The referees could reasonably infer that there was a direct connection between the striking and bending of the gas service pipe on the southerly side of Dalton Street and the break at the joint in the north side. The defendant complains that the street was not excavated so as to ascertain by direct evidence that the breaking and the bending in fact involved but one single pipe. The plaintiff had no franchise to excavate the street. The defendant had such a franchise and was thereby in better position to make the necessary test if it deemed that the same would be helpful. Be that as it may, the referees had before them for examination portions of the pipe which could be compared as to size, color, apparent deterioration and the like, and they had evidence as to the location of the extremities, their apparent course and direction as they lay in the ground, and their depth below the surface of the street. We do not believe that anyone could seriously doubt that but one pipe was involved and the referees were justified in so finding. They could further properly find that a blow sufficient to produce the bend in a piece of pipe as they observed it was sufficient to cause damage at the point where the pipe entered the main and, in fact, to cause the type of damage which they observed upon examination of the exhibit.

The defendant contends, however, that, even granting all of the foregoing, no negligence chargeable to it or its employees was shown and a resulting explosion in the Hersum house was too remote a consequence as to be legally foreseeable. It is not necessary that the exact injury which results from negligence be foreseeable if, in fact, injury in some

form should have been anticipated as a probable consequence of the negligence and, viewing the occurrence in retrospect, the consequences appear to flow in unbroken sequence from the negligence. *Hatch* v. *Globe Laundry Co., supra; Thompson* v. *Frankus, supra; Barbeau* v. *Buzzards Bay Gas Co.*, 308 Mass. 245, 31 N. E. (2nd) 522. As was stated in *Ill. C. R. Co.* v. *Siler*, 229 Ill. 390, 394, 82 N. E. 362, "If the consequences follow in unbroken sequence from the wrong to the injury without an intervening efficient cause, it is sufficient if, at the time of the negligence the wrongdoer might, by the exercise of ordinary care, have foreseen that some injury might result from his negligence." *McClure* v. *Hoopeston Gas & E. Co.*, 303 Ill. 89, 135 N. E. 43, 25 A. L. R. 250, 259 annotated. When this defendant began excavation of the street it knew that gas pipes were concealed there in various places. It was bound to know that gas is an extraordinarily dangerous element and must be treated with great care and caution. The defendant's awareness of its duty in this respect is shown by the fact that it called upon representatives of the gas company to locate hidden lines and that when it reached an identified location it caused the digging to be done by hand rather than with a power shovel. The defendant was bound to proceed in the exercise of reasonable care and that care would necessarily be commensurate with the danger. The defendant was under a duty to anticipate that if it struck and injured a pipe carrying gas, causing the gas to escape, that gas would gather in some location and in all probability would ultimately injure some person or property in some manner. As was stated in *Ehret* v. *Village of Scarsdale et al.*, 269 New York 198, 199 N. E. 56, 59, "In this case it is plain that by the exercise of reasonable vigilance, the defendant (not a gas company but the holder of a permit to excavate the street and construct a drain) might have anticipated that gas might leak from a break in the injured gas main (damaged by defendant) at the point where it was incased in the pipe drain, and that

the escaping gas might find its way into a public sewer or a farm drain in the street and from there into houses along the street, and endanger life or property in such houses. Ordinary foresight would suffice for that, but no foresight, however extraordinary, would have enabled the defendant to determine when, where, or how such injury would occur. The orbit of danger was undefined, both in time and space. In fact, no damage resulted from the negligent act for almost a year, and then the damage occurred almost simultaneously in two separate houses at considerable distance from each other and from the point of the leak. *Nonetheless, the damage was the result of a danger which could have been anticipated by the exercise of reasonable foresight.*" (Emphasis supplied)

After the gas service pipe had been struck and severely bent by the power shovel the defendant was immediately notified of that fact. The defendant had been warned of the possible existence of another gas pipe in the area. The examination then made by the defendant disclosed to it the size and nature of the pipe, its location and direction as it lay beneath the ground and, coupled with the warning already received, should have made it apparent to the defendant, in the exercise of reasonable care, that in all probability this was a gas service pipe. The defendant then had a plain duty to notify the gas company so that further examination might be made to ascertain whether other serious and concealed damage had been caused. The defendant elected to rely wholly upon its own cursory examination of the bent pipe and proceeded to act upon the erroneous assumption that this was an abandoned pipe. An employee of the defendant testified that if he had been aware that this was a gas service pipe, he would have notified the gas company. Under somewhat similar circumstances the California court recognized that it is the duty of one who, while excavating in a street, strikes and bends a gas service pipe, to notify the gas company of the accident. Failure to give such noti-

fication is negligence. *Rauch et al.* v. *So. Cal. Gas Co. et al.*, 273 P. (Cal.) 1111.

We think the referees upon this evidence could further find negligence on the part of the defendant in permitting the gas service pipe to be forcibly struck and bent by the power shovel. The defendant was well aware of the caution which must be exercised in locating and digging out a gas service pipe which is carrying gas. It did not permit the power shovel to be used at the location of the first pipe, but conducted the whole operation with hand digging. It knew of the possibility of the second pipe and it knew the location of the gas service entrance in the cellar of the Kennison house. Under the circumstances which were here present, we think it makes no difference whether the operator of the power shovel was a servant and agent of the defendant or an independent contractor. The defendant in any event was exercising control as to when and where the shovel should be used and how deep an excavation should be made with it. The apparent hazard to be anticipated from negligence was so great that the defendant could not avoid responsibility. Such a rule has been adopted where the danger to others is great. " 'A duty is imposed upon the employer in doing work necessarily involving danger to others, unless great care is used, to make such provision against negligence as may be commensurate with the obvious danger. It is this duty which cannot be delegated to another so as to avoid liability for its neglect.' " *Grinnell* v. *Carbide & Carbon Chemicals Corp.*, 282 Mich. 509, 276 N. W. 535, 542; *Covington, etc., Bridge Co.* v. *Steinbrock & Patrick*, 61 Ohio State 215, 55 N. E. 618; *Nugent* v. *Boston Consol. Gas Co.*, 130 N. E. (Mass.) 488.

In the action seeking to recover for the injury and death of Helen D. Hersum, her due care is presumed by effect of the statute. R. S., 1954, Chap. 113, Sec. 50. The burden of proving her contributory negligence falls upon the defend-

ant. The defendant in discharge of its burden of proof has not adduced even a scintilla of evidence pointing to her contributory negligence. The uncontradicted testimony shows that the gas connections to the Hersum house had been shut off so that there was no reason for any member of the family to anticipate the presence of gas in the house; that as recently as the day before the fatal explosion there had been no odor of gas in the cellar; that immediately after the explosion there was no odor of gas even in the vicinity of the aperture where gas was discovered in explosive quantity. There is no showing that Helen Hersum knew, or ought reasonably to have known, what quantity of propane gas would have to be present in a large cellar to form a dangerously explosive mixture. Nor is there any showing that she knew, or ought to have known, that such a quantity of propane gas was present. That such a result as to contributory negligence is amply supported by authority is well demonstrated by cases assembled in annotations in 25 A. L. R. 278 and 26 A. L. R. (2nd) 189. The contributory negligence of Harold D. Hersum is not even suggested.

An examination of the authorities suggests that it was not encumbent upon the plaintiff here to prove the method of ignition of the gas. The defendant, having negligently introduced an explosive quantity of gas into plaintiff's cellar, could reasonably anticipate that the gas would be ignited by some means, whether by a spark or a flame. However, we find no error in the ruling of the referees in admitting the statement of Helen Hersum explaining the method of ignition by her throwing the oil burner switch. Under the circumstances which then existed, the statement was clearly a part of the *res gestae*. The case of *Barnes* v. *Rumford*, 96 Me. 315, is clearly distinguishable. In that case the occurrence had ended and the speaker was not then performing any act. Here, however, the event was not terminated but was still continuing. The explosion itself was not the whole

event. It was followed inevitably by fire and the speaker, herself on fire, was in the process of being rescued from the devastated building. This was no mere narration of a past event. Rather was it a spontaneous explanation uttered in the course of a continuing action. In *State* v. *Maddocks,* 92 Me. 348 at 353, the general rule was stated as follows: "It is said in *Lander* v. *People,* 104 Ill. 248, that, 'the true test of the admissibility of such testimony is, that the act, declaration or exclamation must be so intimately interwoven with the principal fact or event which it characterizes, as to be regarded a part of the transaction itself, and also to clearly negative any premeditation or purpose to manufacture testimony.' " 20 Am. Jur. 553, Sec. 662, states in part, "Stated differently, the term '*res gestae*' comprehends a situation which presents a startling or unusual occurrence sufficient to produce a spontaneous and instinctive reaction, during which interval certain statements are made under such circumstances as to show lack of forethought or deliberate design in the formulation of their content. Statements which conform to these requirements and which in some way elucidate, qualify, or characterize the act in question are admissible in evidence as a distinct and separate exception to the hearsay rule." The precise form of the statement does not govern its admissibility. It may be in narrative form and in answer to a question if it meets all the requirements of admissibility as part of the *res gestae.* 20 Am. Jur. 559, Sec. 668; *Murray* v. *Boston & M. R. R. Co.,* 72 N. H. 32, 54 A. 289. It is inconceivable that this young girl could, while in such dire stress as she then was, cleverly fabricate a self-serving statement.

In conclusion, no error on the part of the referees appearing, and awards to the plaintiff being adequately supported by the evidence and reasonable inferences to be drawn therefrom, the entry will be,

Exceptions overruled.

CHARLES L. BURGESS
vs.
SAMUEL SMALL

Sagadahoc. Opinion, October 19, 1955.

Trover. Cattle. Evidence.

In an action for conversion of cattle the identification of the property converted must be established with reasonable certainty and where the proof is circumstantial the evidence must have a selective application to plaintiff's theory of the case.

Hearsay testimony cannot be accorded any probative force in an analysis of the sufficiency of the evidence.

ON EXCEPTIONS.

This is an action of conversion before the Law Court upon plaintiff's exceptions to the granting of a nonsuit.

Exceptions overruled.

John P. Carey, for plaintiff.

A. Alan Grossman, for defendant.

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

WEBBER, J. This was an action in trover based upon the alleged conversion by the defendant of seven head of the plaintiff's cattle. At the close of the plaintiff's case the presiding justice ordered nonsuit and exceptions thereto raised the only issue here presented. The evidence, viewed in the light most favorable to the plaintiff, discloses that he was the owner of twenty-nine head of cattle; that he operated a store and entrusted the management of his herd to one Perry, his agent, who was deceased prior to the time of trial; that plaintiff was relatively unfamiliar with the par-

ticular cattle in the herd and had seen them only once when they were in the barn of one Hawkes; that he was personally unable to identify individual cattle in the herd; that his agent, Perry, had authority to buy, sell and trade cattle for him and customarily reported these transactions after they were completed; that in May, 1953, with plaintiff's authorization, Perry was keeping the herd in the barn of one Hawkes, where they had been during much of the winter; that during the latter part of May a part of the herd was removed from the Hawkes barn; that both the plaintiff and Hawkes assumed that the cattle were removed by one Elwell, although no witness was present; that Elwell came to the Hawkes barn with a truck and he and Hawkes loaded the remainder and they were removed by Elwell; that Hawkes was able to give a rather general description of part but not all of the individual cattle; that plaintiff authorized his agent, Perry, to pasture his herd on the Elwell farm for a cash consideration and one milch cow; that no witness saw the cattle on the Elwell place; that efforts made by the plaintiff and the Sheriff to locate Elwell prior to trial had failed; that some time in July the plaintiff learned that his cattle were missing; that in July the defendant, who, in the course of his business, buys and slaughters cattle, purchased seven head of cattle from Elwell; that some time thereafter the plaintiff had a telephone conversation with a person whom he assumed to be the defendant, in which the plaintiff asked if cattle had been purchased from Elwell, and was told that they had; that plaintiff was further told that what had been purchased was "a pair of steers and four Holstein heifers and a Guernsey heifer," which had been slaughtered; that the plaintiff and his agent furnished to the Sheriff a list of twenty cattle which were missing which included eight Holstein heifers, four steers and seven Guernsey heifers; that when the Sheriff showed this list to the defendant, the defendant stated that the cattle he purchased from Elwell corresponded with the list "in more or less a general

way." A great deal of hearsay testimony was injected into the case which cannot be accorded any probative force in this analysis of the sufficiency of the plaintiff's evidence. It is apparent that in the absence of Elwell and Perry, no direct evidence could be adduced which would follow individual cattle owned by the plaintiff through the chain, step by step, into the hands of the defendant. Neither were the identifying descriptions sufficiently definite and certain to distinguish the cattle purchased by the defendant from Elwell from other cattle answering the same general description so as to make it clear that the cattle purchased in fact came from the plaintiff's herd. The plaintiff cannot prevail if his case rests upon mere surmise and conjecture. He may prevail upon circumstantial evidence alone if there are no fatal weaknesses in the chain of that evidence.

The degree of particularity with which identification must be made in proof of a conversion in a trover action will vary with the circumstances of the case. Where, as here, there is opportunity for commingling of animals of the plaintiff with other animals of like breed and answering the same general description, identification must be made with reasonable certainty. In *Exchange State Bank* v. *Occident Elevator Co.*, 24 P. (2nd) (Mont.) 126 at 129, the court said: "The rule as to circumstantial evidence in a civil case is that a party will prevail if the preponderance of the evidence is in his favor. This court has said: 'The solution of any issue in a civil case may rest entirely upon circumstantial evidence. * * * All that is required is that the evidence shall produce moral certainty in an unprejudiced mind. * * * In other words, when it furnishes support for the plaintiff's theory of the case, and thus tends to exclude any other theory, it is sufficient to sustain a verdict or decision.' " In that case, the action was for the conversion of wheat. The issue was whether a third party selling wheat to the defendant had a right to do so, or whether the wheat was covered by plaintiff's mortgage. Here also the vital issue was

one of identity as to which there was no direct evidence. In holding the circumstantial evidence sufficient to prove the conversion, the court laid stress on two important facts: (1) that it was shown that the third party had raised no wheat other than that covered by mortgage, and (2) that when he delivered the wheat to the defendant the third party had admitted its identity as mortgaged wheat. If, in the case here before us, it had been shown that Elwell had possession of no cattle other than the herd of the plaintiff and that when he sold cattle to the defendant he had admitted plaintiff's interest, the proof would obviously have been greatly strengthened.

Here is a dispute between an innocent loser of property and an innocent purchaser of property. Upon one or the other the loss must fall. The defendant gains nothing by his innocence if, in fact, Elwell sold him the plaintiff's cattle, but likewise the plaintiff cannot push the loss upon the defendant in the absence of an adequate showing that the cattle were in fact plaintiff's and not another's. The dishonesty of Elwell in the transaction with the defendant cannot be assumed, no matter what lively suspicions the plaintiff may entertain in that respect, based on surmise and conjecture. If Elwell's dishonesty be not immediately assumed, several theories in explanation of the transaction present themselves. There is no evidence whatsoever as to what cattle were maintained on the Elwell farm. Admittedly, Elwell owned and maintained the facilities for pasturing and keeping cattle and, by accepting a cow in payment from the plaintiff, he displayed an interest in owning and keeping cattle of his own. If he had other such cattle, the sale to the defendant may have been from his own herd. With the plaintiff he entered into a transaction of pasturing the cattle of another for pay, and he may have taken the cattle of other persons to pasture in the same manner. A sale of such cattle might be authorized by the owners. Here several plausible theories present themselves which are equally consistent

with the evidence. The evidence must have selective application as to the one adopted by the fact finder. The theory adopted by plaintiff must emerge as the most probable, and the evidence, if it is to suffice, must tend to eliminate other theories by force of the greater probability and rational consistency of the plaintiff's theory. This requirement is not met by wishful thinking or a likely guess. *New York Life Ins. Co.* v. *McNeely,* 52 Ariz. 181, 79 P. (2nd) 948; *Lym* v. *Thompson,* 184 P. (2nd) (Utah) 667; *Jordan* v. *Coach Co.,* 150 Me. 149. The question of proof of identification in conversion cases has often been found troublesome and difficult by courts. In *Hardison* v. *Jordan,* 141 Me. 429, where blueberries were picked in the vicinity of the dividing line between plaintiff and defendant, the evidence was insufficient to determine identity. In *Simpson* v. *Shaw,* 71 Ariz. 293, 226 P. (2nd) 557, identification of cattle was sufficent because made by brands and ear tag numbers. In *Hayes* v. *O'Dell,* 236 S. W. (2nd) (Mo.) 367, resting on circumstantial evidence, the description of a brindle heifer about two years old with a white leg and spike horns two inches long with weight estimated at 500 pounds was not deemed sufficiently definite where there was opportunity for the cattle to have come from sources other than plaintiff. In summation, the court said at page 370: "It is true this (that the identical cattle in defendant's possession were the cattle of the plaintiffs) may be proved by circumstantial evidence but a verdict cannot stand that is based upon suspicion, conjecture, guesswork, surmise or mere possibility, only. There must be substantial evidence and in this case, it is lacking." In *Satterfield* v. *Knippel et al.,* 169 S. W. (2nd) (Tex.) 795, it was held that a description of one bald-face cow did not establish identity with an animal described as one of four red Hereford cows with white faces. At page 797, the court said: "Another item in the bill of sale consisted of 'Two Jersey horned cows and calves.' (Plaintiff) testified that these cows were the two Jersey

cows which she bought from (a third party). This testimony was also based solely upon the bill of sale and (plaintiff's) familiarity with the descriptions of her cattle, since (plaintiff) had not seen the cattle after they were delivered to (defendant), and we think it is obvious, also, that she could not know from these sources alone that the 'two Jersey horned cows and calves' described in the bill of sale were the identical cattle owned by her and that had been located in (defendant's) pasture. * * * She failed, therefore, to establish her ownership of the identical property which she alleged had been converted by the (defendants)." In the Texas case, the plaintiff had little more to go on than the description of cattle contained in the bill of sale to defendant. In the case before us, the plaintiff likewise had little more to go on than the statements attributed to the defendant that the seven cattle purchased by him from Elwell corresponded "in more or less a general way" to the description of the twenty cattle in the list shown him, and that defendant had purchased from Elwell "a pair of steers and four Holstein heifers and a Guernsey heifer," not otherwise identified. We think a statement of the court in a case involving the conversion of cotton in *Anderson, Clayton & Co.* v. *Rayborn et al.*, 192 So. (Miss.) 28, has application here. "The evidence offered tends only to raise a lively suspicion or conjecture that the cotton found in the warehouse of the (defendant), in New Orleans, Louisiana, was the cotton which the complainants had lost."

One of the cattle declared upon by the plaintiff was a Jersey heifer. In his supplemental brief, the plaintiff admits that the Jersey heifer is not sufficiently identified and all claim as to conversion of that animal is abandoned. We think, however, that the identification of the four Holstein heifers and two steers also declared upon is hardly more satisfactory than that provided in connection with the Jersey, and we find no error in the action of the presiding justice below.

Exceptions overruled.

IRVING MCNALLY
vs.
F. P. RAY

Somerset. Opinion, October 25, 1955.

Potatoes. Assumpsit. Sales. Referees.

A referee's decision stands when supported by evidence.

ON EXCEPTION.

This is an action of assumpsit before the Law Court upon exceptions to the acceptance of a referee's report. Exceptions overruled.

John B. Furbush, for plaintiff.

Dubord & Dubord, for defendant.

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

WILLIAMSON, J. This action of assumpsit upon an account annexed for the balance of the purchase price of potatoes is before us on exceptions by the defendant to the acceptance of the Referee's report finding a balance due the plaintiff of $1562.50, plus interest and costs.

The several exceptions are based upon the written objections to acceptance of the report in the Superior Court. We are governed in our consideration of the case by the familiar rule that the decision of a referee stands when supported by any evidence. *Staples* v. *Littlefield,* 132 Me. 91, 167 A. 171 (1933). In the objections and exceptions the defendant in each instance alleges there was no evidence to support the findings and conclusions of the referee. Thus he raises questions of law. In his brief the defendant submits that "the referees' decision as it is written shows that it must be

based on erroneous conclusions of law from undisputed facts."

The referee in his report found "that from the plaintiff the defendant purchased, received delivery of and became obligated to pay for seven hundred thirty (730) barrels of potatoes at $6.25 per barrel ($4562.50) ; that defendant has paid plaintiff $3000," leaving a balance of $1562.50.

The defendant's objections are that there was no evidence: (1) to establish the plaintiff's contentions; (2) that the defendant purchased, received delivery of and became obligated to pay for 730 barrels of potatoes; (3) that title passed to defendant; (4) that there was no breach of express warranty; (5) that there was no breach of implied warranties of merchantableness and conformity to description on the part of the plaintiff; and (6) to support the referee's finding.

The complaint of the defendant in essence is that the referee made his finding (objection 2) and in doing so found that title had passed to defendant and that there were no breaches of express or implied warranties (objections 3, 4, 5). The first and sixth objections raise the same issues in more general but sufficient language under the rule of *Staples* v. *Littlefield, supra.*

It is not necessary that we review the entire record. Briefly we find in the record evidence from which the referee could have found the following facts:

The plaintiff in October 1952 sold potatoes grown by him to the defendant at $6.25 a barrel. 833 barrels in good condition were delivered between the 23rd and 29th of October at defendant's potato house and were there stored by the defendant. Payment was due on completion of delivery.

The plaintiff told the men at the potato house that there was a "little field frost in (the last two loads). They looked at them and they said they would be all right."

The defendant paid the plaintiff $3000 shortly after delivery of the potatoes. On two or three occasions the plaintiff asked for the balance. The defendant indicated that the money was not available and again that "as soon as he could get rid of some of his own potatoes he was trying to load out he would pay me."

The defendant expressed no dissatisfaction with the potatoes until about the last of February. He then told the plaintiff that he did not think the potatoes would keep and that they were "breaking down." The plaintiff said that it was not his fault if the potatoes were not stored or cared for properly, and also that defendant did not have to keep them if he was not satisfied. To this statement the defendant made no reply.

The plaintiff at the time assisted the defendant in "racking" the potatoes. 730 barrels remained after this process was completed. There was evidence that the defendant in May "hauled out and dumped" all of the potatoes.

There is a conflict in the testimony of the plaintiff and the defendant. The latter's position is that on account of the possibility of frost damage he insisted on a guarantee from the plaintiff that they were free from frost, and in light of the condition of the potatoes never did accept them. After suit was brought he demanded that the plaintiff remove the potatoes, paying him twenty cents a barrel for storage and $200 for handling them.

The credibility of the witnesses is not for us to determine. It is sufficient for our purposes that there is "any evidence" to sustain the findings of the referee.

There is no dispute about the law of sales governing the transaction. See Uniform Sales Act, R. S., c. 185 (1954) and particularly §§ 12, 14, 15, 18, 19, 47, and 49, unchanged since R. S., c. 171 (1944). We conclude the referee properly could find that the sale was made as stated by the plain-

tiff and that it was the intention of the parties that the defendant should have an opportunity to inspect the potatoes before title passed, to the end that the amount and quality of the potatoes could then be ascertained, that the "racking" constituted the inspection intended, that 730 barrels of potatoes met the required specifications, and that title thereupon passed to the defendant.

The entry will be

Exceptions overruled.

ELIZABETH HOLMES BUCK
vs.
MAINE CENTRAL TRANSPORTATION COMPANY

Hancock. Opinion, October 28, 1955.

Negligence.
Thoughtless inattention spells negligence.

ON MOTION AND EXCEPTIONS.

This is a negligence action before the Law Court upon defendant's exceptions to the refusal of the trial court to grant a direct verdict and upon general motion for new trial. Exception sustained. New trial granted.

Silsby & Silsby, for plaintiff.

Myer Epstein,
Blaisdell & Blaisdell, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, TAPLEY, JJ. CLARKE, J., did not sit.

WEBBER, J. Plaintiff was a passenger on defendant's bus which was in transit from Ellsworth to Boston, Massa-

chusetts. The bus came to a stop in front of the Arrow Restaurant in Nobleboro. This restaurant was owned and operated by third parties and defendant had no control over the premises. The bus driver informed the passengers that there would be a "lunch stop for all the passengers." Plaintiff left the bus and entered the restaurant through the door on the easterly side. She ate her lunch and then proceeded in search of the ladies' room. She made no inquiry as to its location, but started to leave the restaurant through the door on the westerly side. It was then the middle of the day and broad daylight. She opened the inner door which pulled toward her and then pushed the outer door away from her to open it. Her entire explanation of the accident which then ensued is as follows: "I * * * looked out and I saw steps, and so I started to step down and the next thing I knew I was on the ground." The record discloses no other evidence which, directly or inferentially, would explain the fall. There were no eye witnesses. There is no suggestion that there were any holes or cracks in the steps or any foreign substances or accumulations thereon. The steps were semicircular in design and built of cement. The top step had a radius of 24 inches and each of the two bottom steps had a 12 inch tread. The top step projected laterally 6 inches beyond the door sill on each side. The riser was in each case about 6½ inches. Although the construction differed somewhat from the ordinary rectangular step, it is obvious that there was nothing about the steps which rendered them dangerous per se or which presented any unusual hazard to one in the exercise of due care. Moreover, it is impossible to determine from the evidence whether the construction of the steps contributed to the plaintiff's fall. It is equally possible that plaintiff carelessly stepped beyond the edge of the step and caught her heel, or missed her footing altogether, exactly as she could have when carelessly over-stepping a rectangular step. In short, we are left entirely to conjecture and surmise, which will not substitute for evidence or rea-

sonable inferences from evidence. *Winterson* v. *Pantel Realty Co.*, 282 N. W. (Neb.) 393; *Jordan* v. *Coach Company*, 150 Me. 149.

The steps which the plaintiff used when entering the premises at the easterly door were identical in construction with those at the westerly door. Here was no hidden defect. The nature of the construction was as obvious to the plaintiff as to anyone else if she but looked. Thoughtless inattention spells negligence. *Olsen* v. *Portland Water District*, 150 Me. 139.

The plaintiff does not fail in her proof merely because she herself cannot furnish the evidence necessary to show her own due care and the essential fact that her unfortunate injury was proximately caused by some negligence of the defendant. In *Thompson* v. *Frankus*, 151 Me. 54, we permitted recovery where the deficiencies in the proof coming from the plaintiff alone were met and supplied by other independent evidence. This, however, is not such a case.

Upon the evidence here, the plaintiff could not have recovered from the restaurant owner, who clearly owed to her as his business guest the duty of exercising ordinary care to keep the premises reasonably safe. It is obvious, therefore, that no liability could be imposed under these circumstances upon a defendant which neither possessed nor exercised any control over the premises whatever.

At the close of the evidence, defendant moved for a directed verdict, which was denied. Exceptions were taken. The motion should have been granted. After verdict for the plaintiff, the defendant also filed motion for a new trial. The entry will be,

Exceptions sustained.
Motion for a new trial granted.

EDWARD F. BARNARD, IN EQUITY
vs.
STELLA FULLER LINEKIN

Knox. Opinion, October 28, 1955.

Wills. Trusts. Construction.

The intention of a testator is to be found in the will as a whole and if doubt from the surrounding circumstances.

A later clause in a will controls a preceding one although it cannot cut down or take away except by clear and unambiguous language.

ON REPORT.

This is a bill in equity for the construction of a will reported to the Law Court upon bill, answer and agreed statement. Decree to be entered in accordance with opinion.

Domenic P. Cuccinello, for plaintiff.

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

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, JJ., THAXTER, A.R.J. TAPLEY, J., did not sit.

WILLIAMSON, J. This is a bill in equity for the construction of the wills of Abel M. Fuller and Lizzie M. Fuller, and equitable relief dependent thereon. It is reported to us on bill, answer, and an agreed statement of facts. The plaintiff is a grandson, and the defendant a daughter of the testators. No other persons are interested in the estates. The parties say that "title to substantial real estate is affected by the construction of these wills."

The decisive question is whether the grandson, being more than twenty-five years old at the death of his grandparents, took any interest under either will.

Mr. and Mrs. Fuller executed their wills at the same time in 1923. The grandson was then twelve years old, the son of a deceased daughter of the testators. Mr. Fuller died in February 1936 and Mrs. Fuller in March 1940. In each instance the will was duly allowed in the probate court shortly after death. At the death of his grandfather in 1936 the grandson had reached the age of twenty-five years one month and one day.

Mr. Fuller's will provided as follows:

First — The entire estate to his wife for life with full power of disposal.

"*Second* — Should my beloved wife, Lizzie M. Fuller predecease me, or should any portion of my estate bequeathed and devised to my beloved wife in accordance with the foregoing paragraph of this my will be remaining at the time of her decease, then I dispose of my property as follows: . . ."

(a) A certain house with contents to the defendant. The testator desired that the grandson "up to the time that he arrives at the age of twenty-five years have a room in the house herein devised and a home."

(b) One-half of the residue to the daughter.

(c) "the remaining one-half of all of the (residue) . . . to Stella Fuller Linekin (the daughter), her heirs and assigns forever, as Trustee, to have and to hold upon and for the trusts and purposes hereinafter set forth."

I. Authority and directions for the trustee for the management of the trust.

"II. I direct my Trustee to pay over and apply for the education, support, maintenance, comfort or pleasure of my grandson, Edward F. Barnard, up to the time of his attaining the age of twenty-five years, so much of the income of my said trust estate and at such times and in such amounts as to my said Trustee may seem advisable in her sole and

absolute discretion, for his sole and separate use, without power of anticipation, or alienation and free from the control or interference of his creditors. Any income undisposed of or unapplied for a period of six months after the same has accrued shall be added to the principal of the said trust fund and follow the disposition thereof." Application of principal for the same purposes in the discretion of the wills simply exchange wife for husband.

"(d) Upon my said grandson, Edward F. Barnard, attaining the age of twenty-five years, I direct that the said trust hereinbefore created shall terminate, and I give, devise and bequeath whatever shall then remain of my said trust estate, together with any undisposed of income, to my grandson, Edward F. Barnard, in fee, discharged from any trust.

"(e) If Paragraphs Second (c) I and II of this my last will which have relation to the trust estate for the benefit of my grandson do not become effective, or if said Paragraphs do become effective and my said grandson, Edward F. Barnard, does not attain the age of twenty-five years, in either event, I give, devise and bequeath all of my estate, real, personal or mixed, of every kind and description and wheresoever situate, of which I may die seized or possessed or over which I may have control, to my said daughter, Stella Fuller Linekin."

The will of Mrs. Fuller is substantially like that of her husband. Mrs. Fuller gave to her husband a life estate with full power of disposal, and in paragraph Second disposed of her estate in event her husband predeceased her and of any property remaining at his decease. To this point the trustee was also authorized.

Clauses (a) I and II (b) and (c) in the wife's will are comparable to clauses (c) I and II (d) and (e) in the husband's will. Under clause (a) the wife gave the entire resi-

due of her estate in trust, and not one-half as did the husband. Clauses I and II are identical with the husband's will, except that there is no authorization for the trustee to expend principal as in the wife's will.

Clause (b) differs from clause (d) in the husband's will in that the remainder is "to my grandson, Edward F. Barnard, and my daughter, Stella Fuller Linekin, or the survivor of them" and not to the grandson alone.

Clause (c) and clause (e) of the husband's will are identical, except for the necessary change in reference in the wife's will to "Paragraphs Second (a) I and II."

We are requested by the parties to determine under each will whether the trust for the plaintiff grandson "ever took effect," and also to whom the residuary estate passed. Our task is to find and give effect to the intent of each testator at the time of the making of the will.

The intention is to be found in the will as a whole and in doubt from the surrounding circumstances. *Wing, Adm'x. C. T. A.* v. *Rogers, et al.*, 149 Me. 340, 107 A. (2nd) 708 (1954); *U. S. Trust Co.* v. *Douglass et al.*, 143 Me. 150, 56 A. (2nd) 633 (1948). "A later clause in a will controls a preceding one." *Woodbury* v. *Woodbury*, 74 Me. 413, 414 (1883). ". . . where an estate is given by a will, it cannot be cut down or taken away by a later clause except by clear and unambiguous language." *Brittain* v. *Farrington*, 318 Ill. 474, 149 N. E. 486, 489 (1925). See Restatement, Property § 246. We study the wills with these rules in mind.

Turning to Mr. Fuller's will, we find the critical language in clause (e), above. The daughter under this clause takes the entire estate to the exclusion of the grandson if Second (c) I and II, the trust paragraphs above, (1) "do not become effective" or (2) "do become effective" and the grandson does not reach twenty-five. The measure of the gifts is

thus determined by whether the trust paragraphs do or do not become effective.

There are two situations which call for no discussion: First, the trust paragraphs did not become effective unless the grandson survived the testator; Second, the trust paragraphs became effective if the grandson was under twenty-five at the testator's death. The precise question before us is whether the trust paragraphs, that is to say the trust, became effective when the grandson was over twenty-five at the testator's death. The period within which the property would have been held in trust for him had then ended.

If clause (e) were not in the will, the grandson would have taken under clause (d) since he survived the testator and reached twenty-five. The trust in such case would doubtless have been considered to be machinery created by the testator to protect and preserve the grandson's property until he reached the stated age. The interest of the grandson in such event under clauses (c) and (d) would not have rested on whether or not the trust became effective, but upon survivorship and attainment of a stated age.

The grandson urges in substance that the same weight should be given the trust paragraphs in construing the will, including of course clause (e). He fails to consider, however, that the testator in plain words made the effectiveness of the trust paragraphs a condition upon which the gift to the grandson rested. The trust, in the words of clause (e), was more than machinery to keep property for the grandson until a given age. The gift to the grandson was thereby made dependent upon the effectiveness of the trust.

In view of the grandson's age at the testator's death, there was no reason whatsoever for the trust to become operative. Accordingly the trust did not become effective. Hence the gift to the grandson failed and the daughter took all.

It may seem inequitable that the grandson's interest should hinge upon whether he reached twenty-five years of age before or after his grandfather's death. We may speculate on the reasons why a grandfather would leave property in trust for a grandson until he reached twenty-five, and with the remainder to him on reaching such age, and yet provide that if the grandson had attained twenty-five at the grandfather's death he would take nothing. These questions naturally occur, but they are not the questions before us.

We must find the intention of the testator from the words in the will. We cannot rewrite the will for the testator. *Huard* v. *Hegarty,* 122 Me. 206, 119 A. 609 (1923). He had the lawful right to make the gift to his grandson dependent upon the trust becoming effective. If the grandson had predeceased the testator, it would not have become effective. No more did it become effective when the grandson was over twenty-five at the testator's death. See *Buck* v. *Paine,* 75 Me. 582 (1884).

The same principles apply with the same result in the construction of Mrs. Fuller's will.

We answer the questions submitted by the parties as follows:

I. Under the Second paragraph of the will of Abel M. Fuller:
   (a) The trust in favor of the grandson never took effect.
   (b) Title to one-half of the residuary estate passed to the daughter under paragraph Second clauses (c), (d), and (e).

II. Under the Second paragraph of the will of Lizzie M. Fuller:
   (a) The trust in favor of the grandson never took effect.

(b) Title to the residuary estate passed to the daughter.

III. It is not necessary that we answer the questions relative to the vesting of the corpus of a trust in the grandson on the death of Mrs. Fuller. There was no trust and the property passed as stated in II (b) above.

In light of our construction of the wills, the bill should be dismissed. Under the circumstances it is equitable that no costs be taxed.

The entry will be

Ordered that a decree be entered below in accordance herewith.

EMMA E. WATTRICH, APPELLANT
vs.
MURRAY W. BLAKNEY, APPELLEE

Penobscot. Opinion, October 31, 1955.

Probate Courts. Guardians. Dismissal. Removal. Adult Persons. Appeal.

Action for removal of a guardian is taken against the guardian because of some circumstance relating to malfeasance or other illegal actions by the guardian.

Action for dismissal of a guardian is taken because the reasons for appointment no longer exist.

The Supreme Court of Probate is a creature of statute and its authority is limited. (R. S., 1954, Chap. 153, Sec. 32.)

The provisions of the statute excepting from appellate jurisdiction "decree(s) *removing* a guardian from office" includes a decree *dismissing* the guardian since both acts result in relieving a guardian of his duty and come within the intent of the legislature.

A guardian is not a "person aggrieved" within the meaning of R. S., 1954, Chap. 153, Sec. 32.

It must be affirmatively alleged and established that a right of appeal exists under R. S., 1954, Chap. 153, Sec. 32.

ON EXCEPTIONS.

This case is before the Law Court upon exceptions from a decree of the Supreme Court of Probate dismissing an appeal from an order of the Probate Court which order had dismissed a guardian.

Exceptions overruled.

Oscar Walker, for Appellant.

Albert C. Blanchard, for Appellee.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, TAPLEY, JJ. MR. JUSTICE TIRRELL sat at time of argument and took part in conferences but died before writing of opinion.

TAPLEY, J. On exceptions. Murray W. Blakney, the appellee, on the twenty-fifth day of April, A. D. 1950, was adjudged by the Judge of Probate for the County of Penobscot to be incompetent to manage his own affairs. Emma E. Wattrich, the appellant and sister of Murray W. Blakney, was appointed as his guardian. On March 24, 1954 the appellee filed a petition in the Probate Court for the County of Penobscot representing that he was capable of managing his own affairs and that a guardian was no longer necessary. The Judge of Probate found in favor of Murray W. Blakney, decreeing that Emma E. Wattrich be dismissed as guardian of Murray W. Blakney. Emma E. Wattrich appealed from the order and decree of the Judge of Probate to the Superior Court sitting as Supreme Court of Probate. The appellee, Blakney, filed a motion to dismiss the appeal

before the Supreme Court of Probate. This motion to dismiss was sustained and the appeal dismissed, to which rulings the appellant took exceptions.

The issues are twofold: (1) Has the guardian according to the record in this case a right of appeal? (2) In the light of the pleadings, is the appellant by virtue of being a sister of the appellee, as well as his guardian, entitled to appeal from the order and decree of the Judge of the Probate Court?

The appellee, Mr. Murray W. Blakney, saw fit to petition the Judge of Probate to dismiss his guardian, the appellant, Emma E. Wattrich. This procedure was taken under authority of provisions of Sec. 29, Chap. 158, R. S., 1954:

> "**Disability of adults under guardianship; dismissal of guardian.** When a person over 21 years of age is under guardianship, he is incapable of disposing of his property otherwise than by his last will or of making any contract, notwithstanding the death, resignation or removal of the guardian. When, on application of any such person or otherwise, the judge finds that a guardian is no longer necessary, he shall order the remaining property of the ward to be restored to him, except a legal compensation to the guardian for his services."

It is important to note that the ward was not requesting the removal of his guardian but her dismissal. There is a marked difference between removal and dismissal, as in the former the action is taken against a guardian because of some circumstance relating to the malfeasance or other illegal actions of the guardian, while a request for a dismissal is based only on the fact that the original reasons for the appointment of a guardian no longer exist and the ward is capable of managing his own affairs. This case comes within the latter category—that of dismissal.

A hearing was had before the Judge of Probate on this petition for dismissal of guardian and the Judge of Pro-

bate, after hearing, decreed "that said Emma E. Wattrich be, and is hereby, dismissed from her said office and trust of guardian of said ward and that the remaining property of said petitioner be restored to him except a legal compensation to said Guardian for her services."

To this decree an appeal was taken by the appellant to the Supreme Court of Probate.

The Supreme Court of Probate is a creature of statute and its authority and powers are prescribed by provisions of Sec. 32, Chap. 153, R. S., 1954. That portion of the section pertinent to the problem involved is couched in the following language:

> "**Supreme Court of Probate; appellate jurisdiction; special guardians.** The superior court is the supreme court of probate and has appellate jurisdiction in all matters determinable by the several judges of probate; and any person aggrieved by any order, sentence, decree or denial of such judges, except the appointment of a special administrator, or any order or decree requiring any administrator, executor, guardian or trustee to give an additional or new official bond, or any order or decree under the provisions of section 59 of chapter 154, or any order or decree removing a guardian from office, may appeal therefrom to the supreme court of probate to be held within the county, if he claims his appeal within 20 days from the date of the proceeding appealed from; or if, at that time, he was beyond sea, or out of the United States and had no sufficient attorney within the state, within 20 days after his return or the appointment of such attorney."

This jurisdictional statute provides under what circumstances and by whom appeals may be taken from orders or decrees of probate judges and it also enumerates certain exceptions under which appeals are not allowable. One of the exceptions is "or any order or decree removing a guard-

ian from office." This exception precludes this appellant from appealing from the decree of the Judge of Probate. Although "removal" and "dismissal" are different in definition, both acts result in relieving a guardian of his duty so that in the final analysis, the result is the same and, therefore, comes within the intent of the Legislature.

Thompson, Appellant, 114 Me. 338, at page 340:

> "Appeals in probate proceedings can be sustained only by persons 'aggrieved.' "

A guardian is not a person "aggrieved" in the sense of the word "aggrieved" as used in Sec. 32, Chap. 153 of R. S., 1954.

Look, Appellant, 129 Me. 359, at page 362:

> "The right of guardians in the property intrusted to them is not coupled with an interest."

25 Am. Jur., Sec. 107, page 69:

> "Legal title to the property of an infant or incompetent ward is in the ward, rather than in the guardian. The guardian has no beneficial title in the ward's estate, being merely the custodian and manager or conservator thereof."

The next question to be considered is whether the appellant in her relationship as a sister of her ward, the appellee, is a "person aggrieved" as these words are used in Sec. 32 of the appeal statute.

First, however, consideration must be given to the contention of counsel for the appellee that the appellant has failed to affirmatively allege in her reasons for appeal that she is a person aggrieved within the meaning of the statute. A perusal of the appeal discloses the fact that the appellant represents herself as of Bangor, County of Penobscot and State of Maine; that she is interested as guardian and sister in the estate of Murray W. Blakney; that she is aggrieved

by the decree of the Judge of Probate and that she appeals to the Supreme Court of Probate.

Her reasons of appeal are substantially in effect that the findings of the Probate Judge were contrary to the law and the evidence in the case.

There is nowhere to be found in the reasons for appeal that the appellant affirmatively alleges she is the sister of the appellee; that she is a party in interest; that she is an heir presumptive, or that her status comes within the meaning of the words "person aggrieved" as used in Sec. 32 of the appeal statute. The appellant does not show by her pleadings that she has the right of appeal.

Abbott, Appellant, 97 Me. 278, at page 280:

> "In his notice of appeal he states that 'he is interested as brother in the estate' of the deceased, but this is not a sufficient averment of a legal interest, as there may be several classes of nearer kindred. ****** The appeal should be dismissed because the record of the proceedings fails to show that the appellant has the right of appeal."

Sprowl, Appellant v. *Randell,* 108 Me. 350, at page 352:

> "The right of appeal from any decree or order of the probate court is conferred by statute only, can extend no further than the statute provides, and *must be affirmatively alleged* and established by the case presented. (Emphasis ours.)

Briard, Appellant v. *Goodale,* 86 Me. 100:

A motion to dismiss is proper procedure to attack the legal efficacy of the appeal under the circumstances obtaining in this case. *Edwards* v. *Williams,* 139 Me. 210.

The granting of the motion to dismiss by the Justice of the Supreme Court of Probate was not in error.

Exceptions overruled.

THE NEW ENGLAND TRUST COMPANY, ET AL.
vs.
ELIZABETH M. SANGER, ET AL.

Penobscot. Opinion, November 4, 1955.

Wills. Lineal Descendants. Heirs-at-Law. Adoption. Trusts. Words and Phrases.

Adopted children are "heirs at law" within the meaning of provisions of a testamentary trust which provide that at the death of any of decedent's children that a portion of the principal shall vest proportionately in "lineal descendants" or if none, in "his or her heirs at law."

The intention of the testator expressed in the will, if consistent with rules of law, governs the construction of the will.

Intention must be found in the language of the will read as a whole illumined in cases of doubt by the light of circumstances surrounding its execution.

There is a presumption that technical words are intended in the technical legal sense.

A testator's declarations of intention, whether made before or after the making of the will are alike inadmissible.

The status of the adopted child is fixed by the law of the adoption but the adopted child's rights of inheritance shall be determined by the law of the state of inheritance.

Under Maine law for purposes of inheritance from an adopting parent, an adopted child, on the intestacy of his adopting parent, is treated as an "heir at law."

ON REPORT.

This is a bill in equity before the Law Court upon report of the evidence taken before a single Justice of the Supreme Judicial Court. The Law Court is to render such final decision, on so much of the evidence as is legally admissible, as law and equity require. Decree to be made in accordance with opinion.

James M. Gillin,
Palmer, Dodge, Gardner & Bradford, for plaintiffs.

Eaton, Peabody, Bradford & Veague,
Bingham, Dana & Gould,
Verrill, Dana, Walker, Philbrick & Whitehouse,
Spencer, Stone & Mason, for defendants.

FELLOWS, C. J. This is a bill in equity brought by The New England Trust Company of Boston, Massachusetts, Sabin P. Sanger, 2nd, of Wellesley, Massachusetts, and Glenna R. McCurdy of Bangor, Maine, as trustees under Article Seventeenth of the Will of Dr. Eugene B. Sanger late of Bangor, Penobscot County, Maine, deceased. The bill is brought against Elizabeth M. Sanger, Eugene B. Sanger, 3d, and James D. M. Sanger of Framingham, Massachusetts, Richard G. Averill of Wellesley, Massachusetts, Constance S. Averill of Schenectady, New York and Sabin P. Sanger, 2nd, individually, of Wellesley, Massachusetts. This bill in equity alleges that the plaintiffs are in doubt as to the disposition of the proportional share of the principal of the trust created thereby, represented by the share of Eugene B. Sanger, Jr., son of the testator and now deceased. The case comes to the Law Court on report of the evidence taken June 2, 1955 before a single Justice of the Supreme Judicial Court in Penobscot County. The Law Court is to render such final decision, on so much of the evidence as is legally admissible, as law and equity require.

The evidence shows that Dr. Eugene B. Sanger, a physician and surgeon of Bangor, Maine, died on September 11, 1945, testate. His will was allowed in the Probate Court for Penobscot County, Maine, September 25, 1945. At the time of his death, Dr. Sanger left as his next of kin two sons and a daughter, viz.: Eugene B. Sanger, Jr., Charlotte S. Averill, and Sabin P. Sanger, 2nd. The daughter, Charlotte S. Averill, died on September 26, 1947 leaving two children born to

her (now of age) named Richard G. Averill and Constance S. Averill. Eugene B. Sanger, Jr., died on January 16, 1954, leaving as his widow Elizabeth B. Sanger (now Elizabeth M. Termini) and two children (minors legally adopted by him in Massachusetts by decree of the Middlesex County Probate Court, June 21, 1946). The adopted children are named Eugene B. Sanger, 3d and James D. M. Sanger, who are represented by duly appointed guardian *ad litem,* and by counsel.

The will of Dr. Sanger, disposing of his large estate, is a lengthy document (1) providing for payments of debts and taxes, (2) care of cemetery lot, (3) gift to Congregational Church $1500 in memory of his deceased wife Ethel Field Sanger, (4) to his three children jewelry, household furniture and personal effects formerly of their mother, (5) to his children a division of certain specified household furnishings, (6) medical and surgical library and instruments to a friend, (7) authority to executors to settle agreement made by him May 28, 1940 with divorced wife, (8) to his three children a division of certain shares of stock, (9) a gift to daughter Charlotte Sanger Averill of $10,000, (10) the sum of $50,000 to his son Eugene B. Sanger, Jr., (11) a trust fund of $50,000 for benefit of son Sabin P. Sanger, 2d, (12) to his grandson Richard G. Averill $5,000, (13) to his granddaughter Constance S. Averill $5,000, (14)-(15)-(16) bequests to friends and employees, (17) (The contested paragraph): The rest, residue and remainder to trustees in trust for his three children—annual income divided equally and paid during their lives—the principal vesting proportionately at death of a child in "lineal descendants" or if none, in "his or her heirs at law," with a gift to the Eastern Maine General Hospital if on "the death of the last survivor of my children there shall be surviving no lineal descendants of mine," (18) a provision that children cannot alienate or anticipate principal and income, (19) nomination

of personal representatives. The will is dated August 22, 1945. The present value of the trust, under Article 17 of the will, is more than $700,000. The share now in dispute is one-half of the value.

Under this trust provided for in the Seventeenth paragraph of the will, the income from the residue of Dr. Sanger's estate was to be divided equally among his three children, Eugene B., Jr., Sabin P., 2d, and Charlotte Averill. The said Seventeenth paragraph, after naming the trustees, and stating their authority, provides as follows:

(1) "The net annual income arising from said trust shall be divided among my said three children and paid over to them in quarter-annual installments, as near as may be, during their respective lives."

(2) "Upon the death of any one of my children leaving lineal descendants, said trust shall cease as to the proportional share of the principal of said trust represented by said deceased child's share in the income of the trust at the date of such death and shall vest at once in such lineal descendants per stirpes and not per capita."

(3) "If any of my said children should die, leaving at the time of such death no lineal descendants, then such part of the trust fund as would have vested in such lineal descendants, had any such existed, shall vest free of any trust in his or her heirs at law."

(4) "If, upon the death of the last survivor of my children, there shall be surviving no lineal descendants of mine, then all that portion of the principal of this trust that shall not have vested previously, I give, bequeath and devise to the Eastern Maine General Hospital, of Bangor, Maine, for the erection of a surgical building with operating rooms, to be known as the Sanger Surgical Building."

The plaintiff trustees in their bill in equity state their doubts in this manner:

"That your plaintiffs are in doubt as to the proper construction of said Article Seventeenth of the will of said Dr. Eugene B. Sanger insofar as it relates to the disposition of the proportional share of the principal of the trust created thereby represented by the share of Eugene B. Sanger, Jr., deceased, as it relates to the income thereof at the date of his death, and with respect to the person or persons in whom said proportional share of the principal of said trust has vested and who are entitled to receive such proportional share of the principal of said trust; and are particularly in doubt as to the following:"

"(a) Whether said Eugene B. Sanger, Jr. left surviving him 'lineal descendants,' within the meaning and intent of those words as used in Article Seventeenth of the will of the testator Dr. Eugene B. Sanger, in whom the said Eugene B. Sanger, Jr.'s proportional share of the principal of said trust represented by his share in the income thereof at the date of his death vested, free of trust, upon his death; and if so just what person or persons are his 'lineal descendants' in the premises."

"(b) Whether if said Eugene B. Sanger, Jr. left him surviving no 'lineal descendants,' within the meaning and intent of those words as used in Article Seventeenth of the Will of the testator Dr. Eugene B. Sanger, then just what person or persons are his 'heirs-at-law,' within the meaning and intent of those words as used in Article Seventeenth, in whom said Eugene B. Sanger, Jr.'s proportional share of the principal of said trust represented by his share in the income thereof at the date of his death vested, free of trust, upon his death."

"(c) Just what person or persons are entitled to receive distribution of said Eugene B. Sanger, Jr.'s proportional

share of the principal of said trust represented by his share in the income thereof at the date of his death, and of the income accruing thereon from the date of the death of said Eugene B. Sanger, Jr."

The plaintiff trustees in their brief further and also say:

"There exists doubt, under the Maine decisions, whether, under a will like Dr. Sanger's, adopted children shall be regarded as a life tenant's 'lineal descendant.' In determining whether under Dr. Sanger's will the adopted children of Eugene, Jr., were his 'lineal descendants' the case of *Warren* v. *Prescott,* 84 Me. 483, 24 Atl. 948, is not conclusive of the question, although it did hold an adopted child to be a 'lineal descendant' for the purposes of the 'lapse' statute with respect to an adopting parent who died before the testatrix. The trustees are reasonably in doubt how far some of the language and possible implications of that case may be applicable to the language of Dr. Sanger's will."

"If the adopted children of Eugene, Jr., are not 'lineal descendants' of Eugene, Jr., within the meaning of Dr. Sanger's will, the trustees are reasonably in doubt, under the existing Maine cases, whether, under Dr. Sanger's will, the adopted children should be considered as 'heirs at law' of Eugene, Jr."

The following claims of the parties present the questions for decision:

It is the contention of the defendants Sabin P. Sanger, 2nd (son), and Constance and Richard Averill (children of the deceased daughter) that the children adopted by Eugene B. Sanger, Jr., on June 21, 1946, are neither his "lineal descendants" nor his "heirs at law" within the meaning of the testator's will. These defendants also claim that since Eugene B. Sanger, Jr. had no children born to him during his lifetime, these defendants, Sabin P. Sanger, 2nd, Constance

Averill and Richard Averill (as his only surviving son and the only children of his deceased daughter) are entitled to take the share of the principal from which Eugene B. Sanger, Jr. received the income during his lifetime. They claim they are Eugene B. Sanger, Jr.'s only "heirs at law," and that Eugene's adopted children are not "his heirs at law."

On the other hand, the defendants Eugene B. Sanger, 3d and James D. M. Sanger say that their claim, as legally adopted children of Eugene B. Sanger, Jr., to the trust property rests on two propositions. In the first place, they claim they take as "lineal descendants" of their adoptive father under *Warren* v. *Prescott,* 84 Me. 483 (which holds that a legally adopted child takes a legacy as lineal descendant under a statute passed to prevent a lapsed legacy). In the second place, these defendants claim that if they are not "lineal descendants," they take as Eugene B. Sanger, Jr.'s "heirs at law."

The defendants, Eugene B. Sanger, 3d and James D. M. Sanger, further claim that if the court finds an ambiguity in the will, and looks to drafts of prior wills, the change made in this will from a prior will, which substituted the words "heirs at law" for the prior phrase "children . . . . . and in the lineal descendants of a deceased child," is without sensible meaning unless they, as adopted children, are intended.

The controlling rule in the construction of a will is that the intention of the testator *expressed in the will,* if consistent with rules of law, governs. *U. S. Trust Co.* v. *Douglass,* 143 Me. 150; *Mellen et al.* v. *Mellen et al.,* 148 Me. 153, 157, and cases there cited.

Intention is to be ascertained from examination of the whole instrument. It is the intention of the maker of the will at the time of its execution. *Gorham* v. *Chadwick, et al.,*

135 Me. 479, 482; *Merrill Trust Co.* v. *Perkins et al.*, 142 Me. 363; *Bryant* v. *Plummer*, 111 Me. 511.

In case of doubt the intention is to be ascertained in the light of the existing conditions, which may be supposed to have been in testator's mind. *Cassidy* v. *Murray*, 144 Me. 326; *U. S. Trust Co.* v. *Douglass*, 143 Me. 150.

The principle is stated by this court in *Cassidy* v. *Murray*, 144 Me. 326—"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."

And in a recent case where one of the questions concerned the identification of a legatee, this court said: "If the language in a will is doubtful, or ambiguous, conditions existing when the will was made may be considered, if they were known to the testator and 'may be supposed to have been in the mind of the testator.'" *In Re Knapp's Estate*, 149 Me. 130.

It is well established in this state that the use of a technical word, in the absence of clear evidence to the contrary, leads to the presumption that the testator intended such word in its technical legal sense. *Jacobs* v. *Prescott*, 102 Me. 63, 65; *Houghton* v. *Hughes*, 108 Me. 233, 237.

". . . Whether or not such a result will follow from the use of the language quoted, must depend upon the intention of the testator as disclosed by all of the provisions of the will examined in the light of such attending circumstances and manifest objects as may reasonably be supposed to have been in the contemplation of the testator at the time of making the will, such as the condition of his family and the situation and amount of his property." *Bodfish* v. *Bodfish*, 105 Me. 166, 172.

"In construing a will, it is proper to read it in the light of surrounding conditions, the relations between the testator and his intended beneficiaries, the amount and nature of his estate, and other relevant circumstances which legitimately tend, in cases of doubt, to show the probabilities of his intentions, one way rather than another." *Tapley* v. *Douglass*, 113 Me. 392, 394.

"In the construction of a will, parol testimony is frequently of some assistance for the purpose of identifying the beneficiary, or the subject matter of the devise, or explaining the situation and circumstances surrounding the testator at the time of making the will to be construed, or for the purpose of throwing some light upon the sense in which words of doubtful and ambiguous meaning were used. But the testator's declarations of intention, whether made before or after the making of the will, are alike inadmissible." *Bryant* v. *Bryant*, 129 Me. 251.

The court has recognized that each will presents, or may present, unique problems of interpretation, and that, where interpretation is necessary, a precedent with respect to one will may be of slight help in construing another will, and the intent of another testator. *U. S. Trust Co.* v. *Douglass*, 143 Me. 150, 159, 56 Atl. (2nd) 633; *Abbott* v. *Danforth*, 135 Me. 172, 177, 192 Atl. 544; *Strout* v. *Little River Bank & Trust Co.*, 149 Me. 181, 185, 99 Atl. (2nd) 342, 344.

Revised Statutes 1954, Chapter 158, Section 40—Legal effect of adoption of child—By such decree the natural parents are divested of all legal rights in respect to such child and he is freed from all legal obligations of obedience and maintenance in respect to them; and he is, for the custody of the person and the right of obedience and maintenance, to all intents and purposes the child of his adopters, with right of inheritance when not otherwise expressly provided in the decree of adoption, the same as if born to them in law-

ful wedlock, except that he shall not inherit property expressly limited to the heirs of the body of the adopters nor property from their collateral kindred by right of representation, and he shall stand in regard to lineal descendants of his adopters in the same position as if born to them in lawful wedlock; but he shall not by reason of adoption lose his right to inherit from his natural parents or kindred; and the adoption of a child made in any other state, according to the laws of that state, shall have the same force and effect in this state, as to inheritance and all other rights and duties as if said adoption had been made in this state according to the laws of this state. If the person adopted died intestate, his property acquired by himself or by devise, bequest, gift or otherwise before or after such adoption from his adopting parents or from kindred of said adopting parents shall be distributed according to the provisions of chapter 170, the same as if born to said adopting parents in lawful wedlock; and property received by devise, bequest, gift or otherwise from his natural parents or kindred shall be distributed according to the provisions of said chapter 170, as if no act of adoption had taken place. (Chapter 170 above referred to, contains statutory rules of descent of real and personal property to children and other blood relatives.)

It is well settled that the status of the adopted child is fixed by the law of the adoption but the adopted child's rights of inheritance shall be determined by the law of the state of inheritance. The Maine Court in *Wyman, Appellant,* 147 Me. 237, 243 said: ". . . but the question whether an adopted child (irrespective of where he is adopted) can inherit and the extent of such right of inheritance, will be determined, not by the law of the state where the adoption took place, but by the law of the state where the property is located, or by the law of the domicile of the decedent, as the case may be . . ."

An adopted child was held not to be a "child" within the intention of a testator who provided a gift in remainder after a life estate to three children of X and provided further that, if one of them should die before the life tenant, "that the *child* or *children* of said deceased child" shall receive the parents' share. *Woodcock's Appeal,* 103 Me. 214, 68 Atl. 821.

It has been held that in a deed from a grantor, not the adopting parent, a gift to the "child or children" did not include an adopted child, in the absence of a contrary intent of the grantor appearing in the instrument. *Wilder* v. *Butler,* 116 Me. 389, 102 Atl. 110. Although *Wilder* v. *Butler* contains a comprehensive discussion of various statutes and decisions of Maine and Massachusetts, there is no Maine decision which decides that, in a case like the present one, a gift by a testator to A's "heirs at law," after a life estate to A, either includes or excludes adopted children of A.

For the purposes of inheritance from adopting parent, an adopted child, on the intestacy of his adopting parent, is treated, however, as an "heir at law." *Latham, Appellant,* 124 Me. 120, 126 Atl. 626. Cases in other jurisdictions which deal with the problem, appear to reach various and sometimes conflicting results, dependent on the facts of particular cases and the statutes within the jurisdiction.

This Maine statute by its terms makes the adopted child in relation to his adopting parents the same as a child of blood. *Gatchell et al.* v. *Curtis et al.,* 134 Me. 302. Indeed the court in *Warren* v. *Prescott,* 84 Me. 483 at page 487, recognizing the effect of the adoption statute, specifically said: "By adoption, the adopters can make for themselves an heir . . . . ."

This reasoning is further spelled out in *Wilder* v. *Butler,* 116 Me. 389 at 392, where the court recognized that "the

statute of adoption makes the adopted child inherit from its adopters in the same manner as children born to them in lawful wedlock . . . . . and to that extent constitutes a part of the statute of descent."

This reasoning was affirmed by this court as recently as 1952 when it said, in *Wyman, Appellant,* 147 Me. 237 at 241, "see *Warren* v. *Prescott,* 84 Me. 483, 24 Atl. (2nd) 948, which settled the proposition that by adoption the adopters could make themselves an heir. . . . ."

Neither *Woodcock's Appeal* nor *Wilder* v. *Butler* (both excluding adopted children as "child or children") are contrary. It is readily apparent that a person using the word "children" in a will in no way invokes the statutes of descent and distribution. The word "heirs at law," on the other hand, means those who would take in the event of intestacy. Furthermore, this court has decided that the use of a technical word in a will means an interpretation according to the technical sense of the word. The use of the word "heirs at law" invokes law of intestate inheritance.

We are aware that our court has said, in construing the intention of the Legislature, that an adopted child within the meaning of a "lapse" statute was a "lineal descendant," and that an adopted child may take a devise or legacy given by will to one of his adopting parents, and thus prevent a lapsing where the adopting parent dies before testator, but we do not consider the case of *Warren* v. *Prescott,* 84 Me. 483, 24 Atl. 948, applicable here. The words "per stirpes and not per capita" also tend to show that the intention of this testator as to this provision was to the contrary.

The words in Dr. Sanger's will that follow the foregoing provision relative to "lineal descendants," present the problem in this case. The will says if "no lineal descendants" then "such part of the trust fund shall vest free of any trust

in *his or her heirs at law.*" Lineal descendants, if any, are provided for in the preceding paragraph. The will then says "heirs at law." It does not say "child." It does not say "my lineal descendants." It does not say "my heirs at law." It does not say "his heirs at law who are also my lineal descendants." It does not say "excluding an adopted child." It does not say "heirs." It states positively "his heirs at law."

When parties reasonably disagree on the meaning and intention of a testator who has made a complicated will, the court must determine from the words in the will the probable intention. Courts can only deal in probabilities where intention is in question, but if there is doubt or ambiguity, evidence outside the will may assist in finding the probabilities.

So in relation to the will of Dr. Sanger, the will itself shows that the testator, who by the record was proved to be a person of legally sound mind, was anxious to treat all his three children and their families equally. He divides in three parts furniture and furnishings of his house. He divides personal belongings such as jewelry. He gives to his son Eugene $50,000. He makes a trust of $50,000 for his son Sabin, the son to have the annual income and to receive the principal when he arrives at the age of 30 years. He gives $10,000 to his daughter Charlotte Averill with an explanation that if she thinks this amount less generous than to the sons, for her to remember the trust "heretofore created in her behalf." To each of the two children of Charlotte Sanger Averill (Richard G. Averill and Constance S. Averill, his grandchildren) he gives $5,000 for education.

The residuum of his estate he gives to these plaintiffs (and his now deceased son Eugene, and to Frank G. Averill who resigned) as trustees, to invest and reinvest, and to pay the income quarter-annually to his three children during

their lives. He says in this Paragraph Seventeen: "Upon the death of any one of my children leaving lineal descendants, said trust shall cease as to the proportional share of the principal of said trust represented by said deceased child's share in the income of the trust at the date of such death, and shall vest at once in such lineal descendants per stirpes and not per capita." Then he says: "If any of my said children should die, leaving at the time of such death no lineal descendants, then such part of the trust fund as would have vested in such lineal descendants, had any such existed, shall vest free of any trust in his or her heirs at law."

The testator here has designated the persons who take and in whom his property is to vest if his deceased child has no lineal descendants. The will says it is to vest in the deceased child's heirs at law. Who are the heirs at law of Eugene B. Sanger, Jr.? The statute says that having legally adopted Eugene B. Sanger, 3d, and James D. M. Sanger, they are heirs at law of Eugene B. Sanger, Jr.

In effect the testator has said by the terms of his will that he desired to care for the future of his children. Beyond his children, his real interest ceased. He knew no unborn child, and had only the desire to care for lineal descendants if there were any. Otherwise, he designates that his property shall go to those whom the statutes might then designate. He does not give anything to any grandchild that he did not know. The will does not mention adopted children and it is not necessary that it should. The will does not exclude them. They take because he said "his or her heirs at law" and the statute makes adopted children heirs at law.

To our minds there is no doubt or ambiguity, but if it should be considered that there is doubt or ambiguity in the provision relative to "his or her heirs at law," and all the admissible evidence is considered because of that doubt or

ambiguity, we find that the testator knew when he made the will that the two children (named Eugene B. Sanger, 3d and James D. M. Sanger) were living with his son and daughter in law, Mr. and Mrs. Eugene B. Sanger, Jr., and that adoption was being seriously considered as natural children could not be expected. We find that previous wills had practically the same paragraph relating to this trust, except that a previous will did not say "heirs at law," and instead provided that "if any of my said children should die, leaving at the time of such death no lineal descendants, then such part of the trust fund as would have vested in such lineal descendants had any such existed, shall vest free of any trust in my children then living, and in the lineal descendants of a deceased child by right of representation."

It can well be argued that the change to "heirs at law" of a child from the previous "my children then living and the lineal descendants of a deceased child" was made to care for possible adoption. The change was certainly not made to exclude those whom the testator knew might be adopted.

Written words used by one person, though carefully chosen, may or may not exactly convey to the one who reads them the ideas and intentions of the writer. Spoken words often so disguise our true thoughts that one who hears them misunderstands, or misinterprets, the true meaning. So in a will, and especially a will that is extensive and complicated, it is a common experience that through the years of expectation the parties interested often understand and interpret words as human desires dictate. To a prospective legatee, hope teaches meaning, and financial expectation definitely indicates to him the true intention of the testator.

Dr. Sanger who executed this will, with its many provisions, undoubtedly endeavored to properly and clearly convey his desires to the scrivener in the first instance. The scrivener endeavored to put into the document those inten-

tions as he understood them. Dr. Sanger well knew the meaning and effect of all the provisions of his will because the attorneys that he employed were very capable and very careful, and undoubtedly explained all legal terms, as was their duty, if the legal terms were not already known to the testator. By the testator's signature, as maker of the will, Dr. Sanger has adopted the scrivener's words as written. The words in the will are Dr. Sanger's words.

If all the words in a will unmistakably convey to all readers the same ideas, there is no contest, but when it is possible to reasonably differ, the court may have difficulty in determining from the will, the probabilities of the intention of the testator.

A strong argument is made, and a most comprehensive brief filed by the able attorneys representing Sabin P. Sanger, 2nd (son of testator), Constance S. Averill and Richard G. Averill (grandchildren), with many cases cited from this and other jurisdictions, to the effect that there is a presumption of non-inclusion of adopted children when such words as "children," "issue," "lineal descendants" and the like, are used in the will. In each of the cases cited, however, the decision was made on what the court found to be the intention of the testator as expressed in the will, under the existing circumstances.

No case has been called to our attention, and we have found none, where the adoption statute is like that of Maine and property is left to the heirs at law of the adopting parent. Such a presumption as claimed, if it had existed in this case, would be overcome by the plain words regarding distribution of the proportion of the trust fund when a child dies. If any inconsistency existed in other paragraphs of the will, it could not affect the clear expression of intention contained in paragraph Seventeen. Paragraph Seventeen might well be considered a complete will in itself.

The argument of these attorneys for the surviving son and the children of the deceased daughter is, that "no matter what terminology was used, the adopted child is a stranger to the blood" and that as a consequence the common law presumption controls, in the absence of words being used such as "including an adopted child."

The answer is that *the statute includes* the adopted child as heir of the adopter, and the testator would have excluded the adopted if he had so intended. He said "his or her heirs at law." He does not say "child," "issue" or "descendant." Such construction is not "sentimentality for the adopted," as the attorneys have in effect stated in their brief. The court is not "sentimental" for adopted children. It is not "sentimental" over the "blood." Neither the adopted children nor any blood descendant accumulated this fortune for the testator. The court is not attempting to recognize the growing trend to select and adopt children, and the growing trend for legislatures to protect those adopted. This construction is only giving effect to the positive directions in the will, and recognizing the law of adoption passed by the Maine Legislature.

To one who has read this will of Dr. Sanger, and who is familiar with the adoption statute and the meaning of the phrase "his heirs at law," there is no doubt or ambiguity. The testator intended that if there was failure of lineal descendants when a child died, the proportional part of this trust should vest immediately in "his or her heirs at law." Legally adopted children are heirs at law of a deceased adopting parent.

The proportional part of this trust, from which Eugene B. Sanger, Jr. received benefit, in his lifetime, should be paid by the trustees to Eugene B. Sanger, 3d and James D. M. Sanger, as "his heirs at law." The adopted children being minors, payment should be made to a legally appointed

guardian or guardians. Any income which had accrued before the death of Eugene B. Sanger, Jr. and which was not paid to him in his lifetime, should be paid by the trustees to his executors, and the record apparently shows that it has been so paid. The income from Eugene B. Sanger, Jr.'s proportional part, that has accrued since the death of Eugene B. Sanger, Jr., belongs to his adopted children as his heirs at law.

These proceedings for the construction of this will being necessary for a proper disposition of the trust property, the expenses should be paid by the trustees from the body of the trust before any payment is made to the heirs at law, and before the amount of the proportional part is determined.

Decree to be made by the sitting Justice below in accordance with this opinion. The costs and expenses of each of the parties including reasonable counsel fees, to be fixed by the sitting Justice after hearing, and paid by the Trustees.

ROBERT W. BROWNE, ET AL.
vs.
CHARLES A. WOOD

CLISTA M. WOOD
vs.
ROBERT W. BROWNE, ET AL.

Cumberland. Opinion, November 15, 1955.

Trespass. Title. Common Boundaries. Surveys. Plans. Overruns.

Grantees in severalty of lots of land laid off on a particular plot hold, in proportion to their conveyances, where actual measurements not

controlled otherwise are variant in wide departure from those given in the deeds.

The findings of fact of a single justice will stand if supported by evidence.

A plea of the general issue in an action of trespass places in issue the question of rightful possession.

ON EXCEPTIONS.

This is an action of trespass before the Law Court upon exception to the acceptance of a referee's report. Exceptions overruled.

Verrill, Dana, Walker, Philbrick & Whitehouse,
Wilfred A. Hay & John E. Hanscomb, for plaintiff.

Elton H. Thompson,
Walter E. Murrell, for defendant.

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

CLARKE, J. On exceptions by Charles A. Wood and Clista M. Wood.

The cases were tried together before a referee. The report by the referee is dated October 26, 1954.

The plaintiff in the case of *Wood* v. *Browne* and the defendant in the case of *Browne* v. *Wood* being allegedly aggrieved except to the acceptance of the referees' report filed in the Superior Court for Cumberland County.

These are cross actions of trespass *quare clausum* by adjoining land owners arising out of a controversy as to the location of the common boundary.

A corporation acquired and combined two tracts of land. Subdividing the tract into house lots, the plan was recorded and known as a plan of Deering Village. There were thirty-

three lots including those of the plaintiffs' shown on the plan.

Plaintiff Browne acquired Lot No. 37, plaintiff Wood acquired lot No. 36. Both lots 36 and 37 lie on the easterly side of Brook Road which road at that point on the plan runs substantially north and south and the south line of lot No. 36 and the north line of lot No. 37 is the common boundary. Both plaintiffs acquired their respective lots by deeds in which the lots were described and conveyed by reference to the plan whereby the plan was made a material and essential part of each conveyance with the same force and effect as if copied into deeds. *Thomas* v. *Patten,* 13 Me. 329 and 333; *Lincoln* v. *Wilder,* 29 Me. 169 and 179; *Perkins* v. *Jacobs,* 124 Me. 347.

There was an erroneous plotting of the tract upon the plan. The referee to whom the cases were referred invoked the principle laid down by our court in *Witham* v. *Cutts,* 4 Me. 31; *Wyatt* v. *Savage,* 11 Me. 429 and later reaffirmed in *Susi* v. *Davis et al.,* 133 Me. 354, "Grantees in severalty of lots of land laid off on a particular plot hold, in proportion to their respective conveyances, where actual measurements not controlled otherwise are variant in wide departure from those given in the deeds. It must be presumed in the absence of circumstances showing the contrary, that variance arose from an imperfect measurement of the whole piece of land. Deficiency must be divided among the several lots proportionately to their respective content as shown by the plot. - - - The same principle maintains where the real measurements are in excess of those specifically designated upon the plot."

In the phrase of surveyors there are overruns with material excess of land. Without error in either law or in finding of fact the referee in these cases found by reason of mistake in the survey and plotting an overrun and material

excess of land. Both plaintiffs asserted claim to the overrun. Construction of the deeds and their legal effect was a question of law; but the location of the common boundary was a question of fact. *Abbott* v. *Abbott,* 51 Me. 575.

A careful study of the record, particularly of the several lots, their location, admeasurements and content evidences no error in fact on the part of the referee in finding that the problem narrows itself for practical purposes into the respective rights of lots 36 and 37 with relation to the overrun for the reason that the discrepancy resulting in the line of lots 68 to 71 inclusive appears inconsequential; the discrepancy resulting in the line of lots 2 to 11 inclusive does not appear a subject of issue inasmuch as the plan obviously excludes an area of undisclosed size and shape between the northerly line of lot 11 and the northerly line of the tract.

It is observed that in applying the stated principle to the present case it is conceded that the surplus or overrun should be absorbed by the thirty-three lots shown on the plan but due to the "layout" of the tract peculiar to the plan it is found that the application of the principle may be directed properly to the lots in controversy.

The overrun occasioned by error in survey and/or plotting reduced to actual dimensions and as related to lots 36 and 37 is a trapezoid with its easterly and westerly sides parallel. The area of this trapezoidal strip of surplus land is four hundred twenty-seven square feet. Proportionately lot 37 is entitled to two hundred sixty-two (262.0) square feet and lot 36 is entitled to one hundred sixty-five (165.0) square feet respectively of this surplus, both areas computed to the nearest square foot. These respective surplus areas to be parts of lots 36 and 37 respectively according to the

plan are described and physically set off in the following manner by the referee:

To lot 36 a strip of land in the form of a parallelogram one and sixty-five hundredths (1.65) feet wide on Brook Road and one hundred (100) feet long coinciding with the length or depth of lot 36 and adjoining it. To lot 37 a strip of land in the form of a trapezoid measuring two and ninety-nine hundredths (2.99) feet on Brook Road, and one hundred (100) feet long coinciding with the length or depth of lot 37 and measuring two and twenty-five hundredths (2.25) feet on its easterly end and adjoining lot 37.

With the dimensions of the lots and the common boundary as herein determined, which common boundary is determined to be located approximately midway of the overrun, it is apparent and so found that each of the defendants, claiming as he did benefit of the entire overrun entered upon and occupied the land of each of the plaintiffs and caused damage but not wilfully or knowingly.

The referee found damages in the sum of one hundred dollars in favor of each plaintiff.

At no time prior to the finding of the referee was the overrun designated with the plaintiffs' lots, the plaintiffs' interest therein that of tenants in common and undivided.

The record does not disclose clearly where and when the alleged trespass took place. The findings divided the overrun approximately half and half between the plaintiffs and assessed damages equally indicating the finding that the overrun was the sole subject of alleged damages. This assessment of the damages seems to be fair and equitable and properly arrived at in accordance with the record.

Many of the objections are to factual questions. It has long been the rule substantiated by cases too numerous to mention that whenever a single justice presides without a

jury his findings of fact will stand so long as there is evidence which shall support his findings.

Neither of the plaintiffs pleaded seizin. Both declarations were in trespass *quare clausum.* The general issue was not guilty. This plea puts into issue the question whether plaintiff's rightful possession has been disturbed by the defendant, *Bray* v. *Spencer,* 146 Me. 419.

Judgment in an action trespass *quare clausum* is not a bar by way of estoppel to a real action. This is true even if the defendant in the trespass suit pleads soil and freehold. Judgment in trespass does not necessarily decide title. *Bray* v. *Spencer, supra.*

It is not *res adjudicata* as to a real action pertaining to the same subject matter. The earlier judgment may, however, be conclusive by way of estoppel, only as to facts, without the existence and proof of which it could not have been rendered. *Hill* v. *Morse,* 61 Me. 541; *Smith* v. *Brunswick,* 80 Me. 189; *Kimball* v. *Hilton,* 92 Me. 214; *Harlow* v. *Pulsifer,* 122 Me. 472.

It is requisite that a plaintiff allege and prove that some of his land, in respect to which relief is sought is in the possession of the defendant. A writ of entry would have brought into issue the title itself and would have afforded the parties an apt remedy. Judgment upon an issue raised by proper and sufficient pleadings therein would have been conclusive as to title.

The justice presiding was correct in his acceptance of the report.

Exceptions overruled.

INHABITANTS OF TOWN OF BETHEL

vs.

INHABITANTS OF TOWN OF HANOVER

Oxford. Opinion, November 17, 1955.

Exceptions. Words and Phrases. Paupers. Settlement. Overseers of Poor.

Exceptions that a referee's report is against the law, the evidence, the weight of evidence or that the referee failed in all his findings to give consideration to the rule that the burden of proof is on plaintiff by a preponderance of evidence—are too broad and raise no issue of law.

A "settlement" arises when a person of age has his home in a town for 5 successive years without receiving supplies as a pauper, directly or indirectly (R. S., 1954, Chap. 94, Sec. 1).

"Pauper supplies" are defined in R. S., 1954, Chap. 94, Sec. 2.

"Destitute persons" are entitled to relief under R. S., 1954, Chap. 94, Sec. 28 if they have fallen into distress and stand in immediate need of supplies necessary for their maintenance and support.

When overseers act in good faith and with reasonable judgment their conclusions respecting the necessity of relief will be respected in law.

To acquire a settlement a person must have a sufficient mentality to form and retain an intention with respect to his dwelling place under R. S., 1954, Chap. 94, Sec. 1.

To qualify as a pauper a person must have sufficient mentality to understand and realize that he is making application for pauper supplies and receiving them as such under R. S., 1954, Chap. 94, Sec. 2.

Overseers of the poor cannot delegate their discretionary powers and duties.

ON EXCEPTIONS.

This is an action to recover pauper supplies before the Law Court upon exceptions to the acceptance of a referee's report. Exceptions overruled.

Henry G. Hastings, for plaintiff.

Theodore Gonya, for defendant.

George C. West, Asst. Atty. Gen., for intervenor.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, TAPLEY, JJ. CLARKE, J., did not sit.

WILLIAMSON, J. This is an action by the Town of Bethel against the Town of Hanover to recover for pauper supplies furnished to Roger W. Brown and his family for the period August 25, 1949 to September 16, 1950. The referee to whom the cause was submitted found for the plaintiff town in the amount of $594.57. The case is before us on exceptions to the acceptance of the referee's report. The exceptions are overruled.

The issues are, (1) whether the legal settlement was in Hanover, (2) whether the recipients of assistance were "destitute" within the meaning of the statute, (3) whether the assistance rendered constituted "pauper supplies" in light of Brown's mentality, and (4) whether the Board of Overseers of the plaintiff town unlawfully delegated their duties.

The thirteen exceptions are, as is usual, a restatement of the written objections filed in the Superior Court. We may dispose of five exceptions at the outset. The fourth and fifth exceptions were abandoned. In the first and second exceptions the defendant states that the report is against the law, the evidence and the weight of the evidence. These are the words of a general motion for a new trial. Such objections to a referee's report have no weight. A referee's report

stands if it is based on any evidence of probative value. *Staples* v. *Littlefield,* 132 Me. 91, 167 A. 171 (1933). The grounds of objection must be specific and not general. *Throumoulos* v. *Bank of Biddeford,* 132 Me. 232, 169 A. 307 (1933); *Dubie* v. *Branz,* 146 Me. 455, 73 A. (2nd) 217 (1950); *Bickford* v. *Bragdon,* 149 Me. 324, 102 A. (2nd) 412 (1953). The very point of the first and second exceptions was decided in *Water District* v. *Me. Turnpike Authority,* 145 Me. 35, 38, 71 A. (2nd) 520 (1950). In the thirteenth exception it is charged that the referee erred in all of his conclusions of fact in ignoring and failing to give consideration to the rule that the burden of proof falls upon the plaintiff to establish by preponderance of evidence all of the facts essential to recovery. This exception is far too broad and raises no issue before us. It is contrary to the rules above stated. We therefore do not consider these exceptions. See "Some Suggestions on Taking a Case to the Law Court" by Chief Justice Merrill, 40 Maine State Bar Association 175, 198 (1951).

The pertinent statutory provisions are found in R. S., c. 82 (1944), now R. S., c. 94 (1954), as follows:

> "**Sec. 1, VI.** A person of age having his home in a town for 5 successive years without receiving supplies as a pauper, directly or indirectly, has a settlement therein.
>
> "**Sec. 2.** To constitute pauper supplies, they must be applied for in case of adult persons of sound mind by such persons themselves or by some person by them duly authorized; or such supplies must be received by such persons or by some person authorized by them with a full knowledge that they are such supplies; . . .
>
> "**Sec. 28.** Overseers shall relieve persons destitute, found in their towns and having no settlement therein, . . ."

Under the "any evidence" rule the referee was fully justified in finding the following facts. It is unnecessary that we review the record in detail.

Roger W. Brown on becoming of age in 1932 had the capacity to acquire a settlement in his own right. In December 1936 Brown with his wife lived with his wife's family in Bethel. In the course of a family dispute Brown with his family moved from Bethel to Hanover in June 1940, and until June 1946 maintained a home at various places in Hanover. In June 1946 Brown with his family moved to Bethel.

Brown received no pauper supplies from any source within the state during the six year period in which he resided in Hanover. A contention by the defendant town that aid received from Hanover in 1942 and 1943 while Brown and his family were quarantined interrupted the five year period necessary for the acquisition of a new settlement was abandoned by the defendant. R. S., Chap. 22, Sec. 49 (1944), now R. S., Chap. 25, Sec. 61 (1954).

Between August 25, 1949 and September 16, 1950 the Town of Bethel furnished the supplies or assistance for which the action was brought for Roger W. Brown and his family consisting of his wife and nine children. There is no dispute about the amount of charges or that the supplies were of a proper type to be furnished for pauper relief. Brown was a person of little, if any, education and of low mentality. Brown, to use the words of the referee, "had sufficient mentality to understand and realize that he was making application for pauper supplies and was receiving them with full knowledge that they were such supplies." At the outset of the giving of the relief, a grocer who had been furnishing supplies to Brown on credit, first called on an overseer of the poor of the Town of Bethel. There was some conflict in the testimony of the grocer and the overseer whether the overseer placed a limit on the supplies or told

the grocer to use his own judgment. From January 1, 1950 it is not disputed that the supplies were furnished on the order of the overseer. The referee stated in his report, "the conclusion that the Overseers did not delegate their authority to . . . (the grocer)."

1. **Legal Settlement** — Exceptions 3, 10, 11, 12

Did Brown and his family have a legal settlement in Hanover when the assistance was rendered by Bethel? The defendant contended that no settlement had been acquired because (a) the evidence failed to show that Brown went to Hanover in 1940 with an intention to make his home there indefinitely, and (b) Brown did not have sufficient mental capacity to form and entertain an intention relative to residence or domicile. The exceptions are substantially that there was no evidence in the case to warrant the finding of a settlement in Hanover.

There is no dispute about the applicable principles of law. To establish a legal settlement "there must have been personal presence in that town, and also an intent to remain, continued for five consecutive years, without his receiving public aid, and without being absent during such five years with an intent not to return." *Gouldsboro* v. *Sullivan,* 132 Me. 342, 347, 170 A. 900 (1934); *Madison* v. *Fairfield,* 132 Me. 182, 168 A. 782 (1933); *Inh. of Ellsworth* v. *Inh. of Bar Harbor,* 122 Me. 356, 120 A. 50 (1923). See also *Inhab. of Moscow* v. *Inhab. of Solon,* 136 Me. 220, 7 A. (2nd) 729 (1939).

The rule upon capacity to acquire a settlement is set forth in the following instruction approved by Chief Justice Peters in *Fayette* v. *Chesterville,* 77 Me. 28 (1885), at p. 32:

> "The judge submitted to the jury this test: 'To find that a person has capacity to acquire a settlement, within the meaning of the statute, you must find in the first place, that he had intelligence

> enough to form and retain an intention with respect to his dwelling-place; that he had a mind sound enough to give him will and volition of his own, and such power and control over his mind and his action as to enable him to choose a home for himself; that he must have mental capacity sufficient to act with some degree of intelligence and some intelligent understanding with respect to the choice of his dwelling-place, and to form some rational judgment in relation to it.' "

See also *Inh. of Corinth* v. *Inh. of Bradley*, 51 Me. 540 (1863).

There is much evidence in the case of Brown's intention to make Hanover his home during the period from 1940 to 1946. Indeed, we find nothing to indicate otherwise. On the question of capacity, there is substantial evidence that Brown lacked intelligence. This, however, is not to say that he lacked sufficient mental capacity to change his home from Bethel to Hanover. There is sufficient evidence in the record under the "any evidence" rule to sustain the finding and conclusion. Furthermore, the referee had the advantage not given to us of measuring Brown as he appeared on the witness stand. The referee was satisfied of the intent and the mental capacity. Both were facts to be determined by the fact finder; and there this issue ends.

2. **Destitution**—Exceptions 6 and 7

The second issue is whether Brown and his family were "destitute" within the meaning of Section 28, *supra*. The defendant town in the exceptions contends that the referee erred in fact and in law and that there was no evidence to support his finding.

The meaning of "destitute" under the statute was well expressed in *Inh. of Mt. Desert* v. *Inh. of Bluehill*, 118 Me. 293, 108 A. 73 (1919) at p. 295:

> "The persons alleged to be paupers must have fallen into distress and stood in need of immediate

> relief, and it must appear that the supplies furnished were necessary for their maintenance and support. Bangor v. Hampden, 41 Maine, 484; Corinna v. Exeter, 13 Maine, 321."

See also *Norridgewock* v. *Solon,* 49 Me. 385 (1862); *Alna* v. *Plummer,* 4 Me. 258 (1826); *Clinton* v. *Benton,* 49 Me. 550 (1862); *Naples* v. *Raymond,* 72 Me. 213 (1881). The liability of the town of settlement rests upon the fact of destitution and not upon the opinion of the overseers of the town. *Thomaston* v. *Warren,* 28 Me. 289 (1848).

On the weight to be given the decision of the overseers in extending relief, our court said in *Inhabs. of Machias* v. *Inhabs. of East Machias,* 116 Me. 423, at p. 426, 102 A. 181, at p. 182 (1917):

> "It is settled law in this State that 'when the overseers act in good faith and with reasonable judgment touching the necessity of relief of persons found in need their conclusions will be respected in law.' *Hutchinson* v. *Carthage,* 105 Maine, 134; *Bishop* v. *Herman,* 111 Maine, 58. Their conclusions with regard to the nature and extent of relief should in like manner be respected. In neither case will their decision be final but as they are officers sworn to do their duty it is presumed that they act with integrity until the contrary is shown. *Portland* v. *Bangor,* 42 Maine 403, 410; *Bishop* v. *Herman,* before cited."

For a restatement of the rule see *Fort Fairfield* v. *Millinocket,* 136 Me. 426, 12 A. (2nd) 173 (1940).

As we have indicated, there is no suggestion that the supplies were of a type not suitable for pauper relief. "Destitution" is the problem before us. Without reaching for details in the record, there is evidence showing the small earnings and lack of resources of Brown for the support of

his wife, nine children and himself during a substantial period at the time the aid was given. Much of necessity must be left to the fact finder in the evaluation of the facts found by him in terms of distress and necessity of immediate relief. We cannot say under the "any evidence" rule that the referee's findings were without justification.

Objection is also made to the rule stated by the referee as follows:

> "Our Court has construed this language (Section 28, supra) as giving to the Overseers the right to determine what is reasonably necessary and proper to relieve the destitution or the poverty. It is only in those cases where there has been what amounts to a gross abuse of discretion, or bad faith or collusion, that the Court will interfere with the judgment of the Overseers. The presumption is that the supplies were furnished in good faith and the burden is on the defendant to show otherwise. There is no evidence in this case to indicate that the Overseers of Bethel either abused their discretion or acted in bad faith or were collusive. On the contrary, I find that the family situation quite clearly indicated that aid was required and that the amount of aid furnished was reasonable."

In our view the referee did no more than apply the rule of the *Machias* and *Fort Fairfield* cases, *supra*. Strictly the question did not concern the burden of proof, but the burden of going forward, or the sufficiency of certain evidence to permit a finding of ultimate fact.

The referee, however, went beyond the point of stating a rule of presumption. On evidence in addition to the acts of the overseers he made the finding, quoted above, which can only mean that Brown, his wife and nine children were in distress and required immediate relief. They were found to be "destitute." This was a question of fact and was finally determined by the referee.

3. **Mental Capacity of Brown**—Exception 8

The issue is whether there was any evidence to warrant the necessary finding that Brown had sufficient mental capacity to qualify as a pauper under Section 2, *supra.* We considered the capacity and intelligence of Brown in discussing the issue of legal settlement. There was no error in finding capacity to move his residence from Bethel to Hanover. There is evidence of his life and actions in Bethel since 1946. We are satisfied there was probative evidence from which the referee could properly find, as he did, that Brown had sufficient mentality to understand and realize that he was making application for pauper supplies and was receiving them with full knowledge that they were such.

4. **Unlawful delegation of duties**—Exception 9

The referee is charged with error in finding that the overseers of the poor "did not unlawfully delegate their powers and duties" in furnishing the supplies. The controversy lies in the facts and not in the law. The governing principle is that overseers of the poor cannot delegate to others their discretionary powers and duties. *Fort Fairfield* v. *Millinocket, supra.*

The issue of fact was whether when relief was first given, the grocer and not the overseers determined the need and amount of supplies to be given Brown. On this point there was a conflict of testimony. Brown and the overseer who had the matter directly in hand in substance say the decision was that of the overseers. The grocer on cross examination did not recall whether the overseer placed a limit or told him to use his own judgment. We earlier commented on the conflicting evidence. The referee chose to believe the overseer's version. The finding stands.

Under this exception the defendant town argued that the assistance rendered was not reasonable and proper on the

ground of lack of supervision, inspection, and control by the overseers. This issue, although contained in a list of issues in the bill of exceptions, is not found within Exception 9 and so is not before us.

In passing, we may say however that the referee plainly could find, as he did, that the overseers performed their important duties in a lawful manner.

There were no errors in the decision of the referee. The entry will be

Exceptions overruled.

FHEMIE PELLETIER

vs.

SYLVANUS S. DAVIS

Aroostook. Opinion, November 21, 1955.

Assault and Battery. Arrest. Rule XVIII. New Trial. Damages.

Where a charge of the presiding justice is in error to the point where it causes an injustice to the party or parties involved, then notwithstanding Rule XVIII (Rules of Court) the Law Court will consider the objections.

To justify a new trial a party must prove that the verdict is manifestly wrong.

A verdict will not be set aside for excessive damages unless it is apparent that the jury acted under some bias, prejudice or improper influence, or have made some mistake of fact or law.

ON MOTION FOR NEW TRIAL.

This is an action for assault and battery before the Law Court upon motion for new trial after jury verdict for plaintiff. Motion overruled.

George B. Barnes, for plaintiff.

James A. Bishop, for defendant.

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

TAPLEY, J. On motion for new trial. This is an action of assault and battery. The case was tried before a jury at the November Term, 1954 of the Superior Court for the County of Aroostook. The verdict favored the plaintiff with assessment of damages in the sum of $243.75. The defendant, Sylvanus S. Davis, a police officer of the City of Presque Isle, Maine, filed the general issue of not guilty and for a brief statement of defense stated that at the time of the alleged assault and battery took place he was a duly appointed and qualified constable of the City of Presque Isle acting in the lawful performance of his duty; that he lawfully arrested the plaintiff, taking her into custody by virtue and authority of a warrant issued by the Recorder of the Presque Isle Municipal Court, and that in arresting the plaintiff and taking her into custody, he used only the degree of force as was necessary to accomplish this purpose.

The plaintiff complained to the Presque Isle Police Department against two individuals who were living next door to her, requesting that the department investigate the conditions under which they were living. After the investigation, which was made by the defendant, he reported to her the outcome of his investigation, whereupon an argument took place between the officer and this plaintiff. Following the argument the officer procured a warrant against the

plaintiff charging her with being a person wanton and lascivious in speech and behavior. The officer, being the defendant, later returned armed with the warrant and in company with another police officer. The officers upon their arrival entered the home of the plaintiff, whereupon the defendant told the plaintiff he was in possession of a warrant against her and attempted to advise her of its contents by reading it to her. There was objection on the part of the plaintiff to accompanying the officers to the police station and it was finally agreed that she go there with her husband. After she arrived at the police station there occurred some trouble between the defendant and the plaintiff which finally resulted in the plaintiff being confined in a cell. This case is based on the plaintiff's contention that the acts of the police officer defendant were such as to cause him to be guilty of assault and battery.

The defendant's case in defense was substantially that he was acting under the right and authority of a valid warrant and at no time did he exceed the force that was necessary in arresting and taking into custody the person of the plaintiff. The defendant by process of his motion for a new trial attacks the verdict of the jury by saying that it had no basis in law or fact. He goes one step further by attacking the charge of the presiding justice. It is important to observe that counsel for the defendant in his brief raises a number of issues which, with the exception of the one concerning the judge's charge, pertain to questions of fact. These questions of fact are for jury determination.

The parties to the litigation agreed that the warrant upon which the arrest was based was valid and the jury was so instructed. It is therefore unnecessary to consider any questions bearing upon the validity of the process. The case was closed without the defendant taking exceptions to any portion of the charge. The defendant now seeks to attack the

charge in the proceedings before this court as being inadequate and detrimental to the rights of the defendant.

Rule XVIII of the Rules of Court in part provides:

> "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."

Counsel for the defendant argues that to this Rule there are exceptions and the nature of the charge in this case is such that it comes within the exceptions and should be considered by this court. In support of his contention he cites the case of *Thompson* v. *Franckus,* 150 Me. 196. It is well for us to analyze the *Thompson* case in the light of the circumstances obtaining in the instant case. In *Thompson* v. *Franckus,* 150 Me. at page 201, Justice Tirrell in his opinion wrote:

> "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."

It is readily seen that the policy of this court is to discourage consideration of attacks upon the charge of a presiding justice unless exceptions are taken in accordance with Rule XVIII. An exception to Rule XVIII is only to be allowed where instructions were plainly erroneous or in

cases where the jurors might have been misled as to exact issues. In other words, where a charge of the presiding justice is in error to the point where it causes an injustice to the party or parties involved, then the exception to Rule XVIII would lie and this court would consider the objections.

In view of the fact the attorney for the defendant has brought to our attention his objection to portions of the charge and seeks to invoke an exception to Rule XVIII of the Rules of Court, it becomes necessary and proper that the presiding justice's charge be analyzed with the purpose in mind of determining whether the charge is of such a nature that it comes within the recognized exception of Rule XVIII.

The charge was carefully scrutinized with the idea of determining whether it was plainly erroneous or that the jurors might have been misled as to issues involved. We find that the instructions to the jury were not of that nature which would classify them as plainly erroneous or tending to mislead the jurors as to the exact issues in this case.

The instructions as to the law were adequate and not erroneous.

The defendant by bringing a motion for a new trial before this court burdens himself with the responsibility of proving to the satisfaction of the court that the verdict was manifestly wrong. *Witham* v. *Quigg,* 146 Me. 98; *Lessard* v. *Samuel Sherman Corporation,* 145 Me. 296.

On the issue of liability, the circumstances of this case come within the well defined and accepted rule as stated in *Chizmar* v. *Ellis,* 150 Me. 125, at page 126:

> " '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.' "

Argument is made to the effect that the damages are excessive. In speaking of excessive damages, reference is made to *Pearson* v. *Hanna,* 145 Me. 379, at page 380:

> " 'As a general rule, the parties are entitled to the judgment of the jury and not of the court upon that question. There are cases, to be sure, where the court will intervene; but those cases will be governed by the evidence and circumstances of each particular case. The court will not, however, set verdicts aside on the ground that the damages are excessive or inadequate unless it is apparent that the jury acted under some bias, prejudice or improper influence, or have made some mistake of fact or law.' "

In the light of the evidence on damages, it cannot be said that the jury erred in its findings in this respect.

There are many issues of fact in this case for jury determination. The record discloses no evidence that the jury was biased, prejudiced or improperly influenced.

Motion overruled.

CASINO MOTOR COMPANY

vs.

JOHN H. NEEDHAM, EDWARD E. ROSS, RICHARD W. HOLMES, WARREN V. GRINDLE AND CLARENCE M. PAGE

SUBSTITUTED RESPONDENTS:

GERALD J. GRADY, MATTHEW MCNEARY, LEROY S. NICKERSON, DWIGHT B. DEMERRITT AND VINA P. ADAMS

Penobscot. Opinion, November 23, 1955.

Remedies. Mandamus. Zoning. Statutes.

Mandamus does not lie to review the decision of a zoning board denying a variation in the application of zoning restrictions, even though the application for mandamus is based on the ground of an arbitrary and discriminatory application of the zoning code which deprives plaintiffs of their property without due process.

Mandamus does not become an appropriate remedy because no appeal procedure is provided in the zoning ordinance and state statutes.

The determination of the fitness or unfitness of various uses (variances) involves a discretionary act.

ON EXCEPTIONS.

This is a writ of mandamus before the Law Court upon exception to a decree ordering the writ to issue. Exceptions to the ruling on the right of appeal overruled. Writ quashed. Petition dismissed.

Michael Pilot, for plaintiff.

John H. Needham, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, TAPLEY, JJ. FELLOWS, C. J., does not concur. WEBBER, J., concurs in a separate opinion. MR. JUSTICE TIRRELL sat at the time of argument and took part in conferences, but died before the writing of the opinion.

TAPLEY, J. On exceptions. The Town of Orono, Maine in 1933 enacted a zoning ordinance by authority of the provisions of R. S., 1930, Chap. 5, Secs. 137 to 144 inclusive. On November 14, 1951 the petitioner made application to the defendants, in their capacities as members of the Adjusting Board, for permission to erect a filling station within District Number 3, a residential district under the ordinance. The Board refused the permit after a hearing.

On motion, Gerald J. Grady, Matthew McNeary, Leroy S. Nickerson, Dwight B. Demerritt and Vina P. Adams were substituted as respondents in place of John H. Needham, Edward E. Ross, Richard W. Holmes, Warren V. Grindle and Clarence M. Page.

Petitioner brought a petition for mandamus against the respondents to compel the issuance of the permit. The alternative writ was issued.

The respondents in their return and answer to the alternative writ set forth the following matters of law and fact as cause for not performing the acts named in the writ to be performed:

1. That the respondents say that the petitioner has established no legal right to said permit; that it does not appear to be the plain duty of the respondents to grant said permit; that it was for said respondents, acting as said adjusting board under said ordinance, to determine the fitness or unfitness of the use of said land for a filling station; that the exercise of their discretion was required in the matter and that such discretion was exercised in a correct and legal manner.

2. That the court cannot compel the respondents to grant said permit by its writ of mandamus because the petitioner has an adequate specific legal remedy at law and one which is appropriate and exclusive to the particular circumstances

of the case, namely, by an appeal from said Adjusting Board to the Superior Court as provided by Revised Statutes of Maine, 1930, Chapter 5, Section 140, and acts amendatory thereof, and by Revised Statutes of 1944, Chapter 80, Section 89, and acts amendatory thereof.

A hearing was had before an Active Retired Justice of the Supreme Judicial Court. The justice rendered judgment for the petitioner and in his decree made certain rulings of law and findings of fact and ordered the writ of mandamus to issue, to which rulings of law and findings of fact the respondents seasonably excepted.

The respondents contend that the rulings of law, namely:

> "1. That the appeal Statute, to wit: R. S. 1930, Chapter 5, Section 140, was repealed by the laws of 1943, Chapter 199, Section 6.
>
> 2. Ordinances previously enacted remain in effect, but it was Section 140 of the Statutes which gave the right of appeal and the Statute was repealed.
>
> 3. That the Ordinance gave no appeal.
>
> 4. The Statute having been repealed, there remains no appeal.
>
> 5. That there can be no doubt that the repeal of the Statute of 1930, by the laws of 1943 defeated all rights of appeal under the former."

are erroneous.

They further say, in contention, that the justice below made findings of facts that were not supported by the evidence.

EXCEPTIONS TO RULINGS OF LAW

The respondents contend that there exists a right of appeal from the findings of the Selectmen constituting an Ad-

justing Board and that the petitioner should have proceeded by appeal rather than mandamus.

The petitioner in answer asserts that the law provides no method of appeal in this case and that mandamus is the proper procedure.

The Town of Orono in the year 1933 enacted a zoning ordinance authorized by provisions of an enabling statute, being R. S., 1930, Chap. 5, Secs. 137-144 inclusive. Sec. 140, as amended by P. L. of 1939, Chap. 127, Sec. 1, provided an appeal from the Municipal Officers or Board of Zoning Adjustment to the Superior Court.

The Orono Zoning Ordinance has no provisions regarding appeal from the decisions of the Selectmen constituting an Adjusting Board.

Chap. 199, Sec. 6 of the P. L. of 1943, in part, reads as follows:

> **"Sec. 6. Relation to other acts.** Sections 137 to 144, inclusive, of chapter 5 and sections 31 and 32 of chapter 27 of the revised statutes, as amended, are hereby repealed. In a municipality not having a planning board, ordinances and regulations previously enacted under such sections shall continue in full force and effect and may be amended in accordance with the provisions of such sections until said ordinances and regulations are repealed or superseded by ordinances or regulations under sections 1 to 5, inclusive."

The words are clear and unambiguous that Secs. 137 to 144, inclusive, of Chap. 5, as amended, are repealed. This includes obviously Sec. 140 and its amendments, being the appeal section. The provision in Sec. 6:

> "In a municipality not having a planning board, ordinances and regulations previously enacted under such sections shall continue in full force and

> effect and may be amended in accordance with the provisions of such sections until said ordinances and regulations are repealed or superseded by ordinances or regulations under sections 1 to 5, inclusive."

does not affect the repeal of Secs. 137 to 144, inclusive, excepting that it permits a municipality, such as the Town of Orono, to continue with its zoning ordinance which is unaffected by repeal of the mother statute. This is a saving clause and does not disturb the repealing act in so far as the appeal section is concerned.

50 Am. Jur. Statutes, Sec. 527.

In view of the fact that there are no appeal provisions in the zoning ordinance and the appeal section of the statute was repealed, there was no provision under which the petitioner could have proceeded by appeal.

The finding of the justice below as to rulings of law was correct and this exception is overruled.

EXCEPTIONS TO FINDINGS OF FACT

The respondents in these exceptions assert there was no evidence to sustain certain material findings of fact establishing the bounds of the residential zone, and in particular they object to the vital ruling that the ordinance insofar as it placed the land in question in the residential zone was unconstitutional, hence invalid.

In our view it is not necessary that we pass upon these exceptions. Assuming the court was correct in the findings of fact and in the ruling that the ordinance was invalid, nevertheless it appears that mandamus is not a lawful remedy for the errors so established.

The Adjusting Board of the Town of Orono was created and receives its authority under provisions of the Zoning

Ordinance of the Town of Orono. Section 8 of the Zoning Ordinance reads as follows:

> "The Selectmen shall constitute an Adjusting Board, who shall hear and adjust complaints and shall determine the fitness and unfitness of various uses and other matters pertaining to the operation of this ordinance."

It is to be noted that one of the functions of the board is "shall determine the fit and unfitness of various uses." This means that the board has the right to grant variances. The members of the Adjusting Board are clothed with the power of determination of questions of fitness and unfitness of various uses of property coming under the provisions of the zoning ordinance. Their powers are discretionary in this respect. The petitioner unsuccessfully applied to the Adjusting Board for a "permit," to use the words of the parties, for a variance from the zoning restrictions in a lawfully established residential zone. We have seen that it had no appeal from such decision. It now demands the same permission from the same Board on a different ground, namely, that the ordinance insofar as it affects this land is invalid. The petitioner in its application for a writ of mandamus prays that a writ of mandamus issue commanding the members of the Adjusting Board to *issue their permit* allowing the petitioner to erect and maintain buildings on its land to be used as a filling station. The alternative writ alleges that on the fourteenth day of November, 1951 the petitioner made application to the Adjusting Board for a permit to erect and maintain a filling station on its land. The respondents in their return and answer to the alternative writ stated that it was not their duty to grant the permit and that they were acting as an Adjusting Board under the ordinance for the purpose of determining the fitness or unfitness of the use of the land for a filling station; that

the exercise of their discretion was required and that the discretion was exercised in a correct and legal manner.

We again refer to Section 8 of the ordinance and find there is nowhere in this section authority on the part of the Adjusting Board to issue a "permit of any kind." In so far as the facts in this case are concerned, the authority of the board is confined to the determination of "the fitness and unfitness of various uses." The record is silent as to whether or not there exists in the Town of Orono any public officer such as building inspector whose duty it would be to issue permits for the construction of buildings. There is a marked distinction between an application for a permit to build and an application seeking a variance of a zoning law. It is not necessary as we have suggested to determine in this proceeding whether the ordinance in the part under consideration is valid or invalid. If it is valid and the land is lawfully within the residential zone, subject to restrictions against filling stations, then without question the decision of the Adjusting Board denying a variance must stand. The fact that no appeal is provided from the Adjusting Board to the court does not authorize the court to compel the discretionary act through a writ of mandamus. If the land is lawfully within the residential zone, surely in mandamus we do not pass on what may or may not be a proper variance under the ordinance. If the decision of the Adjusting Board was to the effect that it approved the fitness of the use to which the property was to be used, then the applicant could proceed with its construction and maintenance of a filling station without the necessity of a permit unless the ordinances of the Town of Orono required the obtaining of a building permit.

Bassett on Zoning, page 174:

> "Mandamus is available to the landowner to compel the administrative officer to do his duty as required by law. Perhaps the most frequent group

> of cases where mandamus is employed by landowners is where the building inspector refuses a permit which he ought lawfully to grant."

Such, however, is not the situation here presented.

When it appears that mandamus is not the appropriate remedy, the writ should be quashed.

Webster v. *Ballou,* 108 Me. 522, at page 524:

> "Mandamus is an appropriate and necessary proceeding where a petitioner shows: (1) that his right to have the act done, which is sought by the writ, has been legally established; (2) that it is the plain duty of the party against whom the mandate is sought to do the act, and in the doing of which no discretion may be exercised; (3) that the writ will be availing, and that the petitioner has no other sufficient and adequate remedy."

58 Am. Jur., Sec. 236, page 1065:

> "It has also been held that mandamus does not lie to review a decision of a zoning board denying a variation in the application of zoning restrictions, even though the application for mandamus is based on the ground that denial of the variation constitutes an arbitrary and discriminatory application of the zoning code which deprives the plaintiffs of their property without due process of law."

The nature of and limitations upon the use of mandamus are well stated in *Dorcourt Co.* v. *Great Northern Paper Co.,* 146 Me. 344, 347.

According to the record in this case, mandamus does not lie.

The entry will be

Exceptions to ruling on right of appeal overruled.

Writ quashed.

Petition dismissed.

WEBBER, J. (CONCURRING)

I concur in the result. I find myself unable to agree that it is unnecessary to pass upon the constitutional question which is clearly placed in issue by the exceptions and which has been ably argued by both opposing counsel. The learned justice below found that the petitioner's property, although in a residential zone, was in an area so completely occupied by business enterprises that the zoning ordinance was unconstitutional in its application to that particular property. The opinion of the court makes it apparent to the parties that the issues between them can be resolved by neither appeal nor mandamus. It leaves them, however, without any suggestion as to whether the petitioner may proceed in disregard of the ordinance, or must abide by the decision of the Adjusting Board denying a variance. Inasmuch as the issue is here squarely raised and the parties may be put to unnecessary expense and may engage in further unnecessary litigation if they are left in the twilight of judicial indecision, I feel compelled to comment on the respondents' other exceptions.

The justice below erroneously found that the residential zone extended from Forest Avenue a distance of 800 feet along Main Street in a westerly direction. The evidence makes it clear, and the petitioner in argument admits, that in fact only the westerly 300 feet of this 800 foot area was zoned as residential. The remaining 500 feet was properly zoned as a business district, all but one of the buildings therein being commercial. That this error was material and prejudicial is made readily apparent by the comments in the findings as to the nature and type of property within the "residential district." These findings place great emphasis on the predominance of commercial buildings in what the fact finder mistakenly took to be the area restricted to residential property. In the light of this false factual premise

it is not unnatural then that he should view the zoning as arbitrary, capricious and unreasonable. When we eliminate factual error, however, a very different picture emerges. It becomes apparent that those who sought to lay out the zones recognized that the area extending 500 feet westerly from Forest Avenue to and including the Town Hall property was, except for one building, all occupied by commercial enterprises. Accordingly, this was zoned as a business district. Beyond and westerly of the Town Hall property, however, all the property on both sides of the street, except for two filling stations, was residential. It was in this area that the petitioner's property, itself residential, was located. When a community is being zoned for the first time, the lines which separate the several zones must be placed somewhere and it is almost inevitable that there will be included an occasional non-conforming use. It is inconceivable that the justice below would have declared the ordinance unconstitutional as pertaining to the property of the petitioner if he had not misapprehended the true location of the boundary of the residential zone.

I am aware that in *Nectow* v. *City of Cambridge,* 277 U. S. 183, 48 Sup. Ct. 447, the zoning was declared unconstitutional as to the petitioner's property. It seems to me that that case rests upon and goes no further than its own facts. There the zone line passed through the property leaving part of it zoned as residential and part unrestricted. Moreover, there were large industrial uses in immediate proximity to the plot in question, including an automobile factory, a soap factory, and railroad tracks, which tended to prevent any residential development in the area. Mr. Justice Sutherland, who wrote the *Nectow* decision, also wrote the opinion in *Zahn* v. *Board of Public Works,* 274 U. S. 325, 47 Sup. Ct. 594, only a year earlier. In that case the facts more closely resembled the facts now before us. The residential zone included as nonconforming uses a

grocery store, a market, a fruit stand, a two-story brick business block, a few real estate offices, and one oil station. The opinion in the *Zahn* case states that "whether that determination was an unreasonable, arbitrary, or unequal exercise of power is fairly debatable" and goes on to say that whenever the question is "fairly debatable," the court will not substitute its judgment for that of the legislative body which had the primary responsibility. See also *Euclid* v. *Ambler Co.*, 272 U. S. 365, 47 Sup. Ct. 114. The *Zahn* decision further refers to the opinion of the California court then being reviewed (195 Cal. 497, 234 P. 388) as a "well reasoned opinion." At page 394 of 234 P. the California court said: " 'The mere fact that outside of the * * * district there was other property similar in nature and character would not justify the court upon ascertaining that fact to substitute its judgment for the legislative judgment. The boundary line of a district must always be more or less arbitrary, for the property on one side of the line cannot, in the nature of things, be very different from that immediately on the other side of that line.' " It appears significant that there is no suggestion in the *Nectow* case that the *Zahn* case is disturbed or overruled; on the contrary, it is cited with apparent approval.

In the case before us, we have within the residential zone nothing but residential property, save only two nonconforming uses, both filling stations. Filling stations are frequently found in residential areas and certainly they by no means destroy or diminish the value of residential property to the extent or in the way that certain types of industrial property do. Far more destructive of residential property values are the noise and noxious fumes and smoke which so often emanate from industrial plants and railroad sidings. There were no such plants or sidings in proximity to this residential zone. In my view, the location by Orono of a zone line at the approximate extremity of a well defined

business development, which line encompassed a residential area containing only two filling stations as nonconforming uses, was a reasonable and proper exercise of the police power both in its general application and in its specific application to the property of the petitioner. Such zoning is neither capricious nor confiscatory. I would specifically sustain the exceptions to the finding of a material fact without any supporting evidence, and to the ruling that the zoning ordinance was unconstitutional in its application to the petitioner's property.

NELLIE COLVIN

vs.

MARK L. BARRETT, ADMR. C. T. A. OF THE ESTATE OF JOHN J. MORGAN

Cumberland. Opinion, December 1, 1955.

Assumpsit. Contracts. Implied Contracts. Decedents. Presumptions. Evidence. Inferences. Executors and Administrators.

When services are rendered with the knowledge and consent of another under circumstances consistent with contract relations between the parties a promise to pay is ordinarily implied by law on the part of him who knowingly receives the benefit.

It is incumbent upon a plaintiff to prove that services were rendered under circumstances consistent with contract relations, and that the defendant either expressly agreed to pay or to give certain property therefor, or that mutual understanding between the parties that plaintiff was to receive payment, or in the expectation and belief that he was to receive payment, and that the circumstances and conduct of the defendant justified such expectation and belief.

Verdicts should not be directed against recovery if any reasonable view of the evidence will allow recovery.

There is often a strong if not conclusive inference of fact against payment because of the relation of the parties either through blood, marriage, friendship, business dealings or neighborliness.

One who withholds his demand while an alleged debtor is alive, and in aftertime seeks to compel payment by the latter's estate, has no right to expect that such claims will escape close scrutiny or be enforced in the absence of evidence preponderantly amounting to clear and cogent proof.

ON EXCEPTIONS.

This is an action of assumpsit before the Law Court upon plaintiff's exceptions to the direction of a verdict for defendant. Exceptions sustained.

Berman, Berman & Wernick,
John Flaherty, for plaintiff.

John Curley, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, TAPLEY, JJ. CLARKE, J., did not sit.

FELLOWS, C. J. This is an action of assumpsit brought by Nellie Colvin against the administrator with will annexed of the estate of John J. Morgan to recover for personal services alleged to have been rendered to the deceased, John J. Morgan, during his lifetime from July 1, 1950 to April 8, 1953. The defendant pleaded the general issue. The case was tried before a jury, and at the conclusion of the plaintiff's case the defendant rested and moved for a directed verdict which was granted. The case is now before the Law Court on plaintiff's exceptions.

It was stipulated and agreed by and between counsel that the claim and affidavit of the plaintiff was filed seasonably in the Probate Court. The evidence introduced by the plaintiff consisted only of a deposition of Leslie Drew who lived at 241 Walton St. in Portland during the lifetime of the decedent Morgan. The plaintiff lived at 249 Walton St. The

defendant's testator, Morgan, lived at 235 Walton St. prior to his death. Morgan owned the tenements occupied by the plaintiff Nellie Colvin, the tenement occupied by himself, and the tenement occupied by the deponent Drew. The three tenements were approximately fifty feet apart, and plaintiff Colvin and deponent Drew rented of the decedent for more than fifteen years previous to his death.

After the death of Morgan's wife in 1950, deponent Drew stated that he called on Morgan in his home frequently, if not daily. After Mrs. Morgan went to the hospital and after her death, Drew said that when he called on Morgan, the plaintiff Mrs. Colvin was there cooking his meals, washing his clothes, helping him put on his overcoat, cleaning up the house, and caring for him, and that he (Drew) paid his rent to Mrs. Colvin at Morgan's request. In September or October, 1952 Morgan told Drew "I think Nellie is a good honest woman to look after my affairs. She keeps everything all straight and I think she should be well repaid for what she has done or is doing." Mr. Morgan went to the hospital for treatment about March or April, 1953 and died in May, 1953.

Drew said he was a tenant of the deceased Morgan for about fifteen years and Mrs. Colvin was a tenant of Morgan for a longer period. Drew stated he paid his own rent during this period to Mrs. Colvin, and that Mrs. Colvin showed him (Drew) at four or five different times receipts for her rent signed by the deceased. "They were in the receipt book. She hadn't taken them out. She said 'there is my receipt right there' and hers was the next one to ours." Mrs. Colvin did not state that she had paid her rent, she simply showed her receipts. They were in Morgan's receipt book. Drew testified that his calls were "sometimes before dinner, sometimes would go over after dinner; sometimes after supper." Morgan never mentioned again to Drew that Mrs.

Colvin should be paid. Drew did "errands" for Morgan, such as driving his car for him, but was not paid. Any work Drew did was as a "neighbor, friend and tenant." Morgan never said at any time to Drew that he had paid the plaintiff anything, and the plaintiff never told Drew that she had been paid anything. Drew did not know of his own knowledge whether or not Mrs. Colvin was to receive anything under Morgan's will.

The last few months Morgan could not get on his coat or sweater himself and Mrs. Colvin had to "move him up to the table," and help him to get to bed. "There were times that Mrs. Colvin had to steady his hand for him to sign the rent receipts." But every receipt for rent received by Drew was signed by Morgan, although his hand was "shaky" at the last of his life.

At the conclusion of the reading of the deposition a verdict for defendant was moved for and directed.

The question presented is whether there was sufficient evidence submitted in the deposition offered by the plaintiff to require factual determination by the jury. There is no conflict of testimony of witnesses because there is only the one witness. Assuming, as we must, that the testimony of the deponent Drew is true, (*Jordan* v. *Portland Coach Co.*, 150 Me. 149, favorable to plaintiff) does his testimony warrant a verdict for some amount in the plaintiff's favor? Would a contrary verdict be sustained?

"It is a familiar principle that when services are rendered with the knowledge and consent of another under circumstances consistent with contract relations between the parties, a promise to pay is ordinarily implied by law on the part of him who knowingly receives the benefit of them, and is enforced on grounds of justice in order to compel the performance of a legal and moral duty." *Cole* v. *Clark*, 85 Me. 336, 338.

In a case brought by a daughter against the estate of her father, the court say: "The law of this State with reference to payment for services by a relative or member of the household has been clearly and definitely stated. To recover there must be a contract. It may be express or implied. It is implied as a matter not of law but of fact. It must be proved in accordance with the ordinary rules of burden of proof. It is not enough to show that valuable service was rendered. It must appear that the one who rendered expected compensation and the one who received so understood or under the circumstances ought so to have understood and by his words or conduct, or both, justified the expectation. There is not in any given case a legal presumption of any kind that the services were rendered gratuitously or for compensation." There may be strong inferences, but no legal presumption. *Bryant* v. *Fogg, Admr.,* 125 Me. 420. See also *Saunders* v. *Saunders,* 90 Me. 284; *Leighton* v. *Nash,* 111 Me. 525; *Hatch* v. *Dutch,* 113 Me. 405; *Cheney* v. *Cheney,* 122 Me. 556.

"If it can properly be said that there is any presumption in a given case that the services rendered to a father by a son after he becomes of age, are gratuitous, it is clearly a presumption of fact and not of law. It is not a uniform and constant rule attached to fixed conditions and applicable only generally. It is a conclusion from a process of reasoning which the mind of any intelligent person would apply under like circumstances, and it is applicable only specifically. It rests on probability and is the effect of evidence, the result of inferences to be drawn from the facts in the case at the discretion of the jury, the force of it varying according to circumstances. *Saunders* v. *Saunders,* 90 Me. 290." *Bryant* v. *Fogg,* 125 Me. 420, 423.

In a case involving goods and services where there was no family relationship and in the first count in the declaration

an agreement was alleged to have been made between plaintiff and defendant, whereby defendant was to deed her property for care by plaintiff, the second count was an account annexed stating alleged goods and services, and the third count was for money had and received, it was held (1) that if plaintiff left the farm, without just cause as defendant claimed, and there was therefore a breach of contract, the plaintiff could not recover on *quantum meruit;* (2) that if plaintiff left the farm as plaintiff claimed, because of a wilful breach by defendant, the plaintiff might recover on *quantum meruit;* (3) "If the agreement, instead of being as contended by the plaintiff or the defendant, was not completed because there was not a clear accession on both sides to one and the same terms, then the plaintiff could maintain an action on a *quantum meruit* because where one party renders services beneficial to another under circumstances that negative the idea that the services were gratuitous, and the party to whom the services are rendered knows it and permits it and accepts the benefit, he is bound to pay a reasonable compensation therefor. That is because such facts and circumstances justify a presumption that the party to whom the services are rendered must have requested them and must have intended to pay for them, and, therefore, the law implies a promise on his part to pay for them. *Wadleigh* v. *Pulp & Paper Co.,* 116 Me. 113. We think the circumstances here satisfy the rule if the minds of the parties did not meet. The amount of benefit to the defendant would be a question of fact for the determination of the jury."

The court then sustained the motion for a new trial, stating: "Upon a careful examination of the facts, we are of the opinion that the conclusions of the jury were not authorized by the proof and that the only authorized conclusion is that the minds of the parties did not meet and no completed contract was made. This conclusion harmonizes the facts in the case." *Thurston* v. *Nutter,* 125 Me. 411.

"It is an elementary principle that when valuable services are rendered by one person at the request, or with the knowledge or consent of another, under circumstances not inconsistent with the relation of debtor and creditor between the parties, a promise to pay is ordinarily said to be implied by law on the part of him who knowingly receives the benefit of them, and is enforced on grounds of justice in order to compel the performance of a legal and moral duty. As observed by Chief Justice Marshall in Ogden v. Saunders, 13 Wheat, 214, 'a great mass of human transactions depends upon implied contracts, which grow out of the acts of the parties. In such cases the parties are supposed to have made those stipulations which as honest, fair and just men, they ought to have made.' But the word 'contract' is almost universally employed 'to denote an undertaking voluntarily entered into between the parties, not drawing into contemplation any creation of the law.' Bishop Cont. Sec. 191. All true contracts grow out of the mutual intention of the parties; and if, in a particular instance there is evidence arising from the situation, conduct or family relationship of the parties tending to show that the service was rendered without expectation of any payment or without other payment than such as was received as the service progressed, it cannot be said as a matter of law that a contract is implied on the part of the defendant to pay for such services. Cole v. Clark, 85 Me. 338, and authorities cited." *Saunders* v. *Saunders,* 90 Me. 284, 289.

The cases indicate that it is incumbent upon a plaintiff to prove that services were rendered under circumstances consistent with contract relations, and that the defendant either expressly agreed to pay or to give certain property therefor, or that they were rendered in pursuance of a mutual understanding between the parties that the plaintiff was to receive payment, or in the expectation and belief that he was to receive payment, and that the circumstances

and conduct of the defendant justified such expectation and belief. If there is any presumption that services rendered to a near relative are gratuitous it is a presumption of fact and not of law. It is a question of probabilities according to human experience and the true inferences to be drawn from the facts and circumstances presented. The plaintiff is limited to the proof of an actual contract, express or implied in order to overcome the adverse inference one would ordinarily draw from the fact of relationship through blood or marriage between plaintiff and defendant. See cases previously cited herein and also the case of *Thurston* v. *Nutter* reported in 126 Me. 609; *Atl.* v. *Cannell, Admr.*, 126 Me. 590; *MacQuinn* v. *Patterson*, 147 Me. 196.

As stated in *Leighton* v. *Nash, Exrx.*, 111 Me. 525 at page 528, "There having been no express agreement to pay, it was incumbent on the plaintiff to prove that the services were rendered by the plaintiff either in pursuance of a mutual understanding between the parties that she was to receive payment, or in the expectation and belief that she was to receive payment and that the circumstances of the case and the conduct of the defendant justified such expectation and belief." The court further states, "It is not enough to show that valuable service was rendered. It must be shown also that the plaintiff expected to receive compensation and that the defendant's intestate so understood, by reason of mutual understanding or otherwise, or that under the circumstances he ought to have so understood. Both propositions are essential and must be proved. This is the law of implied contracts." The court, page 528, further states, "Not once during the six years is it shown that there was any conversation between the parties indicating that either of them understood that the service was rendered on a commercial basis. The subject is not shown ever to have been referred to by either. And during all the time, the plaintiff's husband was regularly paying rent for the tenement they

occupied, month after month. If the plaintiff then expected to be paid for her services, it would seem likely that she would have attempted to have her claim used in diminution of rent, although the rent was for her husband to pay, and not for her, unless she wished to conceal her expectation from Mr. Pearson, and make claim for compensation only after his death, when he could no longer dispute it. Such an assumption would not be creditable to the plaintiff, nor helpful." *Leighton* v. *Nash, Exrx.,* 111 Me. 525.

The Law Court must decide, whether upon all the evidence, the case should have been submitted to the jury. *Dyer* v. *Power & Light Co.,* 119 Me. 225. Would a verdict for the plaintiff be sustained? *Ward* v. *Power and Light Co.,* 134 Me. 430; *Fort Fairfield* v. *Millinocket,* 136 Me. 426. Verdict should not be directed if any reasonable view of the evidence will allow recovery. *Andreu* v. *Wellman,* 144 Me. 36; *Giguere* v. *Morrisette,* 142 Me. 95, 101.

There is not in any given case a legal presumption that services are rendered either gratuitously or for compensation. The issue is one of fact, whether under the circumstances of the particular case the services were rendered on the basis of contractual relation, either express or implied.

It appears in many of the cases, where a party seeks to recover for reasonable value of services rendered and there is no direct proof of a written or an oral contract, that there often is a relationship between the parties that causes what some cases call "a presumption of fact" that it was a gratuity; or that the plaintiff expected a gift or a bequest, if there was a will; that there was no expectation to pay and no expectation to be paid. The relation of the parties, either through blood, marriage, friendship, business dealings, or neighborliness, may cause a very strong, if not conclusive, inference that there is nothing due a claimant. It is not a

"presumption in law" although to the reasonable man of ordinary intelligence it may be a "presumption of fact." It is *fact* however, and because men may differ as to the inference to be drawn from given facts, it becomes a question for a jury.

In this case the facts show that services were rendered to the deceased landlord by the tenant plaintiff, and the tenant showed rent receipts signed by deceased. It might be inferred that the services were gratuitous under the circumstances of being a near neighbor, or that the rent receipts showed that the services were paid for, or that the plaintiff expected a gift or bequest, which the will (had it been offered in evidence) might have shown. In any event, according to the deposition alone, there was a question of fact that the jury should have passed on. Reasonable minds might differ on what the deposition shows.

If there had been evidence, in addition to the deposition, the case might be controlled by *Weed* v. *Clark,* 118 Me. 466 at 469, where the court say: "This case totally lacked proof of an express promise on decedent's part to pay plaintiff for her work. The theory that her services were performed under an implied contract for compensation encountered and was outweighed by convincing evidence that she was already paid. One who withholds his demand while an alleged debtor is alive, and in after-time seeks to compel payment by the latter's estate, has no right to expect that such claims will escape close scrutiny or be enforced in the absence of evidence preponderantly amounting to clear and cogent proof. That plaintiff's witnesses testified honestly concerning the performance of services to her, was unquestioned. But, extending complete credence, their testimony tending to show the existence of an implied promise to reward her, was overborne by that of the defense, which made known that she was not left by decedent without payment of her

hire. A verdict for plaintiff in this behalf could not be sustained."

Because the whole evidence, however, in the case at bar, is contained in the one deposition, and because reasoning and reasonable minds might differ as to what the inferences should be from the evidence contained in the deposition, the case should have been submitted to the jury. The entry must be

Exceptions sustained.

ALFRED J. DUTCH

PERCY H. DUTCH

vs.

RUSSELL O. SCRIBNER

Waldo. Opinion, December 14, 1955.

Equity. Wills. Trusts. Executors and Administrators. Attachment. Trustee Process.

To justify the granting of an equity appeal it must appear that the rulings and findings of the justice below are clearly wrong.

The relation of life tenant and remainderman does not create a confidential relationship.

Fraud must be established by clear and decisive proof especially where there is only oral evidence which comes mainly from the parties.

An executor and sole beneficiary of decedent's estate cannot be charged individually as trustee of personal property of the estate until the Probate Court having jurisdiction has ordered distribution from him as executor to himself as beneficiary.

ON APPEAL.

This is an equity appeal before the Law Court following a decree of a single justice dismissing the bill. Appeal dismissed. Decree below affirmed with costs.

McLean, Southard & Hunt,
Clyde L. Chapman, for plaintiff.

Edward A. Weatherbee,
John H. Needham, for defendant.

SITTING: FELLOWS, C. J., WEBBER, BELIVEAU, TAPLEY, JJ. WILLIAMSON, J., and CLARKE, J., did not sit.

BELIVEAU, J. On appeal, by plaintiffs, from the decree of a single justice sitting in equity.

It is an oft repeated rule of law that the plaintiffs cannot succeed on their appeal unless they satisfy the court that the ruling and findings of the justice below were "clearly wrong." We are of the opinion that the findings were not wrong, clearly or otherwise.

This is a bill brought by the plaintiffs against the defendant, executor of the estate of Myra T. Dutch and sole beneficiary under her will dated May 26, 1944. The bill seeks to compel this beneficiary to execute to the plaintiffs a deed of the real estate devised to Myra T. Dutch by Altana E. Dutch, her husband, in his will dated July 20, 1939 and to charge this defendant, as trustee, with the value of the personal property in the amount of $6,270.66, which the widow took under that will.

By the terms of the Altana E. Dutch will,

> "*THIRD:* I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, wherever found and however situated, to my wife Myra T. Dutch, to have and to hold during the term of her natural life and at her decease

> I give, devise and bequeath whatever remains of my said estate to my sons Alfred J. Dutch and Percy H. Dutch in equal shares."

Altana E. Dutch died March 8, 1944 and the wife, Myra, on the 31st day of January 1953.

On June 30, 1944 the plaintiffs executed a quitclaim deed of their interest in the real estate acquired by them under the Altana E. Dutch will, to their stepmother, Myra T. Dutch.

The plaintiffs allege this quitclaim deed was executed because of a promise made by Myra that she would will the real estate to them, and, to void this conveyance, paragraph 8 of the plaintiffs' bill alleges that Myra "in violation of her said agreement and in fraud of the rights of the plaintiffs made and executed the will and testament set forth in paragraph 7 hereof as Exhibit C, whereby legal title to said real estate described in paragraph number 3 hereof descended in fraud of the rights of the plaintiffs into the possession and control of the defendant, Russell O. Scribner."

The plaintiffs had the burden of showing such a promise as they allege, or the perpetration of a fraud by Myra. The evidence for the plaintiffs is that sometime prior to the execution of the quitclaim deed to Myra, June 30, 1944, Myra while out with Alfred J. Dutch in his automobile, as a guest, is alleged to have made the promise on which the plaintiffs rely. That testimony is given by Alfred, Maude his wife, and Dryden, their son. This was nearly 9 years before Myra died and while the evidence shows that the close friendship, which had existed for a good many years, continued and they saw each other frequently, no mention was again made of the alleged promise.

It would seem that if what the plaintiffs claim had really occurred, Alfred's interest would have caused him, during

the nine-year period, to inquire or ascertain if Myra had fulfilled or complied with the alleged promise. Alfred was called to the office of Attorney Morse prior to the execution of the quitclaim deed and there they discussed Myra's desire to have full title to the real estate and, after that discussion, Alfred agreed to comply with her wishes, if Percy, in California, would join him. Mr. Morse testified that no mention was made, or discussion had, of the alleged promise by Myra and in this he is corroborated by Alfred who testified that this phase of the case was not discussed with Mr. Morse at any time.

Plaintiffs' Exhibit No. 2 is a letter from Mr. Morse to Percy H. Dutch of San Bernardino, California, in which Mr. Morse set out the reasons why Myra felt she should have full title to the real estate and informed Percy that Alfred would be willing to join in such a conveyance.

The answer from Percy Dutch as shown by Exhibit 1, dated June 30, 1944, states that he would release his interest in the home place as requested. No mention is made by Percy, in his letter to Mr. Morse, of any promise by Myra to will the real estate to the plaintiffs.

In view of this evidence and the conduct of the plaintiffs for a period of almost 9 years the justice below concluded, as he should, that no such promise as claimed was ever made.

Logic and common sense argue loudly against the claim of the plaintiffs. If their position is true, then the giving of the deed to Myra and a will by her leaving the real estate to them would not in any sense have changed the situation which was created by Altana E. Dutch in his will. While she would enjoy absolute title during her lifetime she in fact would have a life estate and the plaintiffs would take that real estate at her death. This is exactly the situation provided in Altana's will.

The plaintiffs' bill alleges that Myra in taking the deed from the plaintiffs violated a confidential relation which existed between her and the two sons because she was the father's widow and their stepmother.

We are not aware of any law which creates such relationship.

As stated in our court in *Mallett* v. *Hall,* 129 Me. at page 154, relation of life tenant and remainderman does not create a confidential relation and, if such existed, it is a fact to be established by the party claiming that relationship.

The plaintiffs had failed to comply with the rule laid down in *Brickley* v. *Leonard,* 129 Me. 94, that evidence of the promise or contract, which the plaintiffs claim, "must be conclusive, definite and certain, and the contract must be established beyond all reasonable doubt."

While the plaintiffs allege fraud on the part of Myra there is no evidence in the case to show any fraud was practised or perpetrated by her on either or both of the plaintiffs.

Fraud cannot be presumed, "proof of the fraud must be full, clear and decisive, and relief will not be granted where the evidence is loose, equivocal and contradictory, or in its texture, open to doubt or opposing presumptions. This rule is especially enforced where the oral evidence comes mainly from the parties of the suit." *Morris Plan Bank* v. *Winckler,* 127 Me. 311.

The plaintiffs seek to charge the defendant as trustee for the personal property listed in the inventory of the husband's estate and which admittedly came into the hands of Myra. The defendant is in this court as a beneficiary of Myra's will and not as her executor.

While these proceedings were pending the defendant, by motion, petitioned the court that he be allowed to intervene in his capacity as executor. This motion was denied.

The defendant, as an individual, has come into the possession of no part of the goods, chattels and personal property as Myra's beneficiary. His position is that of executor and as such has only that control over it which the law gives him and is subject to Myra's liabilities.

It appears the plaintiffs have filed in the Probate Court a claim against Myra's estate for the value of personal property listed in the inventory of their father's estate and that commissioners have been appointed to determine what, if anything, is due.

If the plaintiffs are successful in that direction then, of course, such an amount as is found due must be paid by the executor out of the personal property, if sufficient, together with other liabilities, if any. No transfer of this property from the defendant as executor to himself as beneficiary can occur until the estate has been finally settled and an order of distribution made by the Probate Court having jurisdiction.

Appeal dismissed.

Decree below affirmed with costs.

CLIFFORD L. SWAN CO., INC.

vs.

CHARLES R. DEAN

Cumberland. Opinion, December 17, 1955.

Contracts. Performance. Tender. Licenses. Dedication.

Ordinarily, unless legally excused, a plaintiff cannot recover damages for breach of a contract without first performing his obligation thereunder, or seasonably tendering performance.

An agreement to set off land for a street with the rights in said street to defendant and to those who might purchase land from him confers more than a bare revocable license incapable of assignment.

An agreement to be binding must be definite and certain.

Where some further act is legally necessary under an alleged contract to make a proposed street available to a defendant, plaintiff must perform or tender before requiring defendant to perform his part of the alleged agreement.

ON EXCEPTIONS.

This is an action for breach of contract before the Law Court upon exception to a verdict for defendant found by a single justice without jury intervention. Exceptions overruled.

Clark D. Chapman, Jr., for plaintiff.

S. Arthur Paul,
Harry C. Libby, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, TAPLEY, JJ. CLARKE, J., did not sit.

WEBBER, J. On June 27, 1949, one Lewis and the defendant Dean were owners of adjoining land. A plan of the Lewis land had been duly recorded in the Registry of Deeds by a predecessor in title in 1909. This plan divided the property into house lots, and showed a proposed street known as Hayden Street fifty feet in width and lying along the side of the Lewis land where it adjoined the Dean land. Lots were sold from time to time to third parties with reference to the recorded plan. No use of the proposed street was ever made by the public, and the street was never accepted by the municipality.

On the day referred to, Lewis and Dean executed a written contract, the material portions of which were as follows:

> "WITNESSETH That the party of the first part, namely Charles R. Dean is the owner of prop-

erty on Main Street, South Portland, formerly known as the William H. Wright property, located on the southerly side of said Main Street and which property is adjacent to and adjoins the Richard E. Lewis property, and in the promotion of the Lewis property so called, the said party of the first part has agreed and does by these presents agree to block out and rough fill a strip of land along the easterly side of the Dean property so called, holding a width of fifty (50) feet and running back in a southerly direction to the bank for a distance of approximately one thousand (1000) feet, and the said party of the first part agrees to do the surface rough grading only on said fifty (50) foot proposed street so called, provided the street lay out is adjacent to and joins the Dean property.

The party of the second part, namely Richard E. Lewis, agrees to set off and establish wholly from his land in contemplation of a house lot development of the Lewis property, and that said street shall be adjacent to the Dean property so called, and that in consideration of the said party of the first part, namely Charles R. Dean rough grading said street, he, the said Charles R. Dean shall have the right and privilege of using said streets for any and all purposes in the development of property belonging to the party of the first part, which shall include the right and privilege of the party of the first part setting off and establishing streets entering into the proposed street which is to be built and surface graded by said Dean, and which street is to be known as Hayden Street, which proposed street is on the records at the South Portland City Assessors office, and the said party of the second part agrees to all terms, conditions and reservations in so far as the said Dean having the right and privilege of entering upon said proposed street may be concerned. Full and complete consideration on the part of both parties is herein and hereby acknowledged."

For several years nothing further occurred. The agree-

ment was never discussed by Lewis and Dean. No efforts were made to perform or secure performance of the contract by either of them. Finally, on August 28, 1954, Lewis conveyed all the remaining land in his subdivision, including the fee in the area occupied by Hayden Street, to the plaintiff. Simultaneously, Lewis assigned to plaintiff the contract with Dean. In September, 1954, the plaintiff made demand on the defendant for performance of the contract. There was no accompanying tender of performance of any kind on the part of the plaintiff. The defendant having failed to perform, the plaintiff contracted to have the street constructed, apparently in a manner intended to meet all municipal requirements as to street acceptance, and involving the removal of a great deal of ledge. The plaintiff now seeks by this action to compel the defendant to pay plaintiff's actual costs of that construction. A single justice below, sitting without a jury, found for the defendant, and exceptions to his decision are before us.

Ordinarily, unless legally excused, a plaintiff cannot recover damages for breach of a contract without first performing his own obligations thereunder, or seasonably tendering performance. Neither this plaintiff nor its assignor did anything or offered to do anything in furtherance of this agreement. The plaintiff contends that the contract conferred upon the defendant a mere license and that no other performance by plaintiff or its assignor was required. With this contention we cannot agree. Ordinarily, nothing else appearing, such a license is revocable and incapable of assignment. *Emerson* v. *Fisk,* 6 Me. 200; 33 Am. Jur. 403, 404, Secs. 98 and 99 and cases cited; Annotation 130 A. L. R. 1253. No words of inheritance or assignment were used in the agreement. The concept that defendant was to have a bare, revocable license incapable of assignment is inconsistent with those portions of the agreement which clearly indicate the intention of the parties that the defend-

ant and those who might purchase land from him were in some manner to receive rights in the proposed street, rights which would be valuable "in the development of the property."

"An agreement to be binding must be definite and certain." 12 Am. Jur. 554, Sec. 64; *Ross* v. *Mancini,* 146 Me. 26; *Bragdon* v. *Shapiro,* 146 Me. 83. This contract suffers much from vagueness, indefiniteness and uncertainty. The mutual rights and obligations of the parties cannot be ascertained with adequate clarity. In what manner were the defendant and his grantees to acquire rights to the use of Hayden Street "for any and all purposes in the development of (defendant's) property"? As members of the public or by direct conveyance? There had been an incipient dedication of the street in 1909 by the recording of the plan and subsequent sale of lots. Purchasers of lots had acquired their irrevocable easements in the proposed street. *Arnold et al.* v. *Boulay,* 147 Me. 116; *Bartlett* v. *Bangor,* 67 Me. 460. But in a period of forty-five years there had been no public use and no municipal acceptance of the street. A reasonable time for acceptance having expired, the rights of the public had been lost, and plaintiff purchased the land from Lewis disencumbered of any obligation to the public and subject only to the rights of lot owners. *Harris* v. *South Portland,* 118 Me. 356, 359; *Burnham* v. *Holmes,* 137 Me. 183, 186. If, then, plaintiff were to make the street available to defendant and those claiming under him as a public street, some further act was required. He might convey the street to the municipality by deed. The acceptance of such a grant for street purposes would ensure the rights of the defendant and those who purchased lots from him as members of the public. *Farnsworth* v. *Macreadie,* 115 Me. 507; *Brown* v. *Bowdoinham,* 71 Me. 144. Or the plaintiff might perform a new act of dedication of the street and procure acceptance thereof. On the other hand, if the defendant's position were

to be assured by direct grant to him, the seasonable tender of an appropriate deed would have been requisite. But the assignor had done nothing. In its turn, the plaintiff did nothing. If the parties intended that the defendant himself should secure his rights by constructing the street in accordance with municipal requirements and by procuring municipal acceptance, we can only say that the agreement falls far short of imposing such rigorous requirements. It provides that the defendant should "block out," "rough fill," "do the surface rough grading," and no more.

The plaintiff has declared upon a contract which so fails to manifest the intention of the parties as to the obligations it imposes that it is unenforceable. If that be not enough, the contract upon any reasonable and conscionable interpretation required some further act of performance on the part of plaintiff designed to make Hayden Street of some practical value to the defendant in the development of his own land. For these reasons we are satisfied that the defendant is entitled to judgment.

Exceptions overruled.

KENNETH A. HUNTER
vs.
FRANK H. TOTMAN

Aroostook. Opinion, January 12, 1956.

Evidence. Witnesses. Recollection. Shop Book Rule.

It is proper for a witness to use her own notes and records to refresh her recollection of a material fact as to which she had personal knowledge, even though such notes and records might not be admissible as independent evidence under the shop book rule. cf. *Hunter* v. *Totman*, 146 Me. 256.

ON EXCEPTIONS.

This is an action of assumpsit before the Law Court upon defendant's exceptions to the admission of certain evidence and the refusal of the presiding justice to direct a verdict.

Exceptions overruled.

Roberts & Bernstein, for plaintiff.
James P. Archibald, for defendant.

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

WEBBER, J. This was an action to recover the balance claimed to be due arising out of the sale of potatoes. The case is before us on defendant's exceptions to the admission of evidence and to the refusal of the presiding justice to direct a verdict for the defendant. The case has twice been tried and on each occasion an Aroostook County jury has found for the plaintiff.

The plaintiff was a potato grower and the defendant a potato buyer. Plaintiff had a large quantity of potatoes in storage which he offered to sell to defendant. They went to-

gether and made such examination of the potatoes as was possible under the conditions of storage. They then had a conversation in the presence of the plaintiff's wife who kept the plaintiff's records. It is not disputed that the terms of sale were agreed upon during that conversation, but the parties are not in accord as to what those terms were. The version offered by plaintiff and his wife is that defendant was to buy all the potatoes, the exact quantity being unknown; that when the defendant inquired as to quantity for the purpose of establishing a contract price, the plaintiff's wife gave him the amount of the "pickers' count" and also the "truckers' count," there being a difference between the two counts of only a few barrels; that the parties then agreed upon the quantity involved, the defendant stating that "he would take the pickers' count"; that this count was 14,344 barrels; that a price of $4.00 per barrel was agreed upon. Upon this version, therefore, a quantity was accepted and agreed upon and by simple mathematical computation a lump sum price for all the potatoes was established at $57,376. Admittedly, if this was the agreed price, a balance remains unpaid. On the other hand the defendant's version is that he agreed to buy all the potatoes at a unit price of $4.00 per barrel and that the figure of 14,344 barrels was used merely as an estimate of quantity; that the potatoes proved to be short of that amount, and that all the potatoes which were actually available and taken from storage have been paid for. There was substantial credible evidence in support of both versions of the contractual agreement, and the issue was clearly one of fact for the jury. It was entirely proper for the presiding justice to refuse to direct a verdict for the defendant.

The plaintiff's wife was permitted over objection to use her record book to refresh her recollection as to the "pickers' count." In *Hunter* v. *Totman,* 146 Me. 259, we reviewed the first trial of this same case. In the course of the first trial

the notebook or record book was *itself* admitted as evidence of the quantity of potatoes in the storage house at the time of sale. In sustaining the defendant's exception, we held that the entries could not fairly be considered as an "account" and the book was not admissible. Upon the second trial, now before us, the defendant contends that the witness cannot be permitted to do by indirection that which cannot be done directly. The situation, however, is not the same. The witness is not here seeking to testify as to quantity in storage of which admittedly she has no personal knowledge. Nor is she seeking to testify as to the quantity of potatoes actually picked, as to which she has only hearsay knowledge. She is giving evidence only as to the "pickers' count," a composite of the reports to her from the pickers and on which she computed and based their pay. That evidence becomes material in view of the plaintiff's contention that the "pickers' count," regardless of its strict accuracy, was accepted and adopted by the parties in their contract as the basis for computing an agreed lump sum price. It was proper for the witness to use her own notes and records to refresh her recollection as to a material fact as to which she had personal knowledge. Defendant takes nothing by this exception.

The entry will be

Exceptions overruled.

STATE OF MAINE

vs.

RICHARD EDGECOMB

York. Opinion, January 12, 1956.

Public Utilities. Trucks. Overload.

The word "cause" in the statutory phrase "no person shall . . . *cause* to be operated any truck" does not mean "compel or bring about" since such latter words suggest compulsion. (R. S., 1954, c. 22, Sec. 36.)

Whether the driver of a truck caused the overload is immaterial to the issue whether the one holding the P.U.C. permit caused the operation.

There is no requirement that a presiding justice read the pertinent statutes to the jury.

The responsibility of one holding a P.U.C. permit under R. S., 1954, c. 22, Sec. 36, cannot be avoided by contracting with another to load the vehicle and direct respondent's driver in the matter of the movement of the vehicle.

ON EXCEPTIONS.

This is a criminal action for violating of the overload statute, R. S., 1954, Chap. 22, Sec. 36. The case is before the Law Court upon exceptions to the refusal of the presiding justice to give certain instructions. Exceptions overruled. Judgment for the State.

William P. Donahue, for plaintiff.

Herbert Townsend, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, TAPLEY, CLARKE, JJ. MR. JUSTICE WEBBER concurs in the result.

CLARKE, J. This is a criminal case by complaint originating in the Sanford Municipal Court, appealed to the York County Superior Court, tried before a jury, verdict guilty, before us on exceptions by the respondent. The subject matter is an over-loaded truck trailer unit operated on the public ways of the State. The unit was owned by and operated under a Public Utility permit issued to the respondent. The unit with a driver was let for hire to another, one Rossi, with knowledge that the unit was to be used by Rossi in transporting lumber owned by Rossi over the highways of the State. The facts were hardly in dispute but there was contention as to the law.

The Statute, R. S., c. 19, Sec. 27 (1944) as amended, now R. S., c. 22, Sec. 36 (1954), provides that no person shall operate or cause to be operated any truck or combination of truck, tractor and trailer with gross weight of vehicle and load in excess of 50 thousand pounds and further provides that the operation of the vehicle shall be prima facie evidence that the operation was caused by the person holding the permit or certificate for said vehicle from the Public Utilities Commission. The respondent furnished the driver and let the vehicle for hire to Rossi knowing that lumber was to be transported over the highways of the State.

When the court had completed its instruction to the jury the respondent made the following requests. Now comes the respondent and complains and says that he is aggrieved by the refusal of the court to instruct the jury as the defendant requests. The respondent requested five instructions and to the refusal of the court to give the second, third, and fourth requested, and the fifth requested instruction as modified. The respondent brings his bill of exceptions. The request that the testimony of respondent as to his instructions to Mr. Rossi not to load more than 14 tons applied to the cargo alone. This request was properly denied.

Request No. 2 that "cause" as used in the statute means to compel or bring about. In other words did respondent compel or bring about the over-loaded truck on the highway. The statutory phrase "causes said operation" does not have the same compulsion suggested by the words of the requested instruction. One who engages in the business of hauling lumber causes the vehicle driven by his driver to be operated on the highway. The control of the vehicle had not been released by the respondent nor through his driver to another. Request No. 2 was properly denied.

Request No. 3. If you find that Mr. Rossi compelled or brought about the over-loaded truck being on the highway, then you must find the defendant not guilty. Whether or not one Rossi violated the Statute is not of issue. The sole issue is whether the respondent caused the operation. Request No. 3 was properly denied.

Request No. 4. Read the statute to the jury. There is no requirement that the court read the statute in question to the jury. The judge in fact did give the substance of the statute in his charge and the jury could have gained no additional information of any consequence from a reading of the statute. Request No. 4 was properly denied.

Request No. 5. That the court instruct the jury that the mere fact that license with the Public Utilities Commission does not make defendant liable for over-loaded vehicle on the highway unless he in fact caused the over-loaded vehicle on the highway. In matter of prima facie evidence the court instructed, ". . . but if you find that there was a Public Utilities Commission certificate in the name of this respondent, then that is prima facie evidence that he caused that vehicle to be operated. Now, that is prima facie only, and it isn't conclusive. You may take it into consideration in determining the guilt or the innocence of this respondent, but, in the final analysis, in spite of this provision of the law,

you must be satisfied that the respondent is guilty of this crime."

The court in general instruction had already instructed the jury in this particular as follows: "What constitutes 'caused to be operated'? And this is where counsel part on the law. This is where they make different interpretations of the statute. And I am going to instruct this jury as a matter of law, in this case, that if you find that the respondent was the owner of the vehicle with a Public Utility permit, and that he furnished the driver and let the truck and the driver out, so to speak, for hire to another with the knowledge that lumber belonging to that other person was to be loaded and hauled over the highways of the State of Maine to another State, the owner of that vehicle, under those circumstances, had the responsibility of ascertaining that the truck was not overloaded. If the truck was overloaded, then the owner who let the truck and driver, if you find that the truck and driver was let under those circumstances, is responsible under the law of this State; and that responsibility cannot be avoided by giving to another person by a contract or by an agreement the duty or the right to load the vehicle and to direct the respondent's driver in the matter of the movement of the vehicle." This was a sufficient general instruction.

Our court states that when an instruction is given, the court is not bound to repeat, or restate, anything which was substantially and properly given. *State* v. *McKracken,* 141 Me. 194; *State* v. *Cox,* 138 Me. 151 and the court is not required to adopt language suggested by counsel. *State* v. *Knight,* 43 Me. 11; *State* v. *Williams,* 76 Me. 480. Further instruction request No. 5 was properly denied.

The court properly instructed the jury as to the meaning and full purport of the term prima facie evidence. There was no misunderstanding by the jury of the facts under the

law so clearly given. The requested instructions except as modified were properly refused. The court is not bound to repeat by request instruction already given, in fact there is a chance that in so doing the subject might be over emphasized to the jury.

During the course of trial exceptions were noted by the respondent in matter of objection to certain evidence, these exceptions were not urged in respondent's bill of exceptions.

The rulings of the presiding justice were correct, the request of the respondent for specific instructions were properly denied. The entry is

Exceptions overruled.
Judgment for the State.

DELAWARE FEED STORES
vs.
FIRST AUBURN TRUST COMPANY

Cumberland. Opinion, January 13, 1956.

Exceptions. Contracts. Promises. Guarantee. Statute of Frauds.

Where a single justice makes no specific findings of fact in finding for plaintiff, the defendant's exceptions must be overruled if from the record a path leading to liability may be found.

In ascertaining to whom credit was extended, the intention of the parties must govern, and the question is always, what the parties mutually understood by the language and whether they understood it to be a collateral or a direct promise.

ON EXCEPTIONS.

This is an action of assumpsit before the Law Court upon exceptions by defendant to findings by a single justice. Exceptions overruled.

Preti & Preti,
Sidney W. Wernick, for plaintiff.

John G. Marshall, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, BELIVEAU, TAPLEY, JJ. WEBBER AND CLARKE, JJ., did not sit.

WILLIAMSON, J. This is an action in assumpsit by a feed store to recover a balance due for grain delivered at the Bishop Poultry Farm and there used to feed a flock mortgaged to the defendant bank. The presiding justice in the Superior Court who heard the case without a jury and with right to except in matters of law reserved, found for the plaintiff for the balance of the account with interest, or $1933.85. Exceptions by the defendant are overruled.

The decision turns upon the meaning and effect of an agreement between the plaintiff and the defendant made by their attorneys. Broadly stated, the issue is whether there was any evidence of probative value from which the presiding justice could find liability either for unjust enrichment or upon an implied contract under the money count for goods sold and delivered. The plaintiff denies that it seeks to recover on a guaranty by the defendant to pay the debt of another.

The presiding justice made no specific findings of fact and gave no reasons for his decision. If from the record there may be found a path leading to liability on either of the stated grounds, the exceptions must be overruled. In our view of the case it is necessary to consider only the exceptions charging error in basing liability upon an implied contract.

The familiar rule of *Sanfacon* v. *Gagnon,* 132 Me. 111, 167 A. 695 (1933) is applicable. The court said, at page 113 (citations omitted):

> "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. . . 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."

In brief and without detail the presiding justice could have found the following facts:

On May 18, 1954 at a meeting attended by representatives of Delaware Mills, the National Bank of Commerce and the defendant, three of the largest creditors of Mr. Bishop, it was arranged that Mr. Bishop would make an assignment for the benefit of creditors in an attempt to avoid bankruptcy. The plan called for the continued operation of the poultry farm by trustees; namely, Mr. Preti, attorney for Delaware Mills and the plaintiff, Mr. Despins, attorney for the defendant bank, and Mr. Hinckley, attorney for the National Bank of Commerce. It was known that Delaware Mills on May 17 had made a real estate attachment covering the Bishop farm. There appears to have been some confusion between Delaware Mills (a Delaware corporation) and the plaintiff Delaware Feed Stores (a Maine corporation) arising from the similarity of names. The confusion, however, in no way affects the issues before us. From this point Mr. Preti and Mr. Despins become the principal actors with full authority to speak and act for their clients.

By agreement of the interested parties Mr. Preti prepared the assignment and, after it was executed by Mr. and Mrs. Bishop, conferred in Auburn on May 20 with Mr. Despins and Mr. Marshall, attorneys for the defendant. In the course of the conference the attorneys came to the conclusion that Mr. Bishop, as a poultry farmer, could not be put

into involuntary bankruptcy. The real estate attachment by Delaware Mills at once became an important factor. In light of this new information Mr. Preti would not agree to discharge the attachment, and the defendant's attorneys indicated that the bank might not join in the assignment. No decision by the bank was reached at the meeting and the draft of the assignment was left with its attorneys.

On the same day Mr. Bishop's attorney notified the three proposed trustees "that there was grain enough on the premises at the Bishop farm in Gray to last only through May 21, 1954." This information was contained in a letter delivered to Mr. Preti and reached Mr. Despins from Mr. Preti on the 21st.

We come to the agreement on which the case rests made on May 21 by Mr. Preti and Mr. Despins by telephone. For our purposes the oral agreement is sufficiently set forth by Mr. Preti in a letter to Mr. Marshall on June 10, as follows:

> "As a result of our recent phone conversation (June 10th) with regard to the First Auburn Trust Company having guaranteed the credit given to Mr. Despins, myself and Mr. Hinckley as Trustees under the assignment during the period from May 21 to June 2 inclusive, I called Mr. Despins by phone and confirmed the fact with him that I had originally (that is on May 21) on behalf of the Trustees agreed with Mr. Despins that he, as a Trustee, together with Mr. Hinckley and myself, would run an open account with Delaware Feed Stores in South Portland for the purpose of buying feed at Bishop Poultry Farm.
>
> "I explained to Mr. Despins at the time of this first conversation that I had discussed with Delaware Feed Stores the fact that no monies, or at least not sufficient monies, would come into the hands of the Trustees for at least ten days with which to pay this open account. I further discussed with Mr. Despins that because of the instability of

> the entire transaction Delaware Feed Stores required as a condition precedent to credit to the Trustees the guarantee of the First Auburn Trust Company of the Trustees' account with Delaware Feed Stores. Mr. Despins, during our recent phone call confirmed the fact that he had called the bank at my request and received their confirmation that they would guarantee the Trustees' account and that he immediately called me by telephone and informed me of this guarantee, whereupon I called Delaware Feed Stores and told them that with this guarantee they could extend credit service to the Trustees."

On the strength of this agreement the plaintiff delivered grain at the Bishop farm from May 21 to June 2. The charge of $2389.35 represented the fair market value of and a reasonable charge for the grain. The farm remained in the possession and control of Mr. Bishop, and after June 2 he furnished the grain.

The assignment for the benefit of the creditors was not completed and never became effective. On June 10 Mr. Preti learned that the defendant would not join and this ended the proposal for an assignment. On the same day he received $704.88 from Mr. Bishop's attorney coming from monies received by Mr. Despins as Trustee from sales from the farm. After deduction of charges for preparation of the papers, Mr. Preti caused the balance of $529.88 to be credited by the plaintiff on the grain account. No further payments on the account were made by Mr. Bishop or his attorney.

In writing to Mr. Despins on July 3rd, Mr. Preti said, in part: "Of course, Delaware Feed Stores never intended to look to Mr. Bishop on *this* account but only to the Trustees and in the event of their default, to the bank which guaranteed it." Again on August 10 Mr. Preti wrote Mr. Despins: "Since it is obvious that the Trustees have no further funds

and the trust is completely out of the question and will probably never come into existence again I, representing Delaware Feed Stores must now look to the guarantor, namely the First Auburn Trust Company in accordance with your agreement with me at the time that said account was guaranteed."

The defendant's position in substance is that the agreement between the plaintiff and the defendant was at most to pay the deficiency in the account of the trustees conditional upon the trustees qualifying under a completed and effective assignment for the benefit of creditors. To use Mr. Despins' words in a letter to Mr. Preti: ". . . you seem to have overlooked the fact that the agreement of the First Auburn Trust Company to guarantee the trustees' account with the Delaware Feed Stores was predicated on the assignment for the benefit of creditors going through." It is unnecessary in our view to discuss other objections touching the legal sufficiency of such a guaranty based on asserted lack of acceptance and notice of extension of credit by the plaintiff and on the application of the Statute of Frauds. R. S., c. 119, § 1-II (1954).

Without question, the words of the May 21st agreement are words commonly found in a guaranty. It was at least the hope of the parties that the grain bill would be paid from the income of the business and not by the defendant. It does not necessarily follow, however, that the agreement was a collateral undertaking to guarantee the debt of another and was not the proper basis of an implied contract for purchase of the grain.

The fact finder must seek and give effect to the intention of the parties.

> "In ascertaining to whom credit was extended, the intention of the parties must govern. This intention should be ascertained from the words used

> in making the promise, the situation of the parties, and all the circumstances surrounding the transaction. The real character of the promise does not depend altogether on the form of expression, but largely on the situation of the parties; and the question is, always, what the parties mutually understood by the language, whether they understood it to be a collateral or a direct promise."

The Hines & Smith Co. v. *Green,* 121 Me. 478, 480, 118 A. 296, 297 (1922). See also *Drummond and Hospital* v. *Pillsbury,* 130 Me. 406, 156 A. 806 (1931); *Davis* v. *Patrick,* 141 U. S. 479 (1891); *Duca* v. *Lord,* 331 Mass. 51, 117 N. E. (2nd) 145 (1953); 49 Am. Jur., Statute of Frauds §§ 65, 90-95; 37 C. J. S. Frauds, Statute of §§ 14-16.

The question is whether the promise of the defendant was an original or collateral undertaking. Did the defendant promise to pay the primary liability of another? If so, the undertaking was collateral and a guaranty. Or did the defendant incur a direct and primary liability for the grain?

There are several considerations based on evidence of probative value which may have led the presiding justice to his decision.

First: The agreement was made with relation to the existing need for grain that very day. Without grain the Bishop Poultry Farm would cease operations.

Second: The agreement was not conditional upon the assignment becoming effective. No such condition was stated in the telephone conversations of May 21. At that time the defendant held the assignment and had not determined whether it would join therein.

Third: Surely it was fairly the intention of the plaintiff and the defendant that someone would be primarily liable for the purchases of grain from May 21 to June 2 upon delivery. The defendant was not taking the risk that the as-

signment would be completed, or that the prospective trustees would later become legally qualified trustees with authority to utilize funds for payment of the account.

Fourth: The fact that the grain was charged to the prospective trustees was not conclusive evidence that credit was extended to them. The entry was subject to explanation and was explained by Mr. Preti. See *The Hines & Smith Co.* v. *Green, supra.*

Fifth: The trustees at no time became liable for the account either as trustees or personally. They were never legally qualified trustees for the assignment creating the trust did not become effective. There is no suggestion that the plaintiff or defendant (or Mr. Preti or Mr. Despins, acting for the parties) intended that the trustees or any of them should have any personal liability in the matter. Mr. Hinckley, the third prospective trustee, indeed does not appear to have had any knowledge of the May 21st agreement. He was informed of the need for grain and there apparently his knowledge ended.

Sixth: Mr. Bishop admittedly was not liable for the grain.

Seventh: With the exclusion of Mr. Bishop and the Trustees, there remains no one with a primary liability for the grain to which the promise of the defendant could be collateral. Hence the defendant was primarily or directly liable therefor.

In *Duca* v. *Lord, supra,* the Massachusetts Court discusses the principles governing the case at bar. The plaintiff made repairs on library property in addition to the requirements of a written contract with the trustees on the oral promise of Deferrari, who directed the work, that "If the library doesn't pay you I will pay you."

The court held the promise was not within the Statute of Frauds for lack of a primary obligation, citing among other authorities Williston on Contracts § 454 (rev. ed.) and Restatement, Contracts § 180. "In short there was no obligation on the part of the trustees to which Deferrari's promise could be secondary." Then turning to the question of the mutual understanding of the parties the court, in affirming judgment for the plaintiff said:

> "Nor is this a case where the parties intended that unless such a primary obligation came into existence there was to be no liability on the part of Deferrari. We think the true situation was that both parties hoped that the trustees would assume the obligation but if that hope was not realized then, in any event, Deferrari was to pay for the extra work."

Mountstephen v. *Lakeman,* L. R. 7 Q. B. 196 (1871), affirmed in L. R. 7 H. L. 17 (1874), is a leading English case on the issues before us. The plaintiff had been employed to construct a main sewer by a local board of health of which the defendant was chairman. On defendant's request that the plaintiff make certain sewer connections with houses, the plaintiff said, "I have none (no objections), if you or the board will order the work, or become responsible for the payment." The defendant replied, "Go on and do the work, and I will see you paid." The plaintiff did the work but the board, alleging that no orders had been given for the work, declined to pay. Justice Willes said, at page 201:

> "But it was competent to a jury to find,—and I need go no further than that, though I think it would have been the proper conclusion to draw,—that the meaning of the answer of the defendant was not 'I will be liable as surety for the board, if they become liable to you,' making the contract one of suretyship; but 'Whether the board be liable or not, do the work and you shall be paid;' that is, 'I undertake to pay you for the work, unless you

> should happen to be paid either by the board or by the owners, assuming they come forward and pay, though they are not liable.' That appears to me to be the result of the conversation. It is a bargain, therefore, by the defendant to pay for the work, though it was known that there was no person liable at the time, and whether a third person should become liable in future or not, that is, whether or not there was, or might be, a third person who could be liable for a debt, or guilty of a default or miscarriage in the matter. And it is only in respect of such a third person that the Statute of Frauds applies."

In *Doyle* v. *White,* 26 Me. 341 (1846) the plaintiff refused to deliver rock to X under his contract on X's credit. The defendant said, "You bring the rock and I will see you paid for it." The promise was found to be a guaranty and within the statute. The importance of the case to us is that whether the promise was original or collateral was a question of fact for the jury. See also *Hammond Coal Co.* v. *Lewis,* 248 Mass. 499, 143 N. E. 309 (1924).

On close examination of the defendant's promise in the frame of the existing situation, the reasons for the decision of the presiding justice become clear. If the promise when made had value for the plaintiff, as of course was intended, it covered the purchase of grain in the event the assignment did not become effective. There is no sufficient ground advanced for disturbing the action below.

The entry will be

Exceptions overruled.

PAUL N. DWYER, PETITIONER
vs.
STATE OF MAINE

Oxford. Opinion, January 17, 1956.

Coram Nobis. Writ of Error. Due Process. Sentence. Habeas Corpus. Statutes. Venue.

A writ of error *coram nobis* is available under Maine practice to attack a criminal judgment for errors of fact not known or not appearing at the time, and not apparent of record, which if known would have prevented the judgment—it reaches a deprivation of constitutional rights, both State and Federal, before, at, and during trial.

Habeas Corpus lies generally speaking, to test the jurisdiction of the court (1) over the crime and (2) over the person, and if jurisdiction is found it is the duty of the court to remand the prisoner.

R. S., 1954, Chap. 129, Sec. 9, relates to criminal as well as civil proceedings even though the revisor of statutes has placed it with certain other sections relating to civil cases ("the proceedings upon writs of error, not herein provided for, shall be according to the common law as modified by the practice and usage in the state and the general rules of court").

Coram Nobis is a part of the procedural law of Maine under Art. X, Sec. 3, Constitution of Maine.

Art. I, Sec. 6 of the Constitution of Maine incorporates the process and proceedings of the common law.

Coram Nobis may be petitioned for in the Superior Court where the conviction was had, or judgment rendered, in the case, and where the record is.

R. S., 1954, Chap. 148, Sec. 32 gives authority to a Justice of the Supreme Judicial Court *only* to remand for errors in *sentence*. *Coram Nobis* may relate to an error in adjudication.

A writ of *error coram nobis* should contain the alleged errors of fact. At the hearing the petitioner should show (1) the existing record and (2) proof of the errors alleged.

Coram Nobis cannot be used (1) to revise a decision made by a court or jury, (2) as a substitute for an appeal, (3) as a substitute for a motion for new trial for newly discovered evidence, (4) to support a claim that the record is false and (5) to contradict the record at the original trial. It is limited to errors of fact which if known at the time of the original trial would have prevented judgment.

Coram Nobis must be proved by a preponderance of the evidence—there is no presumption of innocence and the original decision must be judgment affirmed or recalled.

If a judgment is recalled the case is placed in the same situation as it was before the judgment was entered.

ON REPORT.

This is a writ of error *coram nobis* before the Law Court upon report and agreed statement from the Superior Court. Case remanded to Superior Court for action on pending petition for writ of error *coram nobis.*

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

Frank F. Harding, Atty. Gen.,
Roger A. Putnam, Asst. Atty. Gen., for defendant.

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

FELLOWS, C. J. This is a petition filed at the November term, 1955, of the Superior Court for Oxford County, asking that a writ of error *coram nobis* issue; that a hearing be had on the writ, and that the petitioner's plea of guilty to an indictment for murder, made at the November term, 1937, of said Superior Court, be stricken from the record. Questions of law having arisen as to whether the court has the jurisdiction to hear such a petition, and to issue the writ of error *coram nobis* thereon, and the parties agreeing thereto, the presiding justice ordered the case reported to

the Law Court for decision. The order of the presiding justice states that "if the Law Court is of the opinion that this court has the jurisdiction to entertain this petition, this matter to stand for hearing on the petition," and if the court does not have jurisdiction, the petition to be dismissed.

The claims of the petitioner, Paul N. Dwyer, as alleged in this petition for the writ of error *coram nobis*, are "that your petitioner was indicted by the Grand Jury of the County of Oxford on November 5, 1937 for the murder of one Dr. Littlefield; that after a plea of not guilty had been entered by your petitioner and a jury trial had been commenced, your petitioner, under conditions hereinafter related, changed his plea to guilty; that the plea of guilty to murder was accepted by the court; that he was subsequently sentenced on December 2, 1937 to the State Prison at Thomaston for a life sentence; that your petitioner has for the eighteen years since said date, and currently is, serving this sentence at said prison."

"That your petitioner was coerced into making a plea of guilty by duress and threats of violence by one Francis M. Carroll, an official of the State of Maine, viz., a Deputy Sheriff of Oxford County duly appointed according to law, subsequently convicted by a jury of his peers for the crime to which your petitioner pleaded guilty."

"The duress involved was the culmination of a long series of events which effectively deprived your petitioner, then a minor of seventeen years of age, of independent action when he felt himself under the immediate control of the said Francis M. Carroll."

"The period preceding the actual murder of Dr. Littlefield was marked by several instances where Francis M. Carroll imposed his will upon your petitioner. In the winter of 1936 the said Carroll with threats of physical violence

and by other intimidations coerced your petitioner into typing certain threatening letters to one George R. Morton, president of a manufacturing concern in South Paris, Maine for the purpose of frightening the said Morton into hiring Francis Carroll for a guard's position."

"Again on October 7, 1937 the said Carroll threatened to 'ruin' your petitioner and his mother unless certain letters incriminating Francis M. Carroll of the crime of incest in the possession of your petitioner were relinquished to Carroll."

"Your petitioner states that the dominance over him by Francis M. Carroll was heightened by the threats of Carroll to destroy the romance between your petitioner and Barbara Carroll, and by the emotional shock of witnessing the murders of Dr. and Mrs. Littlefield."

"During the period between the murder of Dr. Littlefield and the arrest of your petitioner, there were many direct threats to the lives of your petitioner and his mother by Francis Carroll. Your petitioner believed and was reasonable in believing that Carroll was able to, and intended to, carry out his threats against your petitioner and those dear to him."

"After your petitioner's arrest he made efforts to keep from being returned to the custody of the said Carroll by deliberately confessing to crimes which he did not commit in order to place the crimes in jurisdictions other than Oxford County."

Your petitioner alleges that the effect of the combined threats, intimidations, influences, etc., resulting in the following events, such as causing him in the winter of 1936 to type the threatening "Morton" letters; causing him to betray confidences; on October 10, 1937, forcing the surrender of incriminating evidence of Carroll's criminal acts upon

his children; on October 15, 1937, causing the making of false statements in New Jersey and New Gloucester; on October 17, 1937, forcing him to utter the false story of robbers and narcotics rings at Augusta State Hospital; forcing him to recant his assertions to his attorney, Abbott; finally culminated on December 1, 1937 in the forcing from your petitioner a plea of guilty to a crime which your petitioner did not commit and of which he is entirely innocent."

"Wherefore your petitioner prays; that a writ of *coram nobis* issue; that this matter be set for hearing before this Honorable Court as soon as feasible; that the Warden of the State Prison at Thomaston, Maine be ordered to deliver your petitioner at the time and place set for such hearing so that he may be present and testify thereat; and that the aforesaid plea of guilty be stricken from the records of this case and that he be discharged."

The above petition for the writ of error *coram nobis* was signed by the petitioner on September 13, 1955, and his affidavit then taken before a Notary Public.

The petitioner, who has been in prison seventeen years under a life sentence, imposed after his plea of guilty to an indictment for the murder of Dr. Littlefield, seeks to have his plea adjudged void for duress under the common law writ of error *coram nobis*. The petition discloses the grounds on which the writ is sought. In brief, the petitioner contends that the then deputy sheriff most closely connected with petitioner's surveillance prior to his trial for murder, one Francis Carroll, who was later himself convicted of the same murder by a jury, caused petitioner, although innocent, to plead guilty to avoid harm to himself and his mother.

The error sought to be attacked by the proposed use of the writ is an error of fact, or mixed fact and law, not

known and not appearing at the time of trial, and thus not one of record. Although the writ has sometimes been applied for in criminal cases in the Superior Court of Maine, and the writ of *coram nobis* has issued, the question as to whether or not the remedy still exists in Maine has not been directly decided.

The issues in this case are whether or not the ancient remedy of writ of error *coram nobis* is available to a petitioner who wishes to attack a criminal judgment for errors not known or not appearing at the time, and not apparent of record, which if known would have prevented the judgment, and whether the writ should issue on the petition.

Is the writ of error *coram nobis* a proper procedural remedy for this petitioner, in order to raise in the Courts of this State the question as to deprivation of his constitutional rights, both State and Federal, before, at, and during his trial?

The status of the law on this particular issue is in doubt, and this is the first time that this issue has been clearly presented to the Law Court for determination.

Since the recent advent of Federal review of State criminal proceedings in Maine, the State's position has been (according to the State's brief) that a prisoner in a State penal institution has not exhausted his State remedies until he has asked for a writ of error *coram nobis*. It is the State's position that the prisoner does not necessarily exhaust his State remedies by resorting to habeas corpus.

Habeas corpus was the remedy pursued in this State by one Green (see *Green* v. *Robbins*, 120 Fed. Supp., 61, affirmed in *Robbins* v. *Green*, 218 Fed. (2nd) 192) and is the remedy which is repeatedly used by prisoners. Generally speaking, the writ of habeas corpus will lie to test jurisdiction. It is jurisdiction of two things, (1) of the crime, viz.:

Did the court that tried this case acquire jurisdiction of the crime and does it have jurisdiction over the crime? (2) of the person, viz.: Did the court have jurisdiction of the accused? If these two questions are answered in the affirmative, then the court has the right and duty in habeas corpus to remand the prisoner in execution of his sentence. See *Wallace* v. *White,* 115 Me. 513. It was long ago settled that persons imprisoned on criminal process are not to be released on habeas corpus for defects in matters of form only. The writ of habeas corpus cannot be used as a substitute for a plea in abatement, or a motion to quash. Nor can it be substituted for an appeal. A writ of error may be the proper remedy. An application for the writ of habeas corpus is addressed to the sound discretion of the court; and the writ will not be granted unless the real and substantial justice of the case demands it. *O'Malia* v. *Wentworth,* 65 Me. 129, 132.

As a technical proposition, habeas corpus, dismissed after hearing, is not *res adjudicata* (*Turgeon* v. *Bean,* 109 Me. 189), but as a *practical* proposition it does so operate. After one judge has dismissed a petition, or dismissed the writ, and the same petitioner files the same or similar petition to the same or another judge, the first decision (if known by the presiding justice) will generally be followed and dismissal ordered. Dismissal of the writ of habeas corpus has also been properly ordered by a judge in habeas corpus proceedings, when a writ of error was more suitable.

The U. S. Supreme Court has pointed out many times that there should be a post conviction procedure within the various states which will be broad enough to cover all deprivations of constitutional rights under the Federal Constitution, and it is well to note that a writ of error *coram nobis* has been accepted by the U. S. Supreme Court as an appropriate post conviction remedy. *Hysler* v. *Florida,* 315 U. S. 411, 62 S. Ct., 688, 86 L. Ed., 932.

Coram nobis—from the Latin *quae coram nobis resident* (which remain with us), so called from the writ being founded on the record and process which are stated in the writ to remain in the court of the king (with us). Tidd's Pr. 2, 1136. See *Fugate* v. *State,* 85 Miss. 94, 37 So. 554, 107 Am. St. Rep. 268, 3 Ann. Cas. 326 for the history of the writ and its use. See also *Sanders* v. *State,* 85 Ind. 318, 44 American Reports, 29 (duress), *Collins* v. *State,* 66 Kan. 201, 97 American State Rep. 361 and note.

Such a writ, therefore, as to form, differs from an ordinary writ of error in two particulars (1) it contains no certiorari clause, for there is no record to be certified, and (2) it has no return day, as it is in the nature of a commission to the trial court to correct error. It also differs in substance from an ordinary writ of error in that it is not issued to correct errors of *law* but errors of *fact* in respect to matters which affect the validity and regularity of the proceedings. Its object is not to correct errors that have arisen through any fault of the court, but to correct the record in matters of fact existing at the time of the pronouncement of the judgment, in respect of which the court was unadvised, whereas, had it been advised, the judgment would not have been pronounced. Standard Encyclopedia of Procedure, Vol. 26, page 601-602; *Collins* v. *State,* 66 Kan. 201, 71 Pac. 251 and long note to this case as reported in 97 Am. State Rep. 362. For forms of writs of error *coram nobis* as used in other jurisdictions, see Ency. of Forms, Vol. 7, page 711, Standard Ency. of Procedure, Vol. 9 "Forms," page 1294. For form of writ of error and pleadings in Maine (under the statute) see *Galeo, Plaintiff in Error* v. *State,* 107 Me. 474, 476.

As Eli Frank points out in his recent book on *coram nobis* (Common Law—Federal—Statutory 1953) the writ was devised to provide a remedy to seek redress for an error in fact unknown at the time of trial. Frank speaks of the writ

as a "long quiescent remedy, admirably adapted to fulfill a role in keeping with the multitudinous decisions handed down by the Supreme Court in the past twenty years in which due process has been affirmed and expanded as one of the bulwarks of American liberty."

There was a slight distinction between *coram nobis* and *coram vobis* at common law. Originating in the sixteenth century, *coram nobis* was a vehicle for reversing a judgment in King's Bench, where the record remained, whereas *coram vobis* was used to correct an error in another court by ordering that court to send the record and process to King's Bench for examination and judgment. See *Atkinson* v. *People's National Bank of Waterville*, 85 Me. 368 (1893); Standard Ency. of Procedure, "Writs of Error," Vol. 26, page 601 and cases there cited; Frank on Coram Nobis, pages 1-4.

The statutory writs of error, frequently used in civil and criminal cases in Maine, are provided for in Revised Statutes (1954), Chapter 129. The material portions of Sections 11 and 12 are as follows:

Sec. 11

> "No writ of error upon a judgment for an offense punishable by imprisonment for life shall issue, unless allowed by a justice of the supreme judicial court or of the superior court after notice to the attorney general or other attorney for the state."

Sec. 12

> "Writs of error shall issue of course upon all other judgments in criminal cases, and applications for the same shall be made to the supreme judicial court or to the superior court in the county where the restraint exists, if in session; if not in session, to a justice of either of said courts. Such court or such justice thereof in vacation, may make such order as the case requires

> for the custody of the plaintiff in error or for letting him to bail; and when issued by the court, it shall be returnable thereto; but when issued by a justice thereof in vacation, it may be returnable before a justice of said court and be heard and determined by him, or returnable to said court; or upon a writ of habeas corpus, if entitled thereto, he may procure his discharge by giving bail."

These two sections of the statute, when this statute has been invoked, have been construed to apply to those errors that appear upon the face of the record. *Nissenbaum* v. *State,* 135 Me. 393; *Smith, Petr.,* 142 Me. 1; *Jenness* v. *State,* 144 Me. 40; *Kaye* v. *State,* 145 Me. 103; *Smith* v. *State,* 145 Me. 313; *Mullen, Petr.,* 146 Me. 191; *Ingerson* v. *State,* 146 Me. 412. In the foregoing cases, the writ of error *coram nobis* was not petitioned for. The writ of error asked for was the statutory writ of error.

Revised Statutes 1954, Chapter 129, Section 9, however, provides as follows: "The proceedings upon writs of error, not herein provided for, shall be according to the common law as modified by the practice and usage in the state and the general rules of court." The fact that this Section 9 has been placed, by the revisors of the statutes, with certain other sections relating to civil cases, renders it no less effective in criminal cases. It is not restricted by its terms, and is applicable to cases civil or criminal.

A divorce case where a writ of error was brought, which contained factual allegation of insanity outside the record, is *Preston* v. *Reed,* 141 Me. 386. The court held that divorce was not "a civil action" and suggested that the remedy should be a petition for annulment. The court say relative to writs of error: "The course of the common law as to writs of error does not appear to have been changed by practice or usage in the state, or by any of the general rules of court."

A writ of error *coram nobis* was originally, and now is, a part of the procedural law of Maine. Article X, Section 3 of the Constitution of Maine states: "All laws now in force in this state, and not repugnant to this constitution, shall remain, and be in force, until altered or repealed by the legislature, or shall expire by their own limitation."

In 1820, when Maine became a state, this article in the Constitution of Maine effectively incorporated all "laws" then in force. Whether the word "law" refers to Massachusetts law or to the common law is immaterial, for by either standard a writ of error *coram nobis* was then recognized as a remedy. *Coram nobis* was recognized by Massachusetts courts until the Massachusetts writ of error statute was passed in 1836, and since that time Massachusetts' cases reflect the opinion that there is no writ in Massachusetts other than those prescribed by statute. See *Com.* v. *Sacco,* 261 Mass. 12, 158 N. E. 167; *Com.* v. *Phelan,* 271 Mass. 21, 171 N. E. 53.

Article 1, Section 6 of the Maine Constitution, however, guarantees a person against deprivation of life, liberty, property or privileges, except by "judgment of his peers or the law of the land." The later phrase, it has often been recognized, incorporates the process and proceedings of the common law. *State* v. *Learned,* 47 Me. 426, 432; *Saco* v. *Wentworth,* 37 Me. 165, 171.

The writ of error *coram nobis* is found in many early Maine cases which recognize this writ. See *Jewett* v. *Hodgdon,* 2 Me. 335 (1823); *Towle* v. *Marrett,* 3 Me. 22 (1824); *Robbins* v. *Bacon,* 3 Me. 346 (1825); *Inhabitants of Cumberland* v. *Prince,* 6 Me. 408 (1830); *King* v. *Robinson,* 33 Me. 114; *Denison* v. *Portland Co.,* 60 Me. 519, 522.

There is no statute that prohibits, limits, or prevents the use of the writ of error *coram nobis.* We find no case in Maine, and no case has been called to our attention, where

the writ of error *coram nobis* has been petitioned for in Maine and has been denied on the ground that its use is not authorized by law. In fact, we know that writs of error *coram nobis* have been occasionally issued in the Superior Court in recent years, because of decisions in the U. S. Supreme Court, except the case at bar, no case has come before this court as a Law Court for decision. An examination of the recent cases in Maine, involving writs of error, show that they were writs of error brought under the statute, and the common law writ of error *coram nobis* was not asked for.

We hold, therefore, that a writ of error *coram nobis* may be petitioned for in the Superior Court in the county where conviction was had, or judgment rendered, in the case, and where the record is. If the petition is in proper form and the petition shows on its face a valid cause (when or if proved by the petitioner at a hearing on the writ), the court should order the writ of error *coram nobis* to issue and hearing should be had thereon. See (Certiorari) *Brooks* v. *Clifford,* 144 Me. 370; (Mandamus) *Hamlin* v. *Higgins,* 102 Me. 510.

Under the common law the petition for writ of error *coram nobis* was directed to the judge who presided at the original trial, if he was then in office. The petition should now be directed to the Superior Court, if the judgment was rendered in the Superior Court, because the hearing on the writ of error *coram nobis* must be held in the county where the record is. It is a part of the original case, and a part of the record. The prisoner in the criminal case is then in court where he was tried and convicted, and the court, if it grants the relief claimed, has by the petitioner's own action reacquired jurisdiction for correction of any error, or for a new trial on the original indictment or complaint.

A further reason for holding that application for the writ of error *coram nobis* should be directed to the Superior Court, is that Revised Statutes, Chapter 148, Section 32 gives authority to a Justice of the Supreme Judicial Court only to remand for error in *sentence.* A judgment in writ of error *coram nobis* might not be in sentence but in the adjudication. There is no statutory authority at present to remand from one court to the Superior Court except for error in sentence. At common law there is no authority to remand to another court. *Shepherd* v. *Com.*, 2 Met. (Mass.), 419. Therefore, a Justice of the Supreme Judicial Court, under the existing statute, should not be asked to act.

The constitutional rights of the individual are our most cherished and most important possessions. The rights of an American citizen, and all those who dwell with us, are guaranteed by Federal and State Constitutions. They are what we live by and what we must continually fight for. "Life, liberty and the pursuit of happiness" depend entirely on the recognition and maintenance of these rights. The Constitution of Maine demands that "every person for an injury done him in his person, reputation, property or immunities, shall have remedy by due course of law; and right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay." Article I, Section 19, Constitution of Maine. Maine and its people always endeavor to do exact justice under and according to the Constitution and the common and statutory law.

Our Creator was wise in not permitting one person to read the mind of another. Such power would undoubtedly be of invaluable assistance in obtaining the truth, but it would often have unpleasant consequences. We humans must depend on what a man says and what he has apparently done to approximate his knowledge and intent. Then too, reliable witnesses are not always present when a crime is committed. The constitutional ideals of "right and jus-

tice" are, as a result, perhaps impossible to obtain in some instances.

There is usually a legal vehicle in Maine for the individual to seek justice if, or when, he feels that injustice has been "done him in his person, reputation, property or immunities," even though laws may be imperfect and human enforcement difficult. Maine takes pride in attempting to carry out the old maxim that "for every wrong there is a remedy." So in the case at bar, this petitioner has legal opportunity to establish his constitutional rights, if it appears that he has been unjustly deprived of them.

This case presents an unusual feature in that the parties do not disagree. The counsel for petitioner says that the common law writ of error *coram nobis* has not been abolished in Maine, nor has its use been curtailed by statute or decision. To this statement the Attorney General agrees, and says that its use is necessary in order to have it as a post conviction remedy, where constitutional rights may have been violated through facts unknown at the time of conviction.

This court decides that the Superior Court of Maine has jurisdiction to entertain this petition for a writ of error *coram nobis* and to order the writ to issue. When the petition for writ of error *coram nobis* is in proper form and on its face states facts that show a right to the writ, for good and sufficient cause, a justice is authorized to order the writ to issue.

When a writ of error *coram nobis* is issued, it should contain allegation of the errors of fact alleged in the petition. At the hearing on the writ of error *coram nobis* the petitioner must show (1) the existing record and (2) prove the duress, or other valid fact alleged, that shows deprivation of constitutional rights. The proceeding, on the writ, is not to revise a decision made by the court or jury. It is

not an appeal, or a motion for a new trial or newly discovered evidence, or a claim that the original record is false. The proceeding is for the purpose of presenting facts which, if known at the time of trial, would have prevented the judgment from being rendered. The record of the case in which judgment was pronounced is not to be contradicted, the error must be consistent with it. The matter involved in the original trial is not open on writ of error *coram nobis,* but only the questions presented relating to alleged errors of fact, which fact if known at the time of trial would have prevented the judgment from being made.

The decision on the writ of error *coram nobis* is to the effect that the judgment complained of be affirmed or recalled, according as it may be for the state or the petitioner. If the decision is for the petitioner, then the case is placed in the same situation as it was before the judgment was entered. See *Collins* v. *State* (Kan.) reported in 97 American State Reports and extensive note, with many cases cited, re a petition for writ of error *coram nobis,* and the pleading and practice.

Whether the writ of error *coram nobis* should issue on the petition is a question of law. Whether the existing record should be changed is a question of fact to be proved at the hearing on the writ. The petitioner, at the hearing on a writ of error *coram nobis,* is not presumed innocent. The petitioner must, therefore, prove the truth of his allegations to the satisfaction of the presiding justice by a preponderance of evidence.

Case remanded to Superior Court for action on pending petition for writ of error coram nobis.

INHABITANTS OF THE TOWN OF BRUNSWICK
vs.
W. H. HINMAN, INC.

Cumberland. Opinion, January 17, 1956.

Taxation. Statutory Construction.

Provisions omitted from a statutory revision are by that fact repealed.

The deletion from the statutes of the words "and other things" from a definition of real estate which provided it "shall include all lands in the State and all buildings *and other things*" precludes a levy upon a cement silo and batching bin used for highway construction even though such steel structures are bolted to cement piers sunk in the ground.

The opinion of a commissioner appointed to revise the statutes that the revision was made "without essential change of legal intendment" is not a controlling factor since the Legislature demonstrates its own purpose by eliminating certain words.

Personal property is taxable at owner's domicile.

ON EXCEPTIONS.

This is an action to recover taxes before the Law Court upon defendant's exceptions to findings of the presiding justice in favor of plaintiff. Exceptions sustained.

Donald W. Parks, for plaintiff.

Locke, Campbell, Reid & Hebert, for defendant.

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

BELIVEAU, J. On exceptions by the defendant. This is an action to recover taxes assessed on two structures owned by the defendant and situated in the Town of Brunswick on April 1, 1953, on land not owned by it.

The case was tried before a jury but at the close of the evidence it was submitted, by agreement, to the presiding justice. The right to except as to matters of law was reserved by both parties.

The property involved consisted of what is described as a cement silo and a batching bin used by the defendant in connection with the construction of highways in the Brunswick area.

From the testimony and the exhibits it appears that the cement silo and batching bin were steel structures bolted to cement walls or piers sunk some distance in the ground and built for the sole purpose of accommodating these structures.

The justice below ruled that taxation of these two structures was within the contemplation of Section 3, Chapter 81 of the Revsed Statutes of 1944, part of which reads:

> "Real estate, for the purpose of taxation . . . . . shall include all lands in the state and all buildings erected thereon or affixed to the same . . . . . ."

Prior to the revision of 1883 the statute read:

> "Real estate for the purpose of taxation . . . . . shall include all lands in the state and all buildings *and other things* erected on or affixed to the same . . . . . ."

The words, "and other things" were omitted in that revision and were never again made a part of that law prior to the assessment of this tax in 1953. However, the justice below ruled "that such omission did not change the intendment of the statute as revised and that the present part must be read as if those words remained." This was error.

Much is made of the report by the commissioner appointed to revise the 1883 statute, and some reliance is placed by the plaintiff, on his statement, in that report, that the re-

vision was made, "without essential change of legal intendment."

Whatever the commissioner intended to accomplish, the Legislature of 1883 nevertheless omitted the words "and other things" which, in our opinion demonstrates its purpose, to eliminate them. While many revisions have taken place since 1883 the words were never again made a part of that statute. The controlling factor is the action of the Legislature and not the opinion of the commissioner as explained in his report.

The statute as it now exists requires no interpretation and what we are asked to do, in fact, is to add to it. This is legislation and is wholly within the province of the Legislature. During the period of about 70 years the Legislature failed or refused to amend this law by adding the words omitted in the 1883 revision.

Our court has held that provisions omitted from a revision are by that fact repealed. *McIntire* v. *McIntire,* 130 Me. at page 334.

The property involved was personal and was taxable in the town in which the defendant had its domicile, to wit: Anson.

Exceptions sustained.

W. M. WILEY, D/B/A FAIRMOUNT MARKET
vs.
SAMPSON-RIPLEY COMPANY

Penobscot. Opinion, January 19, 1956.

Unfair Sales Act. Sales. R. S., 1954, Chap. 184. Police Power. Statutory Construction. Due Process. Injunctions. Prima Facie.

Laws which prohibit the sale of merchandise below cost, are not valid, where the only purpose is to make such sales illegal.

The Unfair Sales Act which makes sales below cost illegal when made *with the intent to injure competitors or destroy competition* is constitutional under the police power.

Law in derogation of the common law must be strictly construed.

The prima facie provisions of R. S., 1954, Chap. 184, Secs. 2, 4 and subsection III of Section 4 are unconstitutional.

A statute creating a presumption that is arbitrary violates the due process clauses of state and federal constitutions.

The Legislature cannot constitutionally declare one fact to be presumptive of another unless a rational connection exists (Webber, J., concurring specially).

ON APPEAL.

This is a bill in equity seeking injunctive relief for violation of the Unfair Sales Act. The case is before the Law Court upon appeal from a decree granting the injunction. Appeal sustained. Bill to be dismissed without costs to either party.

Hough & Guy, for plaintiff.

Robert Preti, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, TAPLEY, JJ. WEBBER, J., concurring specially. CLARKE, J., did not sit.

BELIVEAU, J. Appeal from final decree. This is a Bill in Equity brought by the plaintiff under the self-termed Unfair Sales Act, now Chapter 184 of the Revised Statutes.

The plaintiff in his bill alleges that on the 6th day of August 1954 the defendant advertised, offered and sold Chase & Sanborn coffee at a price of 99c per pound, which cost it $1.07 or 8c less less than the price paid. This is not disputed.

A temporary injunction was issued and later, after full hearing, a permanent injunction granted, restraining the defendant from selling this coffee below cost, if done with intent to injure or destroy competition, excepting sales enumerated in Section 3 of Chapter 184. From this decree the defendant appeals.

The authority, to proceed, as in this case, is found in Subsection 1, Section 4, which provides that

> "Any person damaged or who is threatened with loss or injury by reason of a violation or threatened violation of the provisions of this chapter may bring a bill in equity . . . . . ."

Subsection III of Section 4 makes,

> ". . . proof of any advertisement, offer to sell or sale of any item of merchandise by any retailer or wholesaler at less than cost to him as herein defined shall be prima facie evidence of intent to injure competitors and destroy competition."

Subsection I of Section 4 entitles,

> "the plaintiff to recover from a defendant 3 times the amount of damages sustained and cost of suit including reasonable attorneys' fee."

Several grounds of defense are advanced by the defendant. One is the constitutionality of the act.

It is recognized that laws which prohibit the sale of merchandise below cost, are not valid, where the only purpose is to make such sales illegal.

Fairmont Creamery Co. v. *State of Minnesota,* 274 U. S. 1, 47 Sup. Ct. Rep. 506.

State v. *Packard-Bamberger & Co.,* 123 N.J.L. 180, 8 A. (2nd) 291.

To meet this objection, most uniform sales act, as in our case, make such conduct illegal only when the sale below cost is

> ". . . with intent to injure competitors or destroy competition. . . . . ."

If such intent is not established then there is no violation. This law comes within the well recognized police powers of the State, and has for its purpose the prevention of ruthless, unfair and destructive competition, and to that extent is constitutional.

Carroll v. *Schwartz, et al.,* 14 A. (2nd) 754.

It is recognized by this court and other courts throughout the country, that any law in derogation of the common law must be strictly construed.

Surace v. *Pio,* 112 Me. at 496.

At the time this bill was brought, both parties were engaged in retail grocery business in the city of Bangor. Bangor covers a large area and had in 1950 a reported population of over 31,000; one of the largest cities in this State. While it does not appear in evidence, it must be assumed that many others in that city were engaged in the retail grocery business. The plaintiff carried on a humble business and part of that business was the sale of coffee. Coffee, so the defendant says, was one of some 6,000 items carried in

its store for retail purposes. According to the defense testimony the sale below cost was confined to Chase & Sanborn coffee and was to last for a period of three days. This testimony is uncontradicted.

It is not contended by the plaintiff that the defendant in its proposed sale of coffee had any particular retailer in mind, or that the effect on the plaintiff would be different from that felt by all other grocers doing business in Bangor.

The plaintiff testified he could not prove the loss of business because of the defendant's sale of Chase & Sanborn coffee at the price hereinbefore mentioned and without being specific, assumed it would cause him some damage. It is not in evidence that the sale was aimed at causing damage to the plaintiff or had for its purpose to injure other competitors and destroy competition. There is no evidence of ill will, ill feeling or intent, on the part of the defendant, to eliminate or damage the plaintiff as a competitor. Insofar as this case is concerned the defendant did not know of the plaintiff's existence. The distance between the two stores was considerable. As we have said before, the selling below cost, alone, is not a violation of any part of the Unfair Sales Act and is only effective when done

> "with intent to injure competitors or destroy competition."

Under this law the plaintiff was required to make out no more than a prima facie case. This was done and the plaintiff rested. The defendant by necessity was forced to offer a defense and explain the purpose and reason for the sale. This was the only evidence as to what motivated the defendant's action and was not contradicted. The defendant's position is that the sale was not made to injure competitors or destroy competition, and its purpose was to make friends and create good will.

The purpose was legitimate and is not covered by the Unfair Sales Law. It is a practice resorted to by merchants from time immemorial and recognized as proper by the courts and business generally. Where attempts have been made, as we have seen before in this opinion, to prevent it by legislation, such laws have been declared unconstitutional.

If nothing else is involved, a merchant may dispose of his merchandise at such prices as he may see fit to place on his wares.

The defendant's explanation or reasons for the sale of coffee below cost was explained, as we have said before, by William Ripley, President of the defendant corporation, and the only conclusion to be reached is that the so-called sale was proper and legitimate and not a violation of the act.

While we hold that the Unfair Sales Act is constitutional insofar as it seeks to prevent unfair competition and to that extent comes within the police powers of the State, we rule that the prima facie provisions of Section 2 (criminal prosecution), Section 4 (injunctive relief) and Subsection III of Section 4 (prima facie evidence, in civil actions, of intent to injure competitors and destroy competition) are unconstitutional.

In a criminal prosecution the prima facie rule established by this statute lifts from the shoulders of the State the burden of proving the crime, and has, in fact, the practical effect of removing the presumption of innocence and creating a presumption of guilt which the defendant must rebut or disprove in order to escape conviction. This is wholly contrary to, and destructive of well known law that one accused of crime is presumed innocent until proven guilty and that the State must prove beyond a reasonable doubt every ele-

ment of the crime necessary to show violation and secure conviction.

The U. S. Supreme Court passed on the prima facie provision of a California law which prohibited an alien, who was neither a citizen nor eligible for citizenship, from occupying land for agricultural purposes and made such occupancy a crime. It further provided that when such occupancy was proven by the State and the indictment alleged alienage and ineligibility for citizenship, a prima facie case was made out and the burden placed on the defendant to show his right to such occupancy. The court said:

> "Possession of agricultural land by one not shown to be ineligible for citizenship is an act that carries with it not even a hint of criminality. To prove such possession without more is to take hardly a step forward in support of an indictment. No such probability of wrongdoing grows out of the naked fact of use or occupation as to awaken a belief that the user or occupier is guilty if he fails to come forward with excuse or explanation."

Morrison v. *People of State of California,* 291 U. S. 82, 54 S. Ct. 281 at P. 285.

> "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions. And the state may not in this way interfere with matters withdrawn from its authority by the Federal Constitution, or subject an accused to conviction for conduct which it is powerless to proscribe."

Bailey v. *Alabama,* 219 U. S. 219, 31 S. C. 145, 55 L.Ed. 191.

> "A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to

which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. *Bailey* v. *Alabama,* 219 U.S. 219, 233 et seq., 31 S. Ct. 145, 55 L. Ed. 191. Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property. 'It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' *McFarland* v. *American Sugar Co.,* 241 U.S. 79, 86, 36 S. Ct. 498, 501 (60 L.Ed. 899)"

Manley v. *State of Georgia,* 279 U. S. 1, 49 S. Ct. 279 U. S. 1, 49 S. Ct. 215, 73 L.Ed. 575.

"It is apparent from this decision of the Supreme Court that in determining the validity of a presumption created by a legislative body, two questions are to be considered; (1) Whether the fact presumed may be fairly inferred from the fact proven; (2) whether the presumption created will be of aid to the state without subjecting the accused to unreasonable hardship or oppression. With respect to the presumption created by the sixth paragraph of section 3 of part 2, we have already pointed out that, in our opinion, the fact of guilty intent is not reasonably to be inferred from the fact of sale at less than 10 per cent. above the cost of the goods. No doubt, the presumption of guilt would be helpful to the state in the prosecution of alleged violators of the statute, but it would be as hurtful to the accused as it would be helpful to the accuser. Intent is something which is easily asserted and hard to disprove. To cast upon a merchant who has sold goods at less than 10 per cent. above their cost, the burden of establishing that the sale was not made with an intent to injure competitors or destroy competition, subjects him to unreasonable hardship. We think the disadvantage to him of the presumption of guilt should be regarded as outweighing the advantage of the presumption to the state."

Great Atlantic & Pacific Tea Co. v. *Ervin,* Fed. Sup. 23, 82.

The proceedings for injunctive relief or for recovery of damages creates a presumption of violation of the statute by merely showing the evidence of a conduct, the sale below cost, which, as we have seen before, is legal, proper and common practice.

While in actions for an injunction or for recovery of treble damages the plaintiff must allege that the defendant acted

> "with intent to injure competitors or destroy competition....."

that fact need not be proved by him as part of his case. In such action, as in a criminal prosecution, the burden is placed on the defendant to satisfy the court that the sale below cost was not a violation of the Unfair Sales Act.

This is clearly contrary to the due process of law clauses of our State and Federal Constitutions.

The appeal is sustained and the bill is to be dismissed without costs to either party.

Appeal sustained.

Bill to be dismissed without costs to either party.

WEBBER, J., CONCURRING

I concur in the result. In the interest primarily of emphasis, I would like to call particular attention to the tests which must be applied in determining the constitutionality of a prima facie presumption.

As the opinion of the court points out, the plaintiff here was unable to offer any direct evidence whatever of any in-

tent on the part of the defendant to injure competitors or destroy competition. The evidence offered by the defendant that it was merely conducting an advertising sale to last not over three days remained uncontradicted and was the only evidence in the case on that issue. The plaintiff did show an advertisement to sell and sales below cost. To supply the missing but essential evidence of wrongful intent, the plaintiff relied entirely on the statutory presumption R. S., 1954, Chap. 184, Sec. 4, Subsec. III quoted in full in the opinion. If this presumption is valid, the plaintiff has put into the case some evidence of wrongful intent and raised a question of fact; if it is not valid, the plaintiff has failed to offer any evidence in proof of an essential element of his case.

The basic issue is then whether or not the statutory presumption survives the test of constitutionality. The test to be applied in such cases was well stated in 20 Am. Jur. 163, Sec. 159 as follows: "A presumption cannot ordinarily be raised from some fact proved unless a rational connection exists between such fact and the ultimate fact presumed. The legislature cannot constitutionally declare one fact to be presumptive evidence of another unless this rational connection exists." Mr. Justice Holmes in *McFarland* v. *American Sugar Co.*, 241 U. S. 79 at 86; 36 S. Ct. 498 at 501 said: "As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.' "

We are familiar with a number of prima facie presumptions created by our own statutes which upon examination will be found to pass the tests of reasonableness and to be founded on common knowledge and experience. The prima

facie effect of certain stated quantities of alcohol found in the blood as set forth in R. S., 1954, Chap. 22, Sec. 150 is firmly based on scientific and medical experience. In *State* v. *Morin,* 102 Me. 290, the statute as it then existed provided in effect that payment of the United States special tax was prima facie evidence that the person paying the tax was a common seller of intoxicating liquors. The court applied the same test of reasonableness and said at page 291: "The process of reasoning, by which guilt may be inferred from this fact, is that it is probable, or, at least, more probable than otherwise, that a person would not pay a tax as a liquor dealer unless he intended to engage in that business, and that consequently it is a proper inference by induction from the fact of such payment that he is engaged in such business." At page 292, the prima facie result is referred to as the inference which may "be ordinarily drawn therefrom." Since the advent of state control of the sale of liquor under proper license, the provision has been altered to read as it now appears in R. S., 1954, Chap. 61, Sec. 84: "Notice of any kind in any place or resort, indicating that liquors are there unlawfully kept, sold or given away shall be held to be prima facie evidence that the person or persons displaying such notice are common sellers of liquors, and that the premises so kept by them are common nuisances." Here again the assumed fact flows normally from the known fact and is in accord with rational probabilities and common knowledge and experience.

When, however, we apply these tests to the presumption under consideration, we are forced to a very different conclusion. One who offers for sale an item at less than cost does not ordinarily intend the destruction of competition. The mere fact that he may be engaged in vigorous but lawful competition is hardly the equivalent of a fixed purpose to create a monopoly. There are too many legitimate reasons which will explain most offerings of articles at less

than cost to permit the assumed wrongful intent as a probable and reasonable inference. It was exactly on this reasoning that the presumption under consideration was declared unconstitutional in *Great Atlantic & Pacific Tea Co.* v. *Ervin,* 23 Fed. Supp. 70. At page 80, the court said: "If all profitless sales of goods were always or were even usually made by merchants for the purpose of injuring their competitors so that it could truly be said that such sales had, in and of themselves, a sinister significance, we would not hesitate to say that the Legislature was within its rights in creating a presumption of sale below cost with wrongful intent. So far as we are aware, however, * * * such sales have not been regarded as indicating an intent to do evil. There are many reasons, aside from a desire to injure competitors, which might induce a merchant to make profitless sales of goods. The statute itself recognizes the right to meet local competition. A sudden necessity of paying claims of importunate creditors might furnish a reason for sales at less than cost * * *. Other similar illustrations are not wanting." And at page 81 the court quoted *McFarland* v. *American Sugar Co., supra* when it stated: " 'The presumption created here has no relation in experience to general facts.' " Our own statutory presumption is practically identical with the one there disposed of as unconstitutional and upon the same reasoning must be held invalid.

In the case before us, the plaintiff, having failed to present any evidence whatever of wrongful intent and being deprived of any reliance upon the prima facie presumption, is not entitled to the injunctive relief which he seeks.

FRANK E. SOUTHARD, JR.
vs.
CAMDEN NATIONAL BANK

Kennebec. Opinion, January 19, 1956.

Trustee Process. Exceptions.

A trustee process is "lifted" within the meaning of an agreement to pay "when the trusteeship is lifted" when the principal action is dismissed for lack of jurisdiction.

The Law Court has no authority to disturb a decision of a presiding justice unless he has made an error in law or unless he had no credible evidence to sustain his findings.

ON EXCEPTIONS.

This is an action on the case before the Law Court upon exceptions to a judgment rendered by the Superior Court upon agreed statement. Exceptions overruled.

McLean, Southard & Hunt, for plaintiff.

Gilbert Harmon,
C. S. Roberts, for defendant.

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

FELLOWS, C. J. This was an action on the case, heard by the presiding justice of the Superior Court for Kennebec County upon agreed facts, and judgment rendered for the plaintiff in the sum of $297.69 with interest in the sum of $39.59. The case now comes to the Law Court on defendant's exceptions.

The agreed facts are, in substance, that one Robert Jacobson had on deposit in the Camden National Bank on March 13, 1948 in a checking account, the sum of $297.69. One

Loren Bennett brought trustee process in the Superior Court for Knox County against Jacobson, with the Camden National Bank as alleged trustee. Jacobson made a check for $297.69 on April 23, 1948 and gave it to the plaintiff Southard, who endorsed it, and presented it to the defendant bank for payment. The check was accepted by the bank, with an agreement in writing made by the bank's cashier, dated April 23, 1948, as follows: "Received of Frank E. Southard Jr. left for collection Check #549 drawn by Robert Jacobson For to be paid when Trusteeship is lifted open check a/c."

The trustee process was dismissed for lack of jurisdiction on May 7, 1948. The trusteeship therefore was "lifted." In fact, there never was a legal process. A second trustee process was commenced on May 7, 1948 and served on the bank, but no service was made on Jacobson. This action was dismissed in November, 1949. Again it was "lifted." The defendant bank still did not pay, as it had agreed.

Bennett then brought another action against Jacobson by trustee process, by writ dated May 20, 1949. This action was returnable to the Rockland Municipal Court, instead of the Superior Court as previously, and the Municipal Court "on suggestion" that Jacobson "was not an inhabitant and had no tenant, agent, or attorney," ordered service on the defendant Jacobson by publication in the Camden Herald. Judgment was rendered in the Municipal Court on July 10, 1950 and execution issued on July 17, 1950, "by mistake," without bond being filed. Revised Statutes 1954, Chapter 113, Sections 5, 6 and 7.

The bank made no disclosure in either process (March 13, 1948 and May 7, 1948) in the Superior Court. The bank paid on the Municipal Court execution, issued "by mistake," the sum of $297.69 on July 25, 1950. Jacobson subsequently

brought action for review against Bennett, securing judgment on November 9, 1951.

The defendant bank received on April 23, 1948 the check for $297.69, made by Jacobson and endorsed by the plaintiff Southard, and the bank promised to pay the amount of the check to the plaintiff "when trusteeship is lifted." On May 7, 1948 the trustee action was dismissed for lack of jurisdiction. It was then "lifted" if it had existed before. The amount of the check should then have been paid by the bank to the plaintiff. The bank, however, did not pay the plaintiff as it had promised.

On May 12, 1948 the cashier of the bank sent the check, which the bank promised to pay when "trusteeship lifted," to the plaintiff, because he said it was not "feasible to hold it." On May 15, 1948 the plaintiff sent the check back to the bank, and the bank acknowledged the return of the check and held the check in its possession.

Another trustee process was served on the bank on May 7, 1948 but no service made against the principal Jacobson. The bank filed no disclosure. This second trustee action was dismissed at the November 1949 term of the Superior Court. Again was "trusteeship lifted" and the bank did not pay. No trustee disclosure was filed. The bank should have paid on May 7, 1948 according to its agreement, and filed disclosure in the later case stating that no money was in its hands, and the reason therefor.

By writ dated May 20, 1949 Bennett brought his third trustee writ, and this time in the Municipal Court. There was no affidavit or other proof to permit service by publication. *Hutchins* v. *Hutchins,* 136 Me. 513; *Leathers* v. *Stewart,* 108 Me. 96; *Spinney* v. *Spinney,* 87 Me. 484, and issuing of execution by "mistake" and without bond *Davis* v. *Stevens,* 57 Me. 593, 599. See Revised Statutes 1954, Chap. 113,

Sec. 7. We do not pass upon the questionable validity of this judgment, because in our view whatever was done in Municipal Court is not material. The liability of the bank became established on or before May 7, 1948. In any event, judgment was on December 14, 1951 rendered in review of the Municipal Court action in Knox County Superior Court in favor of *Robert Jacobson* v. *Loren Bennett* for $306.66.

The Law Court has no authority to disturb a decision of a presiding justice unless he has made an error of law or unless he had no credible evidence to sustain his findings.

The justice presiding was certainly not in error here. We cannot understand how he could do otherwise than to render judgment for the plaintiff under the promise, made by the bank, to pay the check when "trusteeship is lifted." The entry must be

Exceptions overruled.

WARREN M. CHAMPLIN

vs.

EVERETT A. RYER

Kennebec. Opinion, January 20, 1956.

Pleading. Demurrer. Principal and Agent. Joinder. Tort. Contracts. Case. Trover. Amendments. Waiver.

Where money is converted the plaintiff may waive the tort and sue for money had and received.

Trover by a principal against his agent for money not turned over to the principal because "converted to his own use" cannot be maintained.

The duty to pay damages for tort does not imply a promise to pay them upon which assumpsit can be maintained.

Improper joinder of tort and contract must be raised by special demurrer.

Demurrers are general where no particular cause is assigned, and special where the particular defects are pointed out.

A general demurrer will be overruled if any one count in the declaration is good.

After a special demurrer is sustained the case falls within R. S., 1954, Chap. 113, Sec. 38 and 11 relating to amendments.

An action on the case includes assumpsit for breach of contract as well as case for breach of duty.

Where there is an express contract of indemnity and by its terms it contains nothing more than the law would imply, it is optional with the plaintiff to declare in assumpsit for money paid, or upon special contract.

ON EXCEPTIONS.

This is an action of assumpsit before the Law Court upon exceptions by the defendant to the overruling of a special demurrer. Exceptions overruled.

Charles A. Peirce, for plaintiff.

Niehoff & Niehoff, for defendant.

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

FELLOWS, C. J. In this action of assumpsit brought in the Superior Court for Kennebec County, a special demurrer was filed by the defendant and the special demurrer was overruled by the justice presiding. The case is before the Law Court on exceptions to the overruling of the demurrer.

The declaration was as follows: "In a plea of the case for that at said Waterville during the month of October, 1950, and at all times subsequent to said date the plaintiff was engaged in the business of selling insurance under the firm name and style of Warren M. Champlin Agency, being duly licensed and authorized by the State of Maine to conduct said business;"

"That on the 23rd day of October, 1950, the plaintiff entered into a written contract whereby he engaged the defendant to work for him as a sub-agent or broker, a copy of which instrument is attached hereto, marked 'Exhibit A' and made a part of this declaration;"

"That substantial, sufficient and satisfactory performance of said contract was made by both parties until June of 1952 when the defendant commenced a course of conduct, one which breached the said contract, in that he collected premiums for various insurance contracts which he unseasonably retained in violation of Section Two of said contract;"

"That said course of withholding of premiums was continued by the defendant without the plaintiff's knowledge until the first day of June, 1953;"

"That on said first day of June, 1953, the plaintiff discharged the defendant from his employment upon the latter's admission then and there of his wrongful withholding of said insurance premiums;"

"That the premiums retained by defendant as aforesaid amount to the sum of Six Hundred Twenty-six Dollars and Fifty-nine Cents ($626.59), for which said sum, among others, the plaintiff seeks restitution;"

"That from time to time the defendant was overdrawn on his drawing account and on accounting for same at divers times, gave to the plaintiff his promissory notes which remain unpaid and are outstanding as of the date of this writ in the amount of Four Thousand Five Hundred Forty-three Dollars and Seventeen Cents ($4543.17), on which sum the plaintiff seeks judgment in this action among other things;"

"That although the defendant by his own wrongful acts, commencing in June, 1952, as aforesaid, breached the contract of employment dated October 23, 1950, yet he continued in the plaintiff's employ until his breach was discovered on said first day of June, 1953, and that during said period from the first day of July, 1952, to and until the first day of June, 1953, the defendant wrongfully claimed and received as commissions the sum of Three Thousand Eight Hundred Forty-four Dollars and Two Cents ($3844.02), and excessive withdrawals on his drawing account during said period in the amount of Three Hundred Forty-eight Dollars and Sixteen Cents ($348.16), on which sums the plaintiff seeks judgment in this action;"

"That said damages previously mentioned total the sum of Nine Thousand Three Hundred Sixty-one Dollars and Ninety-four Cents ($9361.94), all of which have accrued to the plaintiff by reason of the defendant's violation of said written contract;"

"That in addition to said sum the plaintiff seeks the sum of Two Thousand Dollars ($2000.00), a reasonable amount for the damage occasioned by loss of good will and other business losses caused by the defendant's breach of said contract."

(Note: "Exhibit A" referred to in the first count in the declaration, and made a part of the declaration, was a long contract between the parties providing in substance (1) Defendant Ryer's authority to collect premiums, (2) Ryer's promise to pay premiums collected, (3) Plaintiff Champlin promises to pay Ryer certain commissions, (4) territory for Ryer to cover, (5) Ryer agrees to refund certain commissions ratably, (6) Ryer not to extend time for payment of premiums, (7) sub-agents of Ryer, (8) office space, (9) termination of agreement by death, notice, etc., option to purchase, commissions, etc., (10) sale of business by Champlin—options to Ryer, (11) covenant not to compete in business if Champlin buys out Ryer).

The Second Count was the usual money count for goods bargained and sold, and sold and delivered, work done, materials furnished, money lent, money paid, money had and received, money advanced and money found due, with specifications of amounts due in promissory notes $4,543.17, premiums withheld $626.59, commissions wrongfully paid $3,844.02, and improper withdrawals $348.16.

As a Third Count there was attached a list and description of promissory notes "for value received promised the plaintiff," etc., in the amount of $4,543.17.

The causes set forth in the demurrer filed by the defendant were that "in and by the said declaration in the first count thereof the said plaintiff has declared against the said defendant in tort for conversion of moneys, for breach of contract, and for the pay of notes, and in the second and

third counts thereof the said plaintiff has declared against him in assumpsit; for that there are pretended causes of action different in their natures comprehended and included in the same declaration, and which are incompatible and ought not to be joined in the same declaration, to wit, a cause of action founded upon supposed wrongs and damages as set out in said first and third counts, and a cause of action founded upon an alleged indebtedness as set out in the second, third and first counts."

The plaintiff in his first count of this action seeks to recover premiums collected by defendant which defendant "unseasonably" retained $626.59, promissory notes given to plaintiff by defendant in the amount of $4,543.17, commissions "wrongfully claimed and received" by defendant $3,844.02, excessive withdrawals by defendant on his "drawing" account $348.16, — a total of $9,361.94.

In addition to the foregoing total the plaintiff also "seeks the sum of $2000.00 a reasonable amount for the damage occasioned by loss of good will and other business losses caused by the defendant's breach of said contract."

The second count was the general money counts in assumpsit. The third count was assumpsit for promissory notes described.

The defendant filed a special demurrer which demurrer was overruled, and the defendant was allowed exceptions. The defendant's claims, in support of his special demurrer, are that the plaintiff's declaration sets forth a claim for damages for breach of contract, for wrongful conversion of money of the plaintiff, for overdrawing his drawing account, for failure to account for moneys collected, for amounts due on notes and a general money count with specifications. The defendant contends that this declaration sounds in tort and also in assumpsit, and therefore is bad.

The plaintiff's position is that "his declaration sounds entirely in contract and does not contain a misjoinder" and the plaintiff relies upon *Howe* v. *Clancey,* 53 Me. 130, 132 and *Hazelton* v. *Locke,* 104 Me. 164, 168.

The defendant, on the contrary, relies upon *Prest* v. *Inh. of Farmington,* 117 Me. 348, 352; *Colby* v. *Tarr,* 139 Me. 277, 278; *Allen* v. *Ham,* 63 Me. 532, 535; *Flanders* v. *Cobb,* 88 Me. 488, 494.

The case of *Howe* v. *Clancey,* 53 Me. 130 relied on by the plaintiff, holds that where money is stolen from the plaintiff by the defendant, assumpsit for money had and received is maintainable. The plaintiff may waive tort, or any other wrongful taking and recover in this form of action. See also *Androscoggin Co.* v. *Metcalf,* 65 Me. 40. *Hazelton* v. *Locke* cited by the plaintiff, reported in 104 Me. 164, 168 holds that where the relation of principal and agent exists, and the principal brings an action of trover against the agent for money not turned over to the principal because "converted to his own use," that trover cannot be maintained. The court say that "it might be the ground for an action of assumpsit."

The case of *Prest* v. *Inh. of Farmington,* 117 Me. 348, relied on by defendant, where there was a contract to do certain work at a fixed price, the plaintiff brought assumpsit to recover an alleged balance due, and included a charge for extra labor of men and teams that plaintiff claimed was due because of misrepresentation in character of excavation. The court held that "the duty to pay damages for a tort does not imply a promise to pay them, upon which assumpsit can be maintained." See also *Noyes* v. *Loring,* 55 Me. 408.

Colby v. *Tarr,* 139 Me. 277 holds that the joinder of assumpsit and tort is improper, and improper joinder must be raised by special demurrer. In this case of *Colby* v. *Tarr,*

however, there was no demurrer and at the trial the defendant disregarded the misjoinder, and the money counts were treated as surplusage.

The case of *Allen* v. *Ham,* 63 Me. 532, cited by defendant, was a petition under a statute giving a lien for "feeding" and "sheltering" a horse. The defendant demurred generally, because the petitioner claimed a lien for shoeing and for taxes, as well as for keeping. The court held that it was not necessarily a misjoinder, although there might not be a legal cause of action under the lien statute, and the court further said "with respect to the joinder of counts, one sure test of its propriety is—can the same plea be pleaded and the same kind of judgment be rendered on both? If yea, the joinder is certainly proper. But the question is not whether the party plaintiff is entitled to judgment on both. If one declares on two promissory notes one of which is void as being given for an illegal consideration, or on Sunday, his declaration is not therefore bad on demurrer, though he has no legal cause of action upon one of his counts."

Flanders v. *Cobb,* 88 Me. 488, 494, 495 involved a "horse trade" with a promissory note "as boot." The question was whether a declaration in an action in assumpsit could be amended by striking out and inserting a count in deceit. The court say: "A fortiori, in the present case, would it be unauthorized to allow an amendment which changes the nature of the action from assumpsit to an action on the case for deceit. The plea of the defendant in the former case is 'never promised,' while in the latter, it is 'not guilty.' At common law the court had no power to allow an amendment which introduced a new cause of action. Com. Law Pl. page 142. Nor has this been extended by statute in this State. *Farmer* v. *Portland,* 63 Me. 46; *Cooper* v. *Waldron,* 50 Me. 80. Neither can counts which are in form ex contractu be joined with those in form ex delicto." *Flanders* v. *Cobb,* 88 Me. 488, 494, 495.

A demurrer is a signed statement in writing filed in a proceeding in court, to the effect that admitting the facts of the proceeding pleading to be true, as stated by the adverse party, legal cause is not shown why the party demurring should be compelled to proceed further. Demurrers are general where no particular cause is assigned, and special where the particular defects are pointed out. *State* v. *McNally,* 145 Me. 254, 256.

If a general demurrer is filed, and, if any one count is good, the demurrer will be overruled. *Blanchard* v. *Hoxie,* 34 Me. 376; *Mansfield* v. *Goodhue,* 142 Me. 380. If writ contains good and bad counts, a general demurrer is insufficient. *Weston* v. *Blake,* 61 Me. 452, 456; *Blake* v. *M.C.R.R. Co.,* 70 Me. 60.

After a special demurrer is sustained the case falls within Revised Statutes 1954, Chapter 113, Section 38 and Revised Statutes 1954, Chapter 113, Section 11, relating to amendments. *Hudson* v. *McNear,* 99 Me. 406; *Bluehill Academy* v. *Ellis,* 32 Me. 260; *Willoughby* v. *Atkinson Co.,* 93 Me. 185.

In an action under a statute, where there was one count in the nature of case, and one count was quantum meruit, and there was also one count for money had and received, the presiding justice refused to instruct the jury that plaintiff could not recover. The court say "unquestionably an action on the case includes assumpsit as well as action in form *ex delicto.*" *Wadleigh* v. *Paper Co.,* 116 Me. 107; *Holden Mill* v. *Westervelt,* 67 Me. 446. An action on the case includes assumpsit as well as tort. *Hathorn* v. *Calif.,* 53 Me. 471.

At common law the plaintiff might sue in assumpsit for breach of contract, or in case for breach of duty. *Milford* v. *Railway,* 104 Me. 233, 249. The effect of bringing assump-

sit is sometimes to waive damages to be secured in a tort action. *Ware* v. *Percival,* 61 Me. 391.

Where there is an express contract of indemnity, and by its terms it contains nothing more than the law would imply, it is optional with the plaintiff to declare in assumpsit for money paid, or upon the special contract. *Davis* v. *Smith,* 79 Me. 351, 360. Indebitatus assumpsit lies for recovery of dues, in accordance with by-laws signed by defendant, although the contract need not be specially declared on, *Elm City Club* v. *Howes,* 92 Me. 211, 214, but not to defeat rights under the express contract. *Marshall* v. *Jones,* 11 Me. 54.

The claim which the plaintiff in this case seeks to enforce is founded upon a written contract entered into between the parties. There is no tort, or active wrong in it. It is simply a failure to fulfill an obligation. It is true that the first count is inartificially drawn, and follows no recognized form, but nevertheless, in our opinion, it states a case in assumpsit. The first count "sounds" in contract, and a copy of the contract itself containing promises of both parties to pay in accordance with its terms, is made a part of the first count. The second and third counts are also counts in assumpsit. The plea to the action, and to any one or all counts, is the general issue in assumpsit.

The court is of the opinion that there is no misjoinder, and that the special demurrer was properly overruled by the presiding justice.

Exceptions overruled.

DORYCE M. ARNDT (EMPLOYEE)
vs.
TRUSTEES OF GOULD ACADEMY (EMPLOYER)
AND
EMPLOYERS LIABILITY ASSURANCE CORPORATION
(INSURANCE CARRIER)

Oxford. Opinion, January 30, 1956.

Workmen's Compensation. Accident Notice. Knowledge.

The requirements of knowledge by the employer of an accident under R. S., 1954, Chap. 31, Sec. 21 (so as to excuse the 30 day notice under Sec. 20) are not met by the injured employee's telling a senior employee in point of service who had no control over the employee and the senior employee's talking about the accident with the employer the next day.

ON APPEAL.

This is an appeal from a *pro forma* decree of the Superior Court dismissing a petition for award of compensation. Appeal dismissed. Decree affirmed.

Berman & Berman, for plaintiff.

James R. Desmond, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, TAPLEY, CLARKE, 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 sole and only issue here is notice to the employer within 30 days, as required by Section 20 of Chapter 31 of

the Revised Statutes or under Section 21 of the same chapter that, "the employer or his agent had knowledge of the accident."

It is admitted that the notice required by Section 20 was not given, but the petitioner contends that the requirements of Section 21 were met because the employer or its agent had knowledge of the accident.

Hearing was had before the Commission which found lack of notice, and lack of knowledge by the employer within the statutory period. An appeal was made to the Superior Court and there the presiding justice in a *pro forma* decree sustained the findings of the Commission.

The case is before this court on appeal from that decree. It is admitted that on the sixth day of February 1952 the employee received the injuries complained of while in the employ of the Trustees of Gould Academy. It is her claim that on the day after the accident she told a Mr. Richmond L. Roderick of the accident. At the time of the accident Mr. Roderick was Director of Physical Education and had charge of the men's division and the employee had charge of the women's division. While Mr. Roderick was her senior in point of service, he had no control over her department.

It seems evident from this, that knowledge on the part of Mr. Roderick was not that of the employer. As to knowledge by the defendant, Mr. Roderick testified that, probably the next day, as soon as he learned of the accident, he had some talk about it with Mr. Ireland, who was headmaster of Gould Academy and there is no evidence as just what information was given Mr. Ireland by Mr. Roderick. Mr. Ireland in a letter, admitted in the case, stated that he was not certain when he first knew of the accident but was sure of having heard about it when he retuned from Boston in January 1953.

The employee did nothing more about this situation until around Christmas 1952 or several months after the accident, when she consulted a physician. During this period she continued with her work at the institution, although she claims she was somewhat hampered by the injuries to her back.

The most damaging testimony in the case is her signed statement of January 28, 1953 that, "I didn't report this accident to anyone at the academy . . . . ." While in her testimony she attempts to explain this admission, that, with other evidence in the case, satisfied the Commission that her employer had no knowledge of the accident within the thirty-day period, as required by statute.

It has been repeatedly stated by this court that if there is any evidence to support the findings of the Commission they cannot be set aside. *Robitaille's Case,* 140 Me. 121.

Cases without number can be cited in support of this rule but the *Robitaille's Case* and *Bartlett's Case,* 125 Me. 374 are sufficient. The Commission was the trier of the facts and having sufficient evidence on which to base its findings this court cannot disturb or reverse the pro forma decree on which this appeal is based.

Appeal dismissed.

Decree affirmed.

NATURALIZATION

Rule 43 of the Supreme Judicial and Superior Courts relating to Naturalization (147 Me. 482) is hereby *Amended to read as follows:*

— 43 —

The stated days of the terms of the Court in the several Counties of the State on which final action may be had on petitions for naturalization as provided by Federal law are hereby fixed as the third day of the January, April and September terms, the second day of the March term, the first day of the November term and the first Tuesday following the third Monday of June in *Androscoggin County;* the second day in April, September and November terms in *Aroostook County;* the third day of the February and October terms and the first day of the May term in *Franklin County;* the second day of the April term and the first day of the September term in *Hancock County;* the third day of the February and second day of the October terms, the fourth day of the April term, and the first Wednesday after the third Monday of June in *Kennebec County;* the second day of the February term and the third day of the May and October terms in *Knox County;* the fourth day of the May and October terms in *Oxford County;* the second day of the January and September terms, the first day of the April term and the third day of the November term in *Penobscot County;* the second day of the March term and the third day of the September term in *Piscataquis County;* the third day of the January and May terms and the fourth day of the September term in *Somerset County;* the first day of the January term, the third day of the April term and the second day of the October term in *Waldo County;* the first day of the February and October terms in *Washington County.*

The time for the naturalization hearings to be held as hereinbefore provided shall be 2:30 o'clock in the afternoon except that those held on the third or fourth day of the terms shall be at 11:00 o'clock in the forenoon. The Justice presiding at the term in any County, at his discretion and with the consent of the naturalization examiner, may for cause or convenience assign any pending case or cases for hearing on any other day or days during the term.

Rule effective January 1, 1956.

Approved:

RAYMOND FELLOWS
ROBERT B. WILLIAMSON
DONALD W. WEBBER
ALBERT BELIVEAU
WALTER M. TAPLEY, JR.
PERCY T. CLARKE
Justices of
Supreme Judicial Court

Approved:

FRANCIS W. SULLIVAN
GRANVILLE C. GRAY
HAROLD C. MARDEN
RANDOLPH A. WEATHERBEE
CECIL J. SIDDALL
LEONARD F. WILLIAMS
ABRAHAM M. RUDMAN
F. HAROLD DUBORD
Justices of
Superior Court

MILTON DELAHANTY
vs.
CHICOINE MOTOR SALES, INC.

Androscoggin. Opinion, February 1, 1956.

Evidence. Parol. Fraud.

A receipt is open to explanation and contradiction by parol evidence.

Where a mutual release recites as a fact that certain obligations have been paid, one relying thereon may show that the other party defrauded him by knowingly making such false representations.

Whether one is barred by a mutual release from recovering taxes paid to the use and benefit of another presents a question of fact in the instant case.

Parol evidence is admissible not to alter or change an agreement but to show that the agreement never existed.

ON EXCEPTIONS.

This is an action of assumpsit before the Law Court upon plaintiff's exceptions to certain rulings by a presiding justice of the Superior Court who heard the case without a jury.

Exceptions sustained.

Berman & Berman, for plaintiff.

Frank W. Linnell, for defendant.

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

WILLIAMSON, J. On exceptions. This is an action in assumpsit to recover $285.15 for taxes paid to the defendant's use. The defense is that the action is barred by a mutual release executed prior to the commencement of suit.

The presiding Justice in the Superior Court, hearing the case without a jury, found for the defendant.

The evidence offered by the plaintiff, as stated in the bill of exceptions, may be summarized as follows:

For several years the plaintiff and the defendant were engaged in the operation of a used car lot in Berlin, New Hampshire, under the name of Twin Town Motors. Ostensibly the plaintiff was the owner, and he filed the required certificate of ownership with the state authorities. In fact the business, including the car inventory, was owned by the defendant and the plaintiff had no proprietary interest whatsoever. The defendant received the income and paid all operating expenses and other business liabilities. The plaintiff had a weekly salary of $100 plus a commission.

The City of Berlin assessed against the plaintiff a personal property tax on the used car inventory. Tax bills prior to 1954 upon being received by the plaintiff were delivered to and paid by the defendant. In like manner the 1954 tax, which is the item involved in this action, was assessed against the plaintiff on the inventory and covered only personal property owned by the defendant. In accordance with the practice followed with the tax bills of prior years and other firm bills, the plaintiff delivered this bill to the defendant for payment.

In December 1954 the parties terminated their business relationship and as a part of the dissolution executed an agreement which reads (omitting acknowledgments) as follows:

> "AGREEMENT. KNOW ALL MEN BY THESE PRESENTS that whereas Mr. Milton E. Delahanty, doing business as TWIN TOWN MOTORS in Berlin, New Hampshire, operating a Used Car Lot, formerly served as a regular sales outlet for used cars owned by Chicoine Motor Sales, Inc., a Corporation duly organized and existing in the

County of Androscoggin, State of Maine, and whereas this sales arrangement has now terminated, it is mutually understood and agreed by the undersigned parties that all monies, wages, commissions, or other consideration owed to TWIN TOWN MOTORS by Rene J. Chicoine personally, or as an officer of the Chicoine Motor Sales, Inc. has been paid and is hereby acknowledged.

"It is further understood and agreed that all unsold vehicles belonging to the Chicoine Motor Sales, Inc. have been returned to that Corporation by TWIN TOWN MOTORS, and receipt therefor is here acknowledged.

"It is further understood and agreed that Rene J. Chicoine, personally, or the Chicoine Motor Sales, Inc. is not liable for any existing debts or obligations, or for any such debts or obligations that may be in the future, incurred on behalf of TWIN TOWN MOTORS—all such obligations assumed in his interest having been paid and settled prior to the signing of this agreement.

"We hereby acknowledge the signing of this instrument to be our free act and deed, entered into and signed this 16th day of December, 1954.

/s/ Milton E. Delehanty for TWIN TOWN MOTORS, and Personally

/s/ Rene J. Chicoine for CHICOINE MOTOR SALES, INC. and Personally."

On the same date the plaintiff and Mr. Chicoine by letter authorized and directed a bank to divide between them a so-called Dealer Loss Reserve in the account of Twin Town Motors.

After the execution of the agreement the plaintiff was notified by the city that the 1954 tax bill had not been paid. On demand by the plaintiff, the defendant refused to pay, and later to avoid suit and attachment of real estate, the plaintiff paid the tax. On refusal of the defendant to reimburse him, the plaintiff brought the present action.

At the trial the plaintiff offered to prove, to quote from the bill of exceptions, "that when the agreement . . . was executed . . . he had been informed by the defendant that this tax bill had been paid by it along with all of the others, and that he relied upon this assertion and believed it to be true when he signed the memorandum; that he did not learn until later, after the agreement was executed, that defendant had failed to pay this tax bill."

The plaintiff took exceptions to three rulings by the presiding justice; (1) the exclusion of evidence to the effect stated above under the parol evidence rule; (2) the ruling "that said agreement . . . was conclusive," and the exclusion of evidence "to show that this tax bill was an obligation which defendant should pay and did not pay"; and (3) the ruling "that said agreement . . . barred the plaintiff from offering any evidence to show that the failure on the part of the defendant, under the circumstances claimed by him, to pay this tax bill, formed the basis for an implied promise on the part of the defendant to repay and refund the amount paid by this plaintiff to the City of Berlin in discharge of this tax claim . . ."

Putting to one side for the moment the agreement of December 16, it is plain that an action would lie by the plaintiff to recover the money paid to the city for the 1954 taxes. Equity and good conscience would require that the plaintiff be reimbursed for sums paid under compulsion for the use of the defendant. The decisive question is the effect of the agreement. *City of Biddeford* v. *Benoit,* 128 Me. 240, 147 A. 151 (1929); *Bither* v. *Packard,* 115 Me. 306, 98 A. 929 (1916); *Dresser* v. *Kronberg,* 108 Me. 423, 81 A. 487 (1911); *Marsh* v. *Hayford,* 80 Me. 97, 13 A. 271 (1888); *Davis* v. *Smith,* 79 Me. 351, 10 A. 55 (1887); *Ticonic Bank* v. *Smiley,* 27 Me. 225 (1847); *Kelley* v. *Merrill,* 14 Me. 228 (1837).

The exclusion of the evidence was made upon the theory that the arrangements between the plaintiff and the defendant dissolving their business relationship were completely contained and integrated in the December 16th agreement and letter, and further that the agreement was a mutual release and not merely a receipt. If it was a receipt, it was open to explanation and contradiction by parol evidence. *Crockett, Appellant,* 130 Me. 135, 154 A. 180 (1931). Without question, however, the parties intended to give and receive a release of all claims. The defendant's obligation to pay the 1954 taxes, if as claimed, existed prior to December 16, and was in terms released by the agreement. Parol evidence would not be admissible to change or alter the agreement.

The case, however, is not determined by application of the parol evidence rule. The presiding justice in his written reasons said: "If it be contended that the clause . . . 'all such obligations assumed in his interest having been paid and settled prior to the signing of this agreement,' to which statement plaintiff subscribed, was a statement of fact advanced by defendant and accepted by plaintiff to his damage, plaintiff's remedy is not upon a promise implied at law."

In our view it is here that there was error in excluding the offered evidence. The plaintiff does not seek to alter, change or reform the agreement. His position is this:

First: He may show by the instrument that there had been an agreement to pay the 1954 taxes. It is at least an admission that such was the fact.

Second: He may show by the evidence excluded that the defendant defrauded him in making the agreement, or in other words, that the defendant knowingly made a false representation and that the plaintiff relied upon it. The evidence was then offered to destroy the agreement. In

short, the plaintiff says the agreement was vitiated by the fraud of the defendant. *Morris Plan Bank* v. *Winckler,* 127 Me. 306, 143 A. 173 (1928); *Marston* v. *Ins. Co.,* 89 Me. 266, 36 A. 389 (1896); *Neal* v. *Flint,* 88 Me. 72, 33 A. 669 (1895); *Prentiss* v. *Russ,* 16 Me. 30 (1839).

On the issue of fraud it may be urged "that the plaintiff did not rely and had no right to rely upon the alleged misrepresentations (in our case—payment of the tax bill) because they related to facts of which he had equal or better means of knowledge than the selectmen (the defendant) had under the circumstances of this case." *Prest* v. *Inhabitants of Farmington,* 117 Me. 348, 351, 104 A. 521, 2 A. L. R. 1390 (1918).

The point, however, is not settled against the plaintiff as a matter of law; it is a question of fact. The plaintiff may show for example that the defendant in the routine transaction of Twin Town Motors business and under a duty to the plaintiff, paid tax bills in the past. Under the circumstances, could the plaintiff rely on information from the defendant, or must he inquire of the city about payment of the bill?

Recent illustrative cases on fraud and deceit are *Pelkey* v. *Norton,* 149 Me. 247, 99 A. (2nd) 918 (1953); *Coffin* v. *Dodge,* 146 Me. 3, 76 A. (2nd) 541 (1950).

It is not necessary that fraud be established in an action brought directly for such fraud, or that the agreement be reformed or cancelled in equity. The plaintiff is not compelled to bear the weight of fraud until relief in another action may be obtained. If fraud existed, then the agreement was not lawfully made, and if not lawfully made, then the plaintiff is not bound thereby. The plaintiff's evidence goes not to change the agreement, but to prove that the agreement never existed. This issue was open to the plaintiff in meeting the defense offered by the defendant. Accordingly the evidence should have been admitted.

We express no opinion upon what the facts are or may be found to be on a new trial.

The entry will be

Exceptions sustained.

KATHERINE J. NUTTING
vs.
FREEMONT WING

FREEMONT H. WING
vs.
KATHERINE J. NUTTING
(Two cases)

LEOLA WING
vs.
KATHERINE J. NUTTING

Androscoggin. Opinion, February 1, 1956.

Negligence. Damages.

Damages of $2749 attributable to personal injuries, pain and suffering, are excessive where evidence shows that the injured, a 25 year old woman was in the hospital for 6 days, in bed at home one week, used a crutch for 3 weeks and felt the effects of pain in her leg for another 6 or 8 weeks with the only permanent injury a small scar on the forehead. (Remittitur of excess of $2000).

ON MOTION FOR NEW TRIAL.

These are negligence actions before the Law Court upon general motion for new trial. *Freemont H. Wing* v. *Nutting* (two cases) and *Leola Wing* v. *Nutting*—motions overruled. *Nutting* v. *Wing*—motion sustained unless within thirty

days from filing of mandate, plaintiff remits all of verdict in excess of $3751.

Frank W. Linnell, for Nutting.

Berman & Berman, for Wing.

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

WILLIAMSON, J. These four cases arise from a "head-on" collision between automobiles driven by Mrs. Nutting and Mr. Wing. The jury found for the plaintiff in *Nutting* v. *Wing* and assessed damages at $4500, and for the defendant in actions brought by Mr. Wing and by Mrs. Wing, a passenger in her husband's automobile. The cases are before us on general motions on the usual grounds. The question of excessive damages is present only in *Nutting* v. *Wing.*

On the issue of liability, we are satisfied that the jury could properly find, as they did, that Mrs. Nutting was in the exercise of due care and Mr. Wing was negligent. The vital question was whether the collision took place on the Wing or Nutting side of the median line of a highway with a tarred surface eighteen feet in width.

The evidence of the course and position of the cars and of other factors was conflicting. The jury evidently believed and gave weight to the testimony of a State Police officer about tire marks of the Wing car leading from the Wing toward the Nutting side of the highway. There is nothing inherently improbable or unreasonable in the evidence for Mrs. Nutting. *Fossett et al.* v. *Durant,* 150 Me. 413, 113 A. (2nd) 620 (1955); *Parker* v. *Knox,* 147 Me. 396, 87 A. (2nd) 663 (1952); *Arnst* v. *Estes & Harper,* 136 Me. 272, 8 A. (2nd) 201 (1939); *Raymond* v. *Eldred,* 127 Me. 11, 140 A. 608 (1928).

On the issue of damages Mrs. Nutting was awarded $4500, with special damages of $1751, as follows: Automobile damage $1600, hospital care $66, doctors' bills $50, ambulance $20, towing automobile $15. The balance of $2749 is attributable to personal injuries and pain and suffering. Mrs. Nutting was in the hospital for six days and in bed at home for a week, used a crutch for about three weeks, and felt effects of pain in her leg for another six to eight weeks. She suffered no fractures, and at the time of the trial had made a complete recovery. The only permanent injury she received is a small scar on the forehead of minor consequence. She is a young woman of twenty-five years of age with life expectancy of 30 years. It is difficult, indeed, to measure damages in terms of dollars.

From a review of the record the jury, however, in our opinion was plainly not justified in awarding more than $2000 for the damages in question. For the governing principles see *Candage* v. *Belanger et al.*, 143 Me. 165, 57 A. (2nd) 145 (1948); *Tardiff* v. *Parker, Sr.*, 149 Me. 365, 102 A. (2nd) 866 (1953).

The entries will be

Freemont H. Wing v. Nutting (two cases) and Leola Wing v. Nutting—Motions overruled. Nutting v. Wing—Motion sustained unless within thirty days from filing of mandate plaintiff remits all of the verdict in excess of $3751.

STATE OF MAINE
vs.
UNION OIL COMPANY OF MAINE

York. Opinion, February 3, 1956.

Constitutional Law. Police Power. Gasoline. Signs.

A police power which operates reasonably is not always invalid even though it may incidentally affect rights guaranteed by the constitution.

A constitutional guarantee protects property rights not only from legislative confiscations but also from unjustifiable impairment.

Unjustifiable impairment may consist in destroying property value, restricting its profitable use or imposing such conditions as to use that its value becomes seriously impaired.

An exercise of the police power must not be unreasonable or arbitrary and it must have a substantial relationship to the public health morals or other phase of the general welfare.

ON REPORT.

This is a criminal action before the Law Court under P. and S. Law 1881, Chap. 82. The question presented is the constitutionality of P. L., 1955, Chap. 420, Sec. 200-A P. L., 1955.

Boyd Bailey, Assistant Attorney General,
William Donahue, for plaintiff.

Armstrong, Marshall & Melnick, for defendant.

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

TAPLEY, J. On report. This case originated in the Municipal Court of the City of Biddeford and comes to this court on an Agreed Statement of Facts. This procedure, in

taking this case directly to the Law Court on Agreed Statement from the Biddeford Municipal Court, is authorized by Chapter 82 of the Public and Special Laws of 1881.

The only issue presented for determination is whether the statute, being Chapter 420 of the Public Laws of 1955, is valid or is unconstitutional in that it violates the due process or equal protection clause of the U. S. Constitution or Sections 1 or 6 or Article I of the Maine State Constitution.

The questionable statute reads as follows:

Chapter 420.

> "**Sec. 200-A. Signs.** No signs stating or relating to the price of motor fuel, and no signs designed or calculated to cause the public to believe that they state or relate to the price of motor fuel, other than one or two signs of a size not larger than 6 inches by 8 inches and displayed on each pump or dispensing unit, shall be posted or displayed on or about the premises where motor fuel is sold at retail or displayed within view of any public highway."

This law became effective on August 20, 1955.

There were two criminal warrants issued against the respondent, Union Oil Company of Maine, a corporation, on the thirtieth day of August, 1955, returnable to the Municipal Court of the City of Biddeford, one warrant alleging that the respondent "unlawfully did post and display upon the premises where said Union Oil Company of Maine sold motor fuel at retail, a sign relating to the price of motor fuel which said sign was then and there larger than 6 inches by 8 inches, to wit, a circular sign measuring 3½ feet in diameter and said sign reading 'New-Era Gasoline, Save 4c Per Gal.' " and the other warrant charged that the respondent "unlawfully did post and display upon the premises where said Union Oil Company of Maine sold motor fuel at retail, a sign stating and relating to the price of motor

fuel, which said sign was then and there larger than 6 inches by 8 inches, to wit, 3 feet by 3½ feet, and said sign reading 'Save, Highest Octane, Lowest Prices, .269/10, Tax. Inc.' " It was agreed that the respondent, Union Oil Company of Maine, committed the acts complained of in these complaints dated August 30, 1955 and that they were committed in places and at the times set forth in the complaints. It is to be noted that the respondent does not admit that these acts complained of violated any valid law of the State of Maine. It is further agreed that the signs in no way obstructed the view of traveling motorists or that the use of them violated any law of the State of Maine excepting Chap. 420, P. L., 1955, which law is being attacked by these proceedings.

The respondent is engaged in the sale of motor fuels as an independent retail dealer as distinguished from that retail dealer who sells nationally advertised brands of motor fuel. The respondent became an independent retail dealer in motor fuels on April 1, 1950 by opening a service station at Biddeford, Maine and has been continually so engaged to the present time. It has confined itself to the sale of a private brand of gasoline known as "New-Era Gasoline" since the commencement of its operation on April 1, 1950. It has expanded its service to include eight stations in this State, all of which specialize in the sale of "New-Era Gasoline."

The business policy of the respondent is to sell its product at lower prices than those charged by dealers of the so-called nationally advertised brands. Pursuant to the policy of selling its product at lower prices, the respondent has displayed within view of passing motorists, and on its own premises, the type of signs which are complained of in the warrants.

There are certain photographs taken shortly prior to August 20, 1955 depicting the kind and composition of the

signs used by the respondent at its service stations and which form the basis of the complaints.

The constitutional provisions involved are: Article XIV of the Amendments to the Federal Constitution:

> "- - - - nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

and Sec. 1 of Article I of the Constitution of the State of Maine:

> "All men - - - have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness."

The respondent has abandoned any contention that Sec. 6 of Article I of the Constitution is involved in this case. According to our view of the issues, we find it unnecessary to discuss this section which deals with the right of an accused in a criminal case to demand the nature and cause of the accusation.

The issues of law set forth by the respondent are:

> "I. Whether the retail sale of motor fuel per se is a business so affected with the public interest as to warrant the exercise of the police power in the regulation of same without some showing of a particular evil affecting the public.
>
> II. Assuming that the Legislature found or assumed that some evil existed which warranted this legislation, whether Chapter 420, P. L. 1955 bears a reasonable relation to the evil sought to be cured.
>
> III. Whether Chapter 420, P. L. 1955 violates the equal protection clauses of our State and

> Federal Constitutions in that it is discriminatory in its effect."

The Maine Statute, in essence, provides that if any signs are used stating or relating to the price of motor fuel or signs designed or calculated to cause the public to believe that they state or relate to the price of motor fuel, they shall be restricted to a number of not more than two and to a size not larger than 6 inches by 8 inches to be displayed on each pump or dispensing unit. These restrictions as to the signs concern premises where motor fuel is sold at retail or displayed within view of any public highway. Under this statute no other signs of any description relating to the price of motor fuel or designed or calculated to cause the public to believe that they state or relate to the price of motor fuel are permitted. *State* v. *Miller,* 12 A. (2nd) Page 192 (Conn.) (1940). The *Miller* case concerns the constitutional aspect of a law very similar to the Maine Statute wherein the retail price of gasoline or other fuel for motor vehicles must be displayed on a sign not exceeding 126 square inches in size. No other signs affecting the price of gasoline or other fuel for motor vehicles are permitted to be displayed on the premises.

In this case no objection was made to that provision of the statute which required the price of gasoline to be displayed on the pumps, referring, of course, to the sign limited to a size of 126 square inches. The part objected to as being unconstitutional was that portion of the law which forbade the display of price signs on other parts of the premises or in the vicinity. It is interesting to note that the defendant in this case was also engaged in the sale of a motor fuel which was not nationally known or widely advertised. The court said in its opinion, on page 194:

> "The only grounds advanced in support of the constitutionality of the provisions of the act in question are that it might protect the public from fraud

> and that it might conduce to the safety of automobile drivers upon the highways."

The Connecticut Court found that portion of the statute prohibiting the posting or displaying of any sign showing the sale price of motor fuels on or within the vicinity of the premises and the displaying of any price signs exceeding 126 square inches in size in any other place excepting the pumps to be unconstitutional. *State* v. *Hobson,* 83 A. (2nd) Page 846 (Del.) (1951).

The act under consideration requires price signs for the sale of motor fuel to be restricted to a sign not larger than 4 inches by 6 inches and that no other price signs shall be posted or displayed on or about the premises. Defendant's principal attack is that the provisions of the act deprive him of property without due process of law and violate both the State and Federal Constitutions. The Supreme Court of Delaware held that the limitation upon the size of signs advertising the price of motor fuels are wholly unrelated to the prevention of fraud and that the statutory prohibition of the limitation is unreasonable and arbitrary and in violation of the constitutional restrictions embodied in the Fourteenth Amendment of the Federal Constitution. *Levy, et al.* v. *City of Pontiac, et al.,* 49 N. W. (2nd) Page 80 (Mich.) (1951).

Constitutional attack was made on an ordinance which provided that no signs or placards stating the price of gasoline other than signs not larger than 12 by 12 inches attached to the pumps or dispensing devices shall be maintained on premises where gasoline is sold or offered for sale. The decision states on page 82, in part:

> "The size of signs which plaintiff may care to use, and their location at points other than the pumps, if such signs are not misleading or fraudulent, may

> not be regulated by the legislative body of defendant city."

and on page 83:

> "The ordinance bears no reasonable relation whatsoever to public peace, health, morals, welfare or safety."

Town of Miami Springs, et al. v. *Scoville,* 81 So. (2nd) Page 188, (Fla.) (1955).

This Florida case, of origin as recent as June 15, 1955, concerns itself with the validity of an ordinance of the Town of Miami Springs regulating the size and location of signs displayed by gasoline filling stations to advertise the price of their gasoline. The ordinance provides that the price signs shall not be larger than 12 inches in height and 12 inches in width, to be posted on dispensing equipment and at no other place on the premises. It was found that this ordinance was unconstitutional in that the legislative restrictions involved injure a party on a competitive basis, representing unconstitutional restraints on use and enjoyment of one's business and property and in effect take property without due process of law, in violation of constitutional guarantees.

State v. *Guyette,* 102 A. (2nd) Page 446 (R. I.) (1954).

The constitutionality of two statutory sections are involved, the first one regulating size and number of price signs requiring showing of governmental tax signs to be maintained on the dispensing devices, and the other section prohibiting the use of price signs "posted or displayed on or about the premises where motor fuel is sold at retail and within view of any public highway or reservation." The court declared the first section as constitutional but as to that section last referred to, carrying a prohibition against signs on any portion of premises excepting the pumps, the determination was one of unconstitutionality.

There have been a substantial number of jurisdictions other than those specifically set forth above which have held a statute such as the one now under our consideration as being unconstitutional and it would serve no efficient purpose to analyze in detail these other cases.

We find, however, that there are two states, namely, Massachusetts and New York, which have passed upon a similar question with the resulting opinions that the acts are constitutional.

Slome v. *Godley,* 23 N. E. (2nd) Page 133.

The Massachusetts Statute requires the pumps to be conspicuously marked with the price of the motor fuel dispensed, using signs of a size not larger than 8 inches by 10 inches and no other price signs to be used or displayed about the premises. In the same statute there are further regulations affecting the use of figures, including fractions, in that they shall be all of the same size. The court said on page 135:

> "It is apparent from a reading of the statute that its design was to prevent fraud in the retail sale of gasoline."

This statement, of course, must have been based on the statute as a whole. The wording of the Maine Act does not convey any reasonable impression that it was designed for the purpose of the prevention of fraud upon the public. It says nothing about the size of the figures to be used. It only treats of size and placement of price signs. Maine has a separate statute regulating figures used on gasoline price signs. Section 200 of Chap. 100, R. S., 1954 provides that signs advertising the sale of motor fuel "shall either contain a statement of the taxes included in said price, or, without specifying the amount thereof, shall state that such taxes are included in said price. All figures, including fractions, upon said signs, other than figures and fractions used in any price computing mechanism constituting a part of any pump or dispensing device, shall be of the same size."

Attention is directed to *Merit Oil Co.* v. *Director of Division of Necessaries of Life* (1946) 319 Mass. 301 wherein the same statute as was concerned in the *Slome* case *(supra)* again received the approval of constitutionality. Our preference is not to follow the Massachusetts' ruling but rather that of the weight of authority.

The New York jurisdiction in the case of *People* v. *Arlen Service Stations, Inc.,* 31 N. E. (2nd) page 184, declares constitutional a local law of the City of New York which regulates the sale of motor fuel by prescribing the size of signs, uniformity of numbers of selling price, addition of governmental tax figures to be attached to pump or other dispensing device, and that no price signs shall be posted or maintained on other parts of the premises. The respondent was convicted of violation of Sec. B36-101.0 of the Administrative Code of the City of New York. This conviction was reversed by the Appellate part of the Court of Special Sessions with one dissenter. This court determined that that portion of the act prohibiting in effect the use of price signs on any portion of the premises excepting the pumps was unconstitutional. The New York Court of Appeals overruled the court below by declaring the entire law constitutional.

A police power which does not operate unreasonably is not always invalid even though it may incidentally affect rights guaranteed by the Constitution. Police power, however, is not without its limitations since it may unreasonably affect private rights and thus do violence to those rights guaranteed under either Federal or State Constitutions. 11 Am. Jur., Sec. 259, page 991.

A constitutional guarantee protects one's property rights not only from confiscation by legislative acts but also from an unjustifiable impairment of those rights. A deprivation of a person's property, within the meaning of this constitutional guarantee, may take place by destroying its value,

restricting its profitable use or imposing such conditions as to the use of it that seriously impairs its value. 11 Am. Jur., Sec. 260, page 994.

16 C. J. S., page 562:

> "In order that a statute may be sustained as an exercise of the police power, the courts must be able to see that the enactment has for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals, or general welfare, that there is some clear, real, and substantial connection between the assumed purpose of the enactment and the actual provisions thereof, and that the latter do in some plain, appreciable, and appropriate manner tend toward the accomplishment of the object for which the power is exercised. The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare,' and treated as a legitimate object of the police power, unless the public welfare authorizes the enactment."

Our court has said in speaking of the proper exercise of police power in the case of *Jordan* v. *Gaines,* 136 Me. 291, at page 296:

> "Whether a particular statute has validity as a proper exercise of the police power depends on whether or not it 'extends only to such measures as are reasonable,' but then the police regulation 'must be reasonable under all circumstances. Too much significance cannot be given to the word 'reasonable' in considering the scope of the police power in a constitutional sense, for the test used to determine the constitutionality of the means employed by the legislature is to inquire whether the restrictions it imposes on rights secured to individuals by the Bill of Rights are unreasonable, and not whether it imposes any restrictions on such rights. . . . The validity of a police regulation therefore primarily depends on whether under all the existing circumstances the regulation is reasonable

> or arbitrary and whether it is really designed to accomplish a purpose properly falling within the scope of the police power.' "

State of Maine v. *Old Tavern Farm, Inc.*, 133 Me. 468, at page 470:

> "Police power, in its broadest acceptation, means the general power of a government to preserve and promote the public health, safety, morals, comfort or welfare, even at the expense of private rights."

and again on page 472:

> "The guaranties and assurances of the Constitution of Maine, and of the Constitution of the United States, are positive, direct, unchanged and unrelaxed by circumstances.
>
> 'Subject, however, to the limitation that the real object of the statute must appear, upon inspection, to have a reasonable connection with the welfare of the public, the exercise of the police power by the legislature is well established as not in conflict with the Constitution.' People v. Havnor, 149 N. Y., 195."

The retail sale of gasoline per se is not a business so affected with the public interest that it warrants exercise of police power without evidence of particular evil. *Williams* v. *Standard Oil Co.*, 278 U. S. 235; *Levy, et al.* v. *City of Pontiac, et al., supra.*

In analyzing Sec. 200-A and reducing it to its simplest form, we find that no signs stating or relating to the price of motor fuel or any signs designed or calculated to cause the public to believe they state or relate to the price of motor fuel shall be posted or displayed on or about the premises where motor fuel is sold at retail except, however, that one or two signs of a limited size of 6 inches by 8 inches may be displayed on each pump or dispensing unit. Thus the retailer of motor fuel is restricted by law, first as to size of price signs and, second, as to *where* on his premises

he shall post and/or display the price signs of his motor fuel. Violation of this section is a criminal offense. There is no indication from the reading of the statute that it was enacted to prevent fraud and misrepresentation in the industry and when the yardstick of common sense is applied, it is found lacking in reasonableness. It has the quality of being arbitrary. We are conscious of the well recognized rule that a statute may operate as a valid police power and in its operation may incidentally affect the rights of a person guaranteed to him by both the State and Federal Constitutions. This may occur under circumstances where the police power is not unreasonable, is not arbitrary and has a substantial relationship to public health, public morals, or to any other phase of general welfare. These qualifications do not obtain in reference to the statute now being considered.

It has been demonstrated that the weight of authority has declared statutes and ordinances similar in terms to the one presently under our consideration as being unconstitutional. See 131 A. L. R. 1266.

We determine Chap. 420, Sec. 200-A of the P. L. of 1955 is not reasonably necessary for the accomplishment of any real or legitimate purpose in the exercise of the police power and that it is an unnecessary and oppressive restriction upon a lawful business.

We find Chap. 420, Sec. 200-A of P. L. of 1955 to be unconstitutional.

The complaints should be dismissed.

So ordered.

N. J. GENDRON LUMBER CO., APPELLANT

vs.

INHABITANTS OF THE TOWN OF HIRAM, AND CHARLES J. SMALL, HARRY L. PENDEXTER, AND FRANK W. MERRIFIELD, ASSESSORS FOR THE TIME BEING OF SAID TOWN OF HIRAM, APPELLEES

Oxford. Opinion, February 6, 1956.

Taxation. Trade. Manufactured Lumber. Statutes. Average Amount. Formula.

The phrase "employed in trade" in R. S., 1954, Chap. 81, Secs. 12, 13 has a well defined meaning. Personal property is not employed in trade merely because it would have been sold under certain conditions which never occurred and which were not even anticipated.

The "average amount" formula (which provides that personal property employed in trade shall be taxed on the average amount kept on hand for sale during the preceding year) set forth in Sec. 12 applies to manufactured lumber even though such lumber is otherwise exempted from the provisions of Sec. 12 (R. S., 1954, Chap. 92, Sec. 13).

The literal meaning of the language employed in a statute should be followed only when the policy and intent of the Legislature is implemented by such construction.

ON EXCEPTIONS.

This is an action for tax abatement before the Law Court upon exceptions to the denial of an appeal before the Superior Court. Exceptions sustained. Case remanded to Superior Court for entry of judgment and costs in accordance with the stipulation of the parties.

Gendron, Fenderson & McDougal, for plaintiff.

Sidney Batchelder,
Albert J. Stearns, for defendant.

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

WEBBER, J. The appellant sought an abatement of a portion of the tax assessed on its personal property as of April 1, 1950. The petition having been denied by the assessors, appeal was seasonably taken to the Superior Court. The action of the assessors was there affirmed. Appellant's exceptions now bring the matter before us. The factual background is fully covered by an agreed statement of facts and stipulations.

The appellant is a corporation engaged in the manufacture and sale of lumber, both at wholesale and retail, and is located and conducts its principal business activities in Sanford. During the year ending April 1, 1950, appellant was buying square edged lumber from a third party who was operating a portable sawmill in Hiram. As the lumber came to appellant from the mill, it was stuck in an adjoining field for drying and storage. The quantity of manufactured lumber purchased and stuck varied from month to month. Moreover, there were continuous but fluctuating withdrawals of lumber from storage to be hauled to appellant's mill in Sanford, there to be double-end trimmed and planed and ultimately sold to consumers out of appellant's Sanford yard. The average quantity of lumber on hand in Hiram during the tax year was 157,662 board feet, whereas the amount on hand April 1, 1950 was 371,759. The basic issue here to be resolved is whether the tax should have been based upon the value of the average quantity maintained throughout the year or upon the value of the quantity on hand April 1, 1950.

This issue can only be resolved by an interpretation of the language of R. S., 1944, Chap. 81, Sec. 12 (now R. S., 1954, Chap. 92, Sec. 13), and especially the last clause thereof which states: "provided, however, that personal property

employed in trade shall be taxed on the average amount kept on hand for sale during the preceding year or any portion of that period when the business has not been carried on for a year." We cannot discover that this portion of the statute dealing with valuation on an "average amount" has ever before been construed by this court. This clause was first enacted by P. L., 1919, Chap. 82 as an amendment and an addition to R. S., 1916, Chap. 10, Sec. 13 which read as follows: "All personal property within or without the state, except in cases enumerated in the following section, shall be assessed to the owner in the town where he is an inhabitant on the first day of each April."

This provision has always been interpreted and understood as establishing two rules, one of method and one of situs. As to method, it has always been interpreted to mean that the tax is laid upon the fair value of personal property on hand April 1st. As to situs, it provided explicitly for taxation by the town in which the taxpayer was an inhabitant on April 1st, "except in cases enumerated in the following section." These stated exceptions all dealt with situations in which the *situs* of taxation was varied, but it is important to note that these exceptions in no way varied the *method.* Personal property, whether taxable under the general rule in the town of residence or in some other town under a stated exception, was all and without exception taxable on the basis of the fair value of the quantity on hand April 1st. Thus matters stood until the amendment of 1919. Here for the first time the Legislature provided an exception to the general rule of method. If personal property was employed in trade, it would be taxed on the basis of the average amount kept on hand for sale during the year. The rule of method has never since been varied by further amendment.

The personal property here was manufactured lumber. It was not "in the possession of a transportation company

and in transit." It was therefore taxable in the town where it was situated on April 1, 1950. R. S., 1944, Chap. 81, Sec. 13 as amended; *Dead River Co.* v. *Assessors of Houlton,* 149 Me. 349. This is true even though it was intended that the lumber should be trimmed and planed in another town. *Desjardins* v. *Lumber Company,* 124 Me. 113. The parties agree that the lumber was taxable in Hiram, but the appellees contend that, the lumber being taxable under one of the stated exceptions, it could not be valued under the "average amount" formula, because, they say, "by exempting manufactured lumber from operation of Sec. 12 and placing it in Sec. 13 not only fixes its situs but removes it from the average value clause." In short, the appellees argue that the "average amount" formula is applied only when personal property is employed in trade in the town where the taxpayer is an inhabitant. In the light of the historical development of the statute and for the reasons already stated, we cannot agree with this contention.

It is true that this manufactured lumber was not employed in trade in Hiram, the town where it was taxable. The following appears in the agreed statement: "This lumber which was stuck and stored in Hiram, in the manner above described, was, at all times herein pertinent, held and kept by Appellant for sale, and was, from the moment of its acquisition by Appellant, subject to sale, with or without further processing, at wholesale or retail, in the regular, normal and usual course of Appellant's business. Appellant could and would have sold the lumber in the form in which it came out of the portable sawmill in Hiram, and even F.O.B., the sticking field in Hiram, had the then current demands of the market made that the most profitable way for Appellant to dispose of it. Actually, however, it was expected from the start that the lumber would, in due course, be taken to Appellant's mill in Sanford for further processing, that is, to be double-end trimmed and planed; and this was done, as a matter of fact. As so further pro-

cessed, it was disposed of in the regular channels of trade, the great bulk going directly from Appellant's Sanford yard to consumers, e.g., contractors and builders, etc., some being sold at wholesale and shipped by truck or via rail to retailers in other states. Throughout this period, Appellant had a similar, but larger and more diversified stock of lumber at its Sanford yard, similarly destined for commerce." The phrase "employed in trade" as used in our taxing statutes has a well defined meaning. Personal property is not "employed in trade" merely because it would have been sold under certain conditions which never occurred and which were not even anticipated. It has been said that all property is for sale at a price, an exaggeration which nevertheless has some validity in the realm of commerce. No doubt this lumber would have been sold in Hiram if the offered price were high enough. But the fact remains that it was not sold there, nor were efforts made to sell it there. It was intended and destined for further process and sale in Sanford as a part of the principal business of the taxpayer, and that is exactly where it went. In short, it was employed in trade, not in Hiram but in Sanford. *Sears Roebuck & Co.* v. *Portland et al.*, 144 Me. 250; *New Limerick* v. *Watson*, 98 Me. 379; *Gower* v. *Jonesboro*, 83 Me. 142; see *Leeds* v. *Gravel Co.*, 127 Me. 51.

We do not consider, however, that the "average amount" formula is inapplicable merely because the lumber is not employed in trade in the town where it is taxable. The Legislature in enacting the formula has not so limited it and to construe the statute so narrowly would, we think, defeat the purpose which was intended. What was that purpose? As a practical matter, assessors cannot and do not ordinarily take inventory on each April 1st, nor does the taxpayer for that matter. The property is in trade and as purchases are made and sales occur, the inventory fluctuates. If the average is to be used, the taxpayer feels no necessity to reduce

inventory before April 1st. Conversely, he feels free to increase inventory before the effective tax date if market conditions indicate the advisability of such action. The result, based upon an average, more realistically and less artificially reflects his holdings of personal property as a basis of measuring his public obligation. The literal meaning of the language employed in a statute should be followed only when the policy and intent of the Legislature is implemented by such construction. *Georgetown* v. *Hanscome,* 108 Me. 131. No limitation being imposed, the words "employed in trade" may properly be construed as meaning "employed in trade anywhere." We think this is a case where the letter of the statute best expresses legislative purpose.

In further support of this conclusion, some consideration of the case of *Sears Roebuck & Co.* v. *Portland et al., supra,* is helpful. In that case the taxpayer conducted its main business and made its sales in Portland. In South Portland it maintained in a warehouse a large stock of merchandise which was available either to fill orders or to replenish the stock of the Portland store. Although the case turned on the procedural aspects of declaratory judgment, the court said that the merchandise in South Portland was employed in trade in Portland and there taxable. We do not think anyone would seriously contend that it was not taxable in accordance with the "average amount" formula. The opinion was dated August 4, 1949. On August 6, 1949 there became effective an amendment (P. L., 1949, Chap. 431) which made this same merchandise thereafter taxable in South Portland, where it was situated on April 1st. It was still the same fluctuating inventory of merchandise and still employed in trade in Portland, which by the effect of the new amendment was no longer the taxing city. It is inconceivable that the Legislature intended that by merely changing the situs of taxation of this merchandise, it would also change the method of taxation. Clearly, the situs

changed, but the merchandise, being employed in trade, continued to be taxable under the "average amount" formula. So also the lumber in the case before us, although taxable as "manufactured lumber" in Hiram, was taxable by Hiram under the "average amount" formula because "employed in trade" in Sanford.

Appellant's exceptions must be sustained. The parties have by stipulation agreed that our action in disposition of the bill of exceptions is to effectively terminate the litigation between them, and they have agreed upon alternative judgments and awards of costs which may be entered upon remand to the Superior Court. In event the appellant should prevail, it is stipulated that judgment should be entered below for the appellee Inhabitants of the Town of Hiram in the amount of $302.71 and costs should be awarded to appellant in the agreed amount of $35.

The entry will be

Exceptions sustained.

Case remanded to the Superior Court for entry of judgment and costs in accordance with the stipulation of the parties.

INHABITANTS OF CITY OF LEWISTON
vs.
INHABITANTS OF COUNTY OF ANDROSCOGGIN

Androscoggin. Opinion, February 7, 1956.

Maine State Retirement System Statutory Construction.

The P. and S. Laws of 1953, Chap. 132, Sec. 4 which transfers the employment of the Judge of the Lewiston Municipal Court from the city to the county with the limitation that the judge shall continue as a member of the local city district of the retirement system with the county reimbursing the city for such retirement contributions cannot be construed so as to require the county to reimburse for contributions due prior to the effective date of the amendment.

Legislative intent must be ascertained from the language of the statute—if plain, the court will look no further.

ON REPORT.

This is a bill in equity before the Law Court upon agreed statements. Bill dismissed.

Philip Isaacson, for City of Lewiston.

William B. Hathaway, for County of Androscoggin.

SITTING: FELLOWS, C. J., WILLIAMSON, BELIVEAU, TAPLEY, CLARKE, JJ. WEBBER, J., did not sit.

BELIVEAU, J. Bill in Equity. On agreed statement of facts.

The controversy here is over $7,370.71 which the City of Lewiston paid to the Board of Trustees of the Maine State Retirement System on September 28, 1954, which sum it deducted from its 1954 county tax. This represented the liability of the city to the Retirement System on behalf of Harris M. Isaacson, as of July 14, 1953. Isaacson at that time was and for years prior thereto had been Judge of the

Lewiston Municipal Court. He elected to join the Retirement System on April 3, 1953 and was admitted to membership in that system on May 25, 1953. On July 14, of the same year, he received a Certificate of Prior Service, covering a period of time equal in funds to $7,370.71.

The city claimed this sum was due it from the county by virtue of Section 4, Chapter 132 of the Private and Special Laws of 1953, which laws became effective on August 8, 1953.

Prior to the effective date of the 1953 amendments the Judge of the Lewiston Municipal Court was an employee of the City of Lewiston and as such, at his option, could qualify as a member of the system, which the city joined July 1, 1951.

According to the 1953 amendments, the salary of the Judge of the Municipal Court and other expenses of that court were to be paid by the County of Androscoggin to the city.

The law involved here is found in Section 4 of Chapter 132 of the Laws of 1953 which reads as follows:

> "**Limitation.** Notwithstanding the provisions of this act, the judge of the municipal court of the city of Lewiston now holding said office shall continue to be a contributing member of the local participating district of the city of Lewiston under the provisions of the Maine state retirement system. The city of Lewiston shall pay its liability involved and the county of Androscoggin shall reimburse the said city of Lewiston for such liability."

It is the contention of the city that Section 4 should be so interpreted as to fix on the county liability to the city for payment of the sum paid the Retirement System on September 28, 1954. There is nothing in the 1953 amendments which specifically provides for such reimbursements by the

county. The liability of the city was fixed before the effective date of these amendments and it necessarily follows that the responsibility of the county for reimbursement to the City of Lewiston was established and could only begin from the effective date of the amendments, August 8, 1953.

The purpose of Section 4 was to continue, without any interruption, the membership of the Lewiston Municipal Court Judge in the retirement system and, while payments are to be made by the city, in the first instance, it is to be reimbursed by the county for such payments.

It is true that our courts have held that where there is any uncertainty or more than one possible interpretation of a statute the court may look into the history of the legislation or sometimes, in cases of a revision, consult the report of the Commissioners. *Steele* v. *Smalley,* 141 Me. 355, 44 A. (2nd) 213 (1945).

However, as said by this court in *Sweeney* v. *Dahl,* 140 Me. 133, 34 A. (2nd) 673, (1943):

> "The Legislative intent in a statute must primarily be ascertained from the language thereof and not from conjecture. In other words, the Court will first seek to find the Legislative intention from words, phrases and sentences which make up the subject matter of the statute. If the meaning of the language is plain, the Court will look no further; it is interpreted to mean exactly what it says."

The main purpose of the amendments, hereinbefore referred to, was the payment to the County of Androscoggin of the revenues from the Lewiston Municipal Court which in turn obligated the county for expenses properly incurred by that court.

The payment by the City of Lewiston was to discharge an obligation incurred by it prior to August 8, 1953. It could have discharged this obligation by amortizing payments

over a period of 30 years. However, that would not change the picture because, in either case, it was the discharge of the city's obligation.

The liability of the county, as to any matters pertaining to the Lewiston Municipal Court, did not begin until August 8, 1953 and expenses or obligations incurred prior thereto were the responsibility of the City of Lewiston, which enjoyed the revenue of that court up to the time of the change.

Bill dismissed.

HAROLD BIRMINGHAM
vs.
SEARS, ROEBUCK & COMPANY

Aroostook. Opinion, February 8, 1956.

Negligence. New Trial.

Where there is nothing to indicate that the jury reached its verdict through bias, prejudice, or mistake of law or fact, or that the verdict is clearly wrong, a motion for new trial must be denied.

ON MOTION FOR NEW TRIAL.

This is a negligence action before the Law Court upon general motion for new trial.

Motion denied.

James P. Archibald, for plaintiff.

Beck and Beck,
Scott Brown, for defendant.

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

WILLIAMSON, J. This tort action is before us on motion for a new trial after verdict for the defendant. The plaintiff seeks to recover damages suffered through negligence in the installation of automatically controlled ventilating equipment in the basement of a barn used for the storage of approximately 12,000 barrels of potatoes.

The purpose of the equipment was not to heat the storage space, but to remove excess heat and moisture. The defendant installed a fan in a basement wall with a humidity control nearby and a temperature control placed on the outer wall of the storage space in a room near the entrance to the basement.

The negligence complained of is that the defendant placed the only temperature control in the room which would be the warmest part of the basement when artificial heat was used and no other controls in the storage area to stop the fan when the temperature there reached a dangerous and near freezing level.

The equipment was installed and the control adjusted and fixed to a certain temperature by the defendant. The plaintiff had reason to rely on the skill and judgment of the defendant in the work performed by it.

In operation the fan was designed to expel air from, and of course to draw air from elsewhere into, the storage space. In the winter of 1949-50 it seems clear that the agreed loss of 1036 barrels from freezing resulted from cold air drawn into the storage space from the continued and excessive operation of the fan.

The difficulty with the plaintiff's case is that he used a salamander or oil stove for a considerable period in the winter in the room where the temperature control was located, thus raising the temperature above the point set in the control. The fan was then called into operation.

On two grounds the jury could have found the plaintiff was guilty of contributory negligence. First, he negligently interfered with the effective operation of the automatic controls installed by the defendant. Second, he negligently failed to observe that the fan operated for long periods, thus introducing cold air into the storage area to a dangerous degree, and to remedy the condition created by his own act.

The case was fully and completely tried. The issue is not whether we agree with the verdict, but whether the decision of the jury was clearly wrong. We find nothing to indicate that the jury reached the verdict through bias, prejudice, or mistake of law or fact. *First Nat'l Bank* v. *Morong et al.*, 146 Me. 430, 82 A. (2nd) 98 (1951).

The entry will be

Motion denied.

ARLENE SPEAR JONES
PARENT OF TIMOTHY A. SPEAR AND IN HIS BEHALF
vs.
GLADYS THOMPSON

ARLENE T. JONES, APPELLANT FROM DECREE OF
HARRY E. WILBUR, JUDGE OF PROBATE

Knox. Opinion, February 8, 1956.

Adoption. Habeas Corpus. Abandonment. Appeal.

Upon appeal to the Supreme Court of Probate from a decree of adoption the appellant is strictly confined to such matters as are specifically declared in the reasons of appeal.

Abandonment is a question of fact which requires evidence that the parents at some time definitely gave up their parental interests in the child and their duties to it. It is a question of fact depending largely upon parental intent.

Exceptions to a decree of the Supreme Court of Probate must be overruled if there is any evidence to support them. This standard applies to the denial of a writ of *habeas corpus*.

ON EXCEPTIONS.

This is an adoption proceeding a writ of habeas corpus heard concurrently before the Supreme Court of Probate and the Superior Court. The case is before the Law Court upon exceptions to a decree dismissing the adoption appeal and the writ of habeas corpus. Exceptions overruled.

Christopher S. Roberts, for Arlene S. Jones, Appellant.

Frank G. Harding, for Gladys Thompson, Appellee.

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

TAPLEY, J. On exceptions. These cases involve the custody of a male, minor child born to Arlene Spear, now Arlene Spear Jones, out of wedlock. The child was born on June 29, 1950 and since his birth he has resided with Gladys Thompson and her husband, Leroy F. Thompson. Gladys Thompson is the sister of Oramon Bernard Jones, the alleged father of the child. There have been various actions commenced and prosecuted concerning the custody of this child over a period approximating five years. The cases with which we are now concerned are those of adoption and habeas corpus. The adoption case originated upon the petition of Gladys F. Thompson and Leroy F. Thompson, dated December 5, 1951 and returnable on the twenty-first day of December, 1951 at the Probate Court within and for the County of Knox. On October 26, 1953, by consent of all the parties, Curtis M. Payson was appointed guardian *ad litem* to represent the minor child, Timothy A. Spear, subject of the adoption. Mr. Payson accepted the appointment. A hearing was held on November 2, 1953 before the Judge of

Probate. As a result of this hearing, adoption of Timothy A. Spear, with change of name, was granted to the Thompsons. The mother of the child, Arlene Spear, appealed to the Supreme Court of Probate.

Arlene Spear married Oramon Bernard Jones in May of 1953 and on October 24, 1953, a short time previous to the hearing on the adoption petition, she signed an application for the issuance of a writ of habeas corpus, the purpose of which was to obtain custody of her son. By stipulation between the parties, the application for writ of habeas corpus and the probate appeal were tried together before a justice presiding at the February Term, 1954 of the Superior Court within and for the County of Knox. The justice below refused the writ and affirmed the decree of adoption and change of name as granted by the Judge of Probate. To these rulings Arlene Spear Jones took exceptions.

We shall first consider the exceptions relating to the adoption case. The Thompsons in their petition for adoption allege "that the parent of said child has abandoned said child and ceased to provide for its support." The petition was brought under provisions of Chap. 145, Secs. 35, et seq., R. S., 1944, as amended.

After a full hearing, the Judge of the Probate Court allowed the petition of adoption and decreed that the minor child be that of the petitioners and that his name be changed to Kevin Robert Thompson. The appellant seasonably filed an appeal to the Supreme Court of Probate and alleged the following reasons of appeal:

> "That the only allegation in said petition for adoption whereby the Court had jurisdiction or could grant said petition and made said decree was the statement therein that your Appellant 'has abandoned' her said child and that there was no evidence or the slightest proof at the hearing thereon of any such fact of abandonment."

In these words are stated the issue on appeal.

The appellant is strictly confined to such matters as she specifically declares upon in her reasons of appeal. *Garland, Appellant,* 126 Me. 84; *Barnes* v. *Barnes,* 66 Me. 286; *Gilman* v. *Gilman,* 53 Me. 184. There are no issues raised of procedure and, therefore, we assume that these adoption proceedings were in strict accordance with statutory provisions. The trial judge was charged with the responsibility of determining a question of fact and the fact to be determined was: Did the appellant, Arlene T. Spear, mother of the child, Timothy A. Spear, abandon him and cease to provide for his support?

2 C. J. S., page 389:

> "Abandonment is a question of fact which requires evidence that the parents at some time definitely gave up their parental interests in the child and their duties to it. Whether an abandonment of a child, rendering unnecessary the parent's consent to an adoption, exists is a question of fact, depending largely upon the parent's intention, to be determined on competent evidence after notice to the parent."

A careful perusal of the record will convince the reader that there is a great amount of contradictory testimony given by the witnesses on the one side and the other. This gives rise to the necessity of factual determination which in this case was the particular province of the presiding justice. There is ample evidence to be found in the record upon which he could base his decision.

Waning, Appellant, 151 Me. 239, at page 252:

> "The rule is firmly established that upon exceptions to findings of the sitting Justice in the Supreme Court of Probate upon questions of fact, if there is any substantial evidence to support the findings, the exceptions must be overruled."
>
> "The findings of a Justice of the Supreme Court of Probate in matters of fact, are conclusive, if there

> is any evidence to support them. It is only when he finds facts without evidence that his finding is an exceptionable error in law."

Exceptions to the findings in the adoption case are overruled.

The application for writ of habeas corpus brought by Arlene Spear Jones as parent of Timothy A. Spear, and in his behalf, against Gladys Thompson, was heard at the same time as the appeal in the adoption case. The application was denied and the writ refused, to which rulings the petitioner took exceptions. The exceptions declare "That from the testimony taken at said hearing your petitioner says that no other decision except that of sustaining her petition was warranted or possible under the law."

The same situation obtains relative to this exception as it does to the exception concerning the adoption appeal, meaning the appellant argues that from the testimony adduced at the hearing, the presiding justice could do nothing other than to sustain her application for the writ of habeas corpus. Again we state that the record discloses sufficient evidence to warrant the findings of the presiding justice in respect to the denial of the application and refusal of the writ of habeas corpus. This exception is overruled.

Exceptions overruled.

MAPLEWOOD POULTRY COMPANY
vs.
MAINE EMPLOYMENT SECURITY COMMISSION

Waldo. Opinion, February 9, 1956.

M.E.S.C. Poultry, Contract Growers. Exemption.

The agricultural labor exemption of Chapter 29, Section 3 of the Maine Employment Security law applies to employees of a contract grower because the Maine law includes within the exemption services performed in the employ of "any person."

ON REPORT.

This is a petition before the Superior Court for review of an assessment by the M.E.S.C. The case is before the Law Court upon report and agreed statement. Petition granted. The Respondent Commission to abate Employment Security Contributions assessed against Petitioner.

Brann and Isaacson, for petitioner.

William D. Hathaway, for M.E.S.C.

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

BELIVEAU, J. On agreed statement of facts. The petitioner was assessed for Employment Security contributions for the years 1950 to 1953 inclusive. These assessments were appealed to the Maine Employment Security Commission and after hearing upheld by that body. The petitioner filed a petition for review, addressed to the Superior Court for the County of Waldo. At the October 1955 Term of that court, by agreement of the parties, the case was reported to this court on agreed statement of facts, we "to render such judgment as the law and the evidence requires."

The petitioner during this period was engaged in the production of poultry, sold to the Maplewood Packing Company, for processing and disposition. The stockholders of these two corporations are the same.

The petitioner owns a few poultry farms in the Belfast area where it produces hatching eggs and also raises some poultry. However, most of the poultry it produces is through the contract grower system. The petitioner's concern or interest ceases when the poultry is delivered alive to the Maplewood Packing Company.

In connection with the raising of poultry by the growers, under contract with the petitioner, many services are supplied by the petitioner, in order that the poultry raised may be of the best and highest grade.

The employees are divided into four groups. Of these four groups, we are concerned here with but three.

(1) Service Men

(2) Pick-up Crews

(3) Grain Crews

The duties of these crews are well described in the defendant's brief and that we adopt by quoting it in full:

> "The service men visit the contract growers periodically in accordance with a schedule drawn up by petitioner. On these visits the service men check the following: supply of feed, grit and fuel; the use of fuel and electricity; the storage and handling of grain; the supply and condition of litter; the maintenance and state of repair of the contract grower's raising house and equipment; the conversion ratio of grain to meat; the general health and mortality of the flock; the sanitation practices and raising conditions; the maturity, weight and quality of the flock. The service men also supervise caponizing and capetting programs,

advise the farmer in regard to raising procedures and new techniques, and respond to emergency calls for sick and diseased flocks. In other words, the service men perform a general supervisory and advisory function for the petitioner in regard to the raising of poultry.

The pick-up crews drive out from petitioner's office on a regularly scheduled basis to the various farms where they gather up the chickens, load them into crates, put the crates on the trucks and drive to the Maplewood Packing Company where the crates are unloaded by employees of the packing company.

The grain crews load petitioner's trucks with grain from petitioner's warehouse in Belfast and then proceed to deliver grain to the various farms on a regularly scheduled basis. At the farm the grain crews unload the feed into the farmer's grain bin, pick up empty feed bags and return to the warehouse for more grain. Litter and sawdust are also handled by the grain crews in substantially the same manner."

The wages paid these groups, for the period mentioned earlier in this opinion, is the basis for the Commission's contention that they are subject to Employment Security contributions by the petitioner.

That part of the Employment Security law involved here is found in Section 3, Chapter 29 of the Revised Statutes, which reads as follows:

"**Sec. 3. Definitions.** As used in this chapter, unless the context clearly requires otherwise, the following words shall have the following meanings:

I. 'Agricultural labor' includes all services performed:

A. On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agri-

cultural or horticultural commodity, including the raising, shearing, feeding, caring for, training and management of livestock, bees, poultry and fur-bearing animals and wild life.

B. In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm.

C. In connection with the production or harvesting of maple syrup or maple sugar or any commodity defined as an agricultural commodity in section 15 (g) of the Federal Agricultural Marketing Act, as amended, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs or waterways used exclusively for supplying and storing water for farming purposes.

D. In handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

> As used in this subsection, the term 'farm' includes stock, dairy, poultry, fruit, fur-bearing animal and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards."

Much is said in the respondent's brief as to the interpretation of the statutes involved here. The rule to be followed by this court has long since been established, and often reiterated, that, "If the meaning of the language is plain the Court will look no further; it is interpreted to mean exactly what it says." *Sweeney* v. *Dahl,* 140 Me. 133, 34 A. (2nd) 673 (1943) at page 676. The language of the statute is plain and there is no need or necessity for the court to look any further as it is to be interpreted to mean exactly what it says. There is nothing vague, ambiguous or uncertain about it.

In the respondent's brief it is intimated that the business conducted by the petitioner was a "business enterprise" and for that reason not covered by exemption of "agricultural labor." It purports to cite as authority the case of *Stromberg Hatchery* v. *Iowa Employment Security Com'n.,* 239 Iowa 1047, 33 N. W. (2nd) 498 (1948).

The suggestion made of a "business enterprise;" in that decision, is a quote from the argument by the defendant Commission in that case which the court neither discussed nor passed upon. The plaintiff there was engaged exclusively in the business of hatching eggs, exempt under the Iowa law. The Commission advanced the argument that certain employees, not directly engaged in the hatching of eggs were not exempt. The court in its opinion ignores the commercial enterprise argument and rules that the several employees such as salesmen, office clerks, office managers and others were engaged in the business of hatching eggs and for that reason were exempt under the Iowa law.

We are not aware of any decision which labels the business of raising poultry as a "business enterprise" and for that reason subject to the provisions of the law. We are concerned here solely with the Maine Statute and no such distinction is made nor can any such intimation be found in the statutes. That position is not tenable.

Again in the respondent's brief the argument is advanced that the services "must be an integral part of farming operations performed for the farmer and not for a third person." *California Employment Com'n.* v. *Butte County Rice Growers Ass'n. et al.,* 25 Calif. (2nd) 624, 154 P. (2nd) 892 (1944).

Our law, which defines "agricultural labor," specifically includes services performed in the employ of any person. The court, in the *California* case, *supra,* held that the services performed by employees of a warehouse were not "agricultural labor" and one reason advanced was that the warehouse was a general one opened to the public.

If the law provided that such employees must be in the employ of the owner, tenant or operator of the farm then the problem involved here would be easy of solution. On the contrary, such "agricultural labor" may be performed by one "in the employ of any person."

The services performed by the several crews whose duties are briefly described in this opinion, were necessary and essential for "the raising, * * * feeding, caring for * * * and management of * * * poultry."

The facts that these services were provided by the petitioner does not change the picture in the least. It may be necessary that because of the tremendous growth of this industry in Maine, in a comparatively few years, and the necessary employment of possibly hundreds of persons, that the law should be changed to cover them. However, that

is not for this court; that duty devolves on the legislature to amend the law, if it sees fit, by what it may deem to be appropriate legislation.

Petition granted.

The Respondent Commission to abate Employment Security contributions assessed against the petitioner.

INHABITANTS OF OWLS HEAD
vs.
JOHN E. DODGE, JR.

Knox. Opinion, February 13, 1956.

Exceptions. Taxation. Public Use. Exemptions. Airports. Supplemental Assessments. Technical Defenses.

A bill of exceptions must include all that is necessary to enable the court to decide whether the rulings or decision of which one complains were erroneous. The bill should show the claims and contentions of the parties and enough of the claims, allegations and facts to be clearly understood.

Where the only issue involves the right of a town to tax certain airport buildings allegedly "not devoted to public use," the value of the entire leasehold interest is immaterial.

The findings of the trial court sitting without a jury if based upon reasonable and credible evidence must be upheld.

Statutory tax exemptions are strictly construed. Municipally owned property not devoted to public use is not exempt. R. S., 1954, Chap. 92, Sec. 6.

Persons in possession of real estate are liable for taxes thereon.

Airports and landing fields and buildings thereon are land for purposes of taxation.

A leasehold interest is an interest in land for taxation purposes *(ibid.)*.

Only property devoted to public use is tax exempt. The way the property is used is the test.

Taxation is the rule, exemption the exception.

Where there is sufficient credible evidence to support a finding that a supplemental assessment was in legal conformity to R. S., 1954, Chap. 92, Sec. 30 the finding will not be disturbed.

In matters of taxation mere technical defenses have never found favor.

A decision docketed as received and filed in vacation Nov. 1, 1954 is proper where the next term does not commence until Nov. 2 even though filed after business hours on Nov. 1.

ON EXCEPTIONS.

This is an action of debt for taxes upon a supplemental assessment. The case is before the Law Court upon exceptions after judgment for plaintiff.

Exceptions overruled.

Domenic Cuccinello, for plaintiff.

Frank F. Harding, for defendant.

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

FELLOWS, C. J. This is an action of debt for taxes brought by the inhabitants of the Town of Owls Head against John E. Dodge, Jr. in Superior Court for Knox County. The case was heard by a Justice of the Superior Court, in vacation by agreement, and judgment rendered for the plaintiff for $1912.50. The case comes to the Law Court on exceptions by the defendant.

The case is this: The town of Owls Head, Maine held a legal town meeting on March 2, 1953 and at the meeting the

town clerk, selectmen, assessors, tax collector, and treasurer were elected and qualified. No assessment was made against the defendant, or against the property, for the tax years 1949 to and through 1953. The property in question was supplementally assessed and entries were made in the valuation books for the years 1949-1953. On August 17, 1953 supplemental tax warrants and tax certificates covering the property were given to the tax collector. The collector sent bills for taxes due. The taxes were not paid, and the collector was directed to bring suit against the defendant. A formal request for payment was made of defendant Dodge. The defendant refused to pay and suit was brought.

The property now in question is located on land known as the Rockland Municipal Airport. There was no tax on the land. The assessors assessed certain buildings on the land. The defendant gave no list of properties to the assessors in order to claim any exemption. The Airport made no list or claim through any attorney or representative, nor did the city of Rockland.

The defendant John E. Dodge, Jr. operated the Rockland Municipal Airport under a lease from the city of Rockland dated August 4, 1949 to run for five years with privilege of renewal. During the World War II, the airport was leased October 19, 1943 to the United States Government for the duration of the war, and in 1946 the government gave the airport back to the city of Rockland under a revocable permit, which permit has not been revoked.

The excepting party is bound to see that the bill of exceptions includes all that is necessary to enable the court to decide whether the rulings or decision of which he complains were or were not erroneous. Failing to do so, his exceptions must fail. The Law Court has jurisdiction over exceptions only when they clearly present the issues to be considered. The bill itself should show the claims and contentions of the parties, and enough of facts, allegations, or

claims, as to be clearly understood. *Bronson, Aplt.*, 136 Me. 401, 402; *Bradford* v. *Davis*, 143 Me. 124, 128; *Heath et al., Aplts.*, 146 Me. 229, 232, 233. The issues presented by the defendant's bill in this case are not clear in every instance. The bill does not show, for example, exactly the error claimed in all instances, and why it was error. The defendant's brief attempts to make the contentions clear, but a brief is no part of a bill of exceptions. *Heim* v. *Coleman*, 125 Me. 478.

Again, an exception to be valid must raise a question of law. If it calls in question the interpretation of a written statement or a written document it must specify in what regard it raises a question of law. The bill of exceptions must show clearly and distinctly that the ruling was not on a question where law and fact are so blended that it is impossible to tell on which the adverse ruling was based. See *American Sardine Co.* v. *Olsen*, 117 Me. 26; *Laroche* v. *Despeaux*, 90 Me. 178.

The bill of exceptions states that the defendant is aggrieved by the findings of the presiding justice and his claims of error are as follows: (1) That the presiding justice excluded evidence of the value of the contract between the defendant and the city of Rockland, (2) that the presiding justice erred in finding that there was a legal supplemental assessment, — the error not specifically stated, (3) that there was error in finding that a legal supplemental assessment was made without any certificate being made by the assessors, (4) that there was error in finding that taxes on specific items can be properly assessed against the defendant in possession of land exempt from taxation, (5) that it was erroneous to find that a legal assessment could be made against the defendant in possession of land exempt from taxation, (6) that it was error to find that the property consisting of airport and landing field is not entirely exempt from taxation, (7) that it was error to hold that

each of the buildings assessed was not used for public purposes, (8) that judgment was not rendered in vacation. Although some exceptions do not show the specific error claimed, several may be considered as doing so, and we, therefore, consider the claims made in the bill so far as shown.

EXCEPTION 1. The value of the leasehold interest in and to the entire airport and buildings is not material. The evidence offered was properly excluded. No tax was claimed on the land. The case involves only the right of the plaintiff town to tax certain buildings that are claimed to be "not devoted to public use." The value of the property taxed only was material. Whether the defendant made profit or loss was not involved. The entire property was not taxable, and the value of the lease of the entire property was not admissible, under the circumstances here, to determine the value of a particular building. Revised Statutes, 1944, Chapter 81, Sections 3, 8, (Revised Statutes 1954, Chapter 92, Sections 3, 9). This first exception is overruled.

EXCEPTIONS 2 - 7. The next six exceptions relate to the legality of the supplemental assessment and claims that the presiding justice erred in his findings of law and facts showing legality, and that it was error not to find that the entire airport property, with buildings thereon, was exempt. The defendant claims that "this so-called 'supplemental assessment' was not actually the work of the assessors, but was the work of one of the assessors, his wife and an attorney;" and that there was "no certification as required by law to create a valid supplemental assessment" citing Revised Statutes 1944, Chapter 81, Section 29 (Revised Statutes 1954, Chapter 92, Section 30).

The presiding justice said in his decision: "This court finds that the assessors were duly elected, that they had jurisdiction to assess the supplemental tax (unless the

property taxed be exempt), and that they did make a proper assessment of the supplemental tax. This being a proceeding not involving a forfeiture, if there were any errors or irregularities in the assessment of the tax, that they were errors in procedure which did not increase the taxpayers' share of the public burden and did not occasion him any other loss, and therefore did not invalidate the assessment. I therefore find the assessment properly made by the three assessors."

"As to the claim of the defendant for exemption, it is borne in mind that exemption from property taxes is the exception and not the rule, that all doubt as to the meaning of the tax statute must be weighed against exemptions. The burden is on the person claiming a tax exemption to establish his right to such exemption." * * *.

"The defendant claims that ownership and not public use is the determining factor on the question of exemption. This court cannot accede to such a view. It is ruled as a matter of law that only that part of the property taxed to the defendant as is appropriated for public use is tax exempt under the provision of the Statute relied upon by the defendant."

"This calls for an examination of the obligations of the defendant under the lease from the City of Rockland, and the use actually made of the property. Under the 8th clause of the lease the defendant agreed to operate the airport for the use and benefit of the public, to make available all airport facilities and service to the public, without discrimination. The obligations of the defendant under this lease are a public duty and any reasonable use of the property in carrying out those obligations is a public use."

"Taking into consideration the obligation of the defendant under the lease and all of the testimony in the case in respect thereto, I find that the use of building No. 6, the

house occupied by the defendant and his family and the use of building No. 7, the service office, hangar and repair shop, are reasonably necessary for airport purposes to carry out the obligations of the defendant under his lease, and that they have been used for public purposes during the years for which the taxes have been imposed, and I find these properties exempt from taxation."

"As to the remainder of the buildings taxed, to wit: buildings Nos. 1, 2, 3, 4, and 5, I find that they either have not been used for public purposes or that their use has been an intermixture of public and private purposes, and that the public use has been merely incidental or trivial to the private use of the property. I therefore find that these buildings are not exempt from taxation."

"The amount of taxes lawfully assessed on these properties by supplemental taxes for the years 1949 to 1953 inclusive, respectively, is as follows, viz.:

#1	The Joy House so-called	$127.50
#2	The Texaco Barn, so-called	127.50
#3	The Knowlton warehouse, so-called	510.00
#4	The Marcus warehouse, so-called	765.00
#5	The Elmer Manufacturing plant, so-called	382.50
		$1,912.50"

The record shows that defendant Dodge carried on the airport according to the lease, and that in addition thereto he carried on a personal "fishing business" and a personal "flying service" or school of instruction, and that he rented to some individuals and corporations certain buildings on the airport properties for their own use or business. "The Joy House" was occupied by one Joy who was a "fishing captain" and incidentally worked for defendant on the airfield. Joy and his family occupied the house as a residence. Previously one Cochrane used it as a residence for his fam-

ily and worked for defendant in the fishing business, and was one of defendant's pupils, and worked for defendant in the flying service. "The Texaco Barn" was used for storage of grease and oils by the Texaco Company. The Texaco Company paid rent to defendant. "The Knowlton warehouse" was rented by Knowlton Brothers in the furniture business, and used by them for storage of furniture—previously the warehouse was rented by defendant for apartments to individuals in the "personal flying service." "The Marcus warehouse" was used for storage of furniture by Stonington Furniture Co. "The Elmer Manufacturing Plant" were buildings rented and used to manufacture prefabricated houses. Previously this manufacturing plant was used by Crie Hardware Co. for storage.

The findings of the trial court sitting without a jury, must be upheld if based upon reasonable and credible evidence. *Mitchell et al., re Will,* 133 Me. 81, 174 Atl. 38. *Jolovitz* v. *Redington & Co.,* 148 Me. 23; and there is no error of law, *Heath et al. Aplts.,* 146 Me. 229, 239, 79 Atl. (2nd) 810; *Consumers Fuel Co.* v. *Parmenter,* 151 Me. 83, 84.

Exemptions in tax statutes are strictly construed. *O'Connor* v. *Wassookeag School,* 142 Me. 86; *Orono* v. *Sigma Alpha Epsilon Society,* 105 Me. 214.

The property of a municipality not devoted to public use is not exempt from taxation. Revised Statutes 1944, Chap. 81, Sec. 6, Subsection 1 (now R. S., 1954, Chap. 92, Sec. 6); *Inhs. of Boothbay* v. *Inhs. of Boothbay Harbor,* 148 Me. 31. See also *Greaves* v. *Houlton Water Co.,* 143 Me. 207, and *McDonald* v. *Stubbs,* 142 Me. 235.

A person in possession of real estate is liable for taxes thereon. Revised Statutes 1944, Chap. 81, Sec. 8, R. S., 1954, Chap. 92, Sec. 9. Interest by contract or otherwise in land exempt is taxable as real estate. Revised Statutes, 1944, Chap. 81, Sec. 3, R. S., 1954, Chap. 92, Sec. 3.

Airports and landing fields and buildings thereon are land for the purpose of taxation. R. S., 1944, Chap. 81, Sec. 6 (Revised Statutes 1954, Chap 92, Sec. 6); Revised Statutes, 1944, Chap 9, Sec. 21, Rule X (R. S., 1954, Chap. 10, Sec. 22); See also *Inhs. Boothbay* v. *Inhs. Boothbay Harbor,* 148 Me. 31.

A leasehold is an interest in land for the purpose of taxation. R. S., 1944, Chap. 81, Sec. 11 (R. S. 1954, Chap. 92, Sec. 12); *Orono* v. *Sigma Epsilon Society,* 105 Me. 214, 74 Atl. 19; *Foxcroft* v. *Straw,* 86 Me. 76, 29 Atl. 950; *Portland Terminal Co.* v. *Hinds et al.,* 141 Me. 68, 39 Atl. (2nd) 5.

"In our view only property appropriated for public uses is tax-exempt under the Statute." *Inhs. of Boothbay* v. *Inhs. of Boothbay Harbor,* 148 Me. 31. The way in which the property is used is the key to whether or not it is tax exempt. In the case of *Orono* v. *Sigma Alpha Epsilon Society,* 105 Me. 214, 74 Atl. 19, the court say "Not all the real estate of literary and scientific institutions is exempt from taxation. . . . Suppose for illustration the university had leased a lot to a citizen of Orono who erected a boarding house or a store for students thereon, could it be contended that the boarding house or store could escape taxation, merely because it rested on land that might have been used by the university for its own purposes but in fact was not? The exemption, which as an exemption must always be construed strictly, does not go so far. *St. James Ed. Inst.* v. *Salem,* 153 Mass. 185; *Foxcroft* v. *Straw,* 86 Me. 76; *Foxcroft* v. *Campmeeting Asso.,* 86 Me. 78."

The general rule of construction of tax statutes is that taxation is the rule and that exemptions are exceptions to the rule and are to be strictly construed. *O'Connor* v. *Wassookeag School, Inc.,* 142 Me. 86, 46 Atl. (2nd) 861.

The statutory provision on supplemental assessments is in part as follows: (Revised Statutes, 1944, Chap. 81, Sec.

29), (Revised Statutes, 1954, Chap. 92, Sec. 30) — "When any polls or estates liable to taxation have been omitted from assessment within five years from the last assessment date the assessors for the time being may by a supplement to the invoice and valuation and a list of assessments assess such polls and estates their proportion of such tax according to the principles on which the assessment was made, certifying that they were omitted. Such supplemental assessments shall be committed to the collector for the time being with a certificate under the hands of the assessor stating that they were omitted and that the powers in the previous warrant, naming the date of it, are extended thereto and the collector has the same power and is under the same obligation to collect them as if they had been contained in the original list; and all assessments shall be valid notwithstanding that by such supplemental assessment the whole amount exceeds the sum to be assessed by more than five per cent (5%) or alters the proportion of tax allowed by law to be assessed on the polls."

The assessors' book on valuation and list of assessments noted the assessment of the supplementary tax in each of the instances where a supplementary tax was assessed, and stated that the tax had been omitted. The book was signed by the three assessors. The supplemental assessments were committed to the collector with certificates, signed by the three assessors, stating that they were omitted, naming the date of previous warrant. Supplemental tax warrants were given to the collector, signed by the three assessors, and also supplemental tax certificates were given the collector signed by the three assessors. The certificates and warrants were on forms reprinted from the Maine Assessors Manual by permission of the Maine Municipal Association, and then stated that the assessments noted on a certain page of the assessment books were omitted by mistake and that the lists are supplemental to original valuation and list of assess-

ments of the year in question, and made by virtue of R. S., Chapter 81, Section 29.

The defendant contends that the supplemental assessment was the work of "an assessor, his wife and an attorney." The assessors adopted the work and made it their own. "It was agreeable to all of them." By their signatures this appears. In these days almost all offices have clerical assistance or a typist, and when assessors employ an attorney, such employment certainly makes for correctness and legality. The exhibits offered by the plaintiff show that certification was made in each instance, and that a supplemental tax warrant in each instance was given the Tax Collector. The warrants and supplemental tax certificates were each signed by the three assessors. There was sufficient credible evidence for the sitting justice to find, as he did find, that there was a legal supplemental assessment and certification.

The defendant cites *Topsham* v. *Purinton*, 94 Me. 354, 47 Atl. 919 as authority that in this case there was no legal supplemental assessment of taxes, which case holds that before supplemental assessments are committed to the collector they should be accompanied with a certificate, under the hands of the assessors, stating that they were omitted by mistake. There was evidence that this was done in the case at bar. In the *Topsham* case, however, there was no authentication by the signatures of the assessors. The assessors did authenticate in the case at bar as shown by the exhibits and by the testimony of one of the assessors.

The defendant also cites *Portland Terminal Co.* v. *Hinds*, 141 Me. 68, 72, holding that the full power of taxation is vested in the legislature and is measured not by grant but by limitation, and no tax assessment is valid, as against anyone except the owner, except by authority of legislative enactment. See Opinion of Justices, 123 Me. 573, 121 Atl. 902.

"Taxation must be practical. It must bring results." *Sears Roebuck Co.* v. *Presque Isle,* 150 Me. 181, 184. While the statute must be followed, the manner of following the terms of the statute often depends on the human qualities of the individuals who form the local board of assessors. All boards in Maine endeavor to be legally correct in their assessments, but the individual members differ, and their methods of doing business and keeping records differ. The records of many boards may not meet with the approval of a technical lawyer or an experienced accountant, yet they accomplish the purpose because capable of being read and understood, and capable of being construed as within the terms of the statute. Errors or irregularities in a proceeding, not involving a forfeiture, which do not take away the taxpayer's rights or increase his proper share of the public burden, do not necessarily invalidate an assessment. If minor errors or irregularities were held to invalidate an assessment, there would be very few, if any, valid assessments in the towns of Maine. Assessors are often inexperienced and often elected on popularity or because they are, in some instances, the only persons willing to accept the office. "When forfeitures are not involved, proceedings for the collection of taxes should be construed practically and liberally," *Cressey* v. *Parks,* 76 Me. 532; *Norridgewock* v. *Walker,* 71 Me. 181; *Bath* v. *Whitmore,* 79 Me. 182.

In *Inhabitants of Athens* v. *Whittier,* 122 Me. 86, 118, Atl. 897, various technical defects in the assessment and taxation of the defendant were raised by the defendant as part of his defense for refusal to pay taxes. In answer to these technical defenses the court said: "In this form of action mere technical defenses have never found favor with the courts. *Cressey* v. *Parks,* 76 Me. 532; *Bath* v. *Reed,* 78 Me. 276; *Rockland* v. *Ulmer,* 87 Me. 357. As this court said in *Greenville* v. *Blair,* 104 Me. 444, 'This action will not be defeated by any mere irregularities in the election of asses-

sors or collector or in the assessment itself, but only by such omissions or defects as go to the jurisdiction of the assessors or deprive the defendant of some substantial right or by the omission of some essential requisite to the bringing of the action.' Also see *Rockland* v. *Farnsworth,* 111 Me. 315." So long as the defendant has not suffered any substantial loss as a result of any irregularity in the tax assessment proceedings, his technical defenses will not be honored. As the court, in the *Athens* case concluded at page 90: "It does not appear that any omission or irregularity pointed out in the proceedings has occasioned the defendant any hardship, loss or injury."

In his bill of exceptions the defendant says that the decision of the presiding justice was not rendered in vacation. This contention of the defendant is because, he says in his brief, "the decree was not filed until after the usual time of the closing of business of the Clerk of Court's office late in the afternoon of the day preceding the convening of the next term of court." The docket entries state that the decision was filed in the clerk's office on November 1, 1954. The term of Court for Knox County began on November 2, 1954. The preceding term in Knox County was in May 1954, and at the May term 1954 the docket shows that by agreement of parties, the case was to be heard by the court in vacation. The case was heard in vacation on June 29, 1954, and judgment for the plaintiff received and filed in vacation on November 1, 1954. See *Bolduc et al.* v. *Granite State Ins. Co.,* 147 Me. 129, 83 Atl. (2nd) 567.

There is no reversible error. The findings of the presiding justice were legal and proper and authorized by the record.

Exceptions overruled.

STATE OF MAINE
vs.
GUY R. ALLEN

STATE OF MAINE
vs.
FREDERICK M. GRINDLE

Washington. Opinion, February 14, 1956.

Night Hunting. Pleading. Variance. Circumstantial Evidence. Principals and Accessories.

In a night hunting complaint the time of day is the essential time element not the date of the alleged offense.

Proof that the alleged offense occurred at 2:15 A.M. on November 4th is consistent with the allegation that it occurred on Nov. 3 one-half hour after sunset and one-half hour before sunrise of the following morning.

To establish proof by circumstantial evidence, the State must prove each circumstance upon which conviction must rest beyond a reasonable doubt and the evidence must be sufficient to exclude every other reasonable hypothesis except respondents' guilt.

All participants are principals in misdemeanor cases.

ON EXCEPTIONS.

These are criminal actions for violation of the night hunting statutes before the Law Court upon exceptions after verdicts of guilty. Exceptions overruled. Judgment of the State in each case.

Harold V. Jewett, for State.

Dunbar and Vose, for defendants.

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

CLARKE, J. These cases originated in the Western Washington Municipal Court and involve two complaints alleging night hunting. The respondents pleaded not guilty, were found guilty, appeal taken. The cases were tried in Superior Court before a jury. The State's case in, the respondents seasonably rested and moved for directed verdicts, motions denied and exceptions taken. Verdicts of guilty were returned by the jury. Exceptions seasonably perfected.

The record discloses that the area was blueberry land, a field, and orchards, which bordered the highway with a black growth background. The respondents in a car were using a so-called trigger light, powered by the car battery, and spotting the general area, including the orchards and blueberry land. Their car speeded up when the officers approached and the officers drove on the left side of the road and forced the respondents' car onto the edge of the blueberry ground. The officers on going to the respondents' car found the windows down. There was a gun of sufficient caliber between the respondents on the front seat with the muzzle to the floor. As the officers came to the car they observed one of the respondents manipulating the breach of this gun. The officers inquired of the respondents if they had any ammunition, the answer was no. The officers estimated the speed of the respondents' car as it approached from thirty to thirty-five miles per hour. The time was between 2:15 and 2:30 in the morning of the fourth of November. The night was wet and the temperature cool. The respondent Grindle was out of the car and stood about in the immediate vicinity. The officers on returning later found cartridges on the ground in close proximity to the place where Grindle had stood. These cartridges fitted the gun found in the car. They also found a clip near where the car had been stopped. The clip filled with cartridges fitted the gun in question. One of the respondents was a former game warden.

There were 5 grounds or causes given by the respondents for the exception taken by each respondent to the refusal of the court to direct a verdict.

Cause No. 1. That the allegations of time of the alleged offense in each complaint was insufficient in law. The complaints allege that on the third day of November 1954 each respondent was night hunting, the specific charge was "Did then and there unlawfully hunt certain wild animals to wit, deer in closed season, between the hours of one-half hour after sunset and one-half hour before sunrise of the following morning." The record is that the respondents were hunting between 2:15 and 2:30 o'clock in the morning of the fourth which was the morning following the third day of November. The essential part of the offense is the time of day. To allege hunting on the third is not the offense, it is obvious that the essential allegation is hunting within certain hours. *State* v. *Harvey,* 126 Me. 509.

Cause No. 2. That the time of the alleged offense as set forth in each complaint and the time offered in evidence as proof thereof was not the same. The allegation states the night of the third but does not stop there, the specific time one-half hour after sunset and one-half hour before sunrise of the following morning. What time of the morning was this? Ans. "This was around 2:15, 2:20." The officer having testified as to what he observed and did. Officer Higgins stated the time between 1:30 and 3:00 in the morning of the fourth. This evidence fits the allegation after sunset of the third and one-half hour before sunrise of the following morning. No material variance between allegation and proof.

Cause No. 3. That there was no evidence of the presence of, or evidence of the likelihood of wild animals or deer, in the vicinity in which the offense is alleged to have occurred. With reference to the area in issue the officer testified, "It is blueberry land four or five hundred yards down to the

back growth." The officer was asked, "Is there an orchard in that area any place?" The Ans. "Yes there are still live trees there now. Had been originally a larger orchard there." In a case of this nature the purpose of the hunter controls, a state of mind compatible with the offense charged. The respondents, one a former game warden, principals in a misdemeanor clearly demonstrated an answer to this exception by spotting the area with a strong light.

Cause No. 4. That there was no evidence of hunting as alleged in said complaints. There are certain elements necessary to night hunting, it must be night time as distinguished from day time, and within the times set by statute, there must be present and available certain instrumentalities, that is, a light, a gun and ammunition and back of this a purpose to search, find and possess the animal. If mere observation all may be left out except the light. Intent or purpose is evidenced by the acts of the offender.

Cause No. 5. That all evidence offered of the alleged offense was circumstantial and a conviction in this case could only have been based on suspicion, conjecture or imagination. Considering the facts it cannot be said that there is any other reasonable supposition than that of night hunting. The evidence meets the test laid down by our court in matter of circumstantial evidence, that is if the state relies upon circumstantial evidence to establish the guilt, it is not sufficient that the evidence all points in the same direction, that is, to the guilt of the accused. It must prove each and every circumstance upon which the conviction must rest beyond a reasonable doubt and the evidence must be sufficient to exclude every other reasonable hypothesis except that of the respondents' guilt. If this rule is followed any crime may be proven by circumstantial evidence. *State* v. *Ward,* 119 Me. 494; *State v. Sprague,* 135 Me. 473. In the light of the evidence the hypothesis or supposition that the respondents were merely observing deer was not a reasonable one.

Respondents were tried together by agreement. These cases were misdemeanors. In a case of a misdemeanor all participants are principals.

We presume that the jury was properly instructed regarding circumstantial evidence as there was no exception to the court's charge.

Exceptions to the refusal of the presiding justice to direct a verdict of not guilty will be overruled where the record shows sufficient evidence to prove guilt beyond a reasonable doubt. *State* v. *Gustin, et al.,* 123 Me. 307; *State* v. *Robinson,* 145 Me. 77.

To justify the setting aside of the verdict, it must be shown clearly that the verdict is wrong.

Credibility of witnesses is to be appraised by the jury who hear and observe them as they testify.

There was sufficient credible evidence upon which the jury based a finding of guilty against these respondents.

Exceptions overruled in both cases.

Judgment for the State in each case.

BURTON M. CROSS
vs.
GUY GANNETT PUBLISHING CO.

Kennebec. Opinion, February 16, 1956.

Libel. Pleading. Demurrer.

When words published are libelous *per se* neither inducement (background of relevant circumstances against which the alleged libelous statement was made) nor colloquium (the averment which links the statement to the background or to the plaintiff) are required.

The inducement and colloquium must be alleged in proper traversable form when the alleged statement is not libelous *per se;* if not then the declaration is demurrable. An article is no less damaging because it accomplishes its mission by the use of insinuation.

A newspaper article must be read as a whole to determine its natural and probable impact upon the minds of its readers and it is libelous if it exposes the plaintiff to public hatred or contempt or ridicule or deprives him of the benefit of public confidence and social intercourse.

Headlines are an important part of a publication.

A false statement that the governor abused his high office by seeking to substitute personal and political favoritism contrary to the statutory policy of the legislature for merit in the operation of a state controlled industry is libelous.

ON EXCEPTIONS.

This is an action of libel before the Law Court upon defendant's exceptions to the overruling of a demurrer to the declaration. Exceptions overruled.

McLean, Southard & Hunt, for plaintiff.

Berman, Berman & Wernick,
Goodspeed and Goodspeed, for defendant.

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

WEBBER, J. This was an action of libel brought by the plaintiff, a former Governor of Maine, against the defendant company, which publishes several daily newspapers in this state. The defendant filed a general demurrer to the plaintiff's declaration which was overruled below. Defendant's exceptions bring the matter before us.

The defendant asserts as one ground of demurrer that the declaration is fatally defective in that it fails to allege that the statement was published of and concerning the facts and circumstances set forth in the inducement. Where words used in an allegedly libelous statement are not defamatory *per se,* the plaintiff may yet show the defamatory nature of the statement when viewed against a background of certain other extrinsic matter or circumstances. The averment of these other relevant circumstances (the inducement) must be in traversable form and must be linked to the statement itself by further traversable allegations that the statement was made of and concerning the matters set forth in the inducement. The averment which effectively performs this linking operation is known as the colloquium. The colloquium also performs the function of linking the statement to the plaintiff as the person defamed thereby. Whenever a colloquium is required to relate the statement to the inducement, failure to set forth such colloquium in proper and traversable form will render a declaration in an action of libel demurrable. *Niehoff* v. *Sahagian,* 149 Me. 396; *Niehoff* v. *Congress Square Hotel Co.,* 149 Me. 412. However, when the published words are libelous *per se,* neither inducement nor colloquium are required. See *Niehoff* v. *Sahagian, supra; Niehoff* v. *Congress Square Hotel Co., supra; Brown* v. *Rouillard,* 117 Me. 55; 53 C. J. S. 247, Sec. 162b and cases cited. Such was the case here on the view we take of the words in the published statement.

The second ground of demurrer advanced by the defendant is that the words used in the published statement are

not defamatory *per se.* In several counts the declaration sets forth the publication of an article in three of the defendant's daily newspapers, The Daily Kennebec Journal published in Augusta, The Waterville Morning Sentinel published in Waterville, and The Portland Press Herald published in Portland. For the purpose of determining the sufficiency of the pleading, the falsity of the article is admitted by demurrer. In each paper the article appeared on the front page and carried a headline. There were minor but relatively unimportant differences in the wording of headlines, use of subheadlines, and the use of heavy black type for emphasis, but essentially the same identical article appeared in each paper and for the purposes of examining the law applicable in this case, it will suffice to incorporate in this opinion only the article as it was published in the Portland Press Herald, as follows:

"CROSS REPORTEDLY SOUGHT
LIQUOR FAVORS FOR THREE

"Governor Burton M. Cross recently asked the two Republican members of the Liquor Commission to grant liquor listings to three persons, it was reliably learned today.

"CROSS REQUESTED the favors at a conference with Liquor Chairman Ralph A. Gallagher of Damariscotta, whom he recently named to the post and Frederick H. Bird of Rockland.

"Although the retiring governor stipulated that he did not want to cause the commissioners any 'embarrassment' in asking the favors, the directness of his approach was not in keeping with the 'hands off' practice he was careful to follow during his administration.

"Cross reportedly asked the commissioners to purchase another brand from liquor salesman Dorian McGraw of Milbridge; to purchase three brands from Foster F. Tabb, retiring Kennebec

County sheriff, apparently so that Tabb could represent a New England rum concern; and to purchase more brands from William A. Bancroft of Portland.

"BANCROFT, A FRIEND of Gardiner wine bottler Herman D. Sahagian a key figure in the 1952 liquor probe, represents a concern selling rum and gin. His gin was delisted March 1, 1950, but relisted a year ago.

"McGraw is related to ex-Senator Owen Brewster by marriage.

"Brewster's name was brought into liquor commission affairs today in another relationship—Executive Councilor Lester S. Crane of Machias said Brewster had asked him through a third party to vote for confirmation of Leo J. Cormier to the Liquor Commission.

"Cormier was confirmed last week but Crane voted against him."

At the outset, we recognize that the article must be read as a whole, taking into account its wording, the nature and use of headlines, and any other methods employed to give special emphasis in order to determine its natural and probable impact upon the minds of newspaper readers. As was said in *Brown* v. *Guy Gannett Publishing Co.*, 147 Me. 3, 5: "It is not necessary in order for printed words to be libelous that they naturally tend to expose the plaintiff to public hatred *and* contempt *and* ridicule, *and* deprive him of the benefit of public confidence and social intercourse. *It is sufficient if they naturally tend to bring about any one of the foregoing consequences.* The governing principle of law is stated in the alternative or disjunctive, *not* in the conjunctive." We must bear in mind that "the daily newspaper is read in the haste of daily living." *Sinclair* v. *Gannett, Publisher, et al.*, 148 Me. 229, 236. An article is no less defamatory because it accomplishes its damaging mission by the use of insinuation. "Insinuations may be as defamatory as

direct assertion, and sometimes even more mischievous." *State* v. *Norton,* 89 Me. 290, 294. In *Palmerlee* v. *Nottage,* 119 Minn. 351, 353, 138 N. W. 312, no direct charge was made against plaintiff in a newspaper article, but by insinuation all of the County Commissioners, of whom plaintiff was one, were accused of "favoritism, nepotism and malfeasance in office." The court said: "A charge need not be made directly—indeed, the venom and sting of an accusation is usually more effective when made by insinuations. The floating calumny which each reader may affix to any and every official act which has aroused suspicion may lay hold of is capable of inflicting graver injury and injustice than a direct, specific charge, which may be squarely met and refuted, if untrue." As was said in *Muchnick* v. *Post Publishing Co.,* 125 N. E. (2nd) (Mass.) 137, 138, "The difficulty in this case lies not in the law, which is well settled, but in its application to the facts. * * * The test is whether, in the circumstances, the writing discredits the plaintiff in the minds of any considerable and respectable class of the community."

We think that a reading of the article in question naturally tends to expose the plaintiff to public contempt and ridicule and to deprive him of the benefit of public confidence. At the time this statement was published the plaintiff was the Governor of Maine and, as such, the head of the Executive Department charged with responsibility for and authority over the State Liquor Commission. The Legislature in establishing the Commission has indicated that in all matters having to do with the purchase, sale and control of alcoholic liquors within this state, the best interests of the state shall be served and that decisions shall not be based upon favoritism or discrimination. We think the only exception to be found is in that provision which discriminates in favor of the people of Maine by providing that "the commission shall in their purchases of liquors give priority,

wherever feasible, to those made from the agricultural products of this state." R. S., 1954, Chap. 61, Sec. 8, Subsection IV. Pursuant to its policy of complete non-discrimination, however, the Legislature provided in Subsection V of the same section, "The commission at all times and with respect to all policies shall neither discriminate against nor in favor of any person, firm or corporation because of his residence or nonresidence in the state * * *." We think, moreover, that regardless of what we deem to be the announced policy of the Legislature in this respect, it would be highly improper for either the Governor or the Liquor Commission to permit either personal or political favoritism to govern the purchase of particular brands of liquors with public funds. Obviously, the best interests of the people of this state require that the choice of liquors to be purchased should rest only upon such factors as quality, competitive price and public acceptance and demand. The reader of the article in question would naturally conclude that the plaintiff in his then capacity as Governor of Maine had attempted to use the great influence of his high office and his appointive power to obtain from members of the Liquor Commission a deviation from those proper standards. The article, both directly and by artful insinuation, conveys to the reader that until the reported incident occurred the Governor had maintained a "hands off" policy and had left the Commission free to make decisions on the basis of merit, but that suddenly and as a marked deviation from his previous attitude he had made improper requests of two Commissioners with no more worthy objective than to benefit personal and political favorites of the plaintiff. The article is filled with political overtones and by insinuation suggests the reasons why the plaintiff might have selected the particular beneficiaries of his favor. The headlines do nothing to minimize the impact of the main article. In two out of three headlines the word "favors" was used and thereby emphasized. "Headlines are an important part of the publication, and

cannot be disregarded, for they often render a publication libelous on its face which without them might not necessarily be so * * *. In these headings to publications we frequently find the 'sting.'" *Landon* v. *Watkins*, 61 Minn. 137, 142, 63 N. W. 615. Courts have frequently made reference to the "sting" in the headline and the fact that many people in a hurried and busy society are headline readers. *Express Pub. Co.* v. *Lancaster*, 270 S. W. (Tex.) 229; *Pratt* v. *Pioneer Press Co.*, 30 Minn. 41, 14 N. W. 62; *Gustin* v. *Evening Press Co.*, 172 Mich. 311, 137 N. W. 674.

The defendant contends that although the article might properly be considered as defamatory *per se* in charging that the plaintiff requested these "favors," it is saved by the inclusion of the reference to the fact that "the retiring Governor stipulated that he did not want to cause the Commissioners any embarrassment." With this contention we cannot agree. In the first place, the emphasis of the whole article is so top heavy with respect to "favors" that the reference to "embarrassment" is completely overborne. Moreover, the reference to "embarrassment" is immediately followed in the same sentence by a reference to "favors" and the sentence itself is so constructed that it presents the two as necessarily in contrast and conflict. The writer by the very method of presentation suggests to the reader that the plaintiff's alleged reference to "embarrassment" should not be accepted or regarded as in any degree offsetting the gross impropriety of substituting favoritism for merit. Actually, the reader would be quite justified in concluding that the reference to "embarrassment" but made matters the worse. The natural and probable impression of the average reader would be that the impropriety of the requests was such as to create "embarrassment," and that the plaintiff in making suggestions which were "not in keeping" with his previous policy was himself aware that they savored of favoritism. The defendant now contends in effect that the reference to

"embarrassment" neutralizes all implication of favoritism and the only natural and probable impression of the reader would be that the plaintiff had asked for consideration of certain individuals and products on the basis of merit. We think a very different type of presentation would have been required to produce such an innocuous result. "It is not the ingeniously possible construction, but the plainly normal construction which determines the question of libel, or no libel, in written words which are maliciously published." *State* v. *Norton, supra,* at 294.

We are not unmindful that the Press as well as all other citizens must be secure in their right to make fair comment and offer criticism with reference to matters of public interest, but there is a great distinction between offering criticism on the one hand and making false statements of fact on the other. Mr. Justice Holmes in *Burt* v. *Advertiser Newspaper Co.,* 154 Mass. 238, 242, 28 N. E. 1, said: "But there is an important distinction to be noticed between the so called privilege of fair criticism upon matters of public interest, and the privilege existing in the case, for instance, of answers to inquiries about the character of a servant. In the latter case, a *bona fide* statement not in excess of the occasion is privileged, although it turns out to be false. In the former, what is privileged, if that is the proper term, is *criticism, not statement,* and however it might be if a person merely quoted or referred to a statement as made by others, and gave it no new sanction, if he takes upon himself in his own person to allege facts otherwise libelous, he will not be privileged if those facts are not true. * * * But what the interest of private citizens in public matters requires is freedom of discussion rather than of statement." (Emphasis supplied.) To the same effect, *O'Regan* v. *Schermerhorn,* 25 N. J. Misc. 1, 50 A. (2nd) 10, 17; *Cook* v. *East Shore Newspapers,* 327 Ill. App. 559, 64 N. E. (2nd) 751. So in the instant case, if it were in fact true that the plain-

tiff abused his high office by seeking to substitute personal and political favoritism for merit in the operation of a state controlled industry, the defendant would be secure in the right to make fair comment and to criticise such action; but when the very fact which alone would justify the criticism is false, as this demurrer admits, the result is libel. *Westropp* v. *E. W. Scripps Co.*, 148 Ohio 365, 74 N. E. (2nd) 340; *Augusta Evening News* v. *Radford*, 91 Ga. 494, 17 S. E. 612.

We think the instant case is not unlike the case of *Muchnick* v. *Post Publishing Co., supra.* In that case the plaintiff was chairman of a school committee. The defendant newspaper published an article criticising his manner and methods while presiding over sessions of the committee, with particular reference to his attitude toward the superintendent of schools. The "sting" of the libel was found in an insinuating question (page 139 of 125 N. E. 2d), as follows: "Could it be that the superintendent's refusal to nominate a certain principal for assistant superintendent has anything to do with the animosity shown to him?" The court found that the article could be read as charging the chairman with an "unworthy purpose," with being "so far false to the position of great public trust reposed in him as to abuse the powers of his office," and with having "the improper objective of forcing a certain appointment to be made by an unwilling superintendent against his own judgment." The court held that in so charging, the article, if false, was defamatory. In numerous cases articles charging favoritism as an abuse of public office have been held defamatory. *Levert* v. *Daily States Pub. Co.*, 123 La. 594, 49 So. 206; *Wofford* v. *Meeks*, 129 Ala. 349, 30 So. 625; *Palmerlee* v. *Nottage, supra.*

The defendant contends that we should follow the precedent which in his view was established in *Niehoff* v. *Congress Square Hotel Co., supra.* This case, however, appears

readily distinguishable. The statement there under consideration went no further than to charge that the plaintiff, a deputy attorney general engaged in the prosecution of a criminal case, urged one of the state's witnesses to give evidence as to certain material facts which, while aiding in the prosecution of the respondent, might also lead to the conclusion that the state's witness himself had committed a crime. The article further related that the state's witness did not think that he had committed any crime. There was, however, no charge or insinuation that the plaintiff was requesting false testimony, or that he knew or had reason to know that the witness had committed no crime if such were indeed the case, or that he persuaded the witness to give the desired testimony by means of promises, threats, duress, or any other improper means. The charge, reduced to its lowest terms, went no further than to indicate that the plaintiff had performed his duty properly on the basis of the knowledge he had. He was in no way defamed by the expressions of anger and chagrin which emanated from the state's witness when he discovered that the evidence which he gave disclosed that in fact and law he had committed a crime. The *Niehoff* case seems to us quite unlike the instant case, but very similar to the case of *Hylsky* v. *Globe Democrat Pub. Co.*, 348 Mo. 83, 152 S. W. (2nd) 119. In that case, a police officer alleged that he was libeled by the use of the word "trapping" in an article describing how he had secured a confession from a friend in a murder case. In sustaining a demurrer, the court noted that an examination of the entire article made it clear that the plaintiff throughout his investigation had merely performed his official duty in a creditable and efficient manner and without resort to any improper methods.

We find no error in the action of the justice below in overruling the demurrer.

The entry will be,

Exceptions overruled.

STATE OF MAINE
vs.
OMER F. GAGNON

Aroostook. Opinion, February 24, 1956.

Criminal Law. Manslaughter. Automobiles. Intoxicating Liquor. Blood Test. Constitutional Law. Fair and Impartial Trial.

Where hearsay testimony regarding a blood test is improperly admitted into evidence in a homicide case the prejudicial effect is not cured by an instruction of the presiding justice to disregard it. The admission of such evidence in the instant case deprives the accused of his constitutional right to a fair and impartial trial.

ON EXCEPTIONS.

This is a charge of manslaughter before this Law Court upon exceptions after verdict of guilty. Exceptions sustained.

Melvin Anderson,
Walter Sage, for State.

David Solman,
James P. Archibald, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, WALKER, BELIVEAU, TAPLEY, CLARKE, JJ.

CLARKE, J. This is a case of homicide. The respondent was tried in the Superior Court for Aroostook County upon an indictment charging involuntary manslaughter and found guilty. The case is before us upon exceptions by the respondent. There were four exceptions, the fourth exception dealt with the overruling by the court of the respondent's motion for a directed verdict. The other three exceptions are (1) blood test testimony, which was hearsay, admitted; (2) statement that respondent was insured, motion

for mistrial denied; (3) that State failed to prove essential elements of manslaughter.

Alfreda Marquis was killed in a motor vehicle collision on the Caribou-Van Buren Road, when the car in which she was riding and driven by her husband was in collision with a motor vehicle operated by the respondent. The happening occurred in the evening of a dark, rainy night. The highway was of the usual width and of tarvia surface.

The respondent was alone in his car, there were three other passengers in the Marquis car. The respondent claimed that when he first saw the lights of the Marquis car it was on his side of the road, that he sounded his horn twice and it appeared from the lights of the approaching car that it was pulling back to its side of the way but that the Marquis car continued on his side, an emergency existed and that he, the respondent, turned to his left to avoid a collision. Marquis claimed that the respondent came over on his side of the way and caused the collision. Both cars remained upright and on the highway following the happening.

There was evidence of drinking by the respondent but conflicting testimony as to his condition. The respondent was badly injured in the happening. There was evidence of drinking in the Marquis car.

During the course of the trial a medical doctor was allowed, over the objection of the respondent, to give testimony regarding a blood test. A proper foundation had not been laid for this testimony and it was hearsay. We consider this exception only.

Dr. Vogell is indefinite regarding a request of respondent to have a blood test. There is no clear evidence that respondent requested it. It would appear that the doctor himself was the one who thought it wise to take it, and probably so advised the respondent. Dr. Vogell, however, took a sample

of blood and gave it to Police Officer Bernard in a test tube sealed with a cork. Bernard had asked the respondent if he wanted a blood test and the respondent said no, and Bernard testified that later he saw Dr. Vogell "drawing blood." Officer Bernard gave the vial to "Trooper" Chase who took it to Houlton the next day. Trooper Chase gave, not one, but two vials to Dr. Gagnon's secretary the next day, but which tube contained blood of respondent is not proved, if either tube actually did. Dr. Gagnon said the test showed 17 6/100 per cent but that he did not make the test, "the nurse ran it." The nurse did not testify. Dr. Gagnon's testimony was rank hearsay and inadmissible testimony relative to a blood test was therefore wrongfully a major portion of the State's case. See R. S., Chapter 22, Section 150; *State* v. *Demerritt,* 149 Me. 380.

As for the verdict there were several probabilities which might have governed the finding.

First, that the respondent was under the influence of liquor and that his condition was the proximate cause of the happening.

Second, that by reason of the dark, rainy night, that the happening might have been an accident or caused by misadventure, except for the testimony of one witness who used the term intoxicated in referring to the respondent's condition.

Third, that a breach of the statute regarding the law of the road being *malum prohibitum* might have been the proximate cause.

Fourth, that the jury might have given little weight to the respondent's witnesses and were prejudiced by hearsay evidence regarding the so-called blood test.

The dividing line between what is merely civil negligence and what is criminal negligence is often so indistinct that

inadmissible testimony concerning a blood test might, and probably would, cause a jury to improperly give too much consideration to testimony that the law says should not be considered. That the presiding justice warned the jury not to take hearsay evidence into account, could not repair any damage that was done. A careful examination of the record indicates that the jury might have weighed the probabilities but that evidence of the blood test in fact controlled its decision.

It is true that in his charge the court instructed the jury to disregard evidence of the test. The presumption is that the jury abided the instruction but common sense dictates the conclusion that the damage had already been done. Our court has ever been mindful of the constitutional rights of the accused to a fair and impartial trial. *State* v. *Corey,* 145 Me. 231. The evidence under the circumstances was of great impressiveness and was prejudicial to the respondent. We are not interested in the verdict, and have no thought of substituting our evaluation of the evidence for that of the jury. Our only interest is that which pertains to a fair trial.

Exception sustained.

LEROY P. BUTTS
vs.
HENRY FITZGERALD

Penobscot. Opinion, February 28, 1956

Executors and Administrators.
Real Actions. Survivorship. Title.
Parties. Boundaries. Death.

A real action commenced under R. S., 1954, Chap. 172 is not abated by death of the plaintiff provided the notice has been given in accordance with Section 16.

Failure to comply with R. S., 1954, Chap. 172, Sec. 16 is ground for a new trial.

ON MOTION FOR NEW TRIAL.

This is a real action before the Law Court upon exceptions and motions for new trial. The action was prosecuted by demandant's wife as administratrix. The jury returned a verdict for plaintiff. Motion for new trial granted.

Oscar Walker, for plaintiff.

Frank G. Fellows, for defendant.

SITTING: WILLIAMSON, WEBBER, BELIVEAU, TAPLEY, CLARKE, JJ. FELLOWS, C. J., did not sit.

TAPLEY, J. On exceptions and motion for new trial. This is a real action involving real estate located in the Town of Greenbush, County of Penobscot and State of Maine. The writ bears date of September 27, 1952 and was entered at the November Term, 1952 of the Superior Court for the County of Penobscot. The defendant pleaded the general issue of *nul disseisin* without brief statement. The docket entries disclose the fact that at the April Term, 1954 death of plaintiff was suggested and at the September

Term, 1954 there appears entry to the effect that "Mignon H. Butts, Admrx. comes in to prosecute." The case was tried before a drawn jury at the September Term, 1954. The verdict favored the plaintiff by establishing a boundary line and in addition thereto by assessing damages for the plaintiff in the sum of $100. The defendant filed a motion for a new trial and bill of exceptions. Defendant's counsel in his brief propounds the following contentions:

"(1) The Plaintiff has failed to establish title, or any title, to the premises, either at the time of bringing suit or subsequent thereto, and

(2) The Plaintiff has failed to allege and present prima facie proof, or any proof, of damages, and

(3) The establishing of line B-C as the boundary between the Defendant and the alleged Plaintiff or others is against all of the evidence, and

(4) The Court below erred in admitting statements of the original Plaintiff made prior to the date of the Writ and concerning boundaries and title."

The defendant strenuously argues that the plaintiff has failed to establish any title or interest in the premises involved at a time either before or subsequent to the institution of the suit. He says that Mrs. Butts, as administratrix of the estate of her husband, Leroy P. Butts, original plaintiff "has presented no evidence that she, in that capacity, has any title or interest in and to the premises in question." In substance and effect, defendant contends that this type of action is not one in which the administratrix may be substituted for its original plaintiff because she, in her capacity as administratrix, has no interest in the real estate concerned in the suit. This question creates the necessity of determining if the administratrix may take the place of the deceased plaintiff in this action and proceed in his stead with its prosecution.

The original plaintiff, according to his declaration, proceeded in his suit by authority of provisions of Chap. 172 of R. S., 1954. The sections of this chapter pertinent to the issue provide that the demandant shall declare on his own seizin and allege a disseizin by the tenant (Sec. 2). He shall set forth the estate which he claims in the premises (Sec. 3). Although the demandant need not prove actual entry under his title, he should prove that he is entitled to an estate in the premises and that he has a right of entry therein (Sec. 4). No action shall be maintained unless at the time of its commencement the demandant had right of entry (Sec. 5).

Sec. 16 of Chap. 172, R. S., 1954, provides:

> "No real action shall be abated by the death or intermarriage of either party after its entry in court; but the court shall proceed to try and determine such action, after such notice as the court orders has been served upon all interested in his estate, personally, or by publication in some newspaper."

It is apparent that the purpose of this statute is to save a real action from abatement by death or intermarriage of either party after its entry in court. It is also equally clear that further procedure in the case cannot take place until "after such notice as the court orders has been served upon *all interested in his estate,* personally, or by publication in some newspaper." (Emphasis ours.) In the case of *Bridgham* v. *Prince, Admr.,* 33 Me. 174, being a real action, we find that upon the death of the defendant, his administrator appeared voluntarily and agreed that the action should be submitted to referees. The court on page 175 said:

> "Upon the death of Buck, the Court had no authority to proceed any further in relation to the writ of entry, which he had commenced, without notice to his legal representatives, and all others interested in his estate, as heirs. Ch. 145, Sec. 19, R. S. A judgment against the administrator would not

> affect the heirs, who alone appear to be interested in the land demanded. A decision without notice to them could have no legal effect upon the title to the property in controversy."

When only the administrator of a deceased defendant appears in a real action, there is no defendant in court against whom a judgment can be given for the land. A judgment against an administrator in this type of case cannot affect the heirs. *Trask* v. *Trask, Admr.*, 78 Me. 103; *Burleigh* v. *Prentiss, et al.*, 95 Me. 192; *Brown, et al.* v. *Strickland,* 32 Me. 174, at page 175:

> "A demandant in a real action must prove his title. - - - - - In administrators de bonis non, the title to the testator's real estate does not vest. They can maintain no real actions. We think no title vested in Mr. Appleton, upon which to maintain this suit."

This administratrix had no title to the real estate involved in so far as her status as such administratrix is concerned. *Averill, Admr.* v. *Cone,* 129 Me. 9.

We have here a situation in which the demandant died after the institution and entry of the action. His wife in her capacity as administratrix of demandant's estate comes in to prosecute the action. No evidence can be found in the record that she has any interest in the real estate whatsoever. There is nothing in the record showing that the heirs or any other persons interested in the real estate were given notice. There is no plaintiff party in which a judgment of the court could possibly vest. The action must fail for the lack of a proper plaintiff. *Consolidated Rendering Co.* v. *Martin,* 128 Me. 96.

In view of our determination as to the status of the plaintiff, we find it unnecessary to consider the exceptions.

Motion for new trial sustained and granted.

STATE OF MAINE

TO THE HONORABLE THE JUSTICES OF THE SUPREME JUDICIAL COURT:

The undersigned Judges and Registers of the Probate Court, duly appointed and qualified pursuant to Section 50, Chapter 153 of the Revised Statutes of 1954, as amended by Chapter 323 of the Public Laws of 1955, authorized and directed by said Statute to make new rules and blanks or amendments to existing rules and blanks, have prepared and respectfully submit the annexed Rules to be used in Probate Courts, for your approval, agreeable to said Statute.

FRANCIS H. BATE
NATHANIEL M. HASKELL
LOUIS C. STEARNS 3d
HENRY A. PEABODY
HARVEY R. PEASE

STATE OF MAINE

SUPREME JUDICIAL COURT

Whereas, it is provided by Section 50, Chapter 153, of the Revised Statutes of 1954, as amended by Chapter 323 of the Public Laws of 1955, that a Commission composed of three Judges and two Registers of Probate appointed by the Governor, may make new rules and blanks or amendments to existing rules and blanks, which shall, when approved by the Supreme Judicial Court, or a majority of the Justices thereof, take effect and be in force in all Courts of Probate, and Whereas a Commission, duly appointed and qualified as aforesaid, has prepared certain rules for use in said Courts of Probate, which are hereunto annexed and have submitted them to the Supreme Judicial Court for approval in accordance with said Statute.

Said rules having been examined by the Justices of the Supreme Judicial Court,

IT IS HEREBY ORDERED, that the rules be approved and that they take effect and be in force in all Courts of Probate in this State on and after April 1, 1956.

Augusta, Maine, January 26th, A. D. 1956.

RAYMOND FELLOWS
ROBERT B. WILLIAMSON
DONALD W. WEBBER
ALBERT BELIVEAU
WALTER M. TAPLEY, JR.
PERCY T. CLARKE

RULES FOR PROBATE COURT GOVERNING PRACTICE AND PROCEDURE IN THE PROBATE COURTS OF THE STATE OF MAINE.

I.

APPEARANCES OF ATTORNEYS.

If a party shall change his attorney pending any proceeding, the name of the new attorney shall be substituted on the docket for that of the former attorney and said party shall give notice thereof to the adverse party; and until such notice or change, all notices given to or by the attorney first appointed shall be considered in all respects as notice to or from his client, except in cases in which by law a notice is required to be given to the party personally; provided, however, that nothing in these rules shall be construed to prevent any party interested from appearing for himself, in the manner provided by law, and in such case the party so appearing shall be subject to the same rules that are or may be provided for attorneys in like cases, so far as the same are applicable.

Each petition shall be considered a separate proceeding and the appearance of an attorney shall be entered accordingly.

II.

AUTHORITY OF ATTORNEYS.

When the authority of an attorney at law to appear for any party shall be demanded, if the attorney shall declare that he has been duly authorized to appear by an application made directly to him by such party or by some person whom he believes to have been authorized to employ him, such declaration may be deemed and taken to be evidence of

authority to appear and prosecute or defend in any proceeding in said court.

III.

TIME OF APPEARANCES.

Petitions and other matters upon which notice has been ordered will not be acted upon until after the return hour, and any attorney or other duly authorized person who desires to appear to contest, or object to any matter in order for hearing, shall give notice to that effect on or before the opening hour of the session of the court at which such hearing is to be had.

IV.

APPROVED BLANKS.

Approved blanks will be furnished by the Register and must be used in all proceedings to which they are applicable. In all inventories and accounts where there is not sufficient space in the original blank, additions or riders may be attached on schedule paper to be furnished by the Register as provided above and not otherwise.

V.

ORDERING NOTICE.

Notice will not be ordered on any petition, report, account or other instrument until the same has been actually filed in Court.

VI.

ENDORSEMENT OF PAPERS.

The names of attorneys and persons acting pro se presenting petitions and other instruments in Court to be acted

upon must be indorsed thereon to secure the prompt issuing of notices and for other purposes.

VII.

REAL ESTATE SALES. ALLOWANCES.

Petitions to sell, mortgage, lease or exchange real estate or to sell personal property, or for allowances to widows or minor children will not be acted upon until the inventory in that estate has been duly filed in Court and approved.

VIII.

LIST OF CLAIMS. LICENSE TO SELL REAL ESTATE.

Petitions to sell real estate for the payment of debts, or legacies, except where the amount has been ascertained by the settlement of an account or the report of Commissioners of insolvency, must be accompanied with a list under oath, of the debts (and legacies, if any) due from the estate, and the estimated amount of the expenses of administration.

IX.

COMMISSION TO TAKE DEPOSITION.

No Commission to take a deposition of witnesses to a will shall issue before the return day of the petition for probate of said will.

X.

UNIFORM VETERANS' GUARDIANSHIP ACT.

All instruments required by the provisions of the Uniform Veterans Guardianship Act shall be filed in duplicate.

XI.

NOTICE, ADMINISTRATION D.B.N. OR D.B.N., C.T.A.

Notice shall be ordered on all petitions for the appointment of an administrator de bonis non or de bonis non with the will annexed.

XII.

LIST OF CLAIMS. INSOLVENT ESTATES.

Representations of Insolvency shall be accompanied with a statement, under oath, of the amount of the debts due from the estate so far as can be ascertained, and of the amount of the appraisal of the real and personal property.

XIII.

GUARDIAN AD LITEM.

The Court may appoint a guardian ad litem, for any party interested in any proceedings before it when it is deemed advisable.

XIV.

ACCOUNTS TO BE ITEMIZED.

Accounts presented for order of notice must include dates of receipts and expenditures and must be fully stated before notice will be ordered thereon.

XV.

FEES AND CHARGES OF REGISTER.

Charges and fees of the Register shall be paid in advance. The Court may refuse to hear any cause or matter, or allow any account until such charges and fees have been paid.

XVI.

SURETY COMPANY BONDS. ATTORNEY-IN-FACT.

When a surety company is offered as surety on a Probate Bond, no such bond shall be approved unless the name of the person executing the bond for the surety company has been certified to the Register by the insurance commissioner, or unless and until such surety company shall have filed with the Register a power of attorney or a certified copy thereof authorizing the execution of such bond. The Court may require proof in the form of an affidavit or otherwise, that the person purporting to be an officer of any surety company and executing in behalf of the company any bond, letter or power of attorney, is in fact such an officer.

XVII.

BONDS, EXECUTION AND CONTENTS.

The names and residences of principals and sureties on all probate bonds shall be written or printed in full, and the signatures thereto witnessed.

XVIII.

APPRAISERS AND COMMISSIONERS.

Sureties on the bonds of administrators, executors, guardians, trustees or conservators will not be appointed appraisers or commissioners on the same estate, nor will any person who is related to the administrator, executor, guardian, trustee, conservator or heirs at law within the sixth degree be appointed to either of said trusts. Christian names and residences of appraisers and commissioners shall be fully stated.

XIX.

AMENDMENTS.

Any petition addressed to the Court, or any Probate Account may be amended under the direction of the Court, with or without notice, when the rights of parties will not be affected.

XX.

REAL ESTATE DESCRIPTIONS.

All petitions for license to sell real estate shall contain a description of the real estate to be sold, sufficiently accurate to make a conveyance thereof.

XXI.

COMMUNICATIONS.

All official communications relating to cases and business in court should be addressed to the Register of Probate to avoid delay.

XXII.

PARTIES TO RETAIN ATTORNEYS.

Parties not familiar with the proceedings in the Probate Court are expected to secure assistance of competent counsellors qualified to practice law within this state. Neither the Judge nor Register is allowed by law to advise in matters coming before the Court.

XXIII.

APPOINTMENT OF ADMINISTRATOR.

No person entitled by law to administer an estate shall be appointed within thirty days after the death of the decedent

without written consent of all other persons so entitled, who are resident in this State.

XXIV.

NOTICE AT DISCRETION OF COURT.

Judges of Probate may order notices on all petitions and other matters presented to their several Courts.

Matters requiring public notice may be combined in a consolidated form under one order of notice to be signed by the Judge or Register.

XXV.

FORM OF LETTERS AND BONDS.

Letters testamentary or of administration with the will annexed and bonds in cases of nuncupative or lost wills are to follow the general form of letters testamentary and of administrations with the will annexed and bonds prescribed in other cases of testate estates.

XXVI.

USE OF DEPOSITIONS.

All depositions shall be opened and filed by the Register at the return day for which they were taken; and if the matters in which they are to be used shall be continued, such depositions shall remain on file and be open to all objections when offered at the trial or hearing as at the return day, and all depositions shall remain on file at least fourteen days; the party producing a deposition may then withdraw it by leave of Court, in which case it shall not be used by either party.

XXVII.

PRODUCTION OF WRITTEN EVIDENCE.

When written evidence is in the hands of an adverse party no evidence of its contents shall be admitted unless reasonable notice to produce it on trial or hearing shall have been given to such adverse party, or his attorney, and comments by counsel upon a refusal to produce it will not be allowed without first proving such notice.

XXVIII.

SPECIFICATIONS.

In all contested cases the Judge of Probate, on his own motion, or on application of the petitioner, may require the party objecting to file specifications of the grounds of the objection within such time as the court may order, but amendments thereto may be filed by leave of the Court, upon such terms as may be deemed reasonable, but not without granting a continuance, if requested, and in such cases the hearing shall be confined to the grounds of objection specified.

XXIX.

CERTIFICATE OF SALE OF REAL ESTATE.

In cases of license to sell real estate at private sale or to mortgage, lease or exchange real estate, a certificate under oath, of such sale, mortgage, lease or exchange shall be filed in the Registry of Probate within thirty days, showing the amount received or the real estate taken in exchange, and the person to whom sold, mortgaged, leased or with whom exchanged.

XXX.

PRIVATE CLAIMS.

No private claim of an administrator, executor, trustee, guardian of an adult or conservator of an estate shall be

allowed in his account or otherwise, unless particularly stated in writing, and notice of such claim included in the notice on said account, or given on petition for allowance of such claim.

If a private claim is stated in an account, the heading of the account shall include the words "and private claim of" to assure its inclusion in the notice on the account.

XXXI.

PROVING WILLS.

Wills must in every case be proved and allowed in open court, and in case the testimony of the witness or witnesses proving the will is not taken down by the court stenographer and certified, the testimony shall be preserved by an affidavit taken before the Judge or Register, and filed with the other papers in the case.

XXXII.

CERTIFICATE OF WORTH OF PERSONAL SURETIES.

All personal surety bonds when presented for approval, shall bear a certificate of a justice of the peace or notary public of the following tenor:

I hereby certify that I have made due inquiry into the financial standing of the sureties on the within bond, and find them to be jointly worth, above their liabilities, the sum of $. I therefore recommend the acceptance and approval of the within bond.

Justice of the Peace.

Notary Public.

XXXIII.

WITHHOLDING LETTERS.

The Judge may direct that letters, testamentary or of administration, shall not issue from the probate office (and in such cases no certificate of appointment shall issue) until twenty days shall have elapsed after date of the decree.

XXXIV.

NOTICE OF FILING PROOF OF CLAIM.

When claims are filed in the probate office after the qualification of an administrator or executor, verified as required by law, the Register shall forthwith give notice of such filing by mail to the administrator or executor of the estate.

XXXV.

CONTENTS OF PETITIONS.

Petitions for administration filed for notice and petitions for probate of wills shall contain the addresses of the widow or widower and of the heirs at law and next of kin of deceased so far as known to the petitioner, and the Register shall give notice, by mail, of the filing of said petition to all persons whose addresses are so given, at least seven days before the return day. If any of the heirs are minors, they shall be so designated.

XXXVI.

WARRANTS OF APPRAISAL.

Letters, testamentary and of administration, letters of guardianship, conservatorship and of trust shall be accompanied by a warrant to appraisers and shall not issue until appraisers are appointed. The warrant need not be recorded

until returned, but the fact of issue shall be entered on the docket.

XXXVII.

PETITIONS IN FOREIGN ESTATES.

All petitions by administrators, executors, guardians, conservators or trustees of foreign estates for license to collect or receive personal property and all petitions by administrators, executors, guardians or conservators of foreign estates to sell real estate shall be filed in the office of the Register of Probate in duplicate, and the Register shall forward to the office of the State Tax Assessor one of said duplicates seven days at least before the return day.

XXXVIII.

REDUCTION OF BOND.

The petition for the reduction of the penal sum of any Probate bond signed by a surety company as surety and the petition for the discharge of liability of a surety or sureties on any Probate bond will not be granted until the principal on such bond has filed and settled his account in Court.

XXXIX.

DESCRIPTION OF REAL ESTATE.

Real estate listed in any Inventory filed in Court shall be sufficiently described to identify it.

XL.

CERTIFICATE OF PERSONAL ASSETS.

Before the allowance of any account, when personal assets or the evidence thereof are not exhibited to the Court, the Court may require a signed statement from an official of the

bank, or other custodian with whom the securities belonging to the estate are kept or deposited, that they are intact in accordance with the Schedule of said account, or such a signed statement may be made on the original account.

XLI.

NOTICE ON ACCOUNTS.

If any account filed by an administrator, executor or trustee in a solvent estate is not assented to in writing by the heirs, legatees or beneficiaries as the case may be, the Court shall order public notice on said account, and in addition the Court may in its discretion, order such administrator, executor or trustee to give to the heirs, legatees or beneficiaries actual notice by mail or otherwise of the time of filing said account and the time when the public notice on said account is returnable; and in case such actual notice is ordered said administrator, executor or trustee shall make return to the Court under oath that he has given such notice before said account can be allowed.

XLII.

CERTIFICATES OF VALUE.

Before administration is granted or a will is allowed in the estate of a resident decedent, the petitioner shall file a resident Certificate of Value. Before administration is granted on the estate of a non-resident decedent, or a foreign will is allowed and an executor or administrator c.t.a. is to be appointed, the petitioner shall file a non-resident Certificate of Value.

XLIII.

SURETY COMPANY BONDS.

The Court may refuse to approve a bond of any Surety Company which does not co-operate with the Court in re-

quiring a trust officer to account in accordance with the requirements of law.

XLIV.

NOTICES TO CLAIMANTS.

Commissioners in insolvent estates and on disputed claims shall notify in writing all claimants of the filing of their reports. Such notice shall be sent by mail to the last known address of the claimant five days at least before the filing of the report and shall give the amount allowed or disallowed.

XLV.

JUDICIAL SEPARATION.

Service of all petitions filed in the Probate Court by a husband or wife, alleging desertion, shall be by a copy of the petition and order of Court thereon, fourteen days at least before the same is returnable. If the residence of the party is known or can be ascertained by reasonable diligence actual notice shall be obtained; otherwise notice shall be given in such manner and by such means as the Court may order.

XLVI.

EQUITY RULE DAYS.

Rule days in equity proceedings in the Probate Courts shall be the fixed days to which all matters requiring public notice are returnable, as held in the different Counties of the State.

XLVII.

EQUITY RULES.

The equity rules of the Supreme Judicial and Superior Courts of the State shall be the rules for equity proceedings

in the Probate Court, so far as the same are applicable thereto.

XLVIII.

EQUITY PROCEDURE. SUBPOENA, NOTICES.

Causes in equity shall be begun by bill filed in the Register's office, upon which subpoena shall issue as a matter of course, returnable on a rule day of the Probate Court of the county in which the bill is filed, held within sixty days after the filing of such bill. In all such cases service shall be made by a copy of subpoena and bill attested by the Register. The Court may by special order fix such time or times for filing answer, plea, demurrer or replication or for hearing of the cause as justice may require.

Where it appears that any defendants reside out of the State the Register, on application of the plaintiff at any time after filing the bill, shall enter an order for the defendants to appear and answer in accordance with the provisions of the equity rules of the Supreme and Superior Courts of the State.

XLIX.

DETERMINATION OF VALUE.

Petitions to determine value and petitions to sell real estate to pay the deficiency of the widow or widower under R. S. Chap. 170, Sec. 1, Par. I, shall not be acted upon until the time for filing claims has expired and a final account allowed.

L.

ACCOUNTS IN FOREIGN ESTATES.

No final account of an executor or administrator of a deceased non-resident leaving tangible personal property in

Maine shall be approved or allowed until or unless the provisions of R. S. 1954, Chap. 155, Secs. 64, 65 and 66 have been complied with.

LI.

TAX COMPUTATION SHEETS.

No account of an executor, administrator or trustee showing any payment except debts, funeral expenses, expenses of administration and legacies or distributive shares wholly exempt from inheritance taxes shall be allowed by the Court unless with the consent of the State Tax Assessor, or unless both the computation sheet issued by said Assessor showing the assessment of said taxes and the receipt for payment thereof are produced for inspection, or a tax waiver is filed.

LII.

PETITIONS TO SELL REAL ESTATE AND DISTRIBUTE.

Petitions for license to sell real estate and distribute the proceeds among heirs or devisees living in different states, shall not be acted upon unless an affidavit on Probate Blank 88a has been filed.

LIII.

APPEALS.

Whenever an appeal is taken from any order, sentence, decree or denial of a Judge of Probate the Appellant at the time of perfecting his appeal in the Probate Court, shall inform the Register as to the number of certified copies of the Reasons of Appeal required for service. In addition to these copies the Register shall also furnish to the Appellant for filing in the Appellate Court, one additional certified copy of the Reasons of Appeal and one certified copy of the Appeal Bond and one certified copy of the Petition, Account, Bill in Equity or other document and the decree thereon which is the subject matter of the appeal.

INDEX

ABANDONMENT

See Adoption, *Jones* v. *Thompson*, 462.

ABATEMENT

See Death, *Butts* v. *Fitzgerald*, 505.
See Rules of Court, *Pyrofax Gas* v. *Cons. Gas*, 172.

ACCESSORIES

See Fish and Game, *State* v. *Allen*, 486.

ACCOUNTS

See Affidavits, *Wright, Admr.* v. *Bubar*, 85.

ADMISSIONS

See Fish and Game, *State* v. *McPhee*, 62.

ADOPTION

Upon appeal to the Supreme Court of Probate from a decree of adoption the appellant is strictly confined to such matters as are specifically declared in the reasons of appeal.

Abandonment is a question of fact which requires evidence that the parents at some time definitely gave up their parental interests in the child and their duties to it. It is a question of fact depending largely upon parental intent.

Exceptions to a decree of the Supreme Court of Probate must be overruled if there is any evidence to support them. This standard applies to the denial of a writ of *habeas corpus*.

Jones v. *Thompson*, 462.

See Wills, *New England Trust Co., et al.* v. *Sanger*, 295.

AFFIDAVITS

Exceptions to the admission of testimony will be sustained only when the specific grounds of the objections are stated in the trial court.

The suppletory oath has no part in the evidence introduced in a case through the statutory affidavit and the objection that affiant administrator had no personal knowledge of the account does not effect the evidential force of the affidavit which the statute provides.

Whether a wife was duly authorized to ratify in writing the infant contract of her husband is a question of fact in the instant case.

Wright, Admr. v. *Bubar*, 85.

AGENCY

See Affidavits, *Wright, Admr.* v. *Bubar*, 85.
See Negligence, *Hersum, Admr.* v. *Kennebec Water Dist.*, 256.
See Trover, *Champlin* v. *Ryer*, 415.

AIRPORTS

See Taxation, *Owls Head* v. *Dodge*, 473.

AMENDMENTS

See Equity, *Munsey* v. *Groves*, 200.
See Specific Performance, *Bell* v. *Bell*, 207.
See Trover, *Champlin* v. *Ryer*, 415.

APPEAL

See Adoption, *Jones* v. *Thompson*, 462.
See *Dutch* v. *Scribner*, 354.

See Fish and Game, *State* v. *Whitehead*, 135.
See Guardians, *Wattrich, Applt.* v. *Blakney*, 289.
See Mandamus, *Casino Motor Co.* v. *Needham, et al.*, 333.

APPEARANCE

See Equity, *Munsey* v. *Groves*, 200.

ARREST

See Assault and Battery, *Pelletier* v. *Davis*, 327.

ASSAULT AND BATTERY

Where a charge of the presiding justice is in error to the point where it causes an injustice to the party or parties involved, then notwithstanding Rule XVIII (Rules of Court) the Law Court will consider the objections.

To justify a new trial a party must prove that the verdict is manifestly wrong.

A verdict will not be set aside for excessive damages unless it is apparent that the jury acted under some bias, prejudice or improper influence, or have made some mistake of fact or law.

Pelletier v. *Davis*, 327.

ASSESSMENTS

See Taxation, *Owls Head* v. *Dodge*, 473.

ASSIGNMENT

See Rules of Court, *Pyrofax Gas* v. *Cons. Gas*, 172.

ASSUMPSIT

See *McNally* v. *Ray*, 277.

ATTACHMENT

See Trustee Process, *Dutch* v. *Scribner*, 354.

ATTORNEY

See *Audita Querela*, *Wintle* v. *Wright, Admr.*, 212.
See Indecent Liberties, *State* v. *Norton*, 178.
See Review, *Munsey* v. *Public Loan*, 17.

AUDITA QUERELA

Audita querela is a remedial process to relieve a party who has been injured or who is in danger of being injured from the consequences of a judgment because of some improper action of the party who obtained it which could not have been pleaded in bar to the action.

Payment or part payment of a demand before judgment will not support an *audita querela* because of the neglect of the party in not taking advantage thereof before judgment is rendered.

There are a few instances of allowing an *audita querela* to show defenses which were available before trial where such defense was not offered because of the intervention of fraud and deceit. To support an *audita querela* such fraud and deceit should be active, affirmative, and effectively intervene to prevent the making of the available defense.

A demurrer admits the truth of the allegations for the purpose of determining the legal sufficiency of the declaration; it does not go so far as to admit their truth for other and unrelated purposes.

The power of the court to censure an attorney must be exercised

with the greatest of care and restraint and only upon certain knowledge that the attorney merits rebuke.

Wintle v. *Wright, Admr.*, 212.

AUTOMOBILES

See Trucks, *State* v. *Edgecomb*, 368.

BANKRUPTCY

What constitutes such a wilful and malicious injury as not to be dischargeable in bankruptcy depends upon the facts of the particular case.

Negligent conduct in driving an auto to be wilful and malicious within the meaning of the Bankruptcy Act must be so in disregard of the consequences to another that it can be said to have been wanton as well as wilful.

Johnstone v. *Gardner*, 196.

BILLS AND NOTES

See Review, *Munsey* v. *Public Loan*, 17.

BLASTING

See Negligence, *Albison et al.* v. *Robbins and White*, 114.
See Negligence, *Cratty* v. *Aceto and Co.*, 126.

BLOOD TESTS

Where hearsay testimony regarding a blood test is improperly admitted into evidence in a homicide case the prejudicial effect is not cured by an instruction of the presiding justice to disregard it. The admission of such evidence in the instant case deprives the accused of his constitutional right to a fair and impartial trial.

State v. *Gagnon*, 501.

BRIEFS

See Fish and Game, *State* v. *Whitehead*, 135.

BROKERS

See Judge's Charge, *Dulac* v. *Bilodeau*, 164.

BURDEN OF PROOF

See Negligence, *Cratty* v. *Aceto and Co.*, 126.
See Wills, *Waning Applt.*, 239.

CASE

See Trover, *Champlin* v. *Ryer*, 415.

CHATTEL MORTGAGES

See Review, *Munsey* v. *Public Loan*, 17.

CLOUD ON TITLE

See Equity, *Munsey* v. *Groves*, 200.

COMMISSIONS

See Liens, *Bangor Roofing* v. *Robbins et al.*, 145.

COMMITMENT

See Insanity, *Opinion of Justices*, 1, 24.

COMMON CARRIERS

See Negligence, *Hayes* v. *N. E. Greyhound*, 169.

COMMON KNOWLEDGE

See Negligence, *Albison et al.* v. *Robbins and White*, 114.

CONFESSIONS

See Fish and Game, *State* v. *McPhee*, 62.

CONSIDERATION

See Rules of Court, *Pyrofax Gas* v. *Cons. Gas*, 172.

CONSTITUTION CONSTRUED

STATE OF MAINE

Constitution of Maine, Art. I, Sec. 1,
State v. *Union Oil*, 438.
Constitution of Maine, Art. I, Sec. 6,
Opinion of Justices, 1, 24.
Constitution of Maine, Art. I, Sec. 6,
Dwyer v. *State*, 382.
Constitution of Maine, Art. VI, Sec. 3,
Opinion of Justices, 1, 24.
Constitution of Maine, Art. X, Sec. 3,
Dwyer v. *State*, 382.

UNITED STATES

Constitution of United States, Amend. XIV,
State v. *Union Oil*, 438.

CONSTITUTIONAL LAW

See Blood Tests, *State* v. *Gagnon*, 501.
See Insanity, *Opinion of Justices*, 1, 24.
See Police Power, *State* v. *Union Oil*, 438.
See *Wiley* v. *Sampson-Ripley Co.*, 400.

CONTRACTS

Ordinarily, unless legally excused, a plaintiff cannot recover damages for breach of a contract without first performing his obligation thereunder, or seasonably tendering performance.

An agreement to set off land for a street with the lights in said street to defendant and to those who might purchase land from him confers more than a bare revocable license incapable of assignment.

An agreement to be binding must be definite and certain.

Where some further act is legally necessary under an alleged contract to make a proposed street available to a defendant, plaintiff must perform or tender before requiring defendant to perform his part of the alleged agreement.

Swan Co. v. *Dean*, 359.

Where a single justice makes no specific findings of fact in finding for plaintiff, the defendant's exceptions must be overruled if from the record a path leading to liability may be found.

In ascertaining to whom credit was extended, the intention of the parties must govern, and the question is always, what the parties mutually understood by the language and whether they understood it to be a collateral or a direct promise.

Delaware Feed v. *Auburn Trust Co.*, 372.

See Affidavits, *Wright, Admr.* v. *Bubar*, 85.
See Evidence, *Burrowes Corp.* v. *Read et al.*, 92.
See Executors and Administrators, 344.

See Liens, *Bangor Roofing* v. *Robbins et al.*, 145.
See Specific Performance.
See Trover, *Champlin* v. *Ryer*, 415.

CORAM NOBIS

A writ of error *coram nobis* is available under Maine practice to attack a criminal judgment for errors of fact not known or not appearing at the time, and not apparent of record, which if known would have prevented the judgment—it reaches a deprivation of constitutional rights, both State and Federal, before, at, and during trial.

Habeas Corpus lies generally speaking, to test the jurisdiction of the court (1) over the crime and (2) over the person, and if jurisdiction is found it is the duty of the court to remand the prisoner.

R. S., 1954, Chap. 129, Sec. 9, relates to criminal as well as civil proceedings even though the revisor of statutes has placed it with certain other sections relating to civil cases ("the proceedings upon writs of error, not herein provided for, shall be according to the common law as modified by the practice and usage in the state and the general rules of court").

Coram Nobis is a part of the procedural law of Maine under Art. X, Sec. 3, Constitution of Maine.

Art. I, Sec. 6 of the Constitution of Maine incorporates the process and proceedings of the common law.

Coram Nobis may be petitioned for in the Superior Court where the conviction was had, or judgment rendered, in the case, and where the record is.

R. S., 1954, Chap. 148, Sec. 32 gives authority to a Justice of the Supreme Judicial Court *only* to remand for errors in *sentence*. *Coram Nobis* may relate to an error in adjudication.

A writ of *error coram nobis* should contain the alleged errors of fact. At the hearing the petitioner should show (1) the existing record and (2) proof of the errors alleged.

Coram Nobis cannot be used (1) to revise a decision made by a court or jury, (2) as a substitute for an appeal, (3) as a substitute for a motion for new trial for newly discovered evidence, (4) to support a claim that the record is false and (5) to contradict the record at the original trial. It is limited to errors of fact which if known at the time of the original trial would have prevented judgment.

Coram Nobis must be proved by a preponderance of the evidence—there is no presumption of innocence and the original decision must be judgment affirmed or recalled.

If a judgment is recalled the case is placed in the same situation as it was before the judgment was entered.

Dwyer v. *State*, 382.

CORPUS DELICTI

See Embezzlement, *State* v. *Woodworth*, 229.
See Fish and Game, *State* v. *McPhee*, 62.

CRIME AGAINST NATURE

The crime against nature (R. S., 1954, Chap. 134, Sec. 3) has been consistently interpreted as being very broad in its scope.

The enticing of a female to perform manual manipulation of male sexual parts is not a violation of R. S., 1954, Chap. 134, Sec. 3.

There must be penetration of a natural orifice of the body to constitute a violation of R. S., 1954, Chap. 134, Sec. 3.

State v. *Pratt*, 236.

CRIMINAL LAW

See Blood Test, *State* v. *Gagnon*, 501.
See Crime Against Nature, *State* v. *Pratt*, 236.
See Embezzlement, *State* v. *Woodworth*, 229.
See Fish and Game, *State* v. *Whitehead*, 135.
See Fish and Game (Night Hunting), *State* v. *Allen*, 486.
See Indecent Liberties, *State* v. *Norton*, 178.
See Pleading, *State* v. *Goodchild*, 48.
See Sentence, *Carr* v. *State*, 226.
See Trucks, *State* v. *Edgecomb*, 368.

DAMAGES

Damages of $2749 attributable to personal injuries, pain and suffering, are excessive where evidence shows that the injured, a 25 year old woman was in the hospital for 6 days, in bed at home one week, used a crutch for 3 weeks and felt the effects of pain in her leg for another 6 or 8 weeks with the only permanent injury a small scar on the forehead. (Remittitur of excess of $2000).

Nutting v. *Wing*, 435.

See Assault and Battery, *Pelletier* v. *Davis*, 327.
See Review, *Munsey* v. *Public Loan*, 17.

DEATH

A real action commenced under R. S., 1954, Chap. 172 is not abated by death of the plaintiff provided the notice has been given in accordance with Section 16.

Failure to comply with R. S., 1954, Chap. 172, Sec. 16 is ground for a new trial.

Butts v. *Fitzgerald*, 505.

See Workmen's Compensation, *Prescott* v. *Old Town Furniture Co.*, 11.

DECEDENTS

See Executors and Administrators, 344.

DEDICATION

See Contracts, *Swan Co.* v. *Dean*, 359.

DEFAULT

See Review, *Munsey* v. *Public Loan*, 17.

DEMAND

See Embezzlement, *State* v. *Woodworth*, 229.

DEMURRER

See *Audita Querela*, *Wintle* v. *Wright, Admr.*, 212.
See Libel and Slander, *Cross* v. *Guy Gannett Pub. Co.*, 491.
See Pleading, *State* v. *Goodchild*, 48.
See Trover, *Champlin* v. *Ryer*, 415.

DUE CARE

See Negligence, *Cratty* v. *Aceto and Co.*, 126.

DUE PROCESS

See *Coram Nobis*, *Dwyer* v. *State*, 382.
See Unfair Sales Act, *Wiley* v. *Sampson-Ripley Co.*, 400.

EMBEZZLEMENT

Upon an indictment charging a superintendent of schools with embezzlement of certain funds, it is proper to allow a high school principal to testify (1) concerning directions given to him by the defendant as to the collection of funds and disposition of the same, and (2) the circumstances under which he turned over to defendant the moneys which became the subject of the embezzlement. It is immaterial whether the relationship of the witness to the defendant was principal and agent.

It is proper to admit testimony as to admissions by defendant where the facts show that in all probability the crime of embezzlement had been committed and the *corpus delicti* established to a probability.

It is unnecessary to prove a demand to return the funds where the facts show that a criminal intent accompanies the misappropriation thereof by an agent or fiduciary.

It is only when there is no evidence of a fraudulent conversion that proof of demand is necessary.

The absence of an allegation of the particular description of the money alleged to have been embezzled does not vitiate an indictment where the omission is cured by verdict.

Objections to defects in mere matters of form come too late after verdict.

State v. *Woodworth*, 229.

EMERGENCY COMMITMENT

See Insanity, *Opinion of Justices*, 1, 24.

EQUITY

Ordinarily exceptions will not be entertained in the Law Court before a case in equity comes up for final hearing.

The approved practice in equity for objecting to the jurisdiction of the court over a defendant is for defendant's counsel to appear specially and file a motion in writing to dismiss for want of jurisdiction over the person. Where the facts showing the failure of jurisdiction do not appear on the record they should be set out in the motion and verified by affidavit.

The limitations of Rule 5 of the Revised Rules of the Supreme Judicial and Superior Courts relating to actions at law are not applicable to equity practice.

Once the jurisdictional issue is saved by exception, and at least in the absence of any subsequent manifest intention to waive it, even a later participation upon the merits will not deprive a party of the benefit of his position upon the issue.

An order of notice upon a non-resident defendant is not in itself sufficient to give the court jurisdiction of such defendant if he fails to appear and submit himself to the jurisdiction.

A party in equity may advance his cause by taking appropriate action under R. S., 1954, Chap. 107, Sec. 7.

A bill in equity seeking the *in personam* relief of an injunction should not be converted by amendment into an *in rem* bill to remove an alleged cloud on title since such amendments have the effect of changing completely the equitable cause of action.

The right of amendment is broad in equity and ordinarily rests in the discretion of the presiding justice.

The joining of a residuary legatee and an executor as party plaintiffs in a bill in equity to remove a cloud on title results in a misjoinder since under ordinary circumstances and in the absence of a

license to sell an executor or administrator has no title to, or control over, realty of his decedent.

Munsey, Exr. v. *Groves*, 200.

See Labor, *Pappas* v. *Stacey and Winslow*, 36.
See Specific Performance, *Bell* v. *Bell*, 207.
See Wills, *Barnard* v. *Linekin*, 283.

ERROR

See Sentence, *Carr* v. *State*, 226.

ESTOPPEL

See Liens, *Bangor Roofing* v. *Robbins et al.*, 145.

EVIDENCE

The parol evidence rule is a rule of substantive law, not a rule of evidence.

Where parties to a writing which purports to be an integration of a contract between them orally agree before or contemporaneously with the making of the writing, that it shall not become binding until a future day or until the happening of a future event, the oral agreement is operative if there is nothing in the writing inconsistent therewith.

Burrowes Corp. v. *Read et al.*, 92.

It is proper for a witness to use her own notes and records to refresh her recollection of a material fact as to which she had personal knowledge, even though such notes and records might not be admissible as independent evidence under the shop book rule. cf. *Hunter* v. *Totman*, 146 Me. 256.

Hunter v. *Totman*, 365.

See Blood Tests, *State* v. *Gagnon*, 501.
See Fish and Game, *State* v. *McPhee*, 62.
See Fish and Game, *State* v. *Allen*, 486.
See Indecent Liberties, *State* v. *Norton*, 178.
See Negligence, *Albison et al.* v. *Robbins and White*, 114.
Cratty v. *Aceto and Co.*, 126.
Herson v. *Charlton*, 161.
Hersum, Admr. v. *Kennebec Water Dist.*, 256.
See New Trial, *Harrison pro ami* v. *Wells*, 75.
See Release, *Delahanty* v. *Chicoine Motor Sales, Inc.*, 429.
See Trover, *Burgess* v. *Small*, 271.
See Wills, *Waning, Applt.*, 239.
See Workmen's Compensation, *Prescott* v. *Old Town Furniture Co.*, 11.

EXECUTORS AND ADMINISTRATORS

When services are rendered with the knowledge and consent of another under circumstances consistent with contract relations between the parties a promise to pay is ordinarily implied by law on the part of him who knowingly receives the benefit.

It is incumbent upon a plaintiff to prove that services were rendered under circumstances consistent with contract relations, and that the defendant either expressly agreed to pay or to give certain property therefor, or that mutual understanding between the parties that plaintiff was to receive payment, or in the expectation and belief that he was to receive payment, and that the circumstances and conduct of the defendant justified such expectation and belief.

Verdicts should not be directed against recovery if any reasonable view of the evidence will allow recovery.

There is often a strong if not conclusive inference of fact against payment because of the relation of the parties either through blood, marriage, friendship, business dealings or neighborliness.

One who withholds his demand while an alleged debtor is alive, and in aftertime seeks to compel payment by the latter's estate, has no right to expect that such claims will escape close scrutiny or be enforced in the absence of evidence preponderantly amounting to clear and cogent proof.

Colvin v. *Barrett*, 344.

See Death, *Butts* v. *Fitzgerald*, 505.
See Equity, *Munsey* v. *Groves*, 200.
See Trustee Process, 354.

EXCEPTIONS

When a trial by jury is waived and the parties submit their cause to a single justice, the Law Court has nothing to do with the facts found.

Consumers Fuel Co. v. *Parmenter*, 83.

See Affidavits, *Wright, Admr.* v. *Bubar*, 85.
See Contracts, *Delaware Feed* v. *Auburn Trust Co.*, 372.
See Equity, *Munsey* v. *Groves*, 200.
See Fish and Game, *State* v. *Whitehead*, 135.
See Negligence, *Martin et al.* v. *Atherton*, 108.
See Paupers, *Bethel* v. *Hanover*, 318.
See Taxation, *Owls Head* v. *Dodge*, 473.
See Trustee Process, *Southard* v. *Nat'l Bank*, 411.
See Wills, *Waning, Applt.*, 239.

FAIR TRADE

See Unfair Sales Act, *Wiley* v. *Sampson-Ripley Co.*, 400.

FISH AND GAME

In order to prove a violation of Section 88 of the 11th Biennial Revision of the Inland Fish and Game Laws the State must prove (1) the killing of the deer, (2) the leaving of the woods without taking the deer and (3) 12 hours elapsing after leaving the woods.

An extra-judicial confession or admission by the respondent is not admissible until some independent evidence has been legally admitted.

The burden of proving notice to the Game Warden under Section 88, *supra*, is upon the respondent.

The question whether there was sufficient evidence to establish the corpus delicti is for the court in the first instance.

State v. *McPhee*, 62.

A person who seeks to justify the killing of a deer in close time under R. S., 1954, Chap. 37, Sec. 94 for the reason it is doing crop damage must show by a preponderance of evidence, (1) that he owned or occupied the land on which the deer was killed, and (2) that "substantial damage" was being done by the deer at the time.

On appeal a respondent is tried and judgment rendered *de novo* upon both law and fact. R. S., 1954, Chap. 146, Sec. 23.

Each ruling objected to must be clearly and separately set forth in the bill of exceptions.

How far or how long counsel may proceed with a witness to test memory or show lack of veracity, bias, prejudice, etc., is a matter of the trial court's discretion.

The court is not bound to state a requested instruction in the words of the request in regard to anything properly covered in the charge as given.

"Briefs" of counsel are not "writings" within the meaning of R. S., 1954, Chap. 146, Sec. 23 and need not be forwarded to the appellate court on appeal.

State v. *Whitehead*, 135.

In a night hunting complaint the time of day is the essential time element not the date of the alleged offense.

Proof that the alleged offense occurred at 2:15 A.M. on November 4th is consistent with the allegation that it occurred on Nov. 3 one-half hour after sunset and one-half hour before sunrise of the following morning.

To establish proof by circumstantial evidence, the State must prove each circumstance upon which conviction must rest beyond a reasonable doubt and the evidence must be sufficient to exclude every other reasonable hypothesis except respondent's guilt.

All participants are principals in misdemeanor cases.

State v. *Allen*, 486.

FORECLOSURE

See Review, *Munsey* v. *Public Loan*, 17.

FRAUD

See *Audita Querela*, *Wintle* v. *Wright, Admr.*, 212.
See Release, *Delehanty* v. *Chicoine Motor Sales, Inc.*, 429.

GUARDIANS

Action for removal of a guardian is taken against the guardian because of some circumstance relating to malfeasance or other illegal actions by the guardian.

Action for dismissal of a guardian is taken because the reasons for appointment no longer exist.

The Supreme Court of Probate is a creature of statute and its authority is limited. (R. S., 1954, Chap. 153, Sec. 32.)

The provisions of the statute excepting from appellate jurisdiction "decree(s) *removing* a guardian from office" includes a decree *dismissing* the guardian since both acts result in relieving a guardian of his duty and come within the intent of the legislature.

A guardian is not a "person aggrieved" within the meaning of R. S., 1954, Chap. 153, Sec. 32.

It must be affirmatively alleged and established that a right of appeal exists under R. S., 1954, Chap. 153, Sec. 32.

Wattrich, Appellant v. *Blakney*, 289.

GUARANTEE

See Contracts, *Delaware Feed* v. *Auburn Trust Co.*, 372.
See Rules of Court, *Pyrofax Gas* v. *Cons. Gas*, 172.

HABEAS CORPUS

See Adoption, *Jones* v. *Thompson*, 462.
See *Coram Nobis*, *Dwyer* v. *State*, 382.
See Insanity, *Opinion of Justices*, 1, 24.

HEALTH AND WELFARE

See Old Age Assistance.

HEARSAY

See Evidence, *Hunter* v. *Totman*, 365.
See Negligence, *Hersum, Admr.* v. *Kennebec Water Dist.*, 271.
See Trover, *Burgess* v. *Small*, 271.

HEIRS AT LAW

See Wills, *New England Trust Co., et al.* v. *Sanger, et al.*, 295.

INDECENT LIBERTIES

In a prosecution for indecent liberties under R. S., 1954, Chapter 134, Section 6, the State may show previous acts of a similar nature to the offense charged for the purpose of showing the relationship between the parties.

The admission of improper evidence that defendant had made improper advances to a third person is cured by being withdrawn or stricken from the record with an instruction given to the jury to disregard it entirely.

Relevancy and materiality are dependent on probative value and rest in the sound discretion of the presiding justice.

It is for the presiding justice to determine, in the exercise of his discretion, whether counsel has transgressed the bounds of professional duty (in remarks to the jury), and whether the misconduct, if any, is prejudicial, and whether a mistrial should be granted.

State v. *Norton*, 178.

See Sentence, *Carr* v. *State*, 226.

INDEPENDENT CONTRACTOR

See Negligence, *Hersum, Admr.* v. *Kennebec Water Dist.*, 256.

INDICTMENTS

See Pleading, *State* v. *Goodchild*, 48.

INHERITANCE TAXES

See Taxation, *Boston Trust Co.* v. *Johnson*, 152.

INJUNCTIONS

See Equity, *Munsey* v. *Groves*, 200.
See Labor, *Pappas* v. *Stacey and Winslow*, 36.
See Unfair Sales Act, *Wiley* v. *Sampson-Ripley Co.*, 400.

INSANITY

See Wills, *Waning, Applt.*, 239.
See *Opinion of Justices*, 1, 24.

INSURANCE

See Negligence, *Albison et al.* v. *Robbins and White*, 114.

INTOXICATING LIQUOR

See Blood Tests, *State* v. *Gagnon*, 501.
See Pleading, *State* v. *Goodchild*, 48.

INVITEES

See Landlord and Tenant, *Thompson* v. *Frankus*, 54.

JOINDER

See Pleading.

JUDGES CHARGE

In testing the refusal to direct a verdict for defendant the evidence must be viewed in the light most favorable to the plaintiff.

The correctness of a charge is not to be determined from isolated statements, but, rather, from the charge as a whole. R. S., 1954, Chap. 113, Sec. 104.

Dulac v. *Bilodeau*, 164.

See Fish and Game, *State* v. *Whitehead*, 135.
See Negligence, *Martin et al.* v. *Atherton*, 108.

JUDGMENT

See *Audita Querela*, *Wintle* v. *Wright*, Admr., 212.
See Review, *Munsey* v. *Public Loan*, 17.

JURISDICTION

See Equity, *Munsey* v. *Groves*, 200.

JURORS

See Negligence, *Martin et al.* v. *Atherton*, 108.

LABOR

In an equity appeal involving no oral testimony the Law Court is not bound by the findings as to matters of fact of a single justice.

A strike solely for organizational purposes is unlawful and picketing in pursuance thereof even though peaceful may be enjoined.

A strike is a concerted refusal by employees to do any work for their employer, or to work at their customary rate of speed, until the object of the strike is attained, that is, until the employer grants the concession demanded.

The statutory right to organize free from "interference, restraint and coercion by their employers *or other persons*" protects the employees from the coercive force generated by picketing and applied to the employer to urge his employees to join the union to save his business and their livelihood.

Freedom to associate of necessity means as well freedom not to associate.

"Other persons" referred to in R. S., 1954, Chap. 153, Sec. 1, includes "labor union officials."

A state may, without abridging the right of free speech restrain picketing for a purpose unlawful under its laws and policies.

(Const. U. S. First and Fourteenth Amendments.)

Pappas v. *Stacey and Winslow*, 36.

See Maine Employment Security Commission.

LAND AND TENANT

A landlord who has retained control of common stairways owes to his tenants and their invitees the duty of exercising ordinary care to keep such stairways reasonably safe for their intended use.

The doctrine that a landlord owes no duty to tenants to make the structural design or plan (such as installing gutters over stairways or changing the steepness of stairs) any more safe than it was at the time of letting does not apply to repairs made necessary by wear, breaking or decay.

Whether there existed a landlord's duty to light the common stairway is a jury question in the instant case.

A plaintiff may under many circumstances be completely unable to remember or recount or explain an accident, but may nevertheless recover if the deficiency is met by other reliable evidence.

Injury must be the natural and probable consequences of negligence.

Thompson v. *Frankus*, 54.

LAW COURT

See Trustee Process, *Southard* v. *Camden Nat'l Bank*, 411.

LIBEL AND SLANDER

When words published are libelous *per se* neither inducement (background of relevant circumstances against which the alleged libelous statement was made) nor colloquium (the averment which links the statement to the background or to the plaintiff) are required.

The inducement and colloquium must be alleged in proper traversable form when the alleged statement is not libelous *per se*; if not then the declaration is demurrable. An article is no less damaging because it accomplishes its mission by the use of insinuation.

A newspaper article must be read as a whole to determine its natural and probable impact upon the minds of its readers and it is libelous if it exposes the plaintiff to public hatred or contempt or ridicule or deprives him of the benefit of public confidence and social intercourse.

Headlines are an important part of a publication.

A false statement that the governor abused his high office by seeking to substitute personal and political favoritism contrary to the statutory policy of the legislature for merit in the operation of a state controlled industry is libelous.

Cross v. *Guy Gannett Pub. Co.*, 491.

LICENSES

See Contracts, *Swan Co.* v. *Dean*, 359.

LIENS

Profit, overhead, taxes, insurance and transportation, *as such and standing by themselves* are non-lienable.

Where applied to the lien law, the implied contract is not essentially to pay the subcontractor under all circumstances, but rather to subject the owner's property to a lien security for such payment.

When by express contract with the owner of property the parties fix the compensation to be paid for full and complete performance of the contract, they have themselves established the debt to be secured by lien.

When the owner is not a party to a contract the determination must be as to what is the fair and reasonable value of the labor and materials in place.

When a subcontractor has a fixed price contract with another contractor who stands between him and the owner, the price agreed represents a ceiling upon the fair and reasonable value of the labor and materials secured by the lien.

Profits, commissions and transportation may appear in the contract price or the fair and reasonable value of the labor and materials furnished.

Fair and reasonable value must be tested in the light of the probable cost to the owner in a free and open market.

Where a subcontractor's bid is submitted to the owner by the prime contractor and is accepted and approved as representing the fair value of the labor and material to be furnished, the owner is estopped to assert that the fair value is less than the sum agreed upon.

Bangor Roofing v. *Robbins et al.*, 145.

LIMITATION OF ACTIONS

See Old Age Assistance, *State* v. *Crommett*, 188.

LINEAL DESCENDANTS

See Wills, *New England Trust Co., et al.* v. *Sanger, et al.*, 295.

LUMBER

See Taxation, *Gendron Lumber* v. *Hiram*, 450.

MALICE

See Bankruptcy, *Johnstone* v. *Gardner*, 196.

MAINE EMPLOYMENT SECURITY COMMISSION

The agricultural labor exemption of Chapter 29, Section 3 of the Maine Employment Security law applies to employees of a contract grower because the Maine law includes within the exemption services performed in the employ of "any person."

Maplewood Poultry Co. v. *M. E. S. C.*, 467.

MAINE STATE RETIREMENT

The P. and S. Laws of 1953, Chap. 132, Sec. 4 which transfers the employment of the Judge of the Lewiston Municipal Court from the city to the county with the limitation that the judge shall continue as a member of the local city district of the retirement system with the county reimbursing the city for such retirement contributions cannot be construed so as to require the county to reimburse for contributions due prior to the effective date of the amendment.

Legislative intent must be ascertained from the language of the statute—if plain, the court will look no further.

Lewiston v. *Androscoggin*, 457.

MANDAMUS

Mandamus does not lie to review the decision of a zoning board denying a variation in the application of zoning restrictions, even though the application for mandamus is based on the ground of an arbitrary and discriminatory application of the zoning code which deprives plaintiffs of their property without due process.

Mandamus does not become an appropriate remedy because no appeal procedure is provided in the zoning ordinance and state statutes.

The determination of the fitness or unfitness of various uses (variances) involves a discretionary act.

Casino Motor Co. v. *Needham et al.*, 333.

MINORS

See Affidavits, *Wright, Admr.* v. *Bubar*, 85.

See Negligence, *Martin et al.* v. *Atherton*, 108.

MISJOINDER

See Equity, *Munsey* v. *Groves*, 200.

NEGLIGENCE

The owner of a dam is entitled to permit the natural flow of water to pass and the lower riparian owner is entitled thereto unless a legislative charter authorizes otherwise.

Negligence must be alleged and proved to render a dam owner liable to a lower riparian proprietor; and the negligence must be the proximate cause of the injury.

Negligence consists in a failure to provide against the ordinary occurrences of life.

Without knowledge of damage the duty to use ordinary care arises from probabilities rather than possibilities.

To render liability without negligence the act must be shown to be wrongful as against the plaintiff.

Michalka v. *Great Northern Paper Co.*, 98.

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

Exceptions must be taken to that part of the judge's charge which is not satisfactory. It is only where manifest error has occurred and injustice inevitably results that alleged error in the charge will be considered on general motion.

A child injured while in the arms of a pedestrian crossing the street can recover only by showing due care of the custodian.

The taking of notes by jurors is not illegal.

The procedure for challenging alleged irregularities of jurors is (1) a motion for mistrial addressed immediately to the presiding justice, or (2) a motion to the Law Court under R. S., Chap. 113, Sec. 59.

A party cannot take his chances on a favorable verdict and then, if it is adverse, object because of facts known before it was rendered.

Martin et al. v. *Atherton*, 108.

Reynolds v. *Hinman Co.*, 145 Me. 343, distinguished.

Negligence must be alleged and proved.

Care must be taken by a defendant in proportion to the danger involved. Ordinary care depends on the circumstances of each particular case. When the risk is great a person must be especially cautious.

The continued use after notice of the same amounts of dynamite that caused and continually caused increasing injury is compelling evidence of negligence.

Statements relative to the fact that the defendant was protected by insurance are not proper.

The proof of negligence in blasting cases does not require evidence by eye witnesses or experts nor that methods other than those used by defendant could have been used.

It is error for referees to fail to take into consideration what is common knowledge.

Albison et al. v. *Robbins and White*, 114.

Referees are the sole judges of the weight and credibility of the evidence before them.

Negligence in blasting cases need not be proved by affirmative or direct evidence.

It is error to conclude that regardless of the factual showing the doctrine of *res ipsa loquitur* never has application in blasting cases.

The doctrine of *res ipsa loquitur* is a rule of evidence which warrants but does not compel an inference of negligence. It does not effect the burden of proof; it merely shifts the burden of evidence.

The doctrine of *res ipsa loquitur* applies where the accident is un-

explained and the instrument causing the injury was under the management and control of the defendant, and the unexplained accident is one which does not ordinarily occur if due care is used.

If a defendant wishes to avoid the inference of negligence that is authorized by the doctrine of *res ipsa loquitur*, he should explain.

Cratty v. *Aceto and Co.*, 126.

If a plaintiff is guilty of contributory negligence to any degree, he cannot recover.

The vehicle approaching an intersection on the right has the right of way. R. S., 1954, Chap. 22, Sec. 86.

Where physical evidence is available it must, when it contradicts that of eye witnesses and parties interested in the outcome, control and be decisive.

Herson v. *Charlton*, 161.

The driver or operator of a one man bus, while he must use reasonable care and correct a negligent situation when it is, or should be, known to him, is not required to be constantly on the alert to cope with the negligence of other passengers.

Hayes v. *N. E. Greyhound*, 169.

Referees like juries, may not base their conclusions on guess and speculation, but they are entitled to draw reasonable inferences from the evidence, and findings will not be upset if the evidence is such to justify a reasonable belief of the probability of the existence of the material facts.

Where there are several possible theories to explain the happening of an event, the evidence must be such as to have selective application to the one adopted by the fact finder.

Reasonable inferences may be drawn under some circumstances from what subsequently occurred.

It is not necessary that the exact injury which results from negligence be foreseeable if, in fact, injury in some form should have been anticipated as a probable consequence of the negligence and, viewing the occurrence in retrospect, the consequences appear to flow in unbroken sequence from the negligence.

Where work involves danger to others unless great care is used, an employer has the duty to make provision against negligence as may be commensurate with the obvious danger. This duty can not be delegated to another so as to avoid liability for its neglect.

Due care of the deceased is presumed under R. S., 1954, Chap. 113, Sec. 50 (Wrongful Death).

The test of the admissibility of a *res gestae* statement is that the act, declaration or exclamation must be so intimately interwoven with the principal fact or event which it characterizes, as to be regarded part of the act itself, and also to clearly negative any premeditation or purpose to manufacture testimony.

The form of a *res gestae* statement does not govern its admissibility. It may be in answer to a question.

Hersum, Admr. v. *Kennebec Water Dist.*, 256.

Thoughtless inattention spells negligence, *Buck* v. *Maine Central Trans. Co.*, 280.

See Bankruptcy, *Johnstone* v. *Gardner*, 196.
See Damages, *Nutting* v. *Wing*, 435.
See Landlord and Tenant, *Thompson* v. *Frankus*, 54.
See New Trial, *Harrison, pro ami* v. *Wells*, 75.
See Workmen's Compensation.

NEW TRIAL

There are five requisites to a new trial for alleged newly discovered evidence: (1) the new evidence must be such that it will probably change the result upon new trial, (2) it must have been discovered since the trial, (3) it must appear that it could not have been discovered before the trial by the exercise of due diligence, (4) it must be material to the issue, (5) it must not be merely cumulative or impeaching. Rules 16 and 17 Revised Rules of Court. R. S., 1954, Chap. 106, Sec. 15.

There are three important questions in every negligence action—how, when, and where, did the negligence occur.

Harrison, pro ami v. *Wells*, 75.

Where there is nothing to indicate that the jury reached its verdict through bias, prejudice, or mistake of law or fact, or that the verdict is clearly wrong, a motion for new trial must be denied.

Birmingham v. *Sears, Roebuck and Co.*, 460.

See Assault and Battery, *Pelletier* v. *Davis*, 327.

See Negligence, *Martin et al.* v. *Atherton*, 108.

NIGHT HUNTING

See Fish and Game, *State* v. *Whitehead*, 135.

NON-RESIDENT

See Equity, *Munsey* v. *Groves*, 200.

NOTICE

See Equity, *Munsey* v. *Groves*, 200.

See Insanity, *Opinion of Justices*, 1, 24.

See Workmen's Compensation, *Arndt* v. *Trustees Gould Academy*, 424.

OLD AGE ASSISTANCE

It is the general rule in Maine that the State is not bound by a statute unless expressly named therein or in some manner specifically so stated. This rule applies to statutes of limitation.

The legislature is presumed to have in mind the decisions of the court.

R. S., 1954, Chap. 165, Sec. 17 which provides that no action shall be maintained against the estate of deceased persons unless commenced and served within twenty months, is not applicable to claims by the State of Maine for Old Age Assistance loans or advances.

The doctrine of "non-claim" which extinguishes the right of recovery rather than merely creating a bar to the recovery, is a doctrine not familiar to Maine and is not applicable where the State is a party and is not specifically referred to in the statutes.

The State may proceed with the enforcement of a claim under R. S., 1954, Chap. 25, Sec. 295 but judgment cannot be enforced against real property so long as the widow or widower occupy it as a home.

State v. *Crommett, Admr.*, 188.

OPINION

See Wills, *Waning, Applt.*, 239.

OVERSEERS OF POOR

See Paupers, *Bethel* v. *Hanover*, 318.

PAROL

See Release, *Delahanty* v. *Chicoine Motor Sales, Inc.*, 429.

PARTIES

See Death, *Butts* v. *Fitzgerald*, 505.
See Equity, *Munsey* v. *Groves*, 200.

PAUPERS

Exceptions that a referee's report is against the law, the evidence, the weight of evidence or that the referee failed in all his findings to give consideration to the rule that the burden of proof is on plaintiff by a preponderance of evidence—are too broad and raise no issue of law.

A "settlement" arises when a person of age has his home in a town for 5 successive years without receiving supplies as a pauper, directly or indirectly (R. S., 1954, Chap. 94, Sec. 1).

"Pauper supplies" are defined in R. S., 1954, Chap. 94, Sec. 2.

"Destitute persons" are entitled to relief under R. S., 1954, Chap. 94, Sec. 28 if they have fallen into distress and stand in immediate need of supplies necessary for their maintenance and support.

When overseers act in good faith and with reasonable judgment their conclusions respecting the necessity of relief will be respected in law.

To acquire a settlement a person must have a sufficient mentality to form and retain an intention with respect to his dwelling place under R. S., 1954, Chap. 94, Sec. 1.

To qualify as a pauper a person must have sufficient mentality to understand and realize that he is making application for pauper supplies and receiving them as such under R. S., 1954, Chap. 94, Sec. 2.

Overseers of the poor cannot delegate their discretionary powers and duties.

Bethel v. *Hanover*, 318.

PEDESTRIANS

See Negligence, *Martin et al.* v. *Atherton*, 108.

PENSIONS

See Maine State Retirement System, *Lewiston* v. *Androscoggin*, 457.
See Old Age Assistance.

PERFORMANCE

See Contracts, *Swan Co.* v. *Dean*, 359.

PERSONAL PROPERTY

See Taxation, *Brunswick* v. *Hinman, Inc.*, 397.

PICKETING

See Labor, *Pappas* v. *Stacey and Winslow*, 36.

PLANS

See Trespass, *Browne et al.* v. *Wood*, 312.

PLEADING

The allegation in a warrant that the defendant "operated a motor vehicle . . . upon the premises of the Ancient York Lodge . . . said premises being located in the village of Lisbon Falls, (etc.) . . ." meets

the requirement of R. S., 1954, Chap. 22, Sec. 150 that the illegal operation occur "upon any way or *in any other place.*"

The word "place" has reference to locality; the word "premises" signifies a distinct and definite locality.

State v. *Goodchild*, 48.

See Embezzlement, *State* v. *Woodworth*, 229.
See Equity, *Munsey* v. *Groves*, 200.
See Fish and Game, *State* v. *Allen*, 486.
See Libel and Slander, *Cross* v. *Guy Gannett Pub. Co.*, 491.
See Rules of Court, *Pyrofax Gas* v. *Cons. Gas*, 172.
See Trover, *Champlin* v. *Ryer*, 415.

POLICE POWER

A police power which operates reasonably is not always invalid even though it may incidentally affect rights guaranteed by the constitution.

A constitutional guarantee protects property rights not only from legislative confiscations but also from unjustifiable impairment.

Unjustifiable impairment may consist in destroying property value, restricting its profitable use or imposing such conditions as to use that its value become seriously impaired.

An exercise of the police power must not be unreasonable or arbitrary and it must have a substantial relationship to the public health morals or other phase of the general welfare.

State v. *Union Oil*, 438.

See Public Utilities, *Re Chapman*, 68.
See Unfair Sales Act, *Wiley* v. *Sampson-Ripley Co.*, 400.

POTATOES

See *McNally* v. *Ray*, 277.

POWERS

See Taxation, *Boston Trust Co.* v. *Johnson*, 152.

PRACTICE

See *Coram Nobis*, *Dwyer* v. *State*, 382.
See Equity, *Munsey* v. *Groves*, 200.

PRESUMPTIONS

See Wills, *Waning, Applt.*, 239.

PRINCIPAL AND AGENT

See Agency.

PRIOR CONVICTION

See Sentence, *Carr* v. *State*, 226.

PROBATE COURTS

See Adoption, *Jones* v. *Thompson*, 462.
See Executors and Administrators.
See Wills, *Waning, Applt.*, 239.

PROFITS

See Liens, *Bangor Roofing* v. *Robbins et al.*, 145.

PROMISES

See Contracts, *Delaware Feed* v. *Auburn Trust Co.*, 372.

PROOF

See Landlord and Tenant, *Thompson* v. *Frankus*, 54.
See Public Utilities, *Re Chapman*, 68.

PROXIMATE CAUSE

See Landlord and Tenant, *Thompson* v. *Frankus*, 54.
See Negligence, *Hersum, Admr.* v. *Kennebec Water Dist.*, 256.
See Workmen's Compensation, *Prescott* v. *Old Town Furniture Co.*, 11.

PUBLIC UTILITIES

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.

"Public Convenience and Necessity" as set forth in R. S., 1954, Chap. 48, Sec. 20 means the convenience and necessity of the public, as distinguished from that of any individual or group of individuals and proof thereof requires evidence of a substantial nature pointing to the convenience and necessity of the public.

Re Chapman, 68.

See Trucks, *State* v. *Edgecomb*, 368.

RATIFICATION

See Affidavits, *Wright, Admr.* v. *Bubar*, 85.

REAL ACTIONS

See Death, *Butts* v. *Fitzgerald*, 505.

RECEIPT

See Release.

RECORD

See Fish and Game, *State* v. *Whitehead*, 135.

REFEREES

See Negligence, *Hersum, Admr.* v. *Kennebec Water Dist.*, 256.
See *McNally* v. *Ray*, 277.

RELEASE

A receipt is open to explanation and contradiction by parole evidence.

Where a mutual release recites as a fact that certain obligations have been paid, one relying thereon may show that the other party defrauded him by knowingly making such false representations.

Whether one is barred by a mutual release from recovering taxes paid to the use and benefit of another presents a question of fact in the instant case.

Parol evidence is admissible not to alter or change an agreement but to show that the agreement never existed.

Delahanty v. *Chicoine Motor Sales, Inc.*, 429.

REMEDIES

See Mandamus, *Casino Motor Co.* v. *Needham, et al.*, 333.

REMOVAL

See Guardians, *Wattrich, Applt.* v. *Blakney*, 289.

REPAIRS

See Landlord and Tenant, *Thompson* v. *Frankus*, 54.

RES GESTAE

See Negligence, *Hersum, Admr.* v. *Kennebec Water Dist.*, 256.

RES IPSA LOQUITUR

See Negligence, *Cratty* v. *Aceto and Co.*, 126.

REVIEW

There are three things which a petitioner must prove to justify the granting of a review under R. S., 1954, Chap. 153, Sec. 1, namely: (1) that justice has not been done; (2) that the consequent injustice was through fraud, accident, mistake, or misfortune, and (3) that a further hearing would be just and equitable.

A petition for review will be denied if the attorney was negligent, for his negligence unexplained is the negligence of his client.

A petition for review under R. S., 1954, Chap. 153, Sec. 1, is addressed to the judicial discretion of the court and must rest upon proven facts.

Where an agreement for judgment upon a promissory note does not indicate that there is to be a hearing on damages, there remains nothing to be done but the filing of the note, the computation of interest and entry of judgment.

Where a petitioner's claim for review is based solely upon an unsupported assertion that he was given an inadequate credit for a repossessed truck, there is no fraud, accident or mistake which the statute requires.

Munsey v. *Public Loan*, 17.

RIPARIAN RIGHTS

See Negligence, *Michalka* v. *Great Northern Paper Co.*, 98.

RULES OF COURT

The objection that plaintiff assignee did not file with its writ the assignment as required by R. S., 1954, Chap. 113, Sec. 170 must be raised by plea in abatement according to Rule 5 of the Revised Rules of Court.

In cases submitted to the Law Court upon report and agreed statement, technical questions of pleading are waived unless the contrary appears.

The admission by a defendant that he has received "one dollar and other valuable considerations" for the execution or giving of a guarantee overcome the objections that it lacks the element of consideration and is not under seal.

Pyrofax Gas Corp. v. *Cons. Gas*, 172.

See Affidavits, *Wright, Admr.* v. *Bubar*, 85.
Rule 5, *Munsey* v. *Groves*, 200.
Rule 18, *Pelletier* v. *Davis*, 327.

SALES

See *McNally* v. *Ray*, 277.

SENTENCE

The authorizing of a sentence for "any term of years" for a prior conviction in an indecent liberties case does not require the fixing of maximum and minimum terms in the sentence since indecent liberties cases are specifically excepted from the statute requiring maximum and minimum terms and such cases by being prior conviction cases do not become punishable by maximum and minimum terms as "other cases . . . (punishable by) any term of years" outside of the exception. (R. S., 1954, Chap. 134, Sec. 6; R. S., Chap. 149, Secs. 3, 11 and 12.)

The allegation of previous convictions is not a distinct charge of crime; it goes to the punishment only.

Carr v. *State*, 226.

See *Coram Nobis*, *Dwyer* v. *State*, 382.

SETTLEMENT

See Paupers, *Bethel* v. *Hanover*, 318.

SHOP BOOK RULE

See Evidence, *Hunter* v. *Totman*, 365.

SPECIFIC PERFORMANCE

The Law Court will not disturb the findings of a presiding Justice in equity unless "clearly wrong."

One entering upon land under a verbal contract with the owner for the sale of the property by that fact recognizes the title of the grantor and is subservient to that title until he has performed or offered to perform his part of the agreement, fully.

A purchaser having met all the terms of an oral contract for the purchase of land is entitled to a conveyance.

The Law Court on an equity appeal may remand a cause for further proceeding. R. S., Chap. 107, Sec. 21.

Bell v. *Bell*, 207.

See Equity, *Munsey* v. *Groves*, 200.

STATUTE OF FRAUDS

See Contracts, *Delaware Feed* v. *Auburn Trust Co.*, 372.
See Specific Performance, *Bell* v. *Bell*, 207.

STATUTES CONSTRUED

REVISED STATUTES

R. S., 1944, Chap. 81, Sec. 3,
Brunswick v. *Hinman, Inc.*, 397.
R. S., 1954, Chap. 22, Sec. 36,
State v. *Edgecomb*, 368.
R. S., 1954, Chap. 22, Sec. 86,
Herson v. *Charlton*, 161.
R. S., 1954, Chap. 22, Sec. 150,
State v. *Goodchild*, 48.
R. S., 1954, Chap. 25, Sec. 295,
State v. *Crommett*, 188.
R. S., 1954, Chap. 29, Sec. 3,
Maplewood Poultry v. *M. E. S. C.*, 467.

R. S., 1954, Chap. 31, Sec. 21,
Arndt v. *Trustees Gould Academy*, 424.
R. S., 1954, Chap. 37, Sec. 94,
State v. *Whitehead*, 135.
R. S., 1954, Chap. 48, Sec. 20,
Re Chapman, 68.
R. S., 1954, Chap. 61, Sec. 8,
Cross v. *Guy Gannett Pub. Co.*, 491.
R. S., 1954, Chap. 81, Secs. 12, 13,
Gendron Lumber v. *Hiram*, 450.
R. S., 1954, Chap. 92, Sec. 6,
Owls Head v. *Dodge*, 475.
R. S., 1954, Chap. 92, Sec. 13,
Gendron Lumber v. *Hiram*, 450.
R. S., 1954, Chap. 92, Sec. 30,
Owls Head v. *Dodge*, 475.
R. S., 1954, Chap. 94, Sec. 2,
Bethel v. *Hanover*, 318.
R. S., 1954, Chap. 100, Sec. 200,
State v. *Union Oil*, 438.
R. S., 1954, Chap. 106, Sec. 15,
Harrison, pro ami v. *Wells*, 75.
R. S., 1954, Chap. 113, Sec. 59, *Martin et al.* v. *Atherton*, 108.
R. S., 1954, Chap. 113, Sec. 132,
Wright, Admr. v. *Bubar*, 85.
R. S., 1954, Chap. 113, Sec. 170,
Pyrofax Gas v. *Cons. Gas*, 172.
R. S., 1954, Chap. 119, Sec. 2,
Wright, Admr. v. *Bubar*, 85.
R. S., 1954, Chap. 129, Sec. 9,
Dwyer v. *State*, 382.
R. S., 1954, Chap. 134, Sec. 3,
State v. *Pratt*, 236.
R. S., 1954, Chap. 134, Sec. 6,
Carr v. *State*, 226.
R. S., 1954, Chap. 146, Sec. 23,
State v. *Whitehead*, 135.
R. S., 1954, Chap. 148, Sec. 32,
Dwyer v. *State*, 382.
R. S., 1954, Chap. 149, Secs. 3, 11, 12,
Carr v. *State*, 226.
R. S., 1954, Chap. 153, Sec. 1,
Munsey v. *Public Loan*, 17.
Pappas v. *Stacey and Winslow*, 36.
R. S., 1954, Chap. 155, Secs. 2 and 43,
Boston Trust Co. v. *Johnson*, 152.
R. S., 1954, Chap. 165, Sec. 17,
State v. *Crommett, Admr.*, 188.
R. S., 1954, Chap. 172, Sec. 16,
Butts v. *Fitzgerald*, 505.
R. S., 1954, Chap. 184, Secs. 2, 4,
Wiley v. *Sampson-Ripley Co.*, 400.

PRIVATE AND SPECIAL LAWS

Private and Special Laws, 1953, Chap. 132, Sec. 4,
Lewiston v. *Androscoggin*, 457.

PUBLIC LAWS

P. L., 1955, Chap. 420, Sec. 200-A, *State* v. *Union Oil*, 438.

STATUTORY CONSTRUCTION

See *Coram Nobis, Dwyer* v. *State*, 382.
See Maine State Retirement System, *Lewiston* v. *Androscoggin*, 457.
See Mandamus, *Casino Motor Co.* v. *Needham et al.*, 333.
See Old Age Assistance, *State* v. *Crommett*, 188.
See Taxation, *Brunswick* v. *Hinman, Inc.*, 397.
See Unfair Sales Act, *Wiley* v. *Sampson-Ripley Co.*, 400.
See *Pappas* v. *Stacey and Winslow*, 36.

STRIKE

See Labor, *Pappas* v. *Stacey and Winslow*, 36.

SUBCONTRACTS

See Liens, *Bangor Roofing* v. *Robbins et al.*, 145.

TAXATION

Testimentary power in a widow "to dispose of said trust property at her death" is not "property" or "any interest therein" passing to her within the meaning of the inheritance tax law. R. S., 1954, Chap. 155, Secs. 2 and 43.

Property subject to a power of appointment passes directly from the donor to the appointee or taker in default of appointment. It is not the property of the donee.

Boston Trust Co. v. *Johnson*, 152.

Provisions omitted from a statutory revision are by that fact repealed.

The deletion from the statutes of the words "and other things" from a definition of real estate which provided it "shall include all lands in the State and all buildings *and other things*" precludes a levy upon a cement silo and batching bin used for highway construction even though such steel structures are bolted to cement piers sunk in the ground.

The opinion of a commissioner appointed to revise the statutes that the revision was made "without essential change of legal intendment" is not a controlling factor since the Legislature demonstrates its own purpose by eliminating certain words.

Personal property is taxable at owner's domicile.

Brunswick v. *Hinman, Inc.*, 397.

The phrase "employed in trade" in R. S., 1954, Chap. 81, Secs. 12, 13 has a well defined meaning. Personal property is not employed in trade merely because it would have been sold under certain conditions which never occurred and which were not even anticipated.

The "average amount" formula (which provides that personal property employed in trade shall be taxed on the average amount kept on hand for sale during the preceding year) set forth in Sec. 12 applies to manufactured lumber even though such lumber is otherwise exempted from the provisions of Sec. 12 (R. S., 1954, Chap. 92, Sec. 13).

The literal meaning of the language employed in a statute should be followed only when the policy and intent of the Legislature is implemented by such construction.

Gendron Lumber v. *Hiram*, 450.

A bill of exceptions must include all that is necessary to enable the court to decide whether the rulings or decision of which he complains were erroneous. The bill should show the claims and contentions of the parties and enough of the claims, allegations and facts to be clearly understood.

Where the only issue involves the right of a town to tax certain airport buildings allegedly "not devoted to public use," the value of the entire leasehold interest is immaterial.

The findings of the trial court sitting without a jury is based upon reasonable and credible evidence must be upheld.

Statutory tax exemptions are strictly construed. Municipally owned property not devoted to public use is not exempt. R. S., 1954, Chap. 92, Sec. 6.

Persons in possession of real estate are liable for taxes thereon.

Airports and landing fields and buildings thereon are land for purposes of taxation.

A leasehold interest is an interest in land for taxation purposes *(ibid.)*.

Only property devoted to public use is tax exempt. The way the property is used is the test.

Taxation is the rule, exemption the exception.

Where there is sufficient credible evidence to support a finding that a supplemental assessment was in legal conformity to R. S., 1954, Chap. 92, Sec. 30 the finding will not be disturbed.

In matters of taxation mere technical defenses have never found favor.

A decision docketed as received and filed in vacation Nov. 1, 1954 is proper where the next term does not commence until Nov. 2 even though filed after business hours on Nov. 1.

Owls Head v. *Dodge*, 475.

See *Maplewood Poultry* v. *M. E. S. C.*, 467.

TITLE

See Trespass, *Browne et al.* v. *Wood*, 312.

See Cloud on Title.

TORTS

See Trover, *Champlin* v. *Ryer*, 415.

TOWNS

See Paupers, *Bethel* v. *Hanover*, 318.

TRADE

See Taxation, *Gendron Lumber* v. *Hiram*, 450.

TRESPASS

Grantees in severalty of lots of land laid off on a particular plot hold, in proportion to their conveyances, where actual measurements not controlled otherwise are variant in wide departure from those given in the deeds.

The findings of fact of a single justice will stand if supported by evidence.

A plea of the general issue in an action of trespass places in issue the question of rightful possession.

Browne, et al. v. *Wood*, 312.

TROVER

In an action for conversion of cattle the identification of the property converted must be established with reasonable certainty and where the proof is circumstantial the evidence must have a selective application to plaintiff's theory of the case.

Hearsay testimony cannot be accorded any probative force in an analysis of the sufficiency of the evidence.

Burgess v. *Small*, 271.

Where money is converted the plaintiff may waive the tort and sue for money had and received.

Trover by a principal against his agent for money not turned over to the principal because "converted to his own use" cannot be maintained.

The duty to pay damages for tort does not imply a promise to pay them upon which assumpsit can be maintained.

Improper joinder of tort and contract must be raised by special demurrer.

Demurrers are general where no particular cause is assigned, and special where the particular defects are pointed out.

A general demurrer will be overruled if any one count in the declaration is good.

After a special demurrer is sustained the case falls within R. S., 1954, Chap. 113, Secs. 38 and 11 relating to amendments.

An action on the case includes assumpsit for breach of contract as well as case for breach of duty.

Where there is an express contract of indemnity and by its terms it contains nothing more than the law would imply, it is optional with the plaintiff to declare in assumpsit for money paid, or upon special contract.

Champlin v. *Ryer*, 415.

TRUCKS

The word "cause" in the statutory phrase "no person shall x x x *cause* to be operated any trucks" does not mean "compel or bring about" since such latter words suggest compulsion. (R. S., 1954, c. 22, Sec. 36.)

Whether the driver of a truck caused the overload is immaterial to the issue whether the one holding the P.U.C. permit caused the operation.

There is no requirement that a presiding justice read the pertinent statutes to the jury.

The responsibility of one holding a P.U.C. permit under R. S., 1954, c. 22, Sec. 36, cannot be avoided by contracting with another to load the vehicle and direct respondent's driver in the matter of the movement of the vehicle.

State v. *Edgecomb*, 368.

See Public Utilities, *Re Chapman*, 68.

TRUSTEE PROCESS

To justify the granting of an equity appeal it must appear that the rulings and findings of the justice below are clearly wrong.

The relation of life tenant and remainderman does not create a confidential relationship.

Fraud must be established by clear and decisive proof especially where there is only oral evidence which comes mainly from the parties.

An executor and sole beneficiary of decedent's estate cannot be

charged individually as trustee of personal property of the estate until the Probate Court having jurisdiction has ordered distribution from him as executor to himself as beneficiary.

Dutch v. *Scribner*, 354.

A trustee process is "lifted" within the meaning of an agreement to pay "when the trusteeship is lifted" when the principal action is dismissed for lack of jurisdiction.

The Law Court has no authority to disturb a decision of a presiding justice unless he has made an error in law or unless he had no credible evidence to sustain his findings.

Southard v. *Camden Nat'l Bank*, 411.

TRUST

See Taxation, *Boston Trust Co.* v. *Johnson*, 152.
See Trustee Process, *Dutch* v. *Scribner*, 354.
See Wills, *Barnard* v. *Linekin*, 283.
New England Trust Co., et al. v. *Sanger, et al.*, 295.

UNFAIR SALES ACT

Laws which prohibit the sale of merchandise below cost, are not valid, where the only purpose is to make such sales illegal.

The Unfair Sales Act which makes sales below cost illegal when made *with the intent to injure competitors or destroy competition* is constitutional under the police power.

Law in derogation of the common law must be strictly construed.

The prima facie provisions of R. S., 1954, Chap. 184, Secs. 2, 4 and subsection III of Section 4 are unconstitutional.

A statute creating a presumption that is arbitrary violates the due process clauses of state and federal constitutions.

The Legislature cannot constitutionally declare one fact to be presumptive of another unless a rational connection exists (Webber, J., concurring specially).

Wiley v. *Sampson-Ripley Co.*, 400.

UNEMPLOYMENT

See Maine Employment Security Commission.

VALUE

See Liens, *Bangor Roofing* v. *Robbins et al.*, 145.

VENUE

See *Coram Nobis*, *Dwyer* v. *State*, 382.

WAIVER

See Rules of Court, *Pyrofax Gas* v. *Cons. Gas*, 172.
See Trover, *Champlin* v. *Ryer*, 415.

WATER

See Negligence, *Michalka* v. *Great Northern Paper Company*, 98.

WILLS

There is no exception or qualification to the requirement that a person must be of sound mind in order to make a valid will (R. S., 1954, Chap. 169, Sec. 1).

The proponents of a will have the burden of proving testamentary capacity. Sanity (in its legal sense) is not to be presumed.

In the legal sense a mind is sound which can reason and will; unsound if it can not.

A "disposing mind" involves the exercise of so much mind and memory as would enable a person to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds.

A "disposing memory" exists when one can recall the general nature, condition and extent of his property and his relation to those to whom he gives, and also to those from whom he excludes his bounty.

The evidence of testator's conduct, emotions, methods of thought, and the like for a reasonable period both before and after the execution of the will is admissible to show his capacity at the moment of making the will.

Proof of insanity of a permanent and progressive kind prior to the making of a will raises a presumption of continuity.

The opinion of an attending physician or family physician is competent as to the patient's mental condition.

Findings of a Justice of the Supreme Court of Probate in matters of fact are conclusive—if supported by evidence.

A decree of the Supreme Court of Probate can be challenged before the Law Court only by exceptions.

The fact that testimony of a party is not directly contradicted does not necessarily make it conclusive and binding upon the court.

Waning, Applt., 239.

The intention of a testator is to be found in the will as a whole and if doubt from the surrounding circumstances.

A later clause in a will controls a preceding one although it cannot cut down or take away except by clear and unambiguous language.

Barnard v. *Linekin*, 283.

Adopted children are "heirs at law" within the meaning of provisions of a testamentary trust which provide that at the death of any of decedent's children that a portion of the principal shall vest proportionately in "lineal descendants" or if none, in "his or her heirs at law."

The intention of the testator expressed in the will, if consistent with rules of law, governs the construction of the will.

Intention must be found in the language of the will read as a whole illumined in cases of doubt by the light of circumstances surrounding its execution.

There is a presumption that technical words are intended in the technical legal sense.

A testator's declarations of intention, whether made before or after the making of the will are alike inadmissible.

The status of the adopted child is fixed by the law of the adoption but the adopted child's rights of inheritance shall be determined by the law of the state of inheritance.

Under Maine law for purposes of inheritance from an adopting parent, an adopted child, on the intestacy of his adopting parent, is treated as an "heir at law."

New England Trust Co., et al. v. *Sanger, et al.*, 295.

WITNESSES

See Evidence, *Hunter* v. *Totman*, 365.
See Wills, *Waning, Applt.*, 239.

WORDS AND PHRASES

See Wills, *New England Trust Co., et al.* v. *Sanger, et al.*, 295.
"Destitute Persons," *Bethel* v. *Hanover*, 318.
"Disposing Mind," *Waning, Applt.*, 239.
"Place," *State* v. *Goodchild*, 48.
"Public Convenience and Necessity," *Re Chapman*, 68.
"Settlement," *Bethel* v. *Hanover*, 318.

WORKMEN'S COMPENSATION

The commission is made the trier of facts and its findings should not be disturbed unless they are founded in whole or in part upon incompetent or illegal evidence.

Whether the work that the claimant was doing caused the hemorrhage resulting in death is a question of fact in the instant case.

Prejudice is not to be presumed in Workmen's Compensation cases from the receipt of inadmissible testimony where there is sufficient competent evidence upon which the findings may rest.

Prescott v. *Old Town Furniture Co.*, 11.

The requirements of knowledge by the employer of an accident under R. S., 1954, Chap. 31, Sec. 21 (so as to excuse the 30 day notice under Sec. 20) are not met by the injured employee's telling a senior employee in point of service who had no control over the employee and the senior employee's talking about the accident with the employer the next day.

Arndt v. *Trustees Gould Academy*, 424.

WRIT OF ERROR

See *Coram Nobis, Dwyer* v. *State*, 382.

WRONGFUL DEATH

See Negligence, *Hersum, Admr.* v. *Kennebec Water Dist.*, 256.

ZONING

See Mandamus, *Casino Motor Co.* v. *Needham et al.*, 333.