MAINE REPORTS

152

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

MARCH 5, 1956 to MARCH 22, 1957

MILTON A. NIXON

REPORTER

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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

---

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

[2] HON. ROBERT B. WILLIAMSON, *Chief Justice*

HON. DONALD W. WEBBER

HON. ALBERT BELIVEAU

HON. WALTER M. TAPLEY, JR.

[3] HON. PERCY T. CLARKE

[4] HON. FRANCIS W. SULLIVAN

[5] HON. F. HAROLD DUBORD

1 Retired September 15, 1956 and died September 3, 1957
2 Qualified as Chief Justice, October 4, 1956
3 Qualified as Active Retired Justice, July 27, 1956
4 Qualified October 4, 1956
5 Qualified October 4, 1956

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ACTIVE RETIRED JUSTICES
OF THE
SUPREME JUDICIAL COURT

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JUSTICES OF THE SUPERIOR COURT

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[4] HON. CHARLES A. POMEROY

[5] HON. JAMES P. ARCHIBALD

[6] HON. ARMAND A. DUFRESNE, JR.

1 Qualified for Supreme Judicial Court, October 4, 1956
2 Died September 2, 1956
3 Qualified Superior Court, June 29, 1955
Qualified Supreme Judicial Court, October 4, 1956
4 Qualified for Superior Court, October 4, 1956
5 Qualified for Superior Court, October 4, 1956
6 Qualified for Superior Court, October 4, 1956

Attorney General

HON. FRANK G. HARDING

Reporter of Decisions

MILTON A. NIXON

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* The opinion herewith, *Cosgrove* v. *Fogg*, dated July 1947, was inadvertently omitted from a prior publication and is herewith published at the special direction of the Chief Justice.

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

FRANK S. CARPENTER, IN HIS CAPACITY AS TREASURER OF THE STATE OF MAINE

vs.

PAUL E. SUSI, FRANK T. SUSI, GUY SUSI D/B/A P. E. SUSI & CO. AND HARTFORD ACCIDENT & INDEMNITY CO.

Androscoggin. Opinion, March 5, 1956.

Contractors. Highways. Bonds. Performance. Statutory Construction. R. S., 1954, Chap. 23, Sec. 40.

The liability of a bonding company furnishing a statutory bond under R. S., Chap. 23, Sec. 40 for a consideration is a surety, and its guaranty is not to be interpreted under the rule *strictissimi juris;* and the contract will be construed most strongly against the surety and in favor of the indemnity which the obligee has reasonable grounds to expect.

The liability of a bonding company for equipment, appliances, tools, labor and materials furnished to the contractor in the performance of the contract depend upon whether the items are substantially consumed in the performance of the particular contract.

ON MOTION.

This is an action of debt upon a highway construction

bond. The case is before the Law Court upon general motion for a new trial. Motion for new trial granted.

John G. Marshall, for plaintiff.

Dubord & Dubord, for defendant for Susi.

Locke, Campbell, Reid & Hebert,
for Hartford Accident Indemnity Co.

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

WILLIAMSON, J. This action of debt against the surety on a highway construction bond is before us on general motion of the defendant for a new trial. The Treasurer of State brought the action on behalf of Snow's, Inc., the supplier, to recover a balance claimed upon an account for tires, tubes, and vulcanizing and retreading services against the P. E. Susi & Co. firm, the contractor, in connection with a highway project in Troy. The plaintiff dismissed the case against the contractor by reason of bankruptcy. The jury assessed damages at the penal sum of the bond and estimated the supplier's damage at $4150.00.

There are two main questions. The first concerns the coverage of the bond, and the second, whether the claim is within such coverage.

The sufficiency of the charge of the presiding justice is not in issue. No exceptions were taken, and indeed the charge is not printed with the record. Under the familiar rule we assume that the case was submitted under proper instructions. *First Nat'l Bank* v. *Morong et al,* 146 Me. 430, 82 A. (2nd) 98 (1951); *Frye, Lounsbury* v. *Kenney,* 136 Me. 112, 3 A. (2nd) 433 (1939); *Archibald* v. *Queen Insurance Company,* 115 Me. 564, 99 A. 771 (1917). We are called upon to determine the correct rule governing the construction of the bond and to measure the jury verdict by the rule so determined.

In 1952 the State Highway Commission awarded two separate construction contracts to the Susi firm; the first, for a highway in Oakland and Smithfield known as the Oakland project, and the second for a highway in Troy known as the Troy project. The contractor carried on the work on both projects at about the same time. The Oakland project was commenced in November 1952 and completed in December 1953. The Troy project ran from August to December 1952, and from May to November 1953. During the progress of the Troy project the supplier sold the tires and tubes and performed the vulcanizing and retreading set forth in the account. The defendant surety does not question the items or charges against the contractor.

The issue is limited to the extent of defendant's liability under the statutory bond in favor of the Treasurer of State given by the contractor and the surety for the Troy project.

The pertinent part of the statute reads:

> "The commission shall have full power in all matters relating to the furnishing of bonds by the successful bidders for the completion of their work and fulfilling of their contracts, and for the protection of the state and town from all liability arising from damage or injury to persons or property." R. S., c. 20, § 21 (1944), now R. S., c. 23, § 40 (1954).

The bond provides that the principal ". . . shall faithfully perform the contract on his part, and satisfy all claims and demands incurred for the same and shall pay all bills for labor, material, equipment, and for all other things contracted for or used by him in connection with the work contemplated by said contract, and shall fully reimburse the obligee for all outlay and expense which the obligee may incur in making good any default of said Principal, . ." The specifications incorporated by reference and made a

part of the contract, and in turn a part of the bond, read in part as follows:

> "Requirements of Contract Bond. 'The successful Bidder, at the time of the execution of the contract, must furnish a bond payable to the Treasurer of the State of Maine, or his successors in office, in the sum of seventy-five (75) per cent of the amount of the contract awarded, in case a surety company bond is provided, or fifty (50) per cent of the amount of the contract awarded if a certified check or other security is provided, as noted below. The form of bond shall be that provided by the Commission and the Surety shall be acceptable to the Commission. This bond shall guarantee due execution and faithful performance and completion of the work to be done under the contract, and the payment in full of all bills and accounts for material and labor used in the work, and for all other things contracted for or used in connection with the contract; the contract shall not be considered in force until such bond has been filed and accepted by the Commission. . .' "
>
> "Responsibility for Damage Claims. '. . . The Contractor shall promptly pay all bills for labor, materials, machinery, board of workmen, water, tools, equipment, teams, trucks, automobiles, freight, fuel, light and power and for all other things, contracted for or used by him on account of the work herein contemplated, and if at any time during the progress of the work or before final payment of any money due the Contractor under the terms of this contract, any claim for labor, materials, board of workmen, water, tools, equipment, teams, trucks, automobiles, freight, fuel, light and power, or for any other things specified as aforesaid, or for damages by reason of any acts, omissions or neglect of said Contractor in the prosecution of the work, shall be presented to said Commission, the Commission may retain such sum or sums from the moneys due the Contractor under this contract as would be necessary to discharge all such claims whether for labor or

> materials or for damages as aforesaid, and until the validity of such claims shall be established and finally determined, and if determined and finally established as valid, all such claims shall be paid from the amount so retained if it be sufficient for that purpose; otherwise, or if at any time the Commission shall be satisfied that any of such claims are invalid and groundless, any amount so retained shall be paid to said Contractor, or in case of default of contract to the contractor's surety, and neither the said Commission nor any member thereof shall be liable to any individual, firm or corporation making such claim for failure or refusal to hold and retain any money due under this contract for the purpose of payment of such claim. . .' "

In support of its motion the defendant bonding company in substance contends: (1) that claims for repairs or replacements of contractor's equipment are not covered by the bond; (2) that tires and tubes adding to the value of the equipment and making it available for future work after the completion of the contract are not covered; and (3) that in any event there can be recovery for repairs and parts required in use of the contractor's regular equipment if, and only if, the items were consumed in the course of the particular contract.

The plaintiff on its part argues that the tires and tubes and other items were "contracted for or used by (the contractor) in connection with the work contemplated. . ." Consumption in this view is not required.

The precise question has not been determined in our court. Two cases in which the provisions of a like bond have been considered are *Foster* v. *Kerr and Houston,* 133 Me. 389, 179 A. 217 (1935) and *McFarland* v. *Rogers,* 134 Me. 228, 184 A. 391 (1936). In *Foster* the court held that the bond covered certain suppliers who furnished labor or materials to the contractor for use in the construction of a

highway bridge. The bond was given under a statute like that now in effect, and the contract provisions stated in the opinion closely parallel the present contract. The court, in construing the bond, said at page 395: ". . that a bonding company, agreeing for a consideration is a surety, and that its guaranty is not to be interpreted under the rule *strictissimi juris.*" And again, quoting with approval from 21 R. C. L. 1160, ". . because it is essentially an insurance against risk, underwritten for a money consideration by a corporation adopting such business for its own profit, the contract will be construed most strongly against the surety and in favor of the indemnity which the obligee has reasonable grounds to expect."

In *McFarland* the surety on a contractor's bond running to a municipality was held liable for unpaid premiums on public liability and workmen's compensation insurance which were required by the specifications forming a part of the contract. The court said, at page 231:

> "Though of course we can not import into a bond an obligation not covered by its terms, yet the rule is laid down in (the Foster case), that the liability of a bonding company, agreeing for a consideration to act as surety, is not to be measured by the rule of *strictissimi juris.* Such an agreement will be construed most strongly against the surety."

The surety urges that the liberal construction rule should be tempered since the bond was drafted by the State and not by the bonding company, and hence a chief reason for the rule does not exist. The point, however, is not open to the surety. It was decided otherwise under like conditions in *Foster* and reaffirmed in *McFarland.*

From our study of the bond in light of the statutes, and the contract including the specifications, and having in mind the purposes for which it was intended, we conclude that

items of the nature described in the claim before us are covered by the bond if, and only if, they are substantially consumed in connection with the contract. In other words, the surety is obligated to pay such claims when substantial consumption in the construction of the particular highway project is proved.

Under the contract for the Troy project the contractor "agrees to supply all equipment, appliances, tools, labor and materials and to perform all work required for the construction and completion of" the project. In the specifications, which form part of the contract referred to in the bond, and in the bond we find provisions relating to payment of claims of third persons. See *McFarland* case, *supra.*

When the contract and bond were executed, the State, the contractor and the surety without question contemplated that the contractor had equipment in general adequate for the performance of the contract and that with ordinary wear and tear on equipment, repairs and replacements would become necessary in the progress of the work. The usefulness of equipment—its life—would depend not alone upon its condition at the outset, but upon the manner and conditions of its employment. Tires and tire repairs are no exception to the general rule.

The surety enters the picture, among other important reasons, to protect those who are not paid for items which within the contemplation of the parties are fairly chargeable to the project. The language of the bond and the contract with the specifications is designed to give a broad protection to suppliers such as Snow's, Inc., but there are limits to be placed upon the responsibility of the surety.

Strictly we could say, for example, that "equipment" includes a truck or bulldozer of great cost and with a useful life far beyond the project at hand. And "all other things"

opens a new field of items for consideration. It readily could be said that a truck or bulldozer or some "other thing(s)" was "contracted for or used by (the contractor) in connection with the work contemplated by said contract." The statement, however, would tell only part of the story without the inclusion of the expected use in future work. In our view such a construction would be unreasonable and we would place such items beyond the coverage of the bond if they are not within the substantial consumption rule.

At the other extreme are repairs and replacements of a minor or incidental character, necessary from time to time in the maintenance of construction equipment. Such items obviously add to the useful life of the equipment, but they are in a sense absorbed in it. The cost in ordinary experience would be charged to current expense and would not be considered an addition to the equipment. Items of this nature in our view are covered by the bond. Whether we classify the items as "material," "equipment," or "other things" does not alter the conclusion. The charges for vulcanizing and retreading of tires reasonably fall within this class of items.

Tires and tubes present a different problem. They have neither the life of the truck, nor the incidental characteristics of the vulcanizing and retreading services. It is entirely possible that in fact the tires may be totally consumed, or substantially consumed, or only slightly used in connection with the project. If the tires and tubes are totally consumed, it is reasonable that their cost be covered by the bond. The total estimated expense of such items must, or in any event is intended to be, included in the contract price of the project. Nor does it seem improper that if such items are substantially consumed in the project the cost should likewise be covered. We do not expect mathematical certainty in a matter of this nature. There is, however, no inherent difficulty in ascertaining the fact of use

of the tire and whether it has more than a residual value at the end of the project.

Under the plaintiff's theory, the surety is obligated to pay for tires placed upon a truck the day before construction is completed under the contract, or more broadly stated, the extent of use on the project is not material and liability exists, although the useful life of the tires is in fact untouched, or only slightly so. Such an interpretation is not however required by the language used.

The coverage of the bond is limited to obligations arising under the particular contract. The surety for the Troy project has no interest thereby in the Oakland project. The fact that the surety on the Troy bond may also be the surety on the Oakland bond does not affect the case. The projects are separate and distinct. The supplier of equipment or "things" with a useful life beyond the particular contract, as here the Troy contract, has no sound reason for protection. If he were covered under such circumstances, the necessary result would be that the surety guarantees payment for equipment not used on the project for which he was surety, but on another project not within the bond.

The rule at first reading may seem to work a hardship upon the supplier. Certainly he cannot prove his case by showing that the item was contracted for or used in connection with the project, taking the words with literal exactness. It becomes necessary for him to establish substantial consumption, and the proof will vary with the type of item. As we have indicated, incidental and minor repairs and replacements will give no trouble. In the case of tires, however, with ordinarily a substantial life, the determination of the fact may raise problems of some difficulty.

A tire need not lose its identity. Its history may be recorded with data of when and where it was in use and its condition. Such records for obvious reasons will be kept,

if at all, by the contractor and they may not be readily available to the supplier at trial. The amount involved in a claim of this nature is not small. The cost of a tire is an item of consequence. In the aggregate the items claimed by the supplier in this instance reach over $5,000 in a highway project with a contract cost of $288,000. Insignificance of amount certainly is no excuse for lack of maintenance of adequate data by the contractor either for his own purposes or at the insistence of the supplier.

The soundness of the substantial consumption rule, however, is not overborne by the difficulty of proof thereby placed upon the supplier. It would be far simpler, and indeed present no problem whatsoever, if on the purchase of a tire for use on the Troy project, or upon the delivery of a tire at the project, the liability of the surety, in the event the contractor failed to pay, had become at once established. We must not forget that apart from the statutory bond the supplier would have no claim whatsoever against anyone other than the contractor. In other words, the supplier gains vital security provided his claim is within the bond.

Further, the bond is required not alone for the benefit of the third persons, as the laborer and here the supplier, but for the benefit of the State to secure compliance with the particular highway construction contract. If the words "contracted for or used in" are taken literally, then the bond would cover the items here in issue, together no doubt with many others of like nature. Claims for labor, for materials unquestionably entering in the construction of the highway, gravel for example, might well be required to share ratably the coverage of the bond. The seller of a bulldozer, used once on a project, and the seller of tires with a useful life remaining after the completion of the contract, would thus gain a like protection with the laborer and the supplier of gravel. To compel the latter to share a loss with

the former in our view would be inequitable, and not required by the language of the bond.

Under the bond the supplier does not acquire a lien, but the protection afforded by the bond is not unlike that of a lien. The reasons underlying a mechanics' lien and a highway construction bond have much in common. On turning to the mechanics' lien we daily see difficult problems of proof placed upon the moving party. For example, the dealer must establish apart from other considerations that lumber was used in the construction of the house on which he seeks to establish a lien. The lumber must constitute part of the building. Delivery at the site is not enough under our law. If the builder to whom the lumber is sold is constructing many houses, the problems of proof of actual use are multiplied. On liens see R. S., c. 178, § 34 (1954); *Marshall* v. *Mathieu et al.,* 143 Me. 167, 57 A. (2nd) 400 (1948); *Fletcher, Crowell Co.* v. *Chevalier,* 108 Me. 435, 81 A. 578 (1911); *Taggard* v. *Buckmore,* 42 Me. 77 (1856); *Perkins* v. *Pike,* 42 Me. 141 (1856); 57 C. J. S. Mechanics' Liens, §§ 43, 44; 36 Am. Jur. Mechanics' Liens, § 72.

The situation in the case at bar is analogous to that of the lumber dealer. "Substantial consumption"—"the actual use" of a lien—must be proved by the supplier if he would hold the surety. In our opinion, as we have stated, the supplier is protected by the bond to the extent that the tires and tubes in question were substantially consumed in the Troy project.

The underlying reasons for the "substantial consumption" rule are discussed at length in *Clifton* v. *Norden,* 177 Minn. 288, 226 N. W. 940, 67 A. L. R. 1227 (1929), involving repairs and tires for motortrucks under a bond covering "tools, machinery, or materials." The court said, at page 942:

> "Tires of motortrucks are parts of the complete machine which on principle may or may not be

> chargeable against the bondsmen, according as there is or is not proof that they were consumed on the particular contract. . . . In the absence of proof that they were at least substantially consumed. . . there can be no recovery for such things as. . . tires."

See also Anno. 67 A. L. R. 1232; 43 Am. Jur., Public Works and Contracts, §§ 185, 186. Other cases of interest which must be read in light of differences in provisions of statutes, bonds, and contracts are: *Margulies* v. *Ogdie* (S. D.) 10 N. W. (2nd) 513 (1943); *Western Material Co.* v. *Enke* (S. D.) 228 N. W. 385 (1929); *Dennis* v. *Enke* (S. D.) 224 N. W. 925 (1929); *State* v. *Metropolitan Casualty Ins. Co. of New York* (Ore.) 26P (2nd) 1094 (1933); *United States* v. *Ambursen Dam Co.* (Cal.) 3 F. Suppl. 548 (1933).

We now apply the rule, which we must assume was given to the jury, to the evidence. It is not necessary to rehearse the evidence in detail. From the evidence of a partner in the Susi firm, it appears in some instances at least, that wherever the tires were delivered (1) they were placed on vehicles used interchangeably on the Troy and Oakland projects some 30 miles apart, or (2) were not substantially consumed on the Troy project. Other than a statement by the partner to the general effect that tires did not last long in such work, there was no evidence upon the life of the tires either in particular or in general. The evidence on the whole lacks the certainty required in finding a fact. Granted the tires were used on the Troy project within the contemplation of the parties, the evidence goes no further. It is purely guess or conjecture on the evidence in the present record whether the tires were substantially consumed on the Troy project, or on both projects, or had a useful life at the end of the Troy project.

The weight of the evidence is against the fact of substantial consumption of the tires and tubes on the Troy

project. We do not attempt to separate the vulcanizing and retreading items from the long account.

The entry will be

Motion for new trial granted.

STATE
vs.
DAVID GAUDIN, APPLT.

Oxford. Opinion, March 7, 1956.

Fish and Game. Moose. R. S., 1954, Chap. 37, Sec. 90 Statutory Construction.

In construing statutes the courts follow the intent of the legislature.

In the criminal law possession usually means care, management, physical control, or the secret hiding or protection of something forbidden or stolen.

ON REPORT.

This is a criminal action for violation of R. S., 1954, Chap. 37, Sec. 90. The case is before the Law Court on Report. Judgment for the State.

Henry H. Hastings, for State.

William E. McCarthy, for defendant.

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

FELLOWS, C. J. This case comes to the Law Court on report, from the Superior Court in Oxford County, with agreed statement of facts. The Law Court to render final

decision in accordance with the "agreed statement and stipulations."

This is the agreed statement as reported under the order of the presiding justice: "This case arose from a complaint and warrant issued from the Rumford Falls Municipal Court dated September 26, 1955, a copy of which is attached hereto and made a part hereof."

"In said Municipal Court respondent plead not guilty, was found guilty and took an appeal to said Superior Court."

"On the afternoon of the twenty-sixth day of September, 1955 two Wardens of the Inland Fish and Game, one of whom was the complainant in this action, came upon the dead carcass of a moose at Byron, Maine. The moose had been shot and the hind quarters removed by someone unknown. The said wardens set up a vigil in the bushes near the moose for the express purposes of attempting to apprehend the person who killed the moose and/or to apprehend anyone else who may take possession of any part of this moose. The carcass of the moose remained in the sight of the wardens from the time they set up the vigil to the time of the offense complained of."

"The respondent came on the carcass about midnight of said day with the intention of taking some of the moose meat. The respondent had with him an axe, lantern and a companion. Neither had a gun."

"The respondent severed about eighty pounds of the forequarter of said moose and dragged and hauled it about fifty feet from the carcass in the direction of his automobile."

"All the activity of the respondent and his companion was observed by the wardens from the time they entered the woods until finally apprehended. When apprehended the respondent made no effort to run, nor to hide the moose meat, but submitted willingly to the wardens."

"The question before this court is whether or not the respondent under the facts stipulated in the above agreed statement at any time had the required possession to warrant a finding of guilty of the offense charged in the said warrant hereto attached."

"If a Jury verdict of guilty would be sustained under this statement of facts and complaint and warrant, then judgment shall be for the State, otherwise for the Respondent."

The statute involved is found in Section 90 of Chapter 37 of the Revised Statutes of Maine, 1954, the pertinent parts of which read as follows:

"No person shall hunt, kill or have in his possession any caribou or moose, or parts thereof, ..."

"Possession of caribou or moose, or parts thereof, without a permit as set out in this section, or after such permit has expired, shall be prima facie evidence of a violation of this section."

The complaint alleged "that David Gaudin of Rumford in said County and State heretofore, to wit, on the 26th day of September in the year of our Lord one thousand nine hundred and fifty-five at Byron in the said County, did then and there have in his possession the left forequarter of a moose, against the peace of the State and contrary to the form of the statute in such case made and provided."

The question presented by the agreed facts, and the order of the presiding justice in reporting the case, clearly appears to depend upon the meaning of the word "possession" as used in the foregoing statute.

The respondent claims in his brief that the wardens had "possession" of the carcass of the moose from the time they found it in the woods, and that the wardens had "exercised that degree of control over it that is required to obtain possession" and that "when the respondent entered the woods,

several hours later, and cut off the forequarter and started dragging it away" the respondent says that the wardens were still "in possession" because "he was doing no more than what the wardens hoped he would do." The respondent claims that "the game wardens had absolute and positive control over the carcass of the moose." The respondent further claims that he was not in "possession" because he had "no more control than what the game wardens cared to impart to him." The respondent further says that under the circumstances "a jury verdict of guilty could not be sustained."

The principal rule that the court follows in the construction of statutes is the intent of the legislature. It is the "cardinal rule," the "pre-eminent rule," the "controlling rule," *State* v. *Koliche,* 143 Me. 283, *Hunter* v. *Totman,* 146 Me. 259, 265. A penal statute is to be construed whenever possible in favor of the rights of a respondent, *State* v. *Wallace,* 102 Me. 232, and a crime cannot be created by inference or implication, *State* v. *Bunker,* 98 Me. 387, which cases are cited in the respondent's brief.

The word "possession" is often ambiguous in its meaning. It is used to describe *actual possession* and also to describe *constructive possession.* Actual and constructive possession are often so blended that it is difficult to see where one ends and the other begins. *National Safe Deposit Co.* v. *Stead,* 232 U. S. 58, 34 Supreme Court 209, 58 L. Ed. 504. Actual possession exists where the thing is in the physical control, or immediate occupancy of the party. Constructive possession is that which exists in contemplation of law without actual personal occupation. Constructive possession often refers to the person lawfully entitled to immediate physical possession and control. In criminal law possession usually means care, management, physical control, or the secret hiding or protection of something forbidden or stolen. See Bouvier's Law Dictionary (3rd Revision) "Possession," 33

Words and Phrases, "Possession," 71-101 and many cases there cited.

Possession is synonymous with occupied, held, or controlled; possession is the fact or condition of having such control of property that a person may enjoy it to the exclusion of all others who have no better right to it than himself; physical control of a thing is possession of it. See, Webster's New International Dictionary.

The Law Court is bound by the facts as stated in the agreed statement, and the facts agreed upon in this case do not show that the carcass of the moose was ever in the possession of the wardens. The statement does not say so. It says that the wardens "came upon the dead carcass of a moose at Byron, Maine. The moose had been shot and the hind quarters removed by someone unknown. The said wardens set up a vigil in the bushes near the moose for the express purpose of attempting to apprehend the person who killed the moose and/or to apprehend anyone else who may take possession of any part of this moose." The agreed statement does not show that the wardens did more than to see the carcass, and to watch near it. There was no entrapment. The respondent was not inveigled or deceived to break the law. Whether or not there was ever constructive possession on the part of the wardens, under any definition, is to our view immaterial. It was the duty of the wardens to enforce the laws relating to fish and game, and it was the duty of the respondent to obey those laws. To follow the contentions of the respondent in this case to a logical conclusion, it would not be possible for a theft to be committed if a night watchman had the valuables in his constructive possession.

The respondent knew the law, and showed by his actions that the conclusive presumption that he knew the law, was in this case absolutely correct. He cut off at midnight, took into possession, and had in his possession and under his

physical control when apprehended, a part of a moose. He was carrying it away with intent to use or dispose of it. The possession of "moose, or parts thereof" was forbidden by the statute, and as intended by the legislature the statute applied to the action of the respondent.

Were any other construction of this statute possible it would not be a recognition of the legislative wisdom in its attempt to protect moose from total destruction in this State. The construction asked for by the respondent would cause wardens to become obsolete and would tend to make moose hunting by day a healthy exercise, and obtaining possession by night a pleasure excursion, in despite of legislative prohibition.

A jury verdict of guilty would certainly be sustained on the foregoing statement of facts.

In accordance with the stipulation, the entry must therefore be

Judgment for the State.

GLADYS E. WOOD
AND
NORMA WOOD
vs.
ALMA LEGOFF

Cumberland. Opinion, March 13, 1956.

Equity. Deeds. Trusts. Dower.

A resulting trust arises by implication of law when the purchase money is paid by one person and the land is conveyed to another.

When a trust becomes passive or dry by operation of law the trust becomes executed so that the legal and equitable title rests in the beneficiary.

A decree recorded pursuant to R. S., 1954, Chap. 107, Sec. 29 will effectively remove a cloud upon the title to real estate caused by the title thereto being vested in a dry trust.

Dower rights attach to real estate of an executed dry trust where the rights of innocent purchasers are not involved. Equity will not set aside a voluntary conveyance except in case of fraud, actual or constructive.

ON APPEAL.

This is a bill in Equity before the Law upon appeal by plaintiff from a decree dismissing the bill. Decree in accordance with the opinion sustaining the decree in part.

Daniel C. McDonald,
Clifford E. McLaughlin, for plaintiff.

George P. Gruna,
Frank W. Linnell, for defendant.

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

MURRAY, A. R. J. This is an appeal by the plaintiffs from a decree dismissing their bill in equity. The facts are as follows:

Clifton A. Wood, a married man living apart from his wife for some time prior to 1937, in the year 1937, requested a man named George W. Jewett to purchase this land in question of Harry Sanborn, and to furnish necessary sums of money from time to time for the purpose of erecting a garage upon the land. The real estate was to be in the name of Jewett. At the time Wood agreed to repay Jewett with garage service and repairs on Jewett's fleet of trucks. Jewett bought the property. Wood took possession of it, built the garage, paid the taxes, lived over the garage and had complete control of the property.

By the year 1940 Wood succeeded in paying all that was due to Jewett. On January 8th, 1943, Wood requested Jewett to convey the property to Frank E. Wood, father of Clifton Wood, which Jewett did. That same day Frank Wood made a deed to the defendant LeGoff which was not delivered.

In the year 1945 Frank Wood delivered the above deed to Clifton Wood with the understanding that Clifton would deliver it to the defendant, which Clifton did. In the year 1951 defendant LeGoff requested Clifton to have the deed recorded and Clifton did so.

Mr. Jewett testified that after he was paid off he had no interest in the property, he was simply holding the title for Clifton. No consideration was paid to him at the time deed was made by him to Frank Wood. The following is the only evidence of consideration as to deed from Frank Wood to LeGoff: Miss LeGoff speaking of Clifton Wood said, "He asked me for a dollar bill. I got it and passed it to him." He says, "This is my dollar from you; that makes

it legal." This was at time of delivery of the Frank Wood deed by Clifton to her.

Plaintiffs contend that there was no transfer in law from Clifton Wood to Alma LeGoff, that Clifton was the owner of the property at all times up to the time of his death. That they inherited it from him. They ask that LeGoff be ordered to convey to them, one-third to Gladys E. Wood, widow, and two-thirds to Norma Wood, only child of Clifton Wood. There is also a prayer for general relief.

The evidence shows that Alma LeGoff, from at least the time of the purchase of the land, knew all the facts and could not be called an innocent purchaser without knowledge, if knowledge by her is necessary to uphold the decree which will flow from this decision.

While the defendant denies that there was a trust at any time, she does say in her brief, "However, whether a resulting trust arose or whether Jewett stood in the position of equitable mortgagee, Clifton's rights were so similar that a Court of Equity might not distinguish between them."

The court holds that a resulting trust arose. The purchase price was paid by Clifton Wood. The real estate was conveyed to Jewett. "A resulting trust arises by implication of law when the purchase money is paid by one person and the land is conveyed to another x x x It may be paid for him by the trustee x x x If by force of the law the borrower became bound to repay then a resulting trust arises x x x." This is a quotation from *Herlihy* v. *Coney,* 99 Me. 469. It is quoted in *Anderson* v. *Gile,* 107 Me. 325.

We also hold that the evidence discloses that the father, Frank E. Wood, held the property in trust for Clifton E. Wood. It was a passive trust, the trustee having no active duties to perform, Frank being a mere passive depository of the title. *Dixon* v. *Dixon,* 123 Me. 470-472. We hold that when in 1940 Clifton Wood paid the debt which he

owed, Jewett became a passive trustee until in 1943 when he conveyed the property to Frank E. Wood, he having no active duties to perform, being a mere depository of the title. The title held by Alma LeGoff we pass for the moment while we ascertain the effect of the above findings.

When the trust became passive or dry, by operation of law the trust became executed so that the legal and equitable title vested in Clifton, the only need of a deed from the trustee would be to remove a cloud from the title, but a decree recorded according to R. S., 1954, Chap. 107, Sec. 29, will effectively remove the cloud—*Hinds* v. *Hinds,* 126 Me. 521-528. *Sawyer* v. *Skowhegan,* 57 Me. 500. In the above cited *Hinds* case the *cestui que,* after the trust became passive gave a deed and it was held good.

We hold that Clifton E. Wood, while either or both of the trusts were passive, was seized of the real estate in question, that his wife had not released her right by descent, and that she at Clifton's death as his widow became owner of one-third of the real estate claimed.

She holds this by virtue of R. S., 1954, Chap. 170, Sec. 1, which is: "x x x In any event one-third shall descend to the widow or widower free from the payment of debts."

As to the daughter. It is a general rule that any person of legal age, having a mental capacity to understand the nature of the transaction may be the donor of property of which he is the legal or equitable owner. The law favors every man's right to dispose of his property as and when he will. A gift consistent with the law will not be set aside by the court because the court may regard the gift improvident or undeserved. Equity will not set aside a voluntary conveyance except in case of fraud actual or constructive. *Mallett* v. *Hall,* 129 Me. 148-152.

Fraud is never presumed, it must be proved. If it was alleged in this case, and of this we are not certain, it was

not proved. It does not matter in this case whether a consideration passed for the deed given to Alma LeGoff. If no consideration the conveyance was a gift.

No confusion can arise between Alma LeGoff and Gladys E. Wood as to the title because of our finding that Clifton was the holder of the legal and equitable title yet he gave no deed.

The deed from Frank Wood to Alma LeGoff conveyed the record title. The evidence shows that Clifton Wood intended by what he did in the premises to convey his title to Alma LeGoff.

If Clifton Wood in his lifetime, brought action against Alma LeGoff, to set aside her title, because he had not granted or surrendered his title by a writing signed by him according to R. S., 1954, Chap. 168, Sec. 16, in a suit in equity, on the evidence presented in case now before this court he would be estopped from doing so. The daughter is in no better position than her father would have been.

Equity deals with the substance of things regardless of form or methods. In the case at bar the substance of the transaction was a conveyance by Clifton to Alma LeGoff. *Sacre* v. *Sacre,* 143 Me. 80-96. *Gray* v. *Jordan,* 87 Me. 140-144.

A decree may be filed dismissing the bill as to Norma Wood and ordering Alma LeGoff to convey to Gladys E. Wood one-third of the property described in the bill free from any encumbrance caused by said LeGoff, and the said Gladys E. Wood, if she so desires, is entitled to an accounting to commence from the date of the death of Clifton E. Wood.

Decree in accordance with opinion.

ALCID F. DUMAIS
vs.
NATALIE ARLENE DUMAIS

Androscoggin. Opinion, April 3, 1956.

Divorce. Custody. Demurrer. Jurisdiction. Antenuptial Promises

For the purposes of testing a demurrer the question is whether the facts justify relief in equity.

Antenuptial religious promises cannot justify the intervention of equity in pending legal divorce proceedings.

The Superior Court has jurisdiction of divorce and custody pending libel under R. S., Chap. 166, Sec. 55. The law of divorce is statutory and given cause therefor, one is entitled thereto as a matter of right not discretion.

ON APPEAL.

This is a bill in equity for injunctive relief before the Law Court upon appeal from a decree sustaining a demurrer. Decree dismissing bill affirmed. Appeal dismissed with costs.

Edward J. Beauchamp, for plaintiff.

Frank W. Linnell, for defendant.

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

WILLIAMSON, J. On appeal. This is a bill in equity by a husband to enjoin his wife from proceeding further with a pending divorce action and to obtain custody of their minor children. The controversy centers upon the effect of antenuptial promises relating to divorce and the religious

education and custody of the children. A claim in the original bill that the wife held property of her husband exceeding $100 in value, making the bill to this extent at least maintainable in equity under R. S., c. 166, § 40, was completely abandoned by amendment. The case was heard on amended bill and demurrer and reaches us on appeal from a decree dismissing the bill.

We pass objections of form raised by the demurrer to the issues arising from the antenuptial promises. For purposes of testing the demurrer the question is whether the facts here briefly stated justify relief in equity. Whitehouse Equity Jurisdiction §§ 324, 326, 331; *Katz* v. *New England Fuel Co. et al.*, 135 Me. 452, 199 A. 274.

The plaintiff, a Catholic, and the defendant, a non-Catholic, both over twenty-one years of age, sought and obtained dispensation for their marriage from the Bishop of Cleveland. The application signed by the defendant reads in part:

> "I, *not a member of the Catholic Church,* desiring to marry Joseph Alcide DuMais, a Catholic, promise on my conscience:
>
> 1. that I will ever adhere to the divine law that prohibits all divorce;
>
> * * * * * * * * *
>
> 3. that all children, boys and girls, that may be born of this union, shall be baptised and educated solely in the Catholic religion by me even in the event of death of my Catholic consort;
>
> 4. that all children in the event of dispute, shall be given to such guardians that will assure the faithful execution of my covenant and promise;"
>
> * * * * * * * * *

The plaintiff made a like "promise on my conscience," with suitable changes arising from the fact that he was a Catholic.

There are four children from 11 to 3 years in age. The two elder were baptized in the Catholic Church. The defendant has refused to have the two younger so baptized, although often requested by the plaintiff.

In July 1955 the defendant brought a libel for divorce, now pending in the Androscoggin Superior Court, in which she prays for the care and custody of the children. The bill in equity was commenced on November 7 and dismissed on November 23rd last, during which period the record indicates there was in effect a restraining order against proceeding with the libel. We have no official knowledge of what, if any, action has since taken place in the divorce case.

The first and decisive question is whether equity has jurisdiction of the controversy. We answer in the negative.

With respect to the libel for divorce, the plaintiff says in substance that the promises to "ever adhere to the divine law that prohibits all divorce" formed a binding contract between the parties; that only by preventing further proceedings on the divorce libel may the plaintiff be saved from irreparable loss; and that there is no plain adequate and complete remedy at law. In short, the plaintiff's argument is that by such promises a husband or a wife may forever close the door of the divorce court to the other.

Divorce by statute is placed within the jurisdiction of the Superior Court. R. S., c. 166, § 55. "The law of divorce in this jurisdiction is wholly statutory." *Wilson, Petr.* v. *Wilson,* 140 Me. 250, 251, 36 A. (2nd) 774. Given cause, the libelant is entitled of right to a divorce. The decision does not lie within the discretion of the court. *Kennon* v. *Kennon,* 150 Me. 410, 111 A. (2nd) 695. The Equity Court has no jurisdiction to grant or deny divorce. The plaintiff husband does not indeed contend otherwise. His position is that the antenuptial promises are not available directly in de-

fense of the divorce libel, and so he seeks indirectly through equity to reach for practical purposes a like result. There is, however, no necessity for the intervention of equity in the pending legal proceedings. The case differs widely from *Usen* v. *Usen,* 136 Me. 480, 13 A. (2nd) 738 in which the court restrained a Maine husband from proceeding further in Florida against his Maine wife with a divorce based upon false allegations of residence.

No authority has been called to our attention in which the point in issue has been raised. The subject matter—divorce—is entirely governed by the statutes, to which alone the courts may look for jurisdiction. Equity on this ground has no jurisdiction of the case insofar as divorce is concerned.

With respect to the religious education and custody of the children, there is no sound reason for equity to act. Provision for the care and custody of children is made by statute in most, if not all, situations. In particular, care and custody "pending libel" and in divorce is placed in the Superior Court. R. S., c. 166, § 55 et seq. In divorce action now pending care and custody may be determined and for all we know officially may have been determined upon the termination of the restraining order on the dismissal of the bill. Jurisdiction when husband and wife are living apart is in the Superior Court or Probate Court, and when legal separation is the issue, is in the Probate Court. R. S., c. 166, §§ 19, 44. There are other statutory provisions for adoption, care of neglected children, and guardianship for example. Habeas corpus also plays a part. *Merchant* v. *Bussell,* 139 Me. 118, 27 A. (2nd) 816.

The rule is plainly and firmly established that the welfare of the child is the controlling fact in determining care and custody. "The paramount consideration for the court . . . is the present and future welfare and well-being of the child." *Grover, Petr.* v. *Grover,* 143 Me. 34, 54 A. (2nd) 637

(custody in divorce); *D'Aoust, Applt.*, 146 Me. 443, 82 A. (2nd) 409 (custody where parents living apart). "In all cases involving custody of minors, whether the issue is presented at the instance of the state itself or by individuals calling on the sovereign power to settle a dispute between them, the welfare of the child is the controlling consideration." *Merchant* v. *Bussell, supra* (habeas corpus).

The complete provision for care and custody cases in other courts is a sufficient denial of jurisdiction in equity. Certainly, in the absence of compelling reasons why other courts are unable to give adequate protection to a child, there is no necessity for consideration of jurisdiction in equity. No such reasons here appear. See *Hoyt* v. *Hubbard*, 141 Me. 1, 38 A. (2nd) 135.

In summary, the demurrer was properly sustained. The plaintiff failed to show jurisdiction in equity over the controversy. Full and complete jurisdiction touching the matters at issue rests elsewhere by statute.

The entry will be

Decree dismissing bill affirmed.
Appeal dismissed with costs.

PORTLAND VEOS TILE & FLOORING CO., INC.
vs.
ABRAHAM E. ROSEN
AND
RUTH E. ROSEN

York. Opinion, April 3, 1956.

Liens. Appeal. Evidence.

The rule is well settled that upon appeal the evidence is reviewed to determine whether the decision of the justice below was clearly wrong as to facts.

ON APPEAL.

This is a bill in equity to enforce a material man's lien. The case is before the Law Court upon appeal. Appeal denied. Decree affirmed.

Bennett Fuller,
Robinson, Richardson & Leddy, for plaintiff.

Bernstein & Bernstein, for defendant.

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

WEBBER, J. The plaintiff in equity seeks to impose a lien for materials and labor furnished on defendants' premises. That the plaintiff furnished lienable items in the amount found by the justice below is not questioned. The issue before us on appeal is raised by his finding on a cross-bill in which the defendants allege that the plaintiff while doing its work negligently scratched and damaged certain bathtubs on the premises. The justice below found for the defendants on the issue of negligence and assessed damages against the plaintiff in the amount of $1,000.

Specifically, the plaintiff was employed to install wall and floor covering of tile or similar material in bathrooms in defendants' motel. It is not disputed that after plaintiff's men had worked in the several bathrooms it was discovered that the tubs were scratched and gouged. Some seventeen bathtubs are involved in the dispute, all but one of which were purchased new by defendants. The question is then whether the evidence would permit the finding that plaintiff and its employees caused and were responsible for the admitted damage. The rule is well established that upon appeal the evidence is reviewed to determine whether or not the decision of the justice below was clearly wrong as to facts. If not, it must be affirmed. The plaintiff's contention is that the responsibility of the plaintiff rests upon nothing stronger than mere surmise and conjecture. The defendants assert that plaintiff's responsibility is shown by proven facts and reasonable inferences drawn from those facts. The justice below saw and heard the witnesses and had the advantage of a view and a careful inspection of the premises and the tubs as an aid to his understanding of the testimony.

The evidence would justify findings that the tubs which were purchased new were in good condition when they were delivered and installed; that before starting their work in any bathroom, the plaintiff's men cleaned the tubs and observed neither scratches nor gouges in any of them; that in the course of installing the tile on the walls it became necessary for plaintiff's workmen to stand and move about in the tubs for two or three hours at a time; that quantities of sand, gravel and grit were being tracked into the buildings from the outside and inevitably found their way into the tubs; that plaintiff's workmen were inserting between the tiles a material referred to as "grout," surplus quantities of which constantly fell to the bottom of the tubs where it could, and it is reasonable to conclude did, become mixed with sand, gravel and grit and formed an abrasive

mixture capable of inflicting scratches and gouges under the feet of workmen moving about in the tubs; that during the course of plaintiff's work the owner on one occasion called the plaintiff's attention to the fact that wrapping paper was being used as the only protection under the feet of plaintiff's workmen, pointed out the danger of scratching the tubs, and remonstrated with the plaintiff for the insufficiency of precautions; that the plaintiff's representative then indicated that the price for the job was not adequate to justify the taking of greater precautions and that the owner would be protected as to any damage caused by plaintiff's workmen. The plaintiff was unable to show that plumbers, painters, carpenters or other workmen stood and worked in the tubs before the damage was discovered. Only the plaintiff's workmen are shown to have so worked in the tubs. Neither was the plaintiff able to contradict the affirmative evidence offered on behalf of the defendants that the seventeen tubs were in good condition and free of marring scratches and gouges when they arrived and were installed. The plaintiff places great emphasis on the fact that five other tubs not involved in this dispute showed evidence of scratches admittedly not caused by plaintiff's workmen. Although this was certainly an element to be given consideration in determining the weight to be given to the evidence favorable to the defendants' contentions, we cannot say that it was so controlling as to render the findings of fact of the justice below clearly wrong. We think that a reasonable inference could properly be drawn that the abrasive mixture in the bottoms of the tubs was pressed and moved about under the weight of plaintiff's workmen in such a manner as to scratch and gouge the enameled surface of these tubs. There is ample evidence to support the assessment of money damages. Accordingly the entry will be,

Appeal denied.

Decree affirmed.

CENTRAL MAINE POWER CO.
RE: CONTRACT RATE FOR OTHER UTILITIES— MAINE CONSOLIDATED POWER COMPANY

Kennebec. Opinion, April 3, 1956.

Public Utilities. Rates. Contracts. Exceptions. Orders.

There must be a fair compliance with R. S., Chap. 44, Sec. 67 so that if requested by the parties the Commission must set forth in its orders and decrees the facts on which its order is based and what is a "fair compliance" depends upon the issues and the accepted background of each case.

Utilities rates established by contract may be set aside when no longer fair.

The findings by the Commission must stand if supported by any substantial evidence.

If rates must increase the adjustment must be equitable and all should bear the burden.

The judgment of the Commission has a wide area of adjustment of rates in the various classifications within the business of the utility.

ON EXCEPTIONS.

This is a petition for a rate increase before the Law Court upon exceptions to a decree of the P. U. C. granting the increase. Exceptions overruled.

Everett H. Maxcy, for Central Maine Power Company.

Locke, Campbell, Reid & Hebert,
for Maine Consolidated Power Company.

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

WILLIAMSON, J. This case is before us on exceptions by the respondent Maine Consolidated Power Company to a decree of the Public Utilities Commission establishing an

increase in the rate for electric energy supplied by the petitioner Central Maine Power Company. R. S., c. 44, § 67. On complaint of the petitioner, the Commission found the rate then in effect under a contract between the petitioner and the respondent, both public utilities, was "unjust, unreasonable and unjustly discriminatory," and granted a proposed increase. R. S., c. 44, §§ 55, 62.

The three grounds of the exceptions are:

(1) that the decree is not supported by substantial evidence;

(2) that the Commission did not make specific findings of fact on which to base its decision, although so requested by the respondent;

(3) That the Commission erred in finding that the so-called 1948 amendment to the contract between the utilities was valid.

We turn to the second exception relating to findings by the Commission. Under Section 67 "questions of law may be raised by alleging exceptions to the ruling of the commission on an agreed statement of facts or on facts found by the commission. . ." Our court has said that, "it is clearly the duty of the Commission under the statute, at least, if requested by any of the interested parties, to set forth in its orders and decrees the facts on which its order is based, otherwise the remedy provided by the statute for any erroneous rulings of law may be rendered futile." *Hamilton* v. *Power Co.*, 121 Me. 422, 425, 117 A. 582; *Casco Castle Co., Petitioner*, 141 Me. 222, 42 A. (2nd) 43.

The analogy with the statutory requirement in equity is close. "Upon request of either party, the justice hearing the cause shall give separate findings of law and fact." R. S., c. 107, § 26. *Sacre* v. *Sacre*, 143 Me. 80, 55 A. (2nd) 592; *Woodsum, et al.* v. ***Portland R. R. Co., et al.*, 144 Me.**

74, 89, 65 A. (2nd) 17. See also Rule 52 (a) Federal Rules of Procedure, 28 U. S. C. A. 13; *Kweskin* v. *Finkelstein,* 223 F. (2nd) 677 (7th Cir. 1955).

The test is whether there has been a fair compliance with the statute. See *Pub. Serv. Comm'n* v. *Wis. Tel. Co.,* 289 U. S. 67. The Commission in its decree stated the basic facts briefly to be sure, but nevertheless adequately within the spirit of the rule. The pertinent facts agreed upon by the parties and found by the Commission are: The contract between the utilities with amendments and "decrees of the Commission in F. C. #1410, under which the petitioner was authorized to increase its rates, tolls and charges for electric energy by an aggregate amount of $2,520,000" were introduced in evidence. No question about such facts, apart from the validity of the so-called 1948 amendment, is raised by the respondent. We quote the following findings from the decree:

> "The additional revenue provided by Supplemental Decree No. 4 in F. C. #1410 falls short of the additional revenue of $1,100,000 allowed and provided by the rates approved in Supplemental Decree No. 3, by $18,208, the amount of additional revenue designed to be produced by the said Class V-2 Rate. (the rate under discussion)
>
> * * * * * * *
>
> "It is acknowledged that recently the petitioner was granted a general rate increase of about 10% by decree of this Commission, *Central Maine Power Co.* vs. *Public Utilities Commission, F. C. #1410,* Supplemental Decrees No. 3 and No. 4. See also same case in 150 Me. 257. The record herein, including the records and decrees in F. C. #1410, show that the petitioner is entitled to an overall increased return which must be paid for by its consumers. The portion of that increase which will affect this customer is about $18,000. If that amount is not allowed the petitioner at all, its rates will be insufficient to give it a fair and rea-

> sonable total return and will adversely affect the general public if the petitioner is thereby unable to render proper service. On the other hand, if this amount is allowed the petitioner and yet absorbed by other customers, they in turn will be paying unjust, unreasonable and discriminatory rates. The Commission finds it to be in the public interest that the general rate increase be divided among all customers of the petitioner, including the respondent, approximately equally."

In substance the present controversy is part of the Central Maine Power Company general rate case known as F. C. #1410. There is no reason for us to blind ourselves to the understanding by all concerned that the issues about the V-2 rate should be separated from the general rate case for later disposition.

Neither party requested or expected the Commission to value again the properties of the Central Maine Power Company or to determine again the need for additional income or the amount thereof, or to review again in any manner the conclusions reached in F. C. #1410. This is not a rehearing of a general rate case involving the petitioner's entire system.

The point of the second exception lies not in the sufficiency of the evidence, but in the sufficiency of the findings in the decree to form an adequate basis for review on exceptions. No precise limitations on the rule of "fair compliance" can be stated. Much depends upon the issues and the accepted background of each case. A statement of the facts on which the petitioner's general rate increase was based in F. C. #1410 would have served no useful purpose. The increase was a fact accepted and unquestioned by the respondent. From the decree we know what the Commission found and the factual basis for its decision. There is no necessity in our view that the decree be vacated and the cause remanded for findings of fact and entry of a new decree.

The first exception directly raises the issue of whether the present rate is unjust, unreasonable, insufficient or unjustly discriminatory. The facts may be briefly restated: At the close of F. C. #1410 with an increase of about 10% in rates the petitioner lacked $18,000 of authorized income. This amount is obtainable by a like increase in the rate to be paid by the respondent.

It is clearly the law that utility rates established by contract as here may be set aside by the Commission when the rates are no longer fair. Such rates are presumed to be reasonable and just until otherwise determined. *Guilford Water Company,* 118 Me. 367, 108 A. 446; *Searsport Water Co. & Lincoln Water Co.,* 118 Me. 382, 108 A. 452. The burden is upon the petitioner to establish before the Commission the need for revision of the rates. On review, however, we do not reach the question of burden of proof. The findings of fact by the Commission must stand if supported by any substantial evidence. *Everett T. Chapman, Re: Petition to Amend,* 151 Me. 68, 116 A. (2nd) 130; *Central Maine Power Company* v. *Public Utilities Commission,* 150 Me. 257, 109 A. (2nd) 512; *New England Tel. & Tel. Co.* v. *Public Utilities Commission,* 148 Me. 374, 94 A. (2nd) 801; *O'Donnell, Petitioner,* 147 Me. 259, 86 A. (2nd) 389; *Public Utilities Commission* v. *Gallop,* 143 Me. 290, 62 A. (2nd) 166; *Gilman* v. *Telephone Co.,* 129 Me. 243, 151 A. 440; *Hamilton* v. *Power Company, supra.*

The respondent contends that the additional annual income of $18,000 from the proposed rate is insignificant when measured against the petitioner's total income, and thus failure of the petitioner to obtain an increase over the present contract rate cannot adversely affect the public interest. In other words, it says the facts stated are not substantial evidence on which to base the decree.

The amount involved, $18,000, is unquestionably small in comparison with petitioner's total gross revenue of $29,-

500,000 reported in October 1954. It is less than 1% of the total increase of $2,520,000 authorized in the general rate case. We may well agree that the petitioner's ability to perform its obligations to the public will not be hampered materially if the contract rate is maintained without increase. The respondent's argument, unsound in our view, leads to the conclusion that a given rate within a utility system should not be increased provided sufficient income is obtainable elsewhere.

The governing principle in adjustment of rates is more equitable. If rates must increase, all should bear the burden. Surely the customer whose rate is last to be considered should not escape a general increase for the reason that he is last in line or that sufficient income has been raised elsewhere.

Our Public Utilities Commission, in an early case, said:

> "Rates may be unjustly discriminatory either because through some inequality they give one customer an unfair advantage over a competitor, or because they impose upon one class of customers, or the members thereof, more than their just proportion of the entire cost of the service. The utility must be given a fair aggregate return, and that aggregate return must be equitably distributed over all of its customers."

Re Lincoln Water Co. P. U. R., 1919 B 752, 765. Nichols on *Public Utility Service and Discrimination* (1928 ed.) page 870.

When there is a general rate increase, and from such an increase the parties cannot here escape, there must of necessity be left for the judgment of the Commission a wide area of adjustment of rates in various classifications within the business of the utility. If the Commission with its accumulated experience and with the resources available to it cannot fairly adjust rates, to whom is this task to be en-

trusted? It is well understood that we do not make rates. Our function as a Law Court in considering exceptions to decrees of the Public Utilities Commission is to guard against violations of the Constitution and the law.

The evidence in support of the findings and conclusions of the Commission was substantial in character and sufficient to form the basis of the decree.

In the third exception the respondent urges that the so-called 1948 amendment to the contract between the utilities was invalid for lack of consideration and lack of authorization or approval by the respondent's directors. Under the amendment in substance the respondent agreed to pay for electric energy "as provided in the Company's Class V-2 rate . . . as the same is now on file or as hereafter changed or modified when such changes or modifications become effective" and for certain fuel charges. The respondent also gained a right to cancel the contract under certain conditions.

In our view it is unnecessary to pass upon the validity of the amendment. It is sufficient to repeat that rates under such contracts are subject to adjustment by the Commission. *Guilford Water Co.* and *Searsport Water Co.* cases *supra.* The respondent cannot well complain that the existing rate was presumed to be fair and reasonable. There is no suggestion that it had ever objected to it. Accordingly, the rate fairly formed a starting point for application of an increase.

The entry will be

Exceptions overruled.

JAMES BRADDOCK
vs.
OLIVE M. MCBURNIE

Aroostook. Opinion, April 13, 1956.

Equity. Exceptions. Equitable Mortgages.

The excepting party must set forth enough in his bill of exceptions to enable the court to determine that the points raised are material and that the rulings excepted to are both erroneous and prejudicial. It must be strong enough to stand alone.

Any written evidence of conveyance may be shown to have been in reality an equitable mortgage, and the agreement which makes it so may be oral.

ON EXCEPTIONS.

This is a bill in equity seeking to establish an equitable mortgage. The case is before the Law Court upon exceptions. Exceptions overruled.

David Solman, for plaintiff.

Albert M. Stevens, for defendant.

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

WEBBER, J. This was a bill in equity seeking to establish that a deed under which defendant asserted title to real estate was in fact an equitable mortgage. The justice below so found and fixed the terms of redemption. Before us are defendant's exceptions, first to the refusal of the justice below to make certain requested supplemental findings, and second to the final decree.

"Many times the Court has reiterated the rule that an excepting party, if he would obtain any benefit from his exceptions, must set forth enough *in the bill of exceptions* to

enable the Court to determine that the points raised are material and that the rulings excepted to are both erroneous and prejudicial. The bill of exceptions must show what the issue was, and how the excepting party was aggrieved. * * * The bill must be strong enough to stand alone. The Court, in considering the exceptions, cannot travel outside of the bill itself." *Jones* v. *Jones,* 101 Me. 447, 450. The bill of exceptions before us recites the requested supplemental findings and the refusal to make them because, as the court said, of their "having been fully covered in the findings previously filed." We are given no inkling as to how the defendant deems herself aggrieved by this action. Our attention is called to no specific claim of error in law. The same may be said for the general exception to the final decree. This exception sets forth the final decree accompanied only by the general statement that defendant is aggrieved. But how? And what issue is intended to be raised? "It is an elementary principle that no final decree can be extended beyond the allegations in the bill." *Emery* v. *Bradley,* 88 Me. 357, 360; *Usen* v. *Usen,* 136 Me. 480, 487. The bill of exceptions incorporates the bill of complaint in equity and we note that it contains the allegations necessary to establish an equitable mortgage. There is here no lack of jurisdiction such as was made apparent by the bill of exceptions in *American Oil Co.* v. *Carlisle,* 144 Me. 1. We conclude that no issues of law are presented for the consideration of the Law Court by this bill of exceptions.

We gather from the argument of counsel, unassisted by the bill of exceptions, that the real complaint of the defendant is that the justice below found that an equitable mortgage was created but ignored certain allegations in the bill of complaint that the defendant was guilty of fraud at the inception of the transaction. An examination of the original bill suggests that these allegations of fraud may well have been deemed to be mere surplusage and in no way

requisite in a cause involving allegation and proof of an equitable mortgage. Proof of the alleged fraud may have been lacking. It matters not. Any written evidence of conveyance may be shown to have been in reality an equitable mortgage, and the agreement which makes it so may be oral. *Smith* v. *Diplock,* 127 Me. 452; *Norton* v. *Berry,* 120 Me. 536. In essence, this is what the bill alleged. None of the evidence taken before the justice below was made a part of the bill of exceptions, and none is printed in the record before us. We assume the proof. Fraud at the inception was not a necessary element. It is apparent, therefore, that no injustice results from our disposition of this case on purely technical grounds.

Exceptions overruled.

STATE
vs.
ANTHONY DIPIETRANTONIO

Androscoggin. Opinion, April 16, 1956.

Criminal Law. Rape. Evidence. Cross Examination. Previous Acts. Reputation. Constitutional Law. Fair Trial. Force.

The elements of the crime of rape are (1) carnal knowledge of a female (2) by force and (3) against her will.

The words "without her consent" and "against her will" are synonymous.

The uncorroborated testimony of a prosecutrix is sufficient if probable and credible.

The question of previous intercourse or chastity is not material to the question of resisting intercourse.

General reputation for chastity may be admissible.

Questions by the presiding justice as to the location of an alleged offense for the purpose of ascertaining jurisdiction are proper. R. S., 1954, Chap. 145, Sec. 7.

The remarks and conduct of the court in a criminal trial are not contrary to R. S., 1954, Chap. 113, Sec. 104 if they are not prejudicial to the constitutional rights of an accused. The court in its questioning to determine the truth, in its admonition of counsel, or cautioning of witnesses must act in such a manner as not to create a prejudice or indicate an opinion on the facts.

The word "force" is its own best definition, and it is a word understood by everyone.

The degree of resistance is evidence to show consent or the lack of it. Resistance is not necessarily an element of the crime.

ON EXCEPTIONS.

This is an indictment for rape before the Law Court upon exceptions and appeal from a denial of a motion for a new trial. Exceptions overruled. Appeal dismissed. Judgment for the State.

Gaston Dumais,
William Hathaway, for State.

Armand A. Dufresne, for Respondent.

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

FELLOWS, C. J. This is an indictment for rape. The case comes to the Law Court on exceptions of the respondent and on appeal from denial of motion for new trial, after trial in the Superior Court for Androscoggin County and verdict of guilty.

The indictment charged "that Anthony Dipietrantonio of Portland, County of Cumberland, State of Maine, on September 26, 1954, at Turner, County of Androscoggin,

State of Maine on one Mary Helen Sweeney, a female of the age of nineteen years, feloniously did make an assault, and her, the said Mary Helen Sweeney, then and there, by force and against her will, feloniously did ravish and carnally know . . .".

Briefly the facts appear to be that on Saturday evening September 25, 1954 at about 11 o'clock Mary Helen Sweeney of Portland, the complainant, weighing 110 pounds, nineteen years old and unmarried, met an acquaintance, one Nicholas Dipietro, on Temple Street in Portland. Dipietro was with his cousin, Anthony Dipietrantonio, the respondent. The respondent was previously not known to Miss Sweeney. After some conversation the three left Portland in the respondent's automobile for Rumford to call on Miss Sweeney's sister, whom she had not recently seen and with whom Dipietro had apparently been friendly.

They stopped outside of Portland, and Dipietro got out of the car and went into a store to buy several bottles of beer. Miss Sweeney remained in the car with the respondent, while Dipietro made the purchase. The two men drank the beer. Later they stopped again for more beer. The three sat on the front seat and Dipietrantonio drove the car. They passed through Gray and Auburn on the way to Rumford.

When they reached the town of Turner, Dipietro said that it was necessary for him "to go to the bathroom," and he got out of the front seat. It was very dark and no houses were near. Miss Sweeney testified that after Dipietro left the car Dipietrantonio "tried to kiss me and put his arms around me and I didn't want him to and I pushed him away and he grabbed me and pushed me against the back of the seat and hurt my back. He pushed me over onto the back seat and I tried to fight him and he kept hitting me * * * *. I told him to leave me alone and he kept hitting me and ripping at my clothes, and he tore my skirt and my bras-

siere, and the more I told him to leave me alone the more he would hit me * * * *. I had black and blue marks on my arms and legs * * *. I tried to fight back. I hit him and scratched him. I tried to kick him but I couldn't move my legs because he had them spread and was laying on them * * * *. I told him if he didn't leave me alone I would tell the police and he said I would not be able to tell anybody. He said he would kill me. I hit him and I know I scratched and tried to kick him away from me. He had my pants ripped off. He held my arms and forced me."

"Nicky came back to the car and he asked me what happened. He wanted to know what happened because I was crying and everything, and I tried to tell him but I couldn't, and he asked Tony what he did to me and Tony said 'nothing.' He said he didn't do anything. I wanted to go home and so Nicky drove the car and I sat in front and Nicky drove and Tony sat alongside of me and on the way back he said he wanted to get in the back seat with me and I said, 'No,' and I told Nicky not to let him take me in the back seat and to tell him to leave me alone and he told him to leave me alone."

"Q. What were you doing while you were driving back?
A. Just sitting there, crying.
Q. You cried all the way back?
A. Yes.
Q. When you arrived home what did you do?
A. I went upstairs. I went into the house, and I woke my mother up.
Q. What time was this, by the way, approximately?
A. Around three, I think; around three o'clock.
Q. Three A. M.?
A. Yes. And I told my mother what had happened.

Q. And then what did you do?

A. I took my skirt off and my sweater because it was all ripped, and I put an old pair of dungarees on and I went downstairs and called the police, and they came up and took me down to the police station.

Q. Will you tell the Court and jury anything you heard said in the police station while the respondent, Tony, was present there?

A. Captain McGuire asked him if he knew me and ever saw me before and he said, 'No.' He said he never saw me before in his life. Captain McQuire said, 'You are lying.' Then Captain McGuire asked Tony where he got the scratches on his face and he said that he didn't know. Captain McGuire said, 'You do know. She gave them to you, didn't she?' And he said, 'Yes, I guess she did.' "

The respondent, weighing about 185 pounds, a mason's helper, who had been in the military service for eight years and was twenty-six years old, admitted at the trial that he had intercourse with Miss Sweeney, but he denied that he used force, did not hold her, did not pull or tear her clothes, "did not touch her sweater," "did not touch her brassiere," did not push her over the seat, did not strike her, did not "touch her skirt," and only "helped her over" on to the back seat. The respondent testified that she did not object to the act. Later on, in cross examination, the respondent positively denied that he even "helped her over" on to the back seat, and respondent stated "she got into the back seat herself."

In this case the act of sexual intercourse was admitted by the respondent, so that the jury were required to answer only two questions, (1) was it done by force? and (2) was it against her will?

The crime of rape as described by the statutes of this State is "whoever ravishes and carnally knows any female

of fourteen or more years of age, by force and against her will * * * * shall be punished." Revised Statutes, 1954, Chap. 130, Sec. 10.

The elements of the crime of rape that must be proved by the State are, therefore (1) carnal knowledge of a female (2) by force and (3) against her will. The words "without her consent" and "against her will" are used synonymously. The crime may be committed when the woman exhibits no will in the matter, as where she is drugged or *non compos mentis.* See *State* v. *Flaherty,* 128 Me. 141 and *State* v. *Castner,* 122 Me. 106, and authorities there cited. The uncorroborated testimony of the prosecutrix is sufficient if probable and credible. *State* v. *Wheeler,* 150 Me. 332.

The respondent's bill of exceptions shows that Exception I was the exclusion by the presiding justice of questions, on cross examination of Miss Sweeney by the respondent's attorney relative to whether she had had "intercourse with a man before." The attorney stated that his reason for asking, and his only purpose, was "because it has some materiality with the question of resisting sexual intercourse or consenting to it with other men." It was not material or admissible for the purpose stated. Evidence of *general reputation* in the community for unchastity may sometimes be admissible, but not specific acts. *State* v. *Flaherty,* 128 Me. 141, 144, 146 Atl. 7. The fact that a woman is unchaste is not a defence to rape. Every woman is entitled to protection, and the statute recognizes this. The statute says "any female." Revised Statutes, 1954, Chap. 130, Sec. 10. If specific acts in a person's life were admissible, each trial for rape might have a number of true or false accusations, for a jury to decide, that were not material to prove the questions of force or consent in the case on trial. *Gore* v. *Curtis,* 81 Me. 403, 3 Greenleaf's Evidence, "Rape," 2nd Ed., 192.

Exception II was taken to the fact that the presiding justice asked of the complainant witness a series of questions relative to distances, and the comparison of distances that she was familiar with in Cumberland County, with the distance she travelled in Turner beyond the "Chickadee Restaurant." The respondent's attorney objected to the questioning by the court because "the State is represented by able counsel" and because questioning by the presiding justice "is prejudicial to the respondent." The presiding justice stated to the respondent's counsel in open court and before the jury that his only purpose was "to ascertain if this Court has jurisdiction," and whether this incident occurred in Androscoggin County and within 100 rods of the line of the next county as required by Revised Statutes, 1954, Chapter 145, Section 7.

We find nothing in the questions asked by the presiding justice that was prejudicial to the respondent's right to a fair trial. The court has a right and duty to ascertain the fact that there is jurisdiction. If the attorney for the State had thought to ask the same questions, the respondent would have had no cause of complaint, and no more has he when the questions are asked by the court.

Exception III related to testimony of the sheriff in regard to the swollen condition of Miss Sweeney's face and scratches on the left side of her face, as not being rebuttal evidence. This exception was expressly waived.

Exception IV was taken by the respondent to questions asked by the presiding justice of the respondent at the close of respondent's testimony. The claim of the respondent's counsel was that the questions might indicate that the presiding justice had an opinion unfavorable to respondent and was by his questions expressing an opinion, contrary to the provisions of Revised Statutes, 1954, Chap. 113, Sec. 104. The questions asked by the presiding justice of the respondent, related to why the respondent went out, as he had

testified, on the Saturday previous to the trial, to locate where the act took place, and why he had stated "I wanted to make sure it happened in Turner," and also what the respondent meant when in his testimony he used the term "criminal assault."

Where the question of a fair and impartial trial is in the balance, this court will and should go beyond the legal technicalities that may be required under other circumstances, so that the accused in any criminal case may get that impartial trial which the Constitution guarantees to him. *State* v. *Jones and Howland,* 137 Me. 137 at 139; *State* v. *Brown,* 142 Me. 16.

"Upon such complaint (that the conduct of the judge and certain questions asked by him, in a rape case, were prejudicial and reflected to the jury his own opinion of the guilt of the respondents), the record will always be examined with great care to determine whether the respondents were accorded a fair and impartial trial." *State* v. *Vashon et al.,* 135 Me. 309 at 310.

A review of a criminal case will be had, even in the absence of proper exceptions, "when it is apparent from a review of all the record that a party has not had that impartial trial to which under the law he is entitled." *State* v. *Smith,* 140 Me. 255 at 285.

A justice who presides over a jury trial occupies a place of great responsibility. He must not only see that a dignified order is maintained in the court room and that the procedure is according to rule and statute, but also that the rights of all parties are protected. In a civil case he must hold the "scales" evenly. In a criminal case he must protect the constitutional rights of a respondent, and at the same time remember that the public is also entitled to protection. A trial in a court of justice is not arranged for the purpose of testing the respective abilities of the attorneys

involved upon the one side or the other. The purpose of a trial is to determine what is the truth, and what is justice under the facts and the law, and to that end the trial judge is not only permitted but it is his duty to participate directly in the trial to facilitate its orderly progress, in order to elicit the truth and to administer justice. His remarks or conduct in performing this duty will not constitute error if they are such as do not discriminate against or prejudice either party in a civil proceeding, or to prejudice the constitutional rights of an accused in a criminal case. Improper remarks may usually be cured by cautioning the jury, or by correcting at the time, or by instructing in his charge not to consider them. He must admonish counsel if occasion demands and caution witnesses, but he must do so in a manner not to create a prejudice or to indicate an opinion on the facts. It is always permissible for the court, and, if it appears necessary for him to do so, it is his duty to propound to witnesses such questions as he deems necessary to bring out any relevant and material evidence, without regard to its effect, whether beneficial to one party or the other. He should remember that he is not employed as one of the attorneys, however, and should not engage in an extended examination, or cross examination unless necessary. The examination of a witness by the presiding judge must be conducted without prejudice to an accused, and in such a manner as to impress the jury that the judge is impartial and is not indicating his opinion on the facts. See *State* v. *Jones*, 137 Me. 137, 16 Atl. (2nd) 103; *York* v. *Railroad Co.*, 84 Me. 117, 128, 24 Atl. 790; *Benner* v. *Benner*, 120 Me. 468, 115 Atl. 202; *Com.* v. *Oates*, 327 Mass. 497, 99 N. E. (2nd) 460; 23 C. J. S. "Criminal Law," 344 Sec. 911; 58 Am. Jur. "Witnesses," 310, Secs. 557, 558; 88 C. J. S. "Trial," 137, Sec. 51.

We have examined the complete record of this case with care and we have noted each and every question asked dur-

ing the trial by the justice presiding. There was nothing in any of the questions asked which prejudiced the rights of the respondent, and we find nothing said or done by the presiding justice to indicate any opinion (if he had an opinion) on the facts. The record shows that the conduct of the presiding justice was fair and impartial. In addition to the apparent impartiality of the questions, the court in charging the jury impressed upon the jury that he had no opinion and that in asking the questions that he did ask, it was in an endeavor to "clear up" some facts not plain to him and which might not be clear to the jury. See *Commonwealth* v. *Oates, supra.* We find no abuse of the right on the part of the presiding justice to ask questions, and no violation of the statutory prohibition relative to expressing an opinion.

Exception V was taken to the denial of motion for a directed verdict, and raises the same questions as the appeal. *State* v. *Smith,* 140 Me. 255, 283; *State* v. *McKrackern,* 141 Me. 194, 197. This exception was waived by filing motion to set aside verdict and appeal. *State* v. *DiPietrantonio,* 119 Me. 18.

Exceptions VI, VII, VIII were requested instructions that were refused except as covered in the charge. The first requested instruction stated that "the force required in a rape case is that force by which the dissenting female is subjected to and put under the power of the assailant, so that he is able, notwithstanding her opposition, to have sexual intercourse with her. Where the female is physically and mentally able to offer resistance, force is a necessary element of the offense." This requested instruction was properly refused. The subject had been fully and clearly covered in the charge. Force is a necessary element in every case brought under Revised Statutes, 1954, Chap. 130, Sec. 10, "by force and against her will." This requested instruction in its definition of "force" might give

the impression that it was necessary for conviction that the respondent should have in some manner rendered the female so unconscious that she had no will. The word "force" itself is its own best definition, and it is a word understood by everyone.

The next requested instruction contained the statement that the female must "put up the greatest effort of which she was capable * * * * because resistance by the female is a necessary element of the crime of rape." This is not the law. Resistance is not necessarily an element. It depends on circumstances. The Maine statute does not say that it is an element. Resistance, if any, and the amount and kind of resistance, is evidence to show consent or lack of consent, and like all evidence is to be carefully considered by the jury. This request was properly refused. It was properly covered in the charge.

The third requested instruction contained the statement that threats of physical bodily injury in a case of rape must "create in the female a reasonable apprehension of great immediate bodily harm, such threats being accompanied by a demonstration of force and being made prior to the act." The word "immediate" and the words "being accompanied by a demonstration of force" are not necessarily the law. The fear might be of a future injury threatened. The instruction given was correct and was in part as follows: "You have in your deliberations the right to consider as to whether or not Mary Helen Sweeney was put under fear. There has been some testimony that she feared the respondent. It is for you to decide, and it is further for you to give such weight as to whether or not that fear prevented her from offering any greater resistance than she did offer, as you may find it. I again say to you that in order for you to find the respondent guilty, the act, that is admitted, must have been committed with force and without consent." See 3 Greenleaf on Evidence, 2nd Ed. "Rape," 192.

Exception IX. The respondent excepted to the whole charge as being unduly a resume of the State's evidence, and unduly commenting on the State's evidence. Exception X. The respondent excepted to the charge "in where your Honor has ruled out the question of chastity of the woman being not in issue" and Exception XI "wherein Your Honor has ruled out the fact that the Portland Police have not been brought in, and the fact that the parents of the child have not been brought in, and the fact that other evidence by the Sheriff or by the County Attorney's office may not have been brought in."

The record shows that the presiding justice did not "rule out" any testimony as stated in this exception. He so stated to the jury when the exception was taken. He did call the attention of the jury to the fact that the questions before them were the allegations in the indictment. This is not a civil case where a party does not testify and inferences may be drawn, as in *Berry* v. *Adams*, 145 Me. 291 cited in the respondent's brief. Even if the respondent had not testified no inferences would be against him. R. S., 1954, Chap. 148, Sec. 22. Exception XII. Counsel for respondent excepted to the whole charge "as not representing the law in the case of rape."

The charge was an excellent one, brief, clear, and not involved with extraneous matter, and easy to understand. The law and contentions were plainly and correctly stated. "Reasonable doubt," the "presumption of innocence," venue, and the necessity to prove that the offense occurred within the County of Androscoggin or within 100 rods, with the three elements of the crime as charged in the indictment, viz.: (1) carnal knowledge (2) force and (3) against her will, were completely covered. The presiding justice further impressed upon the jury that the burden on the part of the State was to prove the allegations in the indictment beyond all reasonable doubt. The reasons for the questions asked of

witnesses, by the court, were again stated in the charge, and that he had no opinion and no opinion was intended to be expressed, and that the jury must not consider anything beyond what the evidence itself disclosed. There was no undue resume of the State's evidence or undue comment thereon. The sexual intercourse was admitted, and the only questions related to force and consent. The chastity of the female was not in issue. Unchastity is no defense. *State* v. *Flaherty,* 128 Me. 141, 146 Atl. 7. The fact that the State did not produce more evidence at the trial was a matter for argument, and was evidently used by respondent's counsel in argument, because the presiding justice said, and correctly said, at the close of the charge, "there has been some reference made here to what the Portland Police did or did not do, what the Auburn Police did or did not do, what the Sheriff's Department did or did not do, what the prosecuting Attorney's office did or failed to do. There has been some intimation that the parents of the girl did or failed to do something. We are not here trying the Portland Police Department. We are not trying the Auburn Police Department. We are not trying the Sheriff's Department or the prosecuting Attorney's Department. Neither are we passing judgment on the parents of Mary Helen Sweeney. The sole issue in this case is: Did this respondent have carnal knowledge of Mary Helen Sweeney with force and without her consent? And in arriving at that, and in considering the evidence, you have a right to consider all of the physical evidence that was produced here, that is, the objective evidence—the skirt, the brassiere, the ear rings, as to whether or not there were any marks or bruises on Mary Helen Sweeney. By that I am not telling you that there were. It is for you to say, from the evidence presented to you. It is for you to say whether or not there were any marks on the respondent, and what caused those marks. It is for you to say as to whether Mary Helen Sweeney yelled, as was described here, and it is for you to

say what caused her to yell. It is for you to consider every element of the evidence presented to you. It is for you to give such weight to that evidence as you see fit to give it, and after you have given the case due consideration it is your duty, if you find the State has not satisfied you beyond that reasonable doubt that the respondent committed the offense he is charged with, to return a verdict of Not Guilty. By the same token, without fear or favor, sympathy or prejudice, if you find that the State has proven to you the elements necessary of proof as I have outlined them to you, and that proof has satisfied you beyond that reasonable doubt as I have previously defined it to you, it is equally your duty to return a verdict of Guilty in this case."

The issue raised on the appeal is whether in view of all the evidence, the jury was justified in believing beyond a reasonable doubt that the respondent was guilty. *State* v. *Smith,* 140 Me. 255, 286; *State* v. *Hudon,* 142 Me. 337, 345; *State* v. *DiPietrantonio,* 119 Me. 18, 109 Atl. 186.

The complaining witness, Miss Sweeney, testified that the crime was committed in Turner in Androscoggin County "not far from the Chickadee Restaurant." Deputy Sheriff Thorne said it was eleven miles from Auburn to Turner. Sheriff McGraw testified that it was fourteen miles from the Chickadee to the County line in Canton. Officer Stewart testified that the respondent told him that it happened "just outside of Auburn." The respondent testified at the trial, however, that it happened in Canton "8 or 10 miles beyond the Chickadee," and according to the Sheriff 8 or 10 miles beyond was still in Androscoggin County. Dipietro admitted he told Portland police he got out of the car at Turner leaving the respondent and Miss Sweeney in the car, but at the trial, in testifying for the defense, Dipietro said "it was Canton I guess." The court in charging the jury on this point said "if the crime was not committed in Androscoggin County then your verdict must be Not Guilty re-

gardless of whether or not the respondent was guilty in this instance of having committed the crime with which he stands charged." The jury was amply justified in determining jurisdiction in Androscoggin.

The respondent admitted that he had sexual intercourse with the prosecutrix on the night in question. This case differs from *State* v. *Wheeler,* 150 Me. 332 where there was complete denial of all the elements of the crime. Here, in this case, the torn skirt, ripped brassiere and broken ear ring, introduced in evidence, and her testimony which was "reasonable and credible," together with the respondent's admissions, would justify the jury to find guilt beyond a reasonable doubt. In addition to this, however, there was the testimony of the Sheriff of Androscoggin County who went to Portland police headquarters and talked with the respondent Dipietrantonio, his cousin Dipietro, and Miss Sweeney, and that the respondent said "Nicky was as responsible as he was, or words to that effect." The sheriff further testified that Miss Sweeney's face was swollen, and that the respondent had a scratch on his face. Officer Stewart of Auburn police department testified that, when finger printing the respondent, he asked respondent "if he had raped this girl first, before his cousin, and he said, he did" * * * *. "I asked him if he enjoyed raping this girl and he answered 'I don't think so.' " Stewart further said the respondent "had two scratches on the right side of his face" * * * "and I asked him then if she had long sharp fingernails and he said 'I guess they were.' "

The case was fully and carefully tried. The record is extensive. We have examined the evidence with care, aided by the exhaustive briefs of counsel. The respondent's rights were taken care of by eminent, thoroughly capable, and experienced counsel. The record shows no partiality on the part of the justice presiding. The jury was amply justified

in finding guilt beyond a reasonable doubt. We find no reversible error. The entry must be

Exceptions overruled.

Appeal dismissed.

Judgment for the State.

STATE OF MAINE

In the SUPREME JUDICIAL COURT for the State.

All of the members of the court concur in the following amendment to the third paragraph of Rule 5 of the Supreme Judicial Court relative to copies for the Law Court (147 Maine 489, 490), so that the paragraph as amended reads:

> "Except as hereinafter provided, all exhibits in the case shall be reproduced in the copies of the case for the Law Court either by printing, photostatic or photographic process, and the original exhibits shall not be filed in the Law Court in specie as a part of the copy of the case. Whenever in the opinion of the justice presiding any of such exhibits cannot be reproduced by printing, photostatic or photographic process, or can be so reproduced only at a cost which is excessive and disproportionate to the importance of such exhibits in affording a fair understanding of the case upon review, such justice shall so certify and by specific order direct that such original exhibits be transmitted by the clerk of the court below to the clerk of the Law Court as forming a part of the record of the case. Whenever such reproduction is by photostatic or photographic process, the copies so prepared may be separately bound and but twelve sets furnished to the clerk of the Law Court. Whenever physical examination of exhibits printed or reproduced as a part of the copy of the case is necessary to afford a fair understanding of the same or their effect, the clerk of the court below, upon order of the justice before whom the case was heard, may transmit to the clerk of the Law Court such exhibit or exhibits as said justice may specify in his order. Nothing herein contained shall prevent the withdrawal of original exhibits and the substitution of copies thereof in the court below when the same is done by agreement of the parties and with the consent of the justice presiding. For the purposes of this rule such substituted

copies shall be deemed the exhibits admitted in the case."

RAYMOND FELLOWS, Chief Justice
ROBERT B. WILLIAMSON
DONALD W. WEBBER
ALBERT BELIVEAU
WALTER M. TAPLEY, JR.
EDWARD P. MURRAY, A. R. J.
PERCY T. CLARKE

Dated May 8, 1956

A true copy

Attest:
RAYMOND FELLOWS,
Chief Justice

ERNEST THIBAULT, APPELLANT
FROM DECREE OF PROBATE
vs.
ESTATE OF ALBERT W. FORTIN

Androscoggin. Opinion, May 11, 1956.

Probate. Wills. Undue Influence. Burden of Proof. Exceptions.

Undue influence means influence amounting to moral coercion, destroying free agency or importunity which could not be resisted, so that the testator was constrained to that which was not his actual will but against it.

The burden of proof is on the one asserting undue influence.

Where there is substantial evidence to support the findings of a presiding Justice of the Supreme Court of Probate, the Law Court cannot substitute its judgment for that of the presiding Justice.

ON EXCEPTIONS.

This is an appeal from a decree of the Supreme Court of Probate disallowing a will. Exceptions overruled.

Frank Coffin,
William D. Hathaway, for proponents.

Clifford & Clifford, for contestants.

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

TAPLEY, J. On exceptions. Albert W. Fortin, late of Lewiston, Maine, died on the nineteenth day of August, 1952. His will was presented for probate to the Probate Court for the County of Androscoggin and, upon hearing, the Judge of Probate entered a decree disallowing the will. The proponent of the will appealed to the Superior Court

sitting as the Supreme Court of Probate. The Supreme Court of Probate, after hearing, disallowed and dismissed the appeal and approved and affirmed the decree of the Judge of Probate denying the petition for the probate of the will and remanded the cause to the Probate Court for the County of Androscoggin for further proceedings not inconsistent with the decree. The proponent took exceptions to the findings and rulings of the presiding justice who heard the case without intervention of a jury. The proponent also took exceptions to the admission of certain testimony but this exception was waived and, therefore, it will not be considered.

The justice sitting in the Supreme Court of Probate, in his opinion, says:

> "this Court finds that the instrument herein presented for probate was in fact procured by the petitioner under misrepresentations, and that said instrument is not the free will of the decedent, but was executed by the decedent by reason of undue influence exerted by the petitioner upon the decedent."

The proponent in his exceptions attacks the justice's findings by alleging that there was no evidence to support them.

Albert W. Fortin was a man 78 years of age and at the time of the execution of his will was bedridden, suffering from paralysis of the left side. The will was executed on June 25, 1952 and on the nineteenth day of August, 1952 Mr. Fortin died. The pertinent paragraphs of the will read as follows:

> "FIRST: I hereby devise and bequeath all property, real, personal or mixed, of which I may die possessed, to my brother-in-law, ERNEST THIBAULT, his heirs and assigns forever, to dispose of the

same, in his sole discretion, as he may think fitting and proper.

SECOND: I purposely omit any of my relatives as I trust implicitely (sic) my said brother-in-law, Ernest Thibault, to dispose of my estate at his discretion."

Ernest Thibault was named sole executor of the will without bond. There are no contentions that the testator was of unsound mind.

The justice below was required to determine if the will was executed as a result of misrepresentation and undue influence. The contestants assert the claim that Ernest Thibault exerted such undue influence on the testator, Mr. Fortin, that the will which Mr. Fortin executed was not the result of a free mind and it gave Mr. Thibault a beneficial interest in the estate which Mr. Fortin did not intend he should have. This claim is most strenuously denied by the proponent. According to the terms of the will, Mr. Thibault is the sole beneficiary, if he so elects, as there is no legal compulsion requiring him to share the estate with any one.

Rogers, Applt., 123 Me. 459, at page 461:

"By undue influence in this class of cases is meant influence, in connection with the execution of the will and operating at the time the will is made, amounting to moral coercion, destroying free agency, or importunity which could not be resisted, so that the testator, unable to withstand the influence, or too weak to resist it, was constrained to do that which was not his actual will but against it."

In re Will of Ruth Cox, 139 Me. 261, at page 272:

"As has been often reiterated, the burden of proof is on the party alleging undue influence. The true test is the effect on the testator's volition. It must be sufficient to overcome free agency, so that what is done is not according to the wish and judgment of the testator."

Mr. Thibault was the brother-in-law and close friend of the testator, as well as being the conservator of his estate. The testimony and the wording of the will demonstrate the faith and confidence which he, the testator, had in Ernest Thibault. This relationship would naturally place Mr. Thibault in such a position of trust that his acts and participation in the drafting of the testator's will should be most carefully scrutinized. It is under such circumstances and relationship that undue influence could most easily be exerted.

O'Brien, Applt., 100 Me. 156, at page 168:

> "It is true, as argued, that great secrecy was observed by Mrs. Campbell and the proponent. No one had any knowledge in regard to the provisions of the will, and no one, except those who were obliged to, the scrivener and the witnesses, that she was making a will at all. It is undoubtedly true that where a will is made under such circumstances, and where a person who is largely benefitted (sic) by its provisions has much to do with its preparation, suspicion is naturally aroused, and all of the facts and circumstances surrounding the making of the will should be scrutinized with jealous care."

The contestant has the burden of establishing undue influence. *Pliny Crockett, Applt.*, 147 Me. 173.

Albert Fortin at the time of the execution of the will was physically unable to leave his bed. Mr. Thibault contacted Hercules E. Belleau, an attorney practicing in Lewiston, and requested him to draft a will for Mr. Fortin. Mr. Belleau testified:

"Q. Now you prepared a will in accordance with Mr. Thibault's instruction?

A. I did.

Q. What were those instructions as you remember?

A. The instructions were that Mr. Fortin left everything that he owned to Ernest Thibault to have and dispose of in his own way.

Q. That was the will you drew up?
A. That is right."

After the will was drafted Attorney Belleau, in company with Mr. Thibault, went to the apartment of Mr. Fortin where he was introduced for the first time to Mr. Fortin by Mr. Thibault. Mr. Belleau had with him for execution the declination of Mr. Fortin's appointment as executor of his wife's will and a petition for the appointment of Mr. Thibault as administrator with the will annexed of the wife's will. These latter documents were executed before the will. The signatures were in the form of crosses. Mr. Belleau testified that he had prepared a will in accordance with the instructions given to him by Mr. Thibault. The will was read to Mr. Fortin and he said that it was all right. Mr. Belleau signed the will as a witness as did Jeanne Marquis, a neighbor, and Alma Gastonguay, Mr. Fortin's housekeeper and nurse.

Alma Gastonguay testified as to the relationship between Mr. Fortin and Mr. Thibault and then gave her version of the circumstances surrounding the execution of the will. She tells of Mr. Belleau and Mr. Thibault coming to the home on June 25th and that they went directly to Mr. Fortin's room and when they went into the room she stayed at the door until she was called to sign the will as a witness. According to the record, Mrs. Gastonguay testified as follows:

"Q. How long was it before you went to the room?
A. I stayed in the door.

Q. All the time?
A. Until the time he called me to have me sign.

Q. Had you stayed all the time in the door after they passed you?

A. When I went back it was to give them a chance to get by. They went in; then I went back to the door.

Q. What happened to the dishes all this time?

A. Stayed in the sink.

Q. In other words, you were curious?

A. Well, I was curious because things were done so quickly. They walked right in. Mr. Belleau went right to the bed. The old man was sleeping.

Q. Will you tell everything you know from this point on?

A. From then on he went into the room and saw the old gentleman. He put himself beside the bed. He had the paper in his hand. He took the paper in one hand and with the other hand took the pen and put it in the old gentleman's hand and then he took his hand and made the cross.

Q. Mr. Fortin was sleeping all during this time?

A. He took the pen away from him and it was then the old gentleman opened up his eyes and looked at him.

Q. What happened then?

A. Then he took the paper and put it on the small table by the side of the bed; said come up and sign here. I asked him 'Why do I sign that?' He said it was his will.

Q. Who said that?

A. Mr. Belleau."

Mrs. Gastonguay witnessed the will and then the question arose as to another witness, whereupon Mrs. Gastonguay requested a neighbor, Mrs. Marquis, to come to the apartment to act as a witness. While waiting for the arrival of Mrs. Marquis some conversation took place in Mr. Fortin's

room. This conversation, according to Mrs. Gastonguay's testimony, was:

"Q. How long did you have to wait for Mrs. Marquis? How long did it take for Mrs. Marquis to come over?

A. Perhaps seven or eight minutes.

Q. What went on in that seven or eight minutes?

A. It was there that he told Ernest. Ernest told him about it was his will. He told Ernest 'I leave everything in your hands so long as you divide it in equal shares between the nephews and nieces, and don't forget Mrs. Gastonguay.'

Q. Did he indicate what share you were to get?

A. He said 'Don't forget Mrs. Gastonguay. She closes both our eyes; she deserves just as much as any nephew or niece, even more.'

Q. Did he tell Ernest that you should get more than any niece or nephew?

A. As much as any nephew or niece, even more.

Q. Did he indicate how much more?

A. No. He repeated it a second time because he figures there is no answer. He didn't have any answer so he repeated the same thing.

Q. Did he get an answer?

A. He didn't get any answer. The third time he raised his voice and he says 'Did you understand Ernest? Don't forget Mrs. Gastonguay.' He said the same thing 'She deserves even more than anyone, nephews or nieces.'

Q. The second time that he spoke did he say to Ernest 'Did you hear what I said; don't forget Mrs. Gastonguay'?
Is that all he said the second time?

A. 'She deserves as much as any nephews or nieces, even more.' The third time he only mentioned myself; he didn't say anything about nephews or nieces."

It is readily seen that the testimony of Mr. Belleau and Mrs. Gastonguay concerning the circumstances attendant to the signing of the will is amazingly different.

There is presented a most important factual question between these two witnesses as to where the truth lies. According to the testimony of Mr. Belleau the testator realized the act of execution, was informed of the contents of the will and was given explanation as to the legal significance of the words used in the will. On the other hand, Mrs. Gastonguay stated that Mr. Fortin affixed his cross to the instrument while under the influence of sleep and without information of contents or explanation of their legal effect.

A reader of the record will find many inconsistencies in the testimony of various witnesses requiring the determination of facts on the part of the justice presiding. It is not for us to substitute our judgment for that of the justice below in evaluating the credibility of witnesses.
Sanfacon v. *Gagnon,* 132 Me. 111, at page 113:

> "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."

See Waning, Applt., 151 Me. 239.

There is evidence to be found that the testator, having confidence in Mr. Thibault, desired him after this, the testator's, death to take care of his affairs and business and what remained should be given to his nephews and nieces.

The record in the case plainly establishes the fact that there is substantial evidence to support the findings of the Justice of the Supreme Court of Probate.

Waning, Applt., supra, 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."

In Re Simmons, 136 Me. 451; *Appeal of Packard,* 120 Me. 556.

Exceptions overruled.

CHRISTINE M. LAWSON
vs.
JEREMIAH M. MCLEOD, ADMR.
WILLIAM H. DUGAN ESTATE

Penobscot. Opinion, June 6, 1956.

Assumpsit. Contracts. Decedents. Damages. Executors and Administrators.

Where reliance is upon an implied contract, it must be shown expressly or by reasonable inferences from facts and circumstances that the one rendering services expected compensation and the one receiving services so understood or ought reasonably to have done so, and in some manner justified the expectation.

A lack of evidence on damages will not justify a defendant's verdict where the proofs are otherwise satisfied and plaintiff would be entitled to nominal damages.

The value of services rendered upon an implied contract is a matter well suited for jury determination.

The amount of damages should be established with reasonable certainty but damages are not uncertain for the reason that the loss sustained is incapable of exact proof by mathematical demonstration.

Sufficient facts must appear so that they, or reasonable inferences from them, will establish proof of the damages by reasonable certainty.

ON EXCEPTIONS.

This is an action of assumpsit for services rendered. The case is before the Law Court upon exceptions to a directed verdict for defendant. Exceptions sustained.

Myer Epstein,
Harry Stern, for plaintiff.

Cornelius J. O'Leary, for defendant.

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

WEBBER, J. Plaintiff brings this action seeking to recover the fair value of services rendered by her to defendant's intestate during his lifetime. Verdict for defendant having been ordered at the close of plaintiff's case, we examine the evidence before us on exceptions in the light most favorable to plaintiff to discover if there be a jury question. A jury could find that there was no blood relationship between the plaintiff and the decedent; that on several occasions she left her occupation as a nurse and traveled from her home in Massachusetts to Bangor, there to remain for some time caring for the decedent and the home where he lived alone; that in 1953 the plaintiff and the decedent were visited by the plaintiff's sister and brother-in-law; that the decedent in general conversation spoke of sending for the plaintiff, and indicated that "she came when he needed her," that "she was a smart girl," that "he did not know what he would have done without her," and that "she would be well repaid." Mr. Dugan also discussed his home and certain securities and their value and stated that he had told the plaintiff "she should have them when he was through." The same witnesses also observed the plaintiff doing housework. During the conversation the plaintiff neither denied nor remonstrated and a jury might find that she thereby gave

tacit approval to these statements of the decedent bearing on their relationship.

The applicable rule was clearly enunciated in the very recent case of *Colvin* v. *Barrett, Admr.*, 151 Me. 344. Where reliance is upon an implied contract, it must be shown expressly or by reasonable inferences from facts and circumstances that the one rendering services expected compensation and the one receiving services so understood or ought reasonably to have done so, and in some manner justified the expectation. No useful purpose will be served by again reviewing all the authorities collected in the *Colvin* case, *supra.* We note especially *Bryant* v. *Fogg,* 125 Me. 420, in which facts not unlike those before us were declared to present a jury question. Suffice it to say that we are unable to distinguish either the *Colvin* case or the *Bryant* case and are thereby compelled to find error in taking the case from the jury.

Counsel for defendant contends that there was no evidence from which the jury could assess damages. This would not justify a defendant's verdict if plaintiff otherwise satisfied her proof, as she would be entitled at least to nominal damages. *Rollins* v. *Blackden,* 112 Me. 459. But the value of services rendered under implied contract is a matter well suited to jury determination. "Damages were not liquidated, nor were they capable of being reduced to certainty by arithmetical calculation, so the criterion was how much the plaintiff deserved for drilling the well. * * * The jury in arriving at its own opinion, from the facts and circumstances and inferences and the opinion given in testimony, might accept the latter opinion at face value, or discredit it, wholly or in part." *Dyer* v. *Barnes,* 128 Me. 131, 132. "It is an accepted rule of law that a party who claims compensation for a wrong suffered must establish the amount of his damages with reasonable certainty. But absolute certainty is not required. Damages are not un-

certain for the reason that the amount of the loss sustained is incapable of exact proof by mathematical demonstration. Juries are allowed to act upon probable and inferential as well as direct and positive proof. Any and all facts and circumstances having a tendency to show the probable amount of damages suffered are properly received and the triers of fact allowed to make the most intelligible and probable estimate which the nature of the case will permit." *Hincks Coal Co.* v. *Milan and Toole,* 135 Me. 203, 207. " 'Where there is some proof of damages sustained from a breach of contract but the amount is uncertain, the court has sometimes instructed the jury to allow the smallest sum which will satisfy the proof.' " *Peterson Co.* v. *Parrott,* 129 Me. 381, 385. It is true of course that "mere speculation, conjecture, or surmise will not suffice. Sufficient facts must appear so that they, or reasonable inferences from them, will establish proof of the damages by reasonable certainty." *Gottesman & Co.* v. *Terminal Co.,* 139 Me. 90, 94. The determination as to what value of services was established by the proof should in the first instance have been left to the jury under proper instructions. The entry will be,

Exceptions sustained.

ALBERT A. PARENT, APPELLANT
vs.
MAINE STATE RETIREMENT SYSTEM

Kennebec. Opinion, June 13, 1956.

Maine State Retirement Plan. Discharge for Cause. Qualifications.

Employees of cities may benefit from the Maine State Retirement Plan only if the employing city has voted to participate.

An employee discharged for cause could not qualify for retirement benefits as being "in service" under the law as it stood prior to 1953. R. S., 1944, Chap. 60, Sec. 6.

An employee discharged for cause in 1952 could not qualify for retirement benefits under a Legislative amendment in 1953 where the amendment was made applicable only to "currently employed." P. L., 1953, Chap. 347.

Whether felonious conduct in the course of public employment disqualifies—undecided.

ON APPEAL.

This is an appeal from a decision of the Board of Trustees of the Maine State Retirement System. The appeal is before the Law Court on report. Application for benefits denied.

Philip Isaacson,
James G. Frost, for State.

Ernest L. Goodspeed, Jr., for petitioner.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, TAPLEY, JJ., MURRAY, A. R. J. (CLARKE, J., did not sit.)

WEBBER, J. This was an appeal from a decision of the Board of Trustees of the Maine State Retirement System denying service retirement benefits to appellant. The mat-

ter is before us on report on an agreed statement of facts, as follows:

"AGREED STATEMENT OF FACTS

1. That the Board of Finance of the City of Lewiston, Maine is the general financial officer of the said City.

2. That the Controller is retained as a City employee by the Board of Finance.

3. That the Controller is the Executive Officer of the Board of Finance.

4. That the Controller is the Clerk of the Board of Finance.

5. That on June 16, 1939 the Board of Finance retained Albert A. Parent to be the Controller.

6. The City of Lewiston became a participating local district in the Employees' Retirement System of the State of Maine on July 1, 1951, in accordance with the provisions of Chapter 60, Revised Statutes, 1944, and such subsequent amendments as it has adopted, in whole or in part, and has continued to the present date to be a participating local district.

7. On August 1, 1951, the petitioner, Albert A. Parent, then controller of the City of Lewiston, became a member of the Employees' Retirement System of the State of Maine in accordance with the provisions of Chapter 60, Revised Statutes, 1944, and such later amendments as adopted by the Lewiston Participating District; and at that time he was issued a prior service certificate giving him credit for 17 years, 7 months, and 25 days of service prior to that date, the correctness of which is in dispute, but not here made an issue.

8. That on May 21, 1952, the said Board of Finance, pursuant to Article VIII, Section 10 of the Revised Charter of the City of Lewiston, suspended the said Albert A. Parent as a result of the

alleged embezzlement by the said Albert A. Parent of $8,876.76 from the said City of Lewiston. At that time Albert A. Parent was 61 years old.

9. That on July 28, 1952, the said Board of Finance notified the said Albert A. Parent that pursuant to said Article VIII, Section 10, a public hearing would be held on the 25th day of August, 1952, at which time he would be given the opportunity to show cause why he should not be removed from the office of Controller as the result of the embezzlement by him of $8,876.76 from the said City of Lewiston.

10. That on August 25, 1952, the said Albert A. Parent failed to appear at the said hearing and the said Albert A. Parent was adjudged guilty of embezzling from the said City of Lewiston the sum of $8,876.76 and as a result of such misconduct was discharged from the position of Controller and was notified to that effect. Up to this time he had been a contributing member of the Retirement System, having made his last contribution on May 16, 1952.

11. That at the June Term of the Superior Court held at Auburn within and for the County of Androscoggin in the year 1952 the said Albert A. Parent was indicted by the Grand Jury for the crime of embezzling funds from the City of Lewiston.

12. That on the 15th day of said Term the said Albert A. Parent was arraigned for said crime of Embezzlement and pleaded guilty thereto before the said Superior Court.

13. That upon said day the said Albert A. Parent was sentenced by the said Superior Court to serve a term of one and one-half to three years in the Maine State Prison.

14. On November 25, 1952, Mr. Parent filed an application with the Board of Trustees of the Employees' Retirement System of the State of Maine, in due form as required by Chapter 60, Revised

Statutes, 1944, and later amendments, for service retirement allowance. At that time he was above the retirement age of 60 years. (P. L., 1951 - Ch. 266).

No decision has ever been rendered by the Board of Trustees upon this application.

15. Upon inquiry by his attorney of the disposition of his application of November 25, 1952, the Board of Trustees of the Retirement System suggested in a letter dated January 19, 1954 to Ernest L. Goodspeed, Jr., attorney for Mr. Parent, that Mr. Parent file another application for service retirement benefits.

On *January 25, 1954,* Mr. Parent filed a new application in due form with the Board of Trustees of the Retirement System, as suggested.

16. By letter of the Secretary of the Retirement System dated September 17, 1954, Mr. Parent was notified that his application for retirement benefits dated November 25, 1952, had been denied by the Board of Trustees of the Retirement System on September 15, 1954.

This information was in error in that it was the application dated January 25, 1954, which had been denied. This is evidenced by the certified copy of the application dated January 25, 1954, filed herewith together with the letter of enclosure relating it to the decision of the Board of Trustees of September 15, 1954.

17. Subsequent to this decision of the Board of Trustees of September 15, 1954, Mr. Parent in due time noted an appeal from the decision to the February Term, 1955, of the Superior Court in and for the County of Kennebec, and perfected said appeal in the manner and form provided by law.

18. Up to and including the time of the decision of September 15, 1954, there was no listing of rules and regulations to assist the Board of Trustees in the administration of the Retirement System, however, all of the decisions which the Board

of Trustees arrives at, under the provisions of the law, are a matter of record and it is upon the basis of such record that it has proceeded over the years.

19. The said Board of Finance is the Pension Board of the City of Lewiston and as such administers the said Employees' Retirement System for the Lewiston Participating District.

20. (Here follows action of the Board of Finance, not in issue)

21. That at a meeting of the Board of Mayor and Aldermen for the City of Lewiston held on November 18, 1954, the following Vote was passed:

> ORDERED, That as recommended by the Board of Finance, this Board of Mayor and Aldermen hereby adopt the following amendments to the Maine State Retirement law enacted by the 1951-1953 Legislature for the benefit of all City employees currently employed and covered by the Maine State Retirement law and those who shall become eligible in the future, and that this recommendation be submitted to the Corporation Counsel for approval before submitting to the Board of Mayor and Aldermen.

(Here follows specific reference to the several pertinent enactments, including P. L., 1953, Chap. 347)"

Although counsel for the intervenor City of Lewiston advances several persuasive arguments in support of the action of the Board, it will be necessary to consider only one in order to dispose effectively of this appeal. It will be seen at once that appellant, having been discharged for good cause, could not possibly qualify as "in service" at the time of his attempted retirement, as required by the law as it stood prior to the enactment of P. L., 1953, Chap. 347. The pertinent portion of that amendment reads as follows:

> "**Sec. 1. R. S., c. 60, § 6, Subsec. 1, Par. A, Amended.** Paragraph A of subsection I of section

6 of chapter 60 of the revised statutes, as enacted by section 3 of chapter 384 of the public laws of 1947, as amended, and as renumbered by section 90 of chapter 266 of the public laws of 1951, is hereby further amended to read as follows:

> 'A. Any member ~~in service~~ may retire on a service retirement allowance upon written application to the board of trustees setting forth at what time he desires to be retired, provided that such member at the time so specified for his retirement shall have attained age 60 and notwithstanding that during such period of notification he may have separated from service.' "

It is inherent in the system that employees of cities may benefit from the plan only if the employing city has voted to participate. Such participation may be limited by action of the city. R. S., 1954, Chap. 64, Sec. 17, Subsec. I, provides in part: "The employees of any * * * city * * * may participate in the retirement system, to the full extent of any and all benefits provided for in this chapter provided the * * * city council or corresponding body of a city * * * approve such participation and file with the board of trustees a duly certified copy of the resolution of the * * * city council or such corresponding body approving such participation and the extent of the benefits which shall apply * * *." In like manner, the Legislature has provided that certain important substantive changes are not binding on participating local districts unless adopted by them. R. S., 1954, Chap. 64, Sec. 17, Subsec. VIII, provides: "Any amendments to this chapter enacted in the years 1953-1954 by the 96th legislature, the benefits of which could apply to employees of participating local districts, shall be made effective only in the event any such district elects to adopt such benefits and agrees to pay into the system the required costs as developed by the actuary." Pursuant to this provision, the City of Lewiston, as shown by the agreed statement, qualified its adoption of the amendments, including

P. L., 1953, Chap. 347, in such a way as to limit their effect to "all City employees currently employed and covered by the Maine State Retirement law and those who shall become eligible in the future." The appellant, being neither "in service" at the time of his application nor "currently employed" when Lewiston took its adoptive action, did not qualify for retirement benefits and his application was properly refused.

In view of the foregoing which is decisive of the rights of this appellant, we deem it unnecessary to determine here whether an applicant for benefits is or is not disqualified by discharge for the commission of a felony in the course of his public employment and in violation of the oath of his office. The appellant is of course entitled to the return of any amount contributed by him, with interest as provided by R. S., 1954, Chap. 64, Sec. 10. The entry will be,

Application for benefits denied.

CHARLES L. PIKE, PETR. FOR WRIT OF ERROR,
CORAM NOBIS
vs.
STATE OF MAINE

Penobscot. Opinion, June 13, 1956.

Error. Coram Nobis. Lesser Offenses. Right to Counsel. Waiver. Constitutional Law.

The guilt or innocence of one convicted of forgery is not properly an issue in *coram nobis* proceedings.

One who did not request counsel but contends that he was deprived of his constitutional right thereto must establish that he had not validly waived his rights.

The Sixth Amendment to the Constitution of the United States does not command the State to furnish counsel.

In State criminal prosecutions it is only when the absence of counsel results in a denial of the essentials of justice that the issue of due process under the Fourteenth Amendment to the Constitution of the United States is involved.

ON EXCEPTIONS.

This is an application for a writ of error *coram nobis* before the Law Court upon exceptions to the denial of the writ. Exceptions overruled.

Roger A. Putnam, Ass't Atty. Gen.,
Oscar Fellows, for State.

Oscar Walker, for petitioner.

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

WILLIAMSON, J. This writ of error *coram nobis* is before us on exceptions by the petitioner, a prisoner at the

State Prison, after a decision in substance affirming the judgment of which he complained. The decision was entered after hearing on the writ by the presiding Justice of the Superior Court in Penobscot County at the September Term 1955. The case was heard and decided before the decision in *Dwyer* v. *State,* 151 Me. 382 was entered in January 1956 in which the procedure in *coram nobis* was discussed at length.

In the instant case we find the essential procedural requirements have been met, although not in the form which we would necessarily consider appropriate or sufficient in future cases. We also take into consideration the fact that the petitioner prepared his own petition.

The petitioner pleaded guilty to an indictment for forgery at the September Term 1953 of the Superior Court in Penobscot County. In his petition for issuance of the writ he set forth three complaints: (1) that he should have been sentenced for accessory after the fact of forgery and not for forgery, or in other words for a lesser sentence, and (2) "I asked for a lawyer at my hearing but they would not get one for me." A third complaint was abandoned and need not be considered.

The justice treated the petition as the writ and ordered hearing thereon. In answering the writ, the State asserted that only the complaint relating to denial of counsel raised an issue in *coram nobis,* and further that the petitioner had waived any right to assistance of counsel.

The case was heard by the justice without a jury on writ, answer of the State and proof. The justice found the "indictment was duly read to the (petitioner). The indictment speaks for itself and contains no count charging the petitioner as an accessory to the crime."

The petitioner sought unsuccessfully to introduce evidence to show that he was not guilty of the forgery to which

he had pleaded guilty. The State suggests that certain of the exceptions to the exclusion of such evidence were not perfected below and thus are not properly before us.

The State would go behind the bill of exceptions allowed by the justice, wherein it is asserted that the petitioner "seasonably excepted," to the transcript of the evidence. It there appears that a separate exception was not noted to several of the rulings. Rule of Court 18, 147 Me. 471.

> "Again it must be remembered that statements of fact contained in the bill of exceptions are taken as true unless contradicted by the record which is made a part of the bill of exceptions. In such cases, the record governs the statement made in the bill of exceptions. Especially is this true with respect to transcript of testimony which is made a part of the bill of exceptions, in which case the transcript will be controlling." Justice (later Chief Justice) Merrill in "Some Suggestions on Taking a Case to the Law Court", 40 Maine State Bar Association 175, 192.

We are satisfied, however, from our examination that the exceptions taken were fairly understood to include the series of disputed rulings. We are not inclined to seek at length for reasons to deny the technical sufficiency of exceptions bearing the stamp of allowance by a justice of our courts.

Taking the exceptions on their merits, we find the rulings below were correct. The guilt or innocence of the petitioner of the charge of forgery was not properly an issue in these proceedings. Hearing on a writ of error *coram nobis* is not a new trial. The purpose and limits of *coram nobis* are discussed at length in the *Dwyer* case, *supra,* and need not be restated.

The remaining and vital issue in the case relates to the matter of counsel at the hearing in Superior Court at which

the petitioner pleaded guilty. The justice, in his decision, said:

> "With reference to the claim of the petitioner that he was refused an attorney, although petitioner testified that he asked the County Attorney and a deputy sheriff for a lawyer, he also testified that he had been convicted on other occasions of felonies, and knew that the presiding justice had authority to appoint counsel in his behalf. The presiding justice was not requested to provide counsel. This Court rules that under the circumstances of this case that petitioner waived any right to have counsel assigned to him.
>
> "I find no evidence upon which to warrant the relief requested."

The Constitution of Maine, Article I, § 6, reads:

> "In all criminal prosecutions, the accused shall have a right to be heard by himself and his counsel, or either, at his election; . . ."

From the record taken most favorably to the petitioner, it appears (1) that he did not have counsel, and (2) that he at no time asked the court for assignment of counsel. At most, he made the request to the county attorney and to a deputy sheriff. Specifically he testified on cross-examination about instances of criminal charges against him over a period of years. He testified in part:

"Q. Now isn't it true, Charles, in your long experience in the criminal courts that you well know that the presiding Justice has authority vested in him to appoint counsel in your behalf if you can prove to him that you can't afford it of your own means?

"A. Yes.

"Q. You know that today and you knew it in 1953, isn't that true?

"A. Yes."

We have then the case of a prisoner who did not request counsel, and who now contends that he was deprived of his constitutional right to assistance of counsel, although he was fully aware of such right and of the propriety of making such request to the court. The burden was upon the petitioner to establish the essential fact, namely, that he had not validly waived his rights, and this burden he failed to meet. *Dwyer* case, *supra,* at page 395.

The rule in cases arising under the Sixth Amendment to the Federal Constitution has been stated in the following language:

> "It must be remembered, however, that a judgment cannot be lightly set aside by collateral attack, even on habeas corpus. When collaterally attacked, the judgment of a court carries with it a presumption of regularity. Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of habeas corpus, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of Counsel. If in a habeas corpus hearing, he does meet this burden and convinces the court by a preponderance of evidence that he neither had counsel nor properly waived his constitutional right to counsel, it is the duty of the court to grant the writ."
> *Johnson* v. *Zerbst,* 304 U. S. 458, 58 S. Ct. 1019, 1025.

Again in *United States* v. *Morgan,* 346 U. S. 502, 74 S. Ct. 247, on a motion in the nature of the extraordinary writ of *coram nobis* the Supreme Court said, at p. 253:

> "Of course, the absence of a showing of waiver from the record does not of itself invalidate the judgment. It is presumed the proceedings were correct and the burden rests on the accused to show otherwise."

Looking at the case from the viewpoint of the Federal Constitution, we find the issue lies not in the Sixth (right to counsel), but in the Fourteenth (due process) Amendment.

> "The Federal Constitution does not command a state to furnish defendants counsel as a matter of course, as is required by the Sixth Amendment in federal prosecutions. Lack of counsel at state non-capital trials denies federal constitutional protection only when the absence results in a denial to accused of the essentials of justice." *Gallegos* v. *State of Nebraska,* 342 U. S. 55, 72 S. Ct. 141, 147.

See also *Betts* v. *Brady,* 316 U. S. 455, 62 S. Ct. 1252; *Gibbs* v. *Burke,* 337 U. S. 773, 69 S. Ct. 1247; *Fitzgibbons* v. *Hancock* (N. H.) 82 A. (2nd) 769. See R. S., c. 148, § 11, on assignment of counsel.

Implied in the decision of the justice is the finding that the petitioner suffered no denial of the essentials of justice. For informative discussions of the issues and procedure see Frank, *"Coram Nobis"* (1953) and Beaney, *"The Right to Counsel in American Courts"* (1955).

We conclude therefore that there was no error in the findings of the justice or in his decision, in terms "writ denied," but in substance affirming the judgment, that is to say the sentence, of which the petitioner complained.

The entry will be

Exceptions overruled.

J. R. CIANCHETTE
D/B/A PITTSFIELD TRUCK & FARM EQUIPMENT
vs.
LEVI HANSON

J. R. CIANCHETTE
D/B/A PITTSFIELD TRUCK & FARM EQUIPMENT
vs.
JOSEPH HANSON

Somerset. Opinion, June 20, 1956.

PER CURIAM.

Each of these two cases is an action of assumpsit on an account annexed, brought in the Superior Court for the County of Somerset. The declaration in the case against Levi Hanson claimed $319.60 due. The declaration in the case against Joseph Hanson claimed $198.18. The declaration in each case also contained omnibus money counts.

Both of the cases were referred to the same referee, who heard the cases, and in one report awarded the plaintiff the sum of $170.34 against Levi Hanson. In the other case, against Joseph Hanson, the referee found due to the plaintiff the sum of $198.18. The evidence presented by the plaintiff in each case was an affidavit signed by the plaintiff, J. R. Cianchette of Pittsfield, in form as provided in Revised Statutes, 1954, Chapter 113, Section 132. The defendant pleaded the general issue in each case, with a brief statement in the case against Levi Hanson "that payment in full of said account was made prior to suit."

Objections were filed to the acceptance of the report of the referee in each case, and exceptions to allowance of referee's report were taken in each case. The bills of exceptions are before us. The record in each case before us shows the plaintiff's affidavit, the report of referee and the

bill of exceptions. The record in each case is barren of any evidence offered by the defendant, if the defendant in either case, in fact introduced any evidence.

The defendants, and each of them, in the bill of exceptions claim error in that the referee admitted the affidavit of J. R. Cianchette as an individual, without further proof of personal knowledge of the various items listed in the account annexed on the part of the plaintiff. The affidavit was admissible. Its weight would have been for the referee even had there been evidence that he had no personal knowledge. See *Mansfield* v. *Gushee,* 120 Me. 333, 337. In the case against Levi Hanson the defendant also claimed that the referee could not find less than the sum demanded, where the only proof offered was an affidavit.

The Statute (R. S., 1954, Chap. 113, Sec. 132) provides for prima facie proof by affidavit of the plaintiff in an action on an account annexed, and the plaintiff is entitled to a judgment in his favor unless the statements in the affidavit are rebutted by "competent and sufficient evidence." The statements in the affidavit in each case were not rebutted in any manner by the defendant. Neither defendant offered any evidence. The plaintiff in each case was entitled to judgment.

That the referee was absolutely bound by all statements of amount in the account annexed, does not follow. The referee was entitled not only to consider the facts stated in the affidavit, but any and all circumstances (such as items, credits, reasonable prices, etc.) that may have appeared, in order to reach a just decision. *Winters* v. *Smith,* 148 Me. 273.

The plaintiff was entitled to judgment in each case, because in each case the defendant offered no evidence to

contradict or rebut the affidavit. See *Mugerdichian* v. *Goudalion*, 134 Me. 290; *Jones* v. *Berry*, 140 Me. 311.

Exceptions overruled in each case.

Clair L. Cianchette, for plaintiff.

Bartolo M. Siciliano, for defendant.

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

LINWOOD A. RANDLETT, ADMR.
ESTATE OF CARL RANDLETT
vs.
GORDON E. LINKLETTER AND MELBA E. LINKLETTER

Somerset. Opinion, June 20, 1956.

PER CURIAM.

On exceptions. This action upon a promissory note was referred with right of exceptions in matters of law. The exceptions to the acceptance of the report by the presiding justice in the Superior Court are based upon objections filed below to rulings and findings of the referee.

We have no transcript of testimony taken at the hearing before the referee, or findings of fact by the referee other than the single finding of an amount due the plaintiff. It is clear from defendants' argument that there was evidence presented apart from certain exhibits in the record. The record is not complete. We are unable therefore to consider the exceptions and they are overruled.

No injustice will result from this disposition of the case. At oral argument counsel for the defense admitted the

amount found by the referee was due upon the note with possibly some minor adjustment in interest. We are unable to understand what advantage the defendants sought to gain by objection to the report below and by pressing exceptions before us. We are in accord with the view expressed by defense counsel at argument, that the case is a "pebble in the shoe."

Under the circumstances there is no necessity for awaiting written argument of the plaintiff before deciding the case.

Exceptions overruled.

Carl R. Wright, for plaintiff.

Bartolo M. Siciliano, for defendant.

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

MINNIE B. BOWIE, GLADYS BOWIE,
BEVERLY BOWIE AND MARY HARRIS
vs.
ALFRED A. LANDRY

Androscoggin. Opinion, June 21, 1956.

Res Judicata. Estoppel. Trespass. Writ of Entry. Demurrer.

Res judicata means that an issue has been decided by a court of competent jurisdiction. *Res judicata* rests on legal reasons.

Estoppel means preclusion by personal action or by judgment. Estoppel rests on equitable reasons.

Possession is a prerequisite in a trespass action; seisin on title is the issue in a writ of entry.

Where a plaintiff in a trespass action mistakes his remedy *res judicata* will not preclude a proper remedy.

To constitute an estoppel by judgment, it must be proved affirmatively that, in the suit in which the judgment was entered, a right or claim was specifically presented, definitely passed upon, adjudged and decided; the judgment is decisive of the issues tendered by the proceedings.

Where in a former action the plea is the general issue and the decision may have been upon any one of several claims or allegations, there is no estoppel.

ON EXCEPTIONS.

This is a writ of entry before the Law Court upon exception to the overruling of a demurrer. Exceptions overruled. Case to stand for trial.

May & May,
Irving Friedman, for plaintiffs.

Frank W. Linnell, for defendant.

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

FELLOWS, C. J. This case comes to the Law Court on plaintiffs' exceptions. The action is a writ of entry describing certain land in Androscoggin County and alleging that the plaintiffs are the owners in common, and that the defendant disseized them within twenty years, and unjustly withholds. The declaration seeks rents and profits, for trees cut, and other waste. The defendant pleaded *nul disseisin* with a brief statement claiming *res judicata,* and also claimed an *estoppel,* because one of the plaintiffs, for the benefit of all, had previously brought *trespass quare clausum* alleging trees cut and removed, and that the jury returned a verdict for the defendant.

In the original trespass case, the general issue only was pleaded. There was no brief statement to raise any particular fact in defense. See *Bowie* v. *Landry,* 150 Me. 239, where the Law Court considered a general motion by plaintiff for new trial in the previous trespass case between the parties.

The plaintiffs demurred to the brief statement filed by defendant in this real action, and the demurrer was sustained. The defendant was then permitted to amend.

An amendment was made to the brief statement and filed in this pending action, which amendment precisely and clearly set out the defense of *estoppel,* improperly stated in the original brief statement, and claimed *res judicata* and that plaintiffs were *estopped.* A second demurrer then was filed by the plaintiffs, which second demurrer was overruled, and the plaintiffs took exceptions. These exceptions to the overruling of the second demurrer to the amended brief statement are now before the Law Court.

The defendant stated, in his amended brief statement, that by the verdict in the previous trespass action that mat-

ters alleged in plaintiffs' declaration are *res judicata,* and also that "the precise question to the plaintiffs' right to recover damages from this defendant in this action for the cutting and carrying away of the same trees for which claim was made by these plaintiffs in said previous action has been determined, and the plaintiffs are estopped to claim damages of the defendant in this action for the cutting and carrying away of said trees."

The plaintiffs contend and say "that the issues presented in the two suits are different, the one being right to possession; the other, title. The damages claimed are incidental only and are not a necessary element in either action. It is not shown that the right of the demandants to damages from the disseizor for injury to the land was particularly presented and determined in the trespass action, or that the judgment was rendered on the merits."

Res judicata (sometimes called res adjudicata) means that an issue has been decided by a court of competent jurisdiction. *Estoppel* means preclusion by personal action or by judgment. The former rests on legal reasons, the latter, equitable. See Bouvier Law Dictionary, Third Revision, "Res Judicata" and "Estoppel."

The cause of action in a trespass suit and the cause in a writ of entry are not the same. The gist of the action of trespass is the breaking and entering, and possession in the plaintiffs is a prerequisite. See *Bray* v. *Spencer,* 146 Me. 416 and cases therein cited. In the writ of entry seizin or title is the issue, the wrongful act is disseizin; the recovery is the land, and perhaps rents, profits, and damages to the realty. *Kimball* v. *Hilton,* 92 Me. 214; *Bemis* v. *Diamond Match Co.,* 128 Me. 335. In a trespass suit, plaintiff must prove he was in possession of the land, or a part of the land. The two are inconsistent, and the evidence that would prove one would probably disprove the other.

The facts revealed by the pleadings in this case tend to show that the defendant may have been in possession of some part of the land when the trespass suit was brought, and that the plaintiffs in the trespass case may have mistaken their remedy. Under these circumstances, *res judicata* is not a defense to the case at bar. *Bray* v. *Spencer,* 146 Me. 416 and cases therein cited. *Hill* v. *Morse,* 61 Me. 541; *Hayden* v. *Railroad Company,* 118 Me. 442.

To constitute an *estoppel by judgment,* it must be proved affirmatively that, in the suit in which the judgment was entered, a right or claim was specifically presented, definitely passed upon, adjudged, and decided. The expression that a judgment is conclusive not only as to subject matter, but also as to every other matter that was or might have been litigated, means that a judgment is decisive upon the issues tendered by the proceeding. If the pleading in the former case was the general issue, and the jury verdict did not necessarily depend on any particular claim, or allegation, and the decision may have been on any one of several, there is no estoppel. *Susi* v. *Davis et al.,* 133 Me. 354, 358; *Bray* v. *Spencer,* 146 Me. 416. "Was the same vital point put directly in issue and determined?" *Howard* v. *Kimball,* 65 Me. 308, 330. See also *Embden* v. *Lisherness,* 89 Me. 578.

In this pending case, there was no *res judicata,* and this the defendant recognized at the time of oral argument, and waived this contention. The defendant does rely on an estoppel by judgment in regard to 313 trees, because he claims, and says in his brief statement, "The precise question of the plaintiffs' right to recover damages from this defendant in this action for the cutting and carrying away of the same trees for which claim was made by these plaintiffs in said previous action has been determined, and the plaintiffs are estopped to claim damages of the defendant in this action for the cutting and carrying away of said trees."

In the previous trespass action between the parties, there was a general verdict for this defendant under a plea of the general issue. This record does not show on what basis and for what cause the verdict was found. The verdict might have been based on any one of several contentions. It might have been based on lack of possession, or possession of only a part of the land described. It might have been for any one of many reasons, and the reasons may have been as different as the number of jurors. If the defendant claims an estoppel by judgment, he must show, if that is possible, that there was a determination of, what he calls in his brief statement, "the precise question." *Embden* v. *Lisherness,* 89 Me. 578; *Susi* v. *Davis et al.,* 138 Me. 354.

The question now before the Law Court is whether the presiding justice was correct in overruling the demurrer to the amended brief statement. He was correct in sustaining the demurrer to the first brief statement filed, because that brief statement claimed that *res judicata* was a bar to this action, and the brief statement did not definitely claim any particular *estoppel.* The amended statement, however, positively states that *"the precise question * * * * of the right to recover* damages from this defendant in this action *for the cutting and carrying away of the same trees* for which claim was made by these plaintiffs in said previous action *has been determined."*

It was not necessary for the brief statement to allege estoppel, but we cannot say that it is "not well pleaded." The defendant could set up a claim of estoppel in a brief statement if he saw fit. Having done so, the second demurrer admitted the truth of the positive and precise allegation in the amended brief statement, for the purpose of testing as a matter of law the validity of the brief statement. The presiding justice was, therefore, correct in overruling the second demurrer.

Exceptions overruled.
Case to stand for trial.

CARROLL I. MCGILVERY, IN EQUITY

vs.

MILDRED A. MCGILVERY ET AL.

Androscoggin. Opinion, June 21, 1956.

Equity. Decrees. Service of Process. Waiver. Pro Confesso. Appeal. Equity Rule 8.

A final decree is one which fully decides and disposes of the whole case, leaving no questions for future consideration nor the necessity of further orders to give all parties the entire benefit of the decision.

A decree *pro confesso* is interlocutory but indispensable to a final decree upon a default. A default in equity requires action by the court.

A waiver of hearing is not a decree *pro confesso.*

A decree not binding upon all parties in interest is not a final decree.

ON APPEAL.

This is a bill in equity by a testamentary trustee for instructions. The case is before the Law Court upon appeal from a certain decree. Case remanded for action below in accordance with opinion.

Skelton & Mahon, for plaintiff.

John A. Platz,
Frank W. Linnell,
Paul A. Choate, for defendant.

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

WILLIAMSON, J. On appeal. This is a bill in equity by a trustee for construction of a testamentary trust and for instructions. The problem is whether profits from a business conducted by the testator and continued by the trustee should be distributed as income or added to the capital of the trust.

In our view from a close study of the record the decree appealed from was not a final decree, and hence the appeal was prematurely brought. It follows that the case should be remanded for further action below. R. S., c. 107, § 21. In *Sawyer* v. *White,* 125 Me. 206, at 208, 132 A. 421, the court said:

> "A final decree is one which fully decides and disposes of the whole case leaving no further questions for the future consideration and judgment of the court. *Gilpatrick* v. *Glidden,* 82 Maine, 201, 203; 1 Whitehouse Eq. Pr. Sec. 399. A decree is final which provides for all the contingencies which may arise and leaves no necessity for any further order of the court to give all the parties the entire benefit of the decision. *Gerrish* v. *Black,* 109 Mass., 474, 477. No decree is a final one, which leaves anything open to be decided by the court, and does not determine the whole case. *Forbes* v. *Tuckerman,* 115 Mass., 115, 119. A decree to be final for the purposes of appeal must leave the case in such a condition that if there be an affirmance, the court below will have nothing to do but execute the decree already entered. *Bank of Rondout* v. *Smith,* 156 U. S. 330; 39 Law Ed. 441; *Dainese* v. *Kendall,* 119 U. S. 53; 30 Law Ed. 305."

By amendment to the bill Laura Fogg, the present appellant, and others interested in the trust were made parties defendant. The motion to amend was dated March 1, 1954 and carries a notation "motion granted" by the justice below dated May 3, 1954.

On March 27, 1954 the appellant executed the following instrument and certain of the defendants named in the mo-

tion executed like instruments after March 1 and before May 3, 1954:

"STATE OF MAINE

ANDROSCOGGIN, SS. SUPERIOR COURT
IN EQUITY

RE: GEORGE M. FOGG ESTATE

I, the undersigned, acknowledge due and sufficient notice of the petition of CARROLL I. McGILVERY, TRUSTEE under the will of GEORGE M. FOGG, late of Lewiston, said County, for interpretation of the provisions of said will pertaining to the distribution of income of the trusts therein created and waive hearing thereon.
March 27, 1954.

/s/ Laura Fogg
Laura Fogg"

On August 19, 1955 findings and rulings of the justice below were filed in which he referred to a hearing on July 27, 1954 and to the acknowledgment of notice and waiver of hearing by the appellant and certain other defendants. The decree appealed from was filed on December 29, 1955.

Apart from whatever effect may be given to the "waiver," there was no appearance by the appellant either pro se or by attorney until an appearance by attorney was noted on the docket on January 6, 1956. "Appearance shall be entered on the docket by the party or his counsel or filed with the clerk." Equity Rule 8, 147 Me. 494. Acknowledgment of notice without appearance does not replace due service. See comment in Whitehouse, Equity (1900 ed.) § 282.

The appellant has made no defense by answer, plea or demurrer. R. S., c. 107, § 15. No decree *pro confesso* against her for default of appearance or defense has ever been entered. R. S., c. 107, §§ 14, 15 unchanged since enacted in P. L., 1881, c. 68, §§ 4, 5.

The long settled rule is stated in Whitehouse, *supra*, § 299, as follows:

> *"Decree pro confesso merely interlocutory but indispensable.* . . . Since the terms of the statute, (R. S. c. 77, §§ 14, 15 (1883), supra, §§ 295, 296) are mandatory and provide that on default of appearance or defence the bill shall be taken pro confesso and give the defendant ten days thereafter in which to be heard on the question of revoking, our court regards the interlocutory decree pro confesso as an indispensable prerequisite to making a final decree in the cause and the court will not proceed to a hearing, when proof ex parte is required or when there are other defendants, until a decree pro confesso has been duly entered against the defendants in default."

The waiver of hearing was not a decree *pro confesso*. A default in equity requires action by the court. It is not accomplished by the acts of the parties.

The argument is made that the "appellant waived her rights to answer and appear at the hearing. The appellee (trustee) proceeded to hearing and did not take the bill pro confesso relying on the waiver." In other words, it is said that the "waiver" became the equivalent of a defense in equity. On the contrary, in our view the "waiver" is no more than further proof of the fact that the appellant made no defense. At that point the plaintiff may start the statutory machinery to produce the indispensable default decree.

The "waiver" does not supplant the decree *pro confesso*. The decree appealed from therefore was improperly entered against the appellant. It has no vitality insofar as she is concerned, and she is not bound thereby. Whether others are bound and to what extent we need not consider or determine.

In bringing his bill, the trustee of course sought a decree binding against all with an interest in the trust. A decree

binding some, but not all, of the interested persons and the trustee would leave at the least a doubt in the administration of the trust. The very purpose of the bill would be destroyed if later the trustee could find himself by differing instructions subject to conflicting duties among the beneficiaries. At the close of this litigation the trustee seeks assurance for the future. This much seems plain, that a decree not binding the appellant would not be termed "final" by the trustee.

Again we turn to Whitehouse, *supra,* at § 237, dealing with bills for instructions:

> "In such a case all persons interested in the subject matter or whom it is desired to conclude by the decree must be made parties and the executor, administrator, or trustee should not take any part in the proceedings or arguments so far as the rights of the claimants are concerned."

In this view of the case the rule that an appeal must be dismissed for want of the evidence or an abstract thereof is not applicable. *Semo* v. *Goudreau et al.,* 145 Me. 251, 75 A. (2nd) 376, same case 147 Me. 17, 83 A. (2nd) 209. Since the appeal was not otherwise effective, there was no need for the evidence or abstract.

If all concerned will be content to travel the well marked paths of equity, we are confident many of the difficulties arising on "short cuts" will be eliminated. At the end the trustee will then obtain a construction of the will and instructions for his guidance protecting and binding alike all interested persons and the trustee in their future dealings.

This opinion is limited to the issue deemed controlling at the present stage of the case. In no way do we express, directly or by inference, any views upon other issues relating either to procedure or to the merits. On procedure generally see Whitehouse, *supra.* Illustrative cases are: *New Eng-*

land Trust Co., et al. v. *Sanger, et al.*, 151 Me. 295, 118 A. (2nd) 760; *U. S. Trust Co. of N. Y. Tr.* v. *Boshkoff, et al.*, 148 Me. 134, 90 A. (2nd) 713; *Dow* v. *Bailey*, 146 Me. 45, 77 A. (2nd) 567.

The appeal was prematurely brought. The entry will be

Case remanded for action below in accordance with opinion.

JUNE BINETTE, ADMINISTRATRIX OF ESTATE OF LEO W. BINETTE

vs.

RAYMOND LePAGE

York. Opinion, June 21, 1956.

Wrongful Death. Contributory Negligence. Nonsuit.

If the plaintiff's evidence in a negligence action shows that his intestate was contributorily negligent, then the defendant has sustained the burden of proof under R. S., 1954, Chap. 100, Sec. 50 and a nonsuit is properly ordered.

ON EXCEPTIONS.

This is a negligence action before the Law Court upon exceptions to the granting of a nonsuit. Exceptions overruled.

Simon Spill, for plaintiff.

Waterhouse, Spencer & Carroll, for defendant.

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

BELIVEAU, J. Exceptions were taken by the plaintiff to the order of the presiding justice granting the defendant's motion for a nonsuit.

The general issue was pleaded together with a brief statement that the plaintiff's intestate's "lack of due care and negligence under the circumstances was responsible for his alleged injuries and resulting death."

Under Section 50, Chapter 100 of the Revised Statutes, 1944, a person who dies as a result of injuries received is presumed to have been in the exercise of due care, and if his contributory negligence is to be made an issue it must be proved by the defendant. If the plaintiff's evidence shows contributory negligence, on the part of the deceased, then the defendant has sustained that burden.

We need not consider the defendant's negligence, if any, because from the record the only conclusion to be arrived at is that the deceased was guilty of contributory negligence.

Late on the evening of July 3, 1954 the automobile of the plaintiff's intestate became disabled on Saco Avenue in the Town of Old Orchard. At his request the defendant dispatched a wrecker to tow the car away. The wrecker was backed by the defendant's employee on the wrong side of the road and in the rear of the Binette car to fasten or attach it to the rear of the wrecker. During this operation Binette placed himself in a position between the rear ends of his car and that of the wrecker and toward the center of the road. As this was going on, another automobile coming from the direction of Old Orchard, toward Saco, on this road, struck the wrecker and pushed the Binette car and the wrecker a distance of about 15 feet.

Binette was injured and his body found in the traveled part of the road and toward the center. He died as a result of the injuries received.

Binette took no part and gave no assistance to the defendant's employee. He deliberately and knowingly placed himself in a position of great danger. It is in evidence that usually the Saco road at this point is much traveled and was much more so on the evening of July 3. The deceased was familiar with this highway and knew, or should have known, that the position he assumed, under the conditions which then existed, was extremely dangerous and hazardous.

From the uncontradicted facts the evidence is conclusive that the plaintiff's intestate was guilty of contributory negligence. His was not the conduct of a reasonably prudent person.

Exceptions overruled.

R. I. MITCHELL, INC.
vs.
BELGRADE SHOE CO.

Androscoggin. Opinion, July 12, 1956.

Negligence. Fires. Master and Servant.
Scope of Employment. Disobedience.

Scope of employment may be a question of fact or one of law depending on the evidence.

A violation of the employer's orders will not relieve the employer of liability if the wrongful act by the employee was within the general scope of his duties.

ON MOTION.

This is a negligence action before the Law Court upon

general motion for a new trial after verdict for plaintiff. Motion denied.

William Cohen,
Berman & Berman,
Robinson, Richardson & Leddy, for defendant.

Brann & Isaacson, for plaintiff.

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

WILLIAMSON and WEBBER, JJ., concur specially in result.

BELIVEAU, J. On exceptions. The plaintiff recovered a verdict in an action for damages brought against the defendant. Several exceptions were taken during the trial but no bill of exceptions was perfected. The only matter before us is the motion asking that the verdict be set aside and a new trial be granted because it is against the law and the charge of the justice; against the evidence; manifestly against the weight of the evidence and because of excessive damages.

The plaintiff occupied the basement, first and second floors of the R. I. Mitchell building in Auburn in its business of selling automotive parts and the defendant occupied the third floor of the same building in its business of manufacturing shoes.

On May 18, 1950 a fire occurred on the third floor of this building, which building was equipped throughout with an automatic sprinkler system. The plaintiff alleged and offered evidence, apparently believed by the jury, that this fire set in motion the sprinkler system, as a result of which water from a sprinkler found its way to the second floor below and caused considerable damage to the plaintiff's merchandise.

It is the plaintiff's contention that the fire was started by a hotplate used the day before the fire, and for sometime

prior thereto, by two of the defendant employees, Parent and Creamer, and which they failed to turn off when through using it for the day of May 17, 1950. The fire occurred early on the morning of the next day, to wit, May 18, 1950, before the start of the day's operation. The plate belonged to Parent and was used by him and Creamer in the course of their work and for the purpose of teaching Creamer the trade of sewer.

There is evidence that the hotplate burned a hole through the floor at the spot where the plate was in use.

The defendant claimed and offered testimony that the use of hotplates by employees had been forbidden; that such use by Parent and Creamer was in violation of this order, and that the water which reached the floors below did not originate from the sprinkler system on the floor occupied by the defendant.

There was sufficient evidence to justify the conclusion reached by the jury that the fire on the defendant's premises was caused by the hotplate used by Parent and Creamer for some time prior to May 18, 1950; that the heat from this fire set in motion the sprinkler system and that the water from the sprinkler directly above the hotplate caused the damage to the plaintiff's stock.

The defendant argues, that, admitting all this to be true, the plaintiff must still prove by credible testimony that Creamer and Parent in using a hotplate, were acting within the scope of their employment. This is one of the issues on which the parties part company.

It is the defendant's position that this is a question of law and not of fact. In *Stevens* v. *Frost,* 140 Me. 1, the court reaffirmed and restated the rule, that scope of employment may be a question of fact or one of law, depending on the evidence. As the court said in this case, "This is but an ap-

plication of the principle that, if only one conclusion is justified, the Court will direct the jury to that conclusion." In this instance the question was one of fact for the jury and not one of law. More than one conclusion was justified.

It is further claimed that the use of the heating element was in direct violation of an order banning the use of plates by sewers for the purpose of making the leather more flexible and easier to sew. Prior to this order the use of such plates by individual employees was permitted.

Eaton v. *Lancaster*, 79 Me. 477, affirms the well-recognized rule that a violation of the employer's orders will not relieve the employer of liability if the wrongful act by the employee was within the general scope of his duties. If the orders or directions of an employer have been violated by an employee, the one to suffer is not the innocent person, not a party to that relationship. Were it otherwise, employers could easily absolve themselves of responsibility and injured parties would be left without any redress.

There is no testimony that Creamer was ever instructed or directed not to use the hotplate, during the months he was in the defendant's employ, prior to the fire. He testified he received no such instructions, but, on the contrary informed Mr. Miller, president of the defendant corporation, that he need not worry about the hot water problem, "because we were heating our own at that time," and could recall no comment or further conversation at the time with Miller. This was denied by Miller. There is again the testimony of this witness that the first order to him forbidding the use of the plates came after the fire of May 18.

In addition to this alleged conversation the jury may have properly drawn the inference that the use of the plate by Creamer and Parent was known and assented to by the de-

fendant. Teaching of Creamer by Parent was with the knowledge and consent of Miller. Parent testified that the use of the plate was part of the job of teaching Creamer to be a hand sewer. Frank, foreman of the hand sewing department, testified he supervised Creamer's training by Parent, and that his duties as foreman were confined to the sewing room. The jury could well conclude that Frank was aware of the situation. It was a proper inference.

The defendant secured from the plaintiff and offered as evidence, a statement by Creamer, marked Exhibit A, dated May 18, 1953, in which he stated that the foreman knew that the plate was used and did not stop them from using it until after the fire.

For what purpose this was introduced by the defendant, is not apparent to the court but it had some corroborative value and was a proper subject for consideration by the jury.

Creamer continued in the defendant's employ for a short time after the fire. Parent continued to be employed in his capacity as sewer and was still working for the defendant as sewer at the time of the trial of this case at the April Term 1955.

While excess in damages is alleged by the defendant as one of the grounds for a new trial that phase of the case was not argued in its brief.

Motion denied.

CONCURRING OPINION.

WILLIAMSON, J. I concur in the result, and in the opinion except with reference to Creamer's statement. The

opinion reads, "For what purpose this was introduced by the defendant, is not apparent to the Court . ." As I see it, the purpose was to test Creamer's credibility. The witness testified he first told of informing Miller before the fire about the hotplate to the lawyer taking the statement. The statement itself showed that it was taken three years after the fire.

RALPH INGERSOLL, ET AL.

vs.

GUY GANNETT PUBLISHING COMPANY, INC., ET AL.

Cumberland. Opinion, July 26, 1956.

Equity. Corporations. Parties. Equity Rule 20.

The divesting themselves unconditionally by plaintiffs of the subject matter on which they have based the bill in equity results in a dismissal of the bill.

No appeal can be entered by parties who have divested their interest in the subject matter of the suit.

Parties cannot be substituted for original plaintiffs by the filing of supplemental bills since new parties may not be admitted without formal order of court. (See Equity Rule 20.)

ON APPEAL.

This is a bill in equity praying for an accounting and the adjudging of trustees. The case is before the Law Court upon appeal from a decree dismissing the bill.

Verrill, Dana, Walker, Philbrick and Whitehouse,
Frank M. Coffin, for plaintiffs.

John E. Willey,
Goodspeed & Goodspeed,
Linnell, Brown, Perkins, Thompson & Hinckley,
for defendants.

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

BELIVEAU, J. On appeal. Bill in Equity, dated September 15, 1952, brought by Ralph Ingersoll and the R. J. Company, Inc., praying for an accounting from the directors of the defendant corporation and that they be adjudged trustees for sums of money alleged to have been paid them illegally by the defendant.

On May 25, 1953, General Newspapers, Inc. filed against the same directors, a so-called Supplemental Bill of Complaint.

On November 9, 1955, the justice below, after hearing upon original and supplemental bills and motion to dismiss, ordered that both bills be dismissed, without costs.

On the 16th day of August, 1948, one Fred R. Lord, then owner of 7,637 shares of capital stock of the Guy Gannett Publishing Company, Inc., by a written contract on that date and the payment of $50,000 by Charles E. Marsh, agreed to sell this stock to one C. E. Haines, or her nominee, at a price of $60.00 per share. This agreement was amended on August 18, 1948 and again on December 20, 1948. These amendments had to do with payment of the balance due, and, as we view the case, are not material here.

On April 27, 1949, C. E. Haines appointed Charles E. Marsh, "my Attorney-in-Fact in all matters pertaining to my contract with Fred R. Lord." Charles E. Marsh arranged for the purchase of the stock from Mr. Lord and the contract with C. E. Haines, his secretary, was so made at his request.

On April 29, 1949, C. E. Haines transferred her interest in the stock to Ralph Ingersoll and Charles E. Marsh, who

were co-partners, doing business under the name of R. J. Company.

R. J. Company, the partnership, on November 15, 1950, sold its interest in the stock to R. J. Company, the corporation.

On November 15, 1952, Ralph Ingersoll and R. J. Company, Inc. disposed of their interest in the stock to Charles E. Marsh, who in turn, on the same day, transferred it to General Newspapers, Inc.

The first question to be determined is the status of the plaintiff Ingersoll and the R. J. Company, Inc. after the transfer of the stock to Charles E. Marsh. They had parted and divested themselves, unconditionally, of the subject matter on which they based their Bill in Equity. From that time on, they were strangers to the proceedings and had no rights or interest which this court could adjudicate, and, while on the records of this court they were still the plaintiffs, such was not the case, as a matter of fact. If the defendants had known of the transfer of the stock to Charles E. Marsh on November 15, 1952, a motion by them calling the court's attention to the change of stock ownership would have resulted in a dismissal of the bill.

Whitehouse, who is recognized as an authority on equity proceedings in this state, says that in such a case no appeal can be entered by plaintiffs who have parted with their interest in the subject matter of the suit. *Whitehouse Equity Practice, Vol. I, Page 838.*

The case of *Card* v. *Bird, et al., 10 Paige Chancery Reports, 426,* discusses such a situation and rules as a matter of law that plaintiffs who have parted with their interest in the subject matter cannot obtain an appeal.

We hold that Ingersoll and the R. J. Company, Inc. were "out of court" after they transferred their stock to Marsh

and had no standing whatever in the litigation then pending.

As stated before, General Newspapers, Inc., while they had owned stock since November 1952, did not attempt to intercede until May 25, 1953, or more than six months after they acquired control of this stock. Their attempt to become a party plaintiff, in place of the original plaintiffs, was by Supplemental Bill of Complaint. There was no privity of any sort or kind between the original plaintiffs and General Newspapers, Inc.

The filing of a supplemental bill by the General Newspapers, Inc. must be considered an attempt by it to be substituted for the original plaintiffs for the purpose of prosecuting the original bill. If this move accomplished the purpose intended, then party plaintiffs could be substituted against the objection of the adverse litigant and without any order or permission of the court.

The General Newspapers, Inc. accomplished nothing by filing a Supplemental Bill and taking no further action on it. *Whitehouse, Vol. I, Sec. 212, Page 389,* lays down the rule that the new party may not be admitted without a formal order. *Equity Rule 20* provides that amendments as to the parties should be made only under order of court.

Appeal dismissed.

Decree below affirmed without costs.

TRIMOUNT COIN MACHINE CO.
vs.
ERNEST H. JOHNSON, STATE TAX ASSESSOR

Kennebec. Opinion, July 31, 1956.

Taxation. Leases. Use. Coin Machines. Declaratory Judgment. R. S., 1954, Chap. 17, Sec. 4.

A Maine customer who leases coin machines from a Massachusetts lessor is not a purchaser at retail sale and hence not liable as such for a sales tax. The lessee in Maine is a *user* but *not* a purchaser.

A foreign lessor is not a user in Maine where he exercises no right or power incident to ownership of machines used by Maine lessees.

At what point an owner or lessor exercises a right or power—not decided.

ON REPORT.

This is a petition for declaratory judgment before the Law Court upon report and agreed statement. Case remanded to the Superior Court for the entry of a declaratory judgment in accordance with this opinion.

Berman, Berman & Wernick, for petitioner.

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

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

WILLIAMSON, J. This petition for a declaratory judgment is before us on report upon an agreed statement of facts. Uniform Declaratory Judgments Act, R. S., c. 107, §§ 38-50.

The problem is whether the petitioner is liable for payment of a use tax upon coin operated amusement machines leased in Maine. Sales and Use Tax Law, R. S., c. 17, § 4.

The petitioner, Trimount Coin Machine Company, a Massachusetts corporation with its only place of business in Massachusetts, purchases coin operated machines and distributes them either by sale or lease. We are here interested only in machines leased for operation within Maine. Leases are bona fide and are not deemed in lieu of purchase. Prospective customers come to the petitioner's Boston office to lease machines, or telephone their orders to the Boston office, or they may place orders through petitioner's salesmen who visit Maine from time to time. When a customer and the petitioner agree upon terms of the lease, the machine is either delivered in Boston to the customer or is shipped f.o.b. Boston to him in Maine. The lease in each instance is executed in Massachusetts and rentals are there paid.

There is nothing in the agreed statement to indicate that the petitioner has ever come into Maine to enforce any provision of such a lease. While the customer or lessee is under an obligation to keep the petitioner informed of the location of the machine, it appears that in practice the petitioner does not insist on performance of this provision.

The state tax assessor contends, to use his words, that the petitioner "should pay a use tax on machines newly purchased by Trimount, which are brought into the State of Maine by the lessee for their first use."

The pertinent parts of the Sales and Use Tax (R. S., c. 17) are:

> "**Sec. 4. Use Tax.** A tax is imposed on the storage, use or other consumption in this state of tangible personal property, purchased at retail sale at the rate of 2% of the sale price. Every person so storing, using or otherwise consuming is liable for the tax until he has paid the same or has taken a receipt from his seller, thereto duly authorized by the assessor, showing that the seller has collected the sales or use tax, in which case the

seller shall be liable for it. Retailers registered under the provisions of section 6 or 8 shall collect such tax and make remittance to the assessor. The amount of such tax payable by the purchaser shall be that provided in the case of sales taxes by section 5. . ." (Amendment Laws 1955, c. 144 not here material.)

"**Sec. 2. Definitions.** 'Retail sale' or 'sale at retail' means any sale of tangible personal property, in the ordinary course of business, for consumption or use, or for any purpose other than for resale, except resale as a casual sale, in the form of tangible personal property. The term 'retail sale' or 'sale at retail' includes conditional sales, installment lease sales, and any other transfer of tangible personal property when the title is retained as security for the payment of the purchase price and is intended to be transferred later. . ."

" 'Sale' means any transfer, exchange or barter, in any manner or by any means whatsoever, for a consideration in the regular course of business and includes leases and contracts payable by rental or license fees for the right of possession and use, but only when such leases and contracts are deemed to be in lieu of purchase by the state tax assessor."

* * * * * * *

" 'Storage' includes any keeping or retention in this state for any purpose, except subsequent use outside of this state, of tangible personal property purchased at retail sale."

" 'Storage' or 'use' does not include keeping or retention or the exercise of power over tangible personal property brought into this state for the purpose of subsequently transporting it outside the state."

* * * * * * *

" 'Use' includes the exercise in this state of any right or power over tangible personal property incident to its ownership when purchased by the user at retail sale."

The decisive issue is whether the petitioner has exercised in this State any right or power over the machine described in the agreed statement incident to its ownership.

We may agree on the impact of the statute upon certain facts. (1) The machine in question was "purchased at retail sale" by the non-resident petitioner outside of Maine. (2) No sales or use tax was paid thereon in another taxing jurisdiction. Hence there is no exemption from the application in whole or in part of the use tax under Section 12 relating to sales or use taxes paid in other jurisdictions. (3) The Maine customer or lessee is not a purchaser at retail sale and hence is not liable for the tax. Under Section 4 the person "so storing, using or otherwise consuming" is liable unless under stated conditions he has taken a receipt from his seller. Further, the word "storage" relates only to "tangible personal property purchased at retail sale" and "use" to such property "when purchased by the user at retail sale." (Sec. 2). Plainly the use tax is directed at the purchaser. (4) There is no "storage, use or other consumption" by the petitioner in Maine. (Sec. 4). (5) The machine is being used in Maine by the lessee.

The question, however, is not whether the machine is in use, within the ordinary meaning of the word, in Maine, but whether the petitioner is so using it within the meaning of the statute. The person taxable must be both a user and the purchaser at retail sale. The lessee in Maine is a *user* but *not* the purchaser and hence is not taxable. The petitioner is the purchaser. Thus the decision turns on whether there is "use" in Maine by the lessor.

In our view of the statute the petitioner is not liable for a use tax. The use and possession of the property in Maine in its entirety is, and at all times has been, in the lessee or customer by virtue of the lease. In the instant case, as we have seen, the lease is bona fide and is not "in lieu of pur-

chase." The rental provided under the lease is therefore true rent for the use of the property.

To lease property in ordinary meaning is to obtain the use and possession of property in return for rent. In *Opinion of Justices*, 146 Me. 183, 188, 79 A. (2nd) 753, relating to a proposed lease by the Maine State Office Building Authority to the State, the justices said, "The so-called lease is not in legal effect a lease, it is a contract of purchase. The so-called rental is not true rent, to wit, payment for the use of property." Under a bona fide lease it is contemplated that use for a limited time by the lessee will be followed by a return of the property to the lessor. In a conditional sale, for example, the end is ultimate ownership by the buyer. 2 Williston Sales, § 336 (1948 rev. ed.); *Sawyer* v. *Hanson*, 24 Me. 542, 545; *Holbrook* v. *Armstrong*, 10 Me. 31, 34.

If the petitioner exercises in this State any right or power incident to its ownership of the machine, the use tax is imposed. The tax does not rest upon the *sum total* of rights and powers incident to ownership, but upon *any* right or power. There is, of course, no use tax arising under any theory of the Act from the purchase of the machine outside of Maine or from the lease written in Massachusetts. Until the machine reached the State of Maine there was no action whatsoever within the State with respect to the property owned by the petitioner.

From the agreed statement it appears that the petitioner has done nothing with respect to the machine within the State of Maine either before or since making the lease. We conclude, therefore, that the petitioner has not exercised in this State any right or power over the property within the statutory definition of "use."

Our decision is based upon and limited strictly to the facts set forth in the agreed statement. At what point a

lessor or owner does exercise a right or power in this State under the statute we do not here consider or determine, except that there has been no such exercise in this State on the facts before us.

In light of our decision it is unnecessary to consider the argument of the petitioner that the use tax statute, construed and applied as contended by the tax assessor in the instant case, is unconstitutional and void.

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

ROGER A. STEWART
vs.
MAINE EMPLOYMENT SECURITY COMMISSION

Waldo. Opinion, July 31, 1956.

Maine Employment Security Commission. Statutory Construction. Acquisition of Business. Estates. Tacking.

The legislature in R. S., 1954, Chap. 29, Sec. 3, subsection IX, Paragraph C in using the phrase "acquire the organization, trade or business" contemplated a situation in which there is continuity of the enterprise relatively uninterrupted by the transfer of ownership.

Proof that one has acquired "substantially all of the assets" of a business is not satisfied by mere conjecture or surmise as to what "all of the assets" consisted at the time of acquisition.

In determining legislative intent with reference to the phrase "substantially all of the assets thereof" the court assigns a literal meaning to the words of the Act and tests the facts accordingly.

Statutes such as the Maine Employment Security Law are remedial and must be liberally construed for the purpose of accomplishing their objectives—the stabilization of employment conditions and the amelioration of unemployment.

ON EXCEPTIONS.

This case is before the Law Court upon exceptions to a decree of the Superior Court affirming a decision of the Maine Employment Security Commission. Exceptions sustained.

William D. Hathaway,
for Maine Employment Security Commission.

Christopher S. Roberts, for employer.

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

WEBBER, J. Until his death on January 3, 1951, H. Parker Frost conducted an automobile and garage business in Belfast under the name of Belfast Auto Sales Co. He held a Ford automobile dealer's franchise, dealt in new and used cars and operated a garage for automotive repairs and service. The Ford franchise automatically terminated upon the death of Mr. Frost and the new and used cars on hand were sent by the executrix to Bangor. The garage continued to be operated by the estate under the name of Belfast Auto Sales Co. until April 1, 1951 and for 13 weeks employed 8 or more employees. On April 1, 1951, the petitioner purchased from the estate the automotive parts and tools and began operations at the same location under his own name. For a period of 13 weeks the petitioner employed at least 8 employees, substantially all of whom had been employed by the Frost estate. The real estate, which included the garage, although owned by Mr. Frost in his

lifetime, seems to have passed by will to his widow and by her was rented to the petitioner under a one-year lease. In addition to the new and used cars, the estate retained all accounts and notes receivable, cash on hand, and good will. At the time of Mr. Frost's death the entire business assets were valued at $83,805.86. The parts and tools were purchased by the petitioner for $19,750. Apart from unsupported assumptions and conjectures, the record is silent as to what portion of the retained assets, if any, may have been liquidated by the estate prior to April 1, 1951. The building was carried on the books of Frost at $19,506.

Upon these facts the Maine Employment Security Commission determined that the employment experience of the petitioner should be tacked to the experience of the estate and that under the provisions of R. S., 1954, Chap. 29, Sec. 3, Subsection IX, Paragraph C, the petitioner should be charged with liability as an "employer." This decision was affirmed in the Superior Court and the case now comes up on exceptions.

Standing alone, both the estate and the petitioner fail to qualify as "employers" under the Act, neither having employed 8 or more persons in each of 20 different weeks as required by Paragraph A of the subsection. Paragraph C, however, reads as follows:

> "('Employer' means)
>
> **C.** Any individual or employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another employing unit not an employer subject to the provisions of this chapter and which, if subsequent to such acquisition it were treated as a single unit with such other employing unit, would be an employer under Paragraph A of this subsection;"

The issue presented is whether or not the petitioner did "acquire the organization, trade or business (of the estate),

or substantially all the assets thereof," it being undisputed that if he did so his employment experience coupled with that of the estate would make him an "employer" under the Act. The term "business" has many meanings which vary with and are ordinarily determined by the context. A "business" may own or lease real and personal property and possess a trade name, good will, cash resources and accounts and notes receivable. It may own valuable patents, copyrights, contracts or franchises. It may have an experienced manufacturing or sales force. The success of the "business" as a going concern may well depend upon the effective combination of some or all of these factors. We think that the Legislature in using the phrase, "acquire the organization, trade or business," contemplated a situation in which there is continuity of the enterprise relatively uninterrupted by the transfer of ownership. In our view, the legislative concept was one of succession to and continuation of a business, ordinarily as a going concern. Certainly upon these facts the entire "business" as it was constituted on April 1, 1951 was not "acquired" by the petitioner. He did not purchase or use the name, the good will, the cash or the accounts and notes receivable. As to the real estate, the leasehold interest which he acquired came not from the estate but from the third party owner. He did not take over or acquire employees under any arrangement with the estate, but hired them individually and independently. In the absence of so many of the usual incidents of the acquisition of an entire business, it is evident that the requisite element of continuity did not exist. In effect, the petitioner began a new enterprise.

Is the petitioner, however, chargeable as having acquired "substantially all the assets thereof"? Although the Commission in the case before us seems at first to have taken the position that the petitioner had acquired the entire business, "all the business that was left" on April 1, 1951, its

position as developed in its brief and argument now is that the petitioner acquired "substantially all of the assets" of the business as of the date of acquisition. With this contention we cannot agree. We have already listed the many assets of the business which the petitioner did *not* acquire. If we consider only physical assets and their inventory values, our starting point is an inventory of approximately $83,800 at the time of Frost's death. Real estate may be disregarded, not having passed into the estate. Subtracting the amount of approximately $19,500 as representing real estate, and further subtracting $19,750 as the amount paid by the petitioner for parts and tools, there yet remain assets unaccounted for in an amount of approximately $44,550. There is no suggestion in the record as to how this amount may be divided among new cars, used cars, accounts receivable, or other assets. Nor does the record disclose, as has been noted, to what extent, if at all, these assets had been liquidated at the time of petitioner's acquisition. Proof that one acquired "substantially all of the assets" of a business is not satisfied by mere conjecture or surmise as to what "all of the assets" consisted of at the time of acquisition. The petitioner disclaimed any knowledge whatsoever. The Commission failed to produce, or even to seek, the necessary information from the executrix or others who might reasonably be expected to possess it. For aught that appears to the contrary, the value of parts and tools purchased by the petitioner may have been less than a third of the value of the physical assets on hand on April 1, 1951. The required proof that what the petitioner bought in fact represented "substantially all of the assets" is completely lacking.

The research of counsel and our own fail to reveal many cases in which the interpretation of this statutory phraseology has been in issue. In *Harris* v. *Egan,* 135 Conn. 102, 60 A. (2nd) 922, where the buyer purchased from an "em-

ployer" as defined by the Act an entire business including good will, the seller retaining only his accounts receivable and payable, the court laid emphasis on the particular wording of the Connecticut statute. Unlike our own, this Act used the words "acquired substantially all of the assets, organization, trade or business." Under this wording and upon these facts, the court found no difficulty in holding that the buyer had "acquired substantially all of the assets or business." Without intimating or suggesting that we would have reached any different result upon application of the Maine statute to the same facts, it may be noted that in our statute the words "substantially all" refer only to "assets" and not to "business." *State* v. *Skyland Crafts*, 240 N. C. 727, 83 S. E. (2nd) 893, relied upon by the petitioner, is a case which involved interpretation of phraseology similar to that used in the Maine statute. For the purpose of ascertaining the meaning of particular words and phrases, it is of no consequence here that the North Carolina statute which was the subject of interpretation dealt with the situation covered by Paragraph B rather than by Paragraph C of the Maine statute. The facts closely resembled the facts before us. The buyer acquired from the seller machinery and raw material but did not acquire real estate, accounts receivable, customer lists, good will, or the right to use the trade name. Moreover, in Skyland the selling concern had been shut down for three months prior to transfer of ownership and in effect had gone out of active business. Although perhaps not determinative, this additional factor without doubt weighed in the balance, particularly in view of the court's interpretation of the statutory language. The court declined to assign any precise meaning to the phrase, "or substantially all of the assets thereof," but stated at page 896 of 83 S. E. (2nd) : "Read in context, (the statute) contemplates a transaction in which the purchaser, instead of buying physical assets as such, succeeds in some real sense to the organization, trade

or business, * * * of a covered employer, ordinarily as a going concern. The underlying idea is that of continuity, the new employing unit succeeding to and continuing the business * * * of the former employing unit." The North Carolina court then held that the requisite continuity did not exist on the facts presented. Whether the court would have reached the same result in the absence of the "shut down" factor, we cannot say. In determining legislative intent with reference to the phrase, "substantially all of the assets thereof," we prefer to assign the literal meaning to the words employed in our own Act and test the facts accordingly. Such a literal meaning seems to have been applied in *State* v. *Lewis,* 218 S. W. (2nd) (Tex.) 515, where the court concluded that a buyer failed to acquire the "business" but became chargeable as an "employer" through purchase of substantially all the physical and tangible assets. Other decisions such as *State* v. *Whitehurst,* 231 N. C. 497, 57 S. E. (2nd) 770; *Spagnola* v. *State,* 23 N. W. (2nd) (Iowa) 433; *Sea Crest Hotel* v. *Dir. of Div. Emp. Sec.,* 330 Mass. 226, 112 N. E. (2nd) 813, seem to us readily distinguishable and require no comment.

Opposing contentions are made upon the issue as to whether the statute should be viewed as a taxing act and construed strictly against the taxing authority, or as a remedial statute to be liberally construed to effectuate legislative purpose. This question was left open in *Unemployment Com.* v. *Androscoggin et al.,* 137 Me. 154. We have no hesitation in holding that statutes such as our Maine Employment Security Law are remedial and must be liberally construed for the purpose of accomplishing their objectives—in this instance the stabilization of employment conditions and the amelioration of unemployment. *Cal. Emp. Stabilization Com'n* v. *Lewis,* 68 Cal. App. (2nd) 552, 157 P. (2nd) 38. But as was said in *Hattersley* v. *Div. of Emp. Sec.,* 19 N. J. 487, 117 A. (2nd) 607 at 609: "No mat-

ter how 'liberal' our construction, we must interpret the statute as it is written."

Having determined that findings that the petitioner either acquired the organization, trade or business of the Frost Estate, or acquired substantially all of the assets thereof, are not supported by evidence, the entry must be

Exceptions sustained.

STATE OF MAINE
vs.
ELIE JOSEPH ARSENAULT

Androscoggin. Opinion, August 1, 1956.

Murder. Malice. Manslaughter. Intoxication. Insanity.

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

Manslaughter is unlawful killing of a human being without malice aforethought. It is the unlawful killing in the heat of passion or on sudden provocation or by accident.

Voluntary intoxication is no excuse for murder. It will not reduce murder to manslaughter where there is malice aforethought, and where there is no provocation or sudden passion.

The law presumes malice when an unlawful killing is proved.

Malice is implied when a wrongful act, known to be such, is done intentionally without just and lawful cause or excuse.

It is only where knowledge or specific intent are necessary elements that intoxication is an excuse.

A defendant in a murder trial is not entitled to an instruction that he is to be found not guilty of murder if "through intoxication (he had), so far lost his intelligence, reason and faculties that he no longer knew what he was doing."

The rule regarding the defense of insanity should never be extended to apply to voluntary intoxication in a murder case.

A conviction must stand where a jury is warranted under the law and evidence in finding guilt beyond a reasonable doubt.

ON EXCEPTIONS.

This is an indictment for murder before the Law Court upon exceptions. Exceptions overruled.

Gaston M. Dumais,
William D. Hathaway, for State.

Israel Alpren,
Philip Isaacson, for respondent.

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

FELLOWS, C. J. This is an indictment for murder on which Elie Joseph Arsenault was tried at the November term, 1954, of the Androscoggin County Superior Court. The verdict was guilty. The case now comes to the Law Court on respondent's exceptions to portions of the charge by the Presiding Justice as given, and on exceptions for refusal to charge as requested.

In the case at Bar, there is a motion to the Law Court for new trial, which was not directed to or passed upon by the Presiding Justice, and not now before the Law Court. *State* v. *Bobb,* 138 Me. 242, R. S. 1954, Chapter 148, Section 30. The motion was not argued by counsel.

The principal facts contained in nearly four hundred pages of record are briefly these: Elie Joseph Arsenault, otherwise known as Joseph Elie Arsenault, a taxi driver in Auburn, Maine, in the early fall of 1952 first met the deceased, Harriet Hinckley, who had been a nurse, and who was then a widow with a small amount of money left to her by her husband. Mrs. Hinckley moved into the apartment

next to that occupied by Arsenault and his wife. While Mrs. Arsenault was away working, the neighbor acquaintance of Joe Arsenault and Harriet Hinckley grew steadily into an intimate friendship, because they were both deeply interested in alcohol. The respondent became messenger and agent for Mrs. Hinckley in the withdrawal of her money to buy liquor. They had long drinking bouts together, with intimate relations.

The respondent testified that on Tuesday, June 29, he, the respondent, received a telephone call from the deceased summoning him over. She wanted to do some drinking, and then visit a daughter in Brunswick. He called for her and they traveled to Auburn where he purchased two pints of whiskey. These were consumed on the road between Auburn and Brunswick, and at the daughter's home. While in Brunswick, pints three and four were purchased. Pint three they drank in Brunswick.

The respondent further testified that late Tuesday evening, the pair left Brunswick. Prior to leaving, Mrs. Hinckley asked her daughter for her revolver, because she had a chance to sell it. She placed the gun in her purse. Pint four was disposed of in Durham, and they fell asleep in the parked automobile. On arising Wednesday, June 30, 1954, they returned to Lewiston and bought pints five and six. These were transported back to Durham where they were consumed. They then returned to Auburn, and pint seven was purchased. This was drunk in Auburn at the home of a friend during the afternoon. A messenger was employed to obtain pint eight, and this was likewise disposed of.

The respondent said that in the evening they left the friend's home and obtained pint nine. At one point on the trip there was an altercation between Mrs. Hinckley and the respondent, and "she slapped me." What the quarrel was about does not appear. Joe said he "was in a fog," and did not remember if she was intoxicated or not, nor who

was driving the car. Joe had a gun of his own, and Mrs. Hinckley had a gun of her own. They returned to the Durham road and remained until after dark. The bottle was finished, and the home where Mrs. Hinckley had been employed as a nurse became the destination, as the owners were away. Pints ten and eleven had been hidden there. In a bedroom of the home, the couple drank these, and the respondent said he commenced to "pass out." Mrs. Hinckley then produced some barbiturates, two of which the respondent swallowed. These pills, he said, made his condition worse. He sat down on the edge of a bed. She was lying next to him. He said she had the gun. She was familiar with guns. He testified that he remembers nothing more.

The respondent testified that when he awoke on Friday morning, Mrs. Hinckley lay dead of a bullet wound. He said he acquired some additional whiskey and recalls almost nothing of the next two days. On Friday afternoon, the police arrived at the death room, at the telephone call of the respondent himself. They found the body of the deceased covered with flowers and religious insignia.

The evidence of the State was to the effect that the respondent telephoned the police, and when the police arrived, Arsenault admitted the shooting of Mrs. Hinckley because he "loved her." One officer said "that woman is dead," and respondent Arsenault replied, "Why shouldn't she be? I shot her." The respondent also told the officers that she asked him to take the gun and to shoot her. In substance, the respondent also told the officers the story as told by him when in court at the trial. The State showed that Mrs. Hinckley's son-in-law took a gun away from the respondent some weeks before the shooting, because the respondent was in the yard at Brunswick pointing the gun at Mrs. Hinckley, threatening to shoot her. Mrs. Hinckley at that time, in the presence of her daughter, son-in-law, and the respondent, at the daughter's house, told her son-in-law "to

put the gun away so that he will not shoot." Mrs. Hinckley and the respondent then were on "a drinking bout." Mrs. Hinckley got the gun back from her daughter just before the day of the shooting by telling the daughter that "she and Joe had a chance to sell it."

From the State's case a jury would be authorized in finding beyond a reasonable doubt that Harriet Hinckley died as the result of a bullet wound. The respondent admitted that he fired the shot, and his testimony is corroborated by evidence that the fatal bullet in the body of Harriet Hinckley was fired from a revolver, which revolver was in the possession of the respondent at the time he was arrested. The procuring of the gun and the use of it indicate premeditation. In addition to this, there are many facts sufficient to imply malice. The evidence nowhere indicates that this implication is in any manner rebutted.

It is sufficient in every indictment for murder to charge that the defendant did feloniously, willfully, and with malice aforethought kill and murder a human being. R. S. 1954, Chapter 145, Section 11.

Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder. R. S. 1954, Chapter 130, Section 1.

Manslaughter is the unlawful killing of a human being without malice aforethought, express or implied. Manslaughter may be in the heat of passion or on sudden provocation, or it may even be accidental. R. S. 1954, Chapter 130, Section 8; R. S. 1954, Chapter 22, Section 151; *State* v. *Pond,* 125 Me. 453; *State* v. *Turmel,* 148 Me. 1, 7.

Where there are statutory degrees of murder (as formerly in Maine) intoxication may sometimes reduce from first to second degree murder. Intoxication will not reduce to manslaughter where there is malice aforethought, and where there is no provocation or sudden passion. Voluntary

intoxication is no excuse for murder. "Voluntary intoxication is not an excuse, or justification, or extenuation of a crime." *Com.* v. *Hawkins,* 3 Gray (Mass.) 463, 466; *Commonwealth* v. *Malone,* 114 Mass. 295. See 26 Am. Jur. 233, Sec. 116, "Homicide" and cases cited; 40 C. J. S. 830, Sec. 5, "Homicide" and the cases there cited.

When the fact of killing is proved and nothing further is shown, the presumption of law is that it is malicious and an act of murder. *State* v. *Knight,* 43 Me. 11; *State* v. *Neal,* 37 Me. 468; *State* v. *Turmel,* 148 Me. 1; *Commonwealth* v. *York,* 9 Metc. (Mass.) 93; *Commonwealth* v. *Webster,* 5 Cushing (Mass.) 295.

"Malice," as used in the definition of murder, does not necessary imply ill will or hatred. It is a wrongful act, known to be such, and intentionally done without just and lawful cause or excuse. *State* v. *Merry,* 136 Me. 243, 8 Atl. (2nd) 143; *State* v. *Knight,* 43 Me. 11; *State* v. *Robbins,* 66 Me. 324.

Voluntary intoxication is not an excuse for crime, *except in those cases where knowledge or specific intent are necessary elements.* "Intoxication does not make innocent an otherwise criminal act." *State* v. *Siddall,* 125 Me. 463, 464.

As the court say in *State* v. *Quigley,* 135 Me. 435, 443, "It is still held by an overwhelming weight of judicial authority that when the insanity of the accused is pleaded in defense, ability to distinguish between right and wrong is the test. *State* v. *Knight,* 95 Me. 467. In the case at bar, insanity is not the plea. When it is attempted to prove the presence of insanity, madness, in early cases termed phrenzy, a test uniformly applied is to determine whether or not the one charged with doing a criminal act possessed, at the time of the act capacity to know the difference between right and wrong."

The following charge has been held proper where the indictment was for an intent to kill: "If it appears from the evidence that the prisoner was intoxicated at the time, and if you find that his state of intoxication was such that he had so far lost his intelligence, and his reason and faculties, that you have a reasonable doubt whether he was able to form and have a purpose to kill, or to know what he was doing, then you should find him not guilty of *intent to kill.*" (Emphasis ours.) *State* v. *Quigley,* 135 Me. 435, 443.

The criterion for determining whether or not a jury verdict in a criminal case should be set aside and a new trial ordered is: In view of all the testimony, was the jury warranted in believing beyond a reasonable doubt that the respondent was guilty? *State* v. *DiPietrantonio,* 119 Me. 18, 19; *State* v. *Pond,* 125 Me. 454; *State* v. *Albanes,* 109 Me. 199; *State* v. *Lambert,* 97 Me. 51; *State* v. *Priest,* 117 Me. 223.

Originally there were no degrees of murder in Maine and the crime was punishable by death. See Laws of Maine, 1822, Chapter 2, Section 1. Later the legislature enacted two degrees of murder, the essential difference between the two being that in first degree murder express malice was required; whereas, in second degree murder only implied malice was necessary. First degree murder was punishable by death and second degree murder was punishable by life imprisonment. See R. S. 1841, Chapter 154, Section 1, 2, and 3. In 1887 the death penalty for first degree murder was abolished. See Public Laws, 1887, Chapter 133, Section 2. As a result of this change in penalty, both first and second degree murder were punishable by life imprisonment. Consequently, there was no longer any need for distinguishing between the two degrees of murder; and in 1903, degrees of murder were abolished, and the definition of murder which now appears in the Statutes was adopted. See

R. S. 1903, Chapter 119, Section 1; R. S. 1954, Chapter 130, Section 1.

The exceptions taken by the respondent relate to some portions of the Charge as made, and to the failure to give certain requested instructions. The jury was charged that intoxication is not an excuse for crime, and exceptions were taken. The presiding Justice also refused to Charge, on request, that if the respondent had, through intoxication, so far lost his intelligence, reason and faculties that he no longer knew what he was doing, that he could not be guilty of murder.

Two of the requested instructions were as follows: The respondent requested the court to charge the jury that: "If it appears from the preponderance of the evidence that the respondent was intoxicated at the time of the killing, and if you find that his state of intoxication was such that he had so far lost his intelligence and his reason and faculties that you have reasonable doubt whether he was able to form and have a purpose to kill or to know what he was doing, then you should find him not guilty of the charge of murder." The court refused to charge as requested, and the respondent duly excepted, which exception was allowed.

The respondent also requested the court to charge the jury as follows: "If you find that the respondent by the preponderance of the evidence has shown that at the time the crime was committed, had so far lost his intelligence and reason as to be temporarily insane, even though induced through the voluntary consumption of alcohol, then you should find him not guilty of the crime of murder." The court refused to charge as quoted, and the respondent duly excepted to the ruling, which exception was allowed. The jury returned a verdict of guilty.

The respondent argues in his brief: "If he was so intoxicated as to be unable to produce either of the two intentional

components of murder, i. e., the intent to do the act in murder based on implied malice, or intent to kill in murder based on express malice, he is not guilty of murder." The respondent in his brief further says: "By stating that intoxication is not an excuse for crime and limiting the consideration of intoxication to memory at the time of an alleged confession and to the ability to do the act, the presiding Justice became the victim of the fallacy. Drunkenness is not an excuse if it produces an intent to kill, but it can explain an act. Even more important, however, is the criminal state of mind. The act, which admittedly may be explained, must be connected with a criminal state of mind." And the respondent also contends that "if any person is insane at the time of the commission of an act constituting a crime, and if there is a proximate relationship between the insanity and the act, then the law supplies that person with an excuse. The fact that the insanity is the product of voluntary intoxication is not a bar to the application of this doctrine."

The respondent, in other words, claims that a person temporarily and voluntarily so intoxicated that for the time he is apparently insane should be subject to rules governing a trial where the plea is "not guilty by reason of insanity." The respondent would also have the insanity rule changed, so that the right and wrong test would not apply, because he criticizes the rule in *McNaghten's Case,* 10 Clark and Finnelly 200, 8 Eng. Rep. 718, followed in *State* v. *Lawrence,* 57 Me. 574; *State* v. *Knight,* 95 Me. 467; that under the rule to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, *from disease of the mind,* as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. The respondent says that this well established rule is not a rule in accord with modern psychological

studies, because the respondent says that "it is only with the acceptance of alcoholism as an illness that we can hope to clarify this area. If the alcoholism brings on an insane state, we are faced with a sad truth; yet we should not assign blame. We must regard the emotions and not overemphasize the cognitive."

There is no evidence in this case of an "insane state" as claimed by the respondent. There was no "delirium tremens." The respondent's mind was not diseased. There is no claim nor evidence of a diseased mind. The only evidence in the case indicates voluntary intoxication. The testimony of the respondent is but a sordid story of two ordinary individuals vainly seeking mental and physical enjoyment or oblivion through excessive drinking.

We cannot agree with the plausible and able, though unconvincing, arguments advanced by the respondent's counsel in their long and carefully prepared brief. It is not only contrary to existing law but to public policy and public safety. Counsel claim that if the jury found that the respondent had "lost his intelligence and reason" at the time of the shooting, through voluntary intoxication, the respondent should be acquitted and allowed to go without day. The statutes require that even when the plea is "not guilty by reason of insanity," and the respondent is acquitted for that reason, that he automatically be confined in a State hospital for the insane. R. S. 1954, Chapter 27, Sections 118-119. The respondent in the case at bar would not be confined for hospital treatment. He was not insane. The respondent's self-called "insanity" was only drunkenness.

The court is unanimous in its opinion that the rule regarding the defense of insanity should never be extended to apply to voluntary intoxication in a murder case. It would not only open wide the door to defenses built on frauds and perjuries, but would build a broad, easy turnpike for escape. All that the crafty criminal would require

for a well-planned murder, in Maine, would be a revolver in one hand to commit the deed, and a quart of intoxicating liquor in the other with which to build his excusable defense.

We find no error. The respondent was well represented by capable and experienced counsel. All his constitutional rights were fully protected. The Charge was eminently fair, legally correct, and most comprehensive. The jury was warranted under the law and the evidence to find guilt in this case beyond a reasonable doubt. In fact, it is difficult to understand how any result other than a verdict of guilt could be arrived at on the facts testified to by the respondent himself. The entry must be.

Exceptions overruled.

STATE
vs.
CHARLES LUMBERT
AND
WALTER HUTCHINS

Cumberland. Opinion, August 7, 1956.

Criminal Law. New Trial. Exceptions. Waiver. Assault and Battery. Retreat.

A motion for a new trial is not, in felony cases, a waiver of the exceptions taken to the refusal of the presiding Justice to direct a verdict.

One should appeal from the denial by the trial court of a motion for new trial in felony cases. Exceptions are not proper.

The ancient doctrine that one must "retreat to the wall" before defending an assault and battery has been discarded by Maine Courts.

One may stand his ground and defend so long as he uses no more force than necessary to repel the attack.

ON EXCEPTIONS.

This is a criminal action for felonious assault. The case is before the Law Court upon exceptions.

Exceptions 1 and 2 overruled. Exception 4 sustained.

Frederic Sturgis,
Arthur Peabody, for State.

David Klickstein,
Basil Latty, for defendants.

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

BELIVEAU, J. On exceptions. These respondents were indicted at the May Term 1955 of Cumberland County Superior Court for assault and battery on one Ted Adrien; tried together at that term and found "Guilty."

Six exceptions were taken by the respondents. One of the exceptions was to the refusal of the presiding justice to direct a verdict of "Not Guilty" and another to grant their motion for a new trial.

The State argues that exceptions to the denial of a motion for a new trial is not proper procedure and that an appeal to this court is the only course opened to the respondents. It further argues that a motion for a new trial is a waiver of the exception and for that reason that exception is not properly before the court for consideration.

A motion for a new trial is not, in felony cases, a waiver of the exception taken to the refusal of the presiding justice to direct a verdict.

In *State* v. *Bobb,* 138 Me. 242 at Page 246, the court says,

> ". . . that the doctrine of waiver under such circumstances does not apply in felony cases."

and that this rule

> ". . . has long since been modified with judicial sanction in felony cases."

and again

> "Since the granting of appeals in all felony cases, however, it has become established practice for the court to consider felony cases on both appeal and exceptions."

It necessarily follows that if the respondents had complied with the statutes and filed an appeal from the ruling denying their motion for a new trial, that that motion and their exceptions would be properly before this court.

It follows again, that an exception to the denial of a motion for a new trial does not bar the respondents from having the full benefit of the exceptions taken to the court's refusal to direct a verdict in their favor; it having been determined that a felony was committed.

The State's case depended on a large part, if not wholly, on the testimony of one Alfred Adrien, referred to in the indictment as Ted Adrien, who lived in Auburn, Maine, at the time of the assault on him by the respondents, on March 19, 1955, at Brunswick. On this day Adrien called on a Mrs. Lavoie, at her request, to deliver some needles she had asked him to bring on this day, a Saturday morning.

Adrien testified he had been at Mrs. Lavoie's about ten minutes when the two respondents appeared and requested the payment of rent from Mrs. Lavoie. It is in evidence that one, or both, of these respondents had been drinking and asked Mrs. Lavoie to serve them some liquor. The younger respondent testified that he was sick and needed the liquor. They each consumed a drink of whiskey and after that was consumed asked for more. They were again each served a drink and Mrs. Lavoie poured one for herself, according to her testimony. This drink was, as she

says, "grabbed" by one of the respondents, Walter Hutchins. Some argument followed and according to Adrien's testimony, she was slapped by Hutchins, the younger of the two respondents. Adrien interceded and asked the respondents to stop. He testified that immediately after that he was struck by one of them and, as he says, "I crybabied and told them I was sick and to leave me alone." He attempted to leave the camp but was stopped by one of the respondents. He then picked up an empty beer bottle from the floor and struck Hutchins on the head, which bottle broke in his hand. He testified they then threw him on the ground, jumped on him and called him vile names. After pleading with them to leave him alone, he was thrown to the floor and the respondents attempted to rifle his pockets. He managed to reach his automobile and, he says, was followed by the respondents, who again assaulted him and went through his pockets.

Some of Adrien's testimony is corroborated by Mrs. Lavoie, the State's witness.

The respondents, in their defense, testified they came to the Lavoie cottage on legitimate business and had not been drinking. While engaged in conversation with Mrs. Lavoie, Adrien out of a clear sky and without any reason or provocation, so they testify, picked up an empty beer bottle, from the floor, threw it at Hutchins and caused serious injury to Hutchins' head. Their position is that whatever injuries were inflicted by them on Adrien was in self-defense.

What happened at the camp this Saturday morning was essentially one of fact and one peculiarly within the province of the jury to decide. We have before us nothing but the cold printed record while the jury had an opportunity, not given this court, to observe the behavior and attitude of all the witnesses while they testified under oath. The opportunity to observe, at close range, witnesses, while they testify under oath, on both direct and cross-examination, is

apt to and should influence the jury in weighing their testimony.

There was sufficient evidence, if believed by the jury, to justify the conviction of the respondents. The defendants take nothing from this exception.

The remaining exceptions are four in number. Exceptions 3, 5 and 6 are to the refusal to give instruction requested by the respondents and the fourth exception to part of the charge. The exceptions involve the law of self-defense and will be disposed of by consideration of the fourth exception taken to that part of the charge where the justice instructed the jury that:

> "If a person has a reasonable apprehension that he is in danger of bodily injury he has a right to defend himself, but he should retreat when he can safely do so."

Restatement of the Law of Torts, Vol. I, Page 139 says:

> ". . . one whom another threatens to attack may stand his ground and repel the attack with any reasonable force which does not threaten death or serious bodily harm, although he realizes that he can safely retreat and so avoid the necessity of using self-defensive force. But the interest of society in the life and efficiency of its members and in the prevention of the serious breaches of the peace involved in bloody affrays requires one attacked with a deadly weapon, except within his own dwelling place, to retreat before using force intended or likely to inflict death or serious bodily harm upon his assailant, unless he reasonably believes that there is any chance that retreat cannot be safely made. But even the slightest doubt, if reasonable, is enough to justify his standing his ground, and in determining whether his doubt is reasonable every allowance must be made for the predicament in which his assailant has placed him."

See also *State* v. *Cox*, 138 Me. 151.

The ancient doctrine that one must "retreat to the wall" has been discarded by our courts and it is now the almost universal rule that in case of assault and battery the assaulted person may stand his ground and defend himself just as long as he uses no more force than necessary to repel the attack. This is the law in the state. *State* v. *Carver*, 89 Me. 74.

That part of the charge was prejudicial to the rights of the respondents and exception four must be sustained.

Exceptions 1 and 2 overruled.
Exception 4 sustained.

GILBERT B. JAEGER
vs.
EDWARD C. CUTTING

Knox. Opinion, August 10, 1956.

Negligence. Invitees.

A County Agricultural Agent coming upon the land of another for the purpose of a seed planting experiment is an invitee and is owed the duty of not being harmed by or through the negligence of the owner's agents.

Duty owed to mere licensee not decided.

ON EXCEPTIONS.

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

Harmon & Nichols, for plaintiff.

Silsby & Silsby, for defendant.

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

MURRAY, A. R. J. This is a tort action for injury caused to the plaintiff by the negligence of the defendant's agent.

At the close of the plaintiff's case the presiding justice directed a verdict for the defendant, to which the plaintiff took exceptions.

The facts are that the plaintiff was a County Agricultural Agent and he wanted to experiment as to the growing of clover. It was arranged between him and the defendant that the day that the defendant was to harrow his field and prepare it for seeding, he was to call the plaintiff. On the day in question he did call the plaintiff who came to defendant's farm for the purpose of planting the seeds which were used in the experiment.

The plaintiff, through the University of Maine, was to furnish the seed and the defendant was to harvest and own the crop. Shortly after the plaintiff arrived at the field, the defendant arrived. The defendant's servant was on the field riding a tractor, to the rear of which was attached a disc harrow.

The plaintiff, defendant, and the agent of the defendant were standing on the ground, the plaintiff and defendant at the left side of the tractor and two or three feet from it. The tractor at that time was not moving. The driver of the tractor left the ground and went to the seat on the tractor and started it in motion. The plaintiff remained where he was, as did the defendant. The plaintiff was back to the tractor and the defendant facing it, they were discussing the planting. When the tractor started to move, the plaintiff turned his head towards the tractor without moving his body. He saw that the tractor would pass him without striking him, then turned to again face the defendant and

continue the discussion. The tractor passed him, but swung to its right and the harrow made some sort of a pivot turn and struck him in the knee causing the injury complained of. But for the fact of the turning, there was room for it to pass the plaintiff without hitting him.

The presiding justice gave no reason why verdict was directed. The evidence is not contradicted.

The plaintiff contends that he was upon the field of the defendant, by both implied and direct invitation of defendant on business from which defendant was to profit, therefore, defendant owed him the duty not to damage him by negligence. Plaintiff also contended that plaintiff was in nowise negligent.

It is the law that the plaintiff must show himself to be free from contributory negligence. It is also the law that if the plaintiff sustains his contention as above, that he can recover. *Shaw Admx.* v. *Piel,* 139 Me. 57, 27 Atl. (2nd) 137.

The defendant contends that plaintiff was guilty of contributory negligence and also that plaintiff was a licensee and failed to produce evidence of wilful, wanton conduct by defendant. He does not appear to deny that if plaintiff was an invitee, defendant would owe him the duty not to cause him harm by negligence.

We are not, at this time, called upon to, nor do we, decide what duty would be owed by defendant if plaintiff was a licensee.

This court is of the opinion that a jury from this evidence could have found:

That the plaintiff, as alleged, was an invitee.

That the defendant, through his servant or agent, the driver of the tractor, was negligent in running the harrow against the plaintiff.

That plaintiff was free from contributory negligence.

Verdict should not be directed for defendant if any reasonable view of the evidence would allow a recovery by plaintiff. *Talia* v. *Merry,* 130 Me. 414.

Exceptions sustained.

STATE OF MAINE
vs.
PAUL HOAR

Cumberland. Opinion, August 30, 1956.

Criminal Law. Appeal. Municipal Court. Trial Justices. Attorneys.

The words in an appeal statute "may . . . appeal . . . to the next Superior Court . . ." mean "next Superior Court at which criminal cases are cognizable." R. S. 1954, Chap. 146, Sec. 22.

Criminal appeal cases are cognizable at Cumberland "on the first Tuesday of every month except July and August." P. L. 1955, Chap. 285.

An appeal should not be dismissed where it is taken to the wrong term and improperly recorded entirely as a result of error by the magistrate. When, however, an appellant is charged with notice of the error on appeal by the furnishing of bail and recognizance he has the duty to make the correct designation and his failure to do so renders his attempted appeal a nullity.

ON REPORT.

This is a criminal appeal before the Law Court upon report. Appeal dismissed.

Frederic S. Sturgis,
Arthur A. Peabody, for State.

George W. Weeks, for respondent.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, JJ. MURRAY, A. R. J. TAPLEY, J., concurring specially. CLARKE, J., did not sit.

WEBBER, J. This matter is before us on report on the following agreed statement of facts:

> "THAT the Respondent Paul Hoar of South Portland in said County, at said South Portland on September 25, 1955 was arrested for the alleged offense of operating a motor vehicle upon a public highway in said South Portland while under the influence of intoxicating liquor.
>
> THAT on September 26, 1955 at a Court held at the Municipal Court for South Portland in said County said case was continued to October 3, 1955 at which time said Respondent waived reading and hearing and pleaded not guilty.
>
> THAT the Justice for said Municipal Court found the Respondent guilty and assessed a fine of one hundred dollars and costs of seven dollars and eighty-two cents.
>
> THAT said Respondent then and there requested an appeal.
>
> THAT said Respondent intended to appeal, and thought he was appealing to the next criminal term of the Superior Court for said County.
>
> THAT in fact, said appeal was noted to the January term 1956 for said Superior Court and that bail was furnished by the Respondent and two sureties for his appearance at said January Term.
>
> THAT at the January term of said Superior Court, the attorney for the State for said County filed a motion to dismiss said alleged appeal for the reason that said alleged appeal was taken to a term of Court which was not the next criminal term for the Superior Court after the judgment rendered in

said Municipal Court, and that said appeal should be dismissed, and is in fact a nullity, and copy of said motion is attached hereto and made a part hereof."

R. S. 1954, Chap. 146, Sec. 22 provides in part: "Any person aggrieved at the decision or sentence of such magistrate may, within 5 days after such decision or sentence is imposed, Sunday not included, appeal therefrom to the next superior court to be held in the same county, and the magistrate shall thereupon order such appellant to recognize in a reasonable sum, not less than $20 with sufficient sureties, to appear and prosecute his appeal and to be committed until the order is complied with." The words "next superior court" have always been construed to mean the "next superior court at which criminal cases are cognizable." This statute must be interpreted in connection with R. S. 1954, Chap. 106, Sec. 11 which provides for the trial terms of the Superior Court in the several counties and designates those terms at which criminal business may be transacted. Until amended in 1955, Subsec. III of that statute read as follows: "III. Cumberland: At Portland on the 1st Tuesday of every month except July and August; but the criminal business of said county shall be transacted at the terms held on the 1st Tuesdays of January, May and September, together with civil business. The January, May and September terms of said court may be kept open for criminal business after their final adjournment for civil business for such time as the presiding justice may deem expedient, provided that they shall be finally adjourned at least 7 days before the convening of the next succeeding term in which criminal business may be done." The Legislature by P. L. 1955, Chap. 285 amended that subsection by adding to the last sentence thereof the following: "and all business having to do with criminal appeal cases and pending indictments may be transacted at Portland on the 1st Tuesday of every month except July and August; and criminal ap-

peal cases from municipal courts and trial justice courts in Cumberland County may be appealed or bailed to the next term of Cumberland County Superior Court at Portland." This amendment was passed as emergency legislation to become effective April 25, 1955 and the emergency preamble throws light on legislative purpose. The preamble states:

> "WHEREAS, the criminal dockets of the courts of Cumberland County are congested; and
>
> WHEREAS, it is necessary that all pending litigation may be administered and acted upon in an orderly, efficient and prompt manner; and
>
> WHEREAS, the following legislation is wholly necessary to aid in adjudicating pending litigation for the benefit of the litigants; and
>
> WHEREAS, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; * * * *."

It is apparent from a reading of these statutes in the light of the preamble that the Legislature intended that henceforth every term of the Superior Court in Cumberland County should be a term at which criminal business arising from appeals and pending indictments might be transacted, but that the grand jury should convene regularly only at the January, May and September terms. The practice to be followed in Cumberland County is now made to follow very closely the pattern established for Androscoggin County by R. S. 1954, Chap. 106, Sec. 11, Subsec. I: "I. Androscoggin: At Auburn on the 1st Tuesdays of January, March, April, June, September and November for civil and criminal business, provided that the grand jury shall attend only at the January, June and September terms, unless specially summoned by order of a justice of said court. All recognizances for appearance to abide action by the grand jury

shall be for appearance at the term at which the next regular session of the grand jury is held, but appeals in criminal as well as civil matters and removals shall be to the next regular term."

So here the respondent claiming an appeal on October 3, 1955 had no choice as matters then stood except to take his appeal to the next regular term of the superior court. The respondent in fact took his appeal without specific designation as to term. Without more, such an appeal should have been construed as returnable to the next regular term as required by the statute. But the respondent furnished bail as a part of his appeal procedure and the recognizance clearly and unmistakably imposed upon the respondent and his sureties the condition that he appear at the January term, 1956 and prosecute his appeal. This was notice to the respondent that the magistrate was erroneously recording his appeal as to the wrong term.

In a case where the appeal is correctly taken by the appellant, but without his knowledge or participation the appeal is improperly recorded entirely as a result of error by the magistrate, the appeal should not subsequently be dismissed. See *State* v. *Bradley*, 80 So. (La.) 657. But the responsibility for taking a proper and legal appeal rests upon the appellant and when he is charged with notice that his undesignated appeal is being recorded as to a wrong term, he has a duty to make the correct designation. Under rather similar circumstances our court said in *State* v. *Quinn*, 96 Me. 496 at 498: "The appeal is undoubtedly void. It is not properly before the appellate court. But it was the duty of the defendant, if he desired to appeal from the judgment of the magistrate, to appeal to the proper court, and the proper term of court, and having failed to do so his attempted appeal was a nullity, and the judgment of the magistrate in the original proceeding stands against him unreversed and unaffected by his ineffectual attempt to appeal therefrom."

The respondent, had he so decided, could have had trial upon the merits before the magistrate and a judgment of not guilty would have been final and conclusive. Instead, he elected, as he had a right to do, to waive hearing and appeal. In so electing, however, he assumed full responsibility for taking his appeal to and furnishing bail for his appearance at a proper term of the Superior Court. This responsibility is not discharged when he participates in an error of the magistrate of which he has seasonable notice. In the case before us, the action of the respondent was ineffective both as to taking of appeal and furnishing the bail required by law.

Appeal dismissed.

TAPLEY, J., CONCURRING

I concur with my associates as to the result but disagree with the reasoning.

The respondent was required to furnish bail to the January Term, 1956 on his appeal and because of this fact it was determined that he thereby received notice that the magistrate had erroneously recorded his appeal to the wrong term. It is held in substance that because of such notice as the respondent received, through the act of giving bail to the wrong term, he participated in the error on the part of the magistrate to his detriment. It should be noted that to the point of giving bail, the respondent had satisfied the statutory requirements of an appeal and he had taken all the necessary action to produce the status of an appeal. In support of the reasoning in the majority opinion that the respondent has the responsibility for taking a proper appeal, the case of *State* v. *Quinn*, 96 Me. is cited. I differentiate the circumstances of the *Quinn* case with the one now under consideration. In the *Quinn* case the respondent was adjudged guilty by the magistrate in March. He took an appeal specifically to the September Term of the Supreme

Judicial Court in Franklin County but the next term following the March in which he was convicted was the June Term. The statute then in force regarding appeals required an appeal to the next term and, as the September Term was not the next term, it was determined that the appeal was void and a nullity. The case holds that it was the duty of the respondent to appeal to the proper court and the proper term of the court. In the *Quinn* case the respondent, by election, appealed to the wrong term of court. In the present case the respondent appealed to the proper term of court in so far as any affirmative action on his part was concerned, thus complying with the terms of the appeal statute.

The process of appeal concerned here is born of statute and is only effective in so far as the proceedings come within its provisions. The respondent according to the agreed statement "requested an appeal" - - - - "intended to appeal, and thought he was appealing to the next criminal term of the Superior Court for said County." This appeal was then noted by the magistrate to the January Term, 1956 and not to the next criminal term of the Superior Court. For this judicial act there was no authority under the statute and the appeal was then and there a nullity. When the alleged appeal reached the Superior Court, the County Attorney asked for its dismissal on the grounds that it was invalid. The respondent, no doubt, desired a jury trial and it can be properly assumed that that was the reason for his appeal. According to the record he was without attorney in the lower court. This respondent was accused of a crime and was attempting to take advantage of his right of appeal. He did everything that the statute required him to do by advising the court of his desire to appeal. He relied upon the court to legally record his appeal in order that his constitutional rights of trial by jury be made available to him. He now finds himself in the unenviable position of be-

ing deprived of a trial by jury and his case returned to the court of original jurisdiction where the sentence there imposed may be executed unless it be determined that the court lost its jurisdiction over the person of the respondent when it improperly admitted him to bail to appear at the January Term, 1956.

I agree with my associates that the entry should be,

Appeal dismissed.

LIONEL GUAY
vs.
CITY OF WATERVILLE
AND
AETNA CASUALTY & SURETY COMPANY

Kennebec. Opinion, September 14, 1956.

Workmen's Compensation. Evidence.

A finding by the Industrial Accident Commission that a petition for compensation was not filed within the one year limitation and that no legal excuse existed will not be set aside where it is apparent that the Commission considered all evidence of probative force and the findings were supported by the evidence.

ON APPEAL.

This is an appeal from the decree of the Superior Court sustaining the action of the Industrial Accident Commission in dismissing a petition. Appeal dismissed. Decree affirmed.

Jerome G. Daviau, for petitioner.

C. Alvin Jagels, for State.

Locke, Campbell, Reid and Hebert,
for the Aetna Casualty and Surety Co.

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

WEBBER, J. This is an appeal from a *pro forma* decree in which a justice of the Superior Court approved the findings of the Industrial Accident Commission and ordered that a petition for award of compensation be dismissed.

The petition, filed with the Commission on December 20, 1955, alleged a personal injury by accident in the course of employment on December 9, 1954. By amendment allowed by the Commission, the date of the alleged accident was changed to December 30, 1954. R. S. 1954, Chap. 31, Sec. 33 provides in part: "An employee's claim for compensation under the provisions of this act shall be barred unless an agreement or a petition * * * shall be filed within 1 year after the date of the accident; provided, however, that any time during which the employee is unable by reason of physical or mental incapacity to file said petition shall not be included in the period aforesaid." It is obvious that if the first date chosen by the petitioner were the correct one, his petition was filed too late unless he was excused by incapacity. If, however, his amended date were the correct one, the filing was seasonable. The respondents by their answer made general denial and specially pleaded failure of seasonable notice and filing. This placed both the date of accident and any legal excuse for delay in filing squarely in issue and it was thereafter encumbent upon the petitioner to prove seasonable notice and filing by the fair preponderance of the evidence.

The evidence here was to some extent in conflict and certainly was of such a nature as to create uncertainty and confusion both as to the date of the alleged occurrence and the inability of the petitioner to comply with the statutory requirement because of incapacity. In the minds of the Commission the weight of the evidence tendered in support of

a date which made filing seasonable in no degree overbalanced the weight of the evidence *contra.* The scales failed to tip in favor of the petitioner's contention on a vital issue. The factfinder was left in a state of unresolved doubt. This doubt is clearly expressed by the following language taken from the decision of the Commission: "After carefully considering and weighing all the evidence, and the circumstances surrounding this case, we find as a fact that this employee has failed to prove by a fair preponderance of the evidence that he did receive a personal injury by accident on December 30, 1954. No one, including the petitioner himself, has definitely given us the correct date of this alleged accident. * * * Assuming that this man did receive an accident while at work, we feel it as reasonable to assume it happened on December 9th as any other date, so far as the evidence is concerned. If it did occur on December 9th, as alleged in the original petition, the case in our opinion is definitely barred by the operation of the statute, and there are no grounds for the application of waiver or estoppel, and we also do not feel that this party was excused because of physical or mental incapacity to file his petition within one year from the date of alleged accident. * * * Where the question of accident, and date of accident is questionable, we do not think the burden lies with the respondents to make any affirmative defense on the matter of failure to file petition within one year from date of alleged accident. We believe for us to rule that this accident took place on December 30th would require a decision based upon guess, surmise or speculation."

Our function upon review was made very clear in *Robitaille's Case,* 140 Me. 121. The court pointed out that at the hearing before the Commission the burden of proof is upon the claimant to establish his contentions upon issues raised by a fair preponderance of the evidence. If a finding of fact is based on any legal and competent evidence it will not be set aside. At page 126, the court said: "If the finding is

against the moving party it must appear that evidence in favor of the moving party was not, in the minds of the Commission, sufficient to sustain the burden of proof against the evidence of the defendant, or that there is absence of any evidence in favor of the moving party, in which situation it matters not whether there be evidence in favor of the defendant, for it is a principle applicable to all judicial proceedings that total lack of evidence in favor of the moving party will entitle the defendant to a decision in his favor, a principle too elemental to require citation of authority. Upon either finding by the Commission, in favor or against the moving party, if it is apparent that the Commission has disregarded evidence which has probative force in favor of the party against whom the decision has been rendered, the decision will be set aside."

The case before us is not one in which evidence was "disregarded" in violation of legal principles. It is rather one in which the evidence tending to favor the petitioner's contention was so undermined by the doubts and uncertainties created by other evidence, that the favorable evidence was deprived of the weight necessary to sustain the burden of proof. We are not the finders of fact nor is it for us to assess the weight of the evidence. We look only for legal error. The Commission found in effect that the evidence was not persuasive upon a vital issue and it refused very correctly and properly to resort to guess, surmise or conjecture. No legal error was thereby committed.

Appeal dismissed.
Decree affirmed.

GARDNER R. MORRILL, APPELLANT
vs.
ERNEST H. JOHNSON, STATE TAX ASSESSOR

Cumberland. Opinion, September 14, 1956

Taxation. Appeal. Reference.

Assessment appeals under the Sales and Use Tax Law are of statutory origin and must be construed strictly according to statute.

Assessment appeals are not a proper subject of reference under statutory provisions where the legislature has seen fit to particularly grant jurisdiction to the Superior Court without right of delegation. R. S. 1954, Chap. 17, Sec. 33.

ON EXCEPTIONS.

This is an assessment appeal before the Law Court upon exceptions to the allowance of a referee's report. Exceptions sustained.

Boyd L. Bailey,
Miles Frye and
Neal L. Dow, Asst. Attys. General, for State.

Edward J. Beauchamp, for Appellant.

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

TAPLEY, J. On exceptions. Gardner R. Morrill, the appellant, is the operator of a general store in Harrison, Maine. He objected to a sales tax assessment made by the State Tax Assessor and petitioned the assessor to reconsider the assessment. The assessment was reconsidered but no change was made. The appellant appealed from the decision of the State Tax Assessor to the Superior Court, within and for the County of Cumberland, whereupon the parties

agreed to refer the action with right to except as to matters of law reserved by both parties. The referee, after hearing, dismissed the appeal. Objection to the allowance of the report of the referee was filed by the appellant. The report of the referee was accepted and allowed, whereupon appellant filed exceptions to the acceptance and allowance of the report.

There is a grave question whether this is a type of action which is capable of reference. The right of appeal in a sales tax case, such as this, finds its source in Chap. 17, Sec. 33 of R. S. 1954. This Sec. 33 being the appeal section, prescribes the procedure as to the taking of the appeal and is worded as follows:

> "**Sec. 33. Appeal.** Any taxpayer aggrieved by the decision upon such petition may, within 30 days after notice thereof from the assessor, appeal therefrom to the next term of the superior court to be begun and held more than 30 days after such notice of said decision in any county where he has a regular place of business for making retail sales, or, if he has no such place of business within the state, to such term of the superior court in Kennebec county. The appellant shall, on or before the 3rd day of the term to which such appeal is taken, file an affidavit stating his reasons of appeal and serve a copy thereof on the assessor, and in the hearing of the appeal shall be confined to the reasons of appeal set forth in such affidavit. Jurisdiction is granted to the superior court to hear and determine such appeals and to enter such order and decrees as the nature of the case may require. Hearings may be had before the court in term time or any justice thereof in vacation and the decision of said court or justice upon all questions of fact shall be final. Decisions shall be certified to the tax assessor. (1951, c. 250, Sec. 1.)"

Attention is called to the fact that this section, among other provisions, provides that the appellant shall file an affidavit

stating his reasons of appeal and, at a hearing of the appeal, he shall be confined to the reasons of appeal. Jurisdiction is specifically granted to the Superior Court to hear and determine appeals of this kind and to enter such orders and decrees as the nature of the case may require. The hearings may be had before any justice of the Superior Court and the decision of the court or justice on all questions of fact shall be final. The right by which cases are referred is provided in Sec. 93 of Chap. 113, R. S. 1954. The authority given by this statute has been defined in some instances by decisions of this court. Reference of cases is authorized by provisions of statute. The jurisdiction of referees cannot be conferred by consent. Bills in equity cannot be submitted to reference. *Faxon* v. *Barney,* 132 Me. 42. A situation analogous to the present problem would be probate appeals which have their origin in statutory enactment. The case of *Chaplin, Appellant,* in 131 Me. 187, holds that although reference was by consent of the parties, the referring of a probate appeal was not legally proper and could not be subject to reference under the statutory provisions. A referee is not a court. *Lipman Brothers, Inc.* v. *Hartford Accident & Indemnity Co.,* 149 Me. 199. It is interesting and significant to note a similarity of provisions in the statutes providing for probate appeals and for appeals from the assessment of sales taxes, in that both provide for the filing of reasons of appeal and hearing confined to reasons of appeal. A most important provision of the appeal section of the sales and use tax law is that of the jurisdictional portion which specifically grants to the Superior Court the authority not only to hear the appeal but also "to enter such order and decrees as the nature of the case may require." The statute further provides that "Hearings may be had before the court in term time or any justice thereof in vacation and the decision of said court or justice upon all questions of fact shall be final. Decisions shall be certified to the tax assessor." This appeal process, like that of the Probate Court, is

defined by statute and must be considered as giving no more authority than is expressed. Accordingly, the only method provided for the hearing of appeal is "before the court in term time or any justice thereof in vacation." The Legislature has seen fit to particularly grant jurisdiction in this type of appeal to the Superior Court without right of delegation of authority for any other method of determination. Like probate appeals, assessment appeals under the sales and use tax law are of statutory origin and must be construed strictly according to the statute. *Chaplin, Appellant, supra.* Jurisdiction is precisely and definitely granted to the Superior Court. There is no interpretation of the specific directions as to hearing that permits of reference.

The presiding justice was without authority to accept the report of the referee.

Exceptions sustained.

STELLA SEEKINS
vs.
LAURENCE W. LOUGEE

Somerset. Opinion, September 17, 1956.

Report. Disclaimer. Pleading. Boundaries. Evidence. Deeds.

Plaintiff may not take advantage of the alleged failure of defendant to file a disclaimer when a case is submitted on report or agreed statement, because, unless the contrary appears, all technical questions of pleading are waived.

Latent ambiguities in deeds may be explained by parol evidence.

ON REPORT.

This is an action involving a boundary dispute. It is before the Law Court upon report of legally admissible evidence. Judgment for defendant.

Bartolo M. Siciliano, for plaintiff.

Frederick Armstrong,
George M. Davis, for defendant.

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

BELIVEAU, J. On report. By agreement of the parties this cause is "reported to the Law Court upon the evidence or so much thereof as is legally admissible; that the matter will be reported on the stipulation that the Supreme Court shall determine the matter both as to fact and to law."

The only issue is the easterly line of the parcel of land described in plaintiff's Exhibit No. 3, a Quitclaim deed to Marcia Brown, the plaintiff's grantor, dated May 1, 1940, to wit:

> "a certain lot or parcel of land at Yankee Hill, so called, situated in Lot Thirteen (13), Range One (1), in the unorganized Township now or formerly known as Taunton and Raynham Academy Grant, in said County of Somerset and State of Maine;
>
> Said land is located easterly of and adjoining Lot 14 which was conveyed to this Grantee by deed dated June 17, 1937, and lies between prolongations easterly of the northerly and southerly lines of said Lot 14 to the water line of Moosehead Lake and bounded on the west by the easterly line of said Lot 14 as described in said deed to said Brown;"

Plaintiff acquired title to Lot 14, and the extension, by a Quitclaim deed from Marcia and Paul R. Brown, dated April 16, 1946. There is no description in this deed of the property conveyed other than reference to the several conveyances by which Marcia Brown acquired title. Defendant is the owner of Lot A lying southerly of Lot 14 and Lots B, C, and D easterly of Lot A. All of the lots referred to

are shown on plan entitled, "Subdivision of Lot 13 Range 1 Taunton & Raynham Township Somerset Co. Maine." dated January 1940 and recorded in Somerset County Registry of Deeds March 12, 1940 in Plan Book 8, Page 19.

The conveyance to Marcia Brown of the extension of Lot 14, was subsequent to the recording of the plan marked plaintiff's Exhibit No. 3.

The extension, according to the uncontradicted testimony of Hubert F. Bates, who surveyed this property, would cover an area of approximately 4,752 square feet.

It is the position of the plaintiff that the extension of Lot 14 goes beyond the easterly end as shown on the plan and includes, if the plaintiff's version is accepted, approximately 11,352 square feet to bring the easterly line to the low water mark. According to the plaintiff's theory it would also include a portion of the southwesterly corner of Lot C conveyed to the defendant on December 26, 1940, and described on the plan.

The plaintiff contends that regardless what the court may find to be the eastern limit of Lot 14 she is still entitled to a verdict because the defendant has not filed a disclaimer to any part of Lot 14 and the extension, which the defendant admits belongs to the plaintiff. This argument is not open to the plaintiff at this stage.

On this point our court has said:

> "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 at Page 455.

The order of the court below makes no reference to pleadings and for that reason are considered waived.

The deed to the plaintiff's grantor contains the only description of the property conveyed to the plaintiff by Marcia Brown. That description fixes the easterly line of the extension of Lot 14 "to the water line of Moosehead Lake." Because of that description it must be determined what was meant by "the water line" at the time of the conveyance to Marcia Brown.

In view of the fact that "to the water line" does not in itself give the court any assistance as to which of at least two "water lines," the low and the high was meant, we must go beyond the deed to establish the easterly line.

Dewey, J., in *Crafts* v. *Hibbard* said:

> "It is well settled that parol evidence cannot be introduced to contradict or control the language of a deed; but it is equally well settled that latent ambiguities may be explained by such evidence. Facts existing at the time of the deed, and prior thereto, may be proved by parol evidence, with the view of establishing a particular line as the one contemplated by the parties, when such line is left, by the terms of the deed, ambiguous and uncertain."
>
> *Crafts* v. *Hibbard,* 4 Met. 438.

Our court in *Abbott* v. *Abbott,* 51 Me. 575 at Page 581 subscribes to this rule and further states it has been applied so often in real actions that no citation of authorities is necessary.

Probably the most convincing evidence is the plan, before referred to, which shows the water line on the easterly end of Lot 14 extension. Not only was this plan on record before the plaintiff acquired title but also on record prior to the time Marcia Brown accepted the deed of the extension of Lot 14 with reference made to the plan in that deed.

The irregular line on the plan shows the water line to be the high water line. The plaintiff had notice of this while

she was negotiating with Mrs. Brown. She not only had Mrs. Brown's deed to study, she also had a copy of the plan which showed definitely the eastern boundary of the extension. She had ample notice before the purchase of the land that the extension did not go beyond the line delineated on that plan. And again during these negotiations she had some talk with Mrs. Brown about the extension of Lot 14. Mrs. Brown informed Mrs. Seekins that she had "never seen any stakes down there." She further testified that after the snow had gone the next spring they went and looked for the stakes but could not find any. If in fact Mrs. Seekins bought the extension with the belief that the easterly line was at the low water mark she would not be looking for stakes to establish the easterly end of Lot 14.

The defendant testified that the plaintiff asked his permission to dig a channel from the low water mark to the high water line for her convenience and that this permission was granted. The plaintiff admits talking with the defendant but does not remember asking permission to dig a channel although they talked about the disposition of the material removed in the process of digging that channel to the plaintiff's land. The plaintiff having failed, in the defendant's opinion, to remove the material, according to their understanding, he in August 1949 forbade the plaintiff to continue with the work she had undertaken. She immediately stopped and, as far as the record is concerned, she never resumed operations.

We are satisfied from all the evidence that extension to Lot 14 went no farther easterly than the high water line shown on the plan and that the plaintiff's conduct prior to her purchase of this property and afterwards is convincing evidence that she, at that time believed, the extension of Lot 14 did not go beyond the high water line as shown on the plan.

Judgment for the defendant.

STATE OF MAINE
APPLICATION OF JOHN A. BALLARD
RE: CONTRACT CARRIER SERVICE

Kennebec. Opinion, September 25, 1956.

Public Utilities. Evidence. Decree.

On hearings before the Public Utilities Commission the ordinary rules of evidence apply, yet the mere erroneous admission or exclusion of evidence will not invalidate an order unless substantial prejudice is shown.

If a factual finding is supported by any substantial evidence it is final.

Whether a factual finding is warranted by law on the record is reviewable on exceptions.

A decree of the Public Utilities Commission will be sustained only as to that part supported by substantial evidence.

The "convenience and necessity" referred to in the statutes is that of the public not of individuals or groups.

ON EXCEPTIONS.

This is an application for a carrier permit before the Law Court upon exceptions to a decree of the P. U. C. Exceptions sustained. Case remanded to the commission upon the existing record for a decree in accordance with this opinion.

Frank Libby, for P. U. C.
Richard J. Dubord, for John A. Ballard.

Raymond E. Jensen, for Intervenors.

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

MURRAY, A. R. J. In this matter John A. Ballard of South Portland filed an application with the Maine Public Utilities Commission for a permit to operate motor vehicles

as a contract carrier upon the public highways of the State of Maine. The request was to transport steel products from the Bancroft & Martin Rolling Mills plant at South Portland to the company's customers in different parts of Maine.

The Commission granted the permit as requested, and Congdon Transportation and Cole's Express, who had intervened, took three exceptions to the ruling of the Commission.

Exception 1 and 3 raised the basic question whether there was any substantial evidence to support the finding and decree of the Commission. Exception 2 deals with a motion made by the exceptors to strike from record, what they call record of an illegal operation by the petitioner prior to the time of his petition.

We shall consider the latter exception first. We assume, for this discussion, that it is a question of admissibility of evidence. To make the discussion clear, we quote in part from R. S. 1954, Chapter 44, Sec. 63: "* * * When objection is made to the admissibility of evidence, the examiner shall note the same * * *. The Commission shall disregard or consider the evidence so objected to * * * and shall report its rulings thereon in its decree of the case."

This exception alleges that the Commission erred in its ruling denying the motion to strike from the record, and in considering the evidence sought to be struck.

"* * * On hearings before the Public Utilities Commission the ordinary rules of evidence apply, yet the mere erroneous admission or exclusion of evidence will not invalidate an order of the Commission. Substantial prejudice must be affirmatively shown." *Public Utilities Commission* v. *Gallop,* 143 Me. 290, 299, citing above from *Damariscotta-Newcastle Water Co.* v. *Itself,* 134 Me. 349.

Assuming, without admitting this evidence to be inadmissible, no substantial prejudice has been shown nor that the intervenors were aggrieved.

Exceptions 1 and 3. In *O'Donnell, Petitioner,* 147 Me. 259 at page 260, this court through the late Justice Nulty said: "This Court has very recently, on two occasions, pointed out to the profession its duties and powers in cases coming before it on exceptions to the rulings of the Public Utilities Commission * * *. It should not be necessary to repeat them * * *." And on page 262: "It is expressly precluded from reviewing the findings of fact, unless they are made without any evidence to support them. It cannot review the judgment of the Commission as to public policy or the discretion vested in it under this statute."

These exceptors, in brief and argument, agree apparently that the above is the law but insist that there is no evidence to support the decree.

"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 inference to be drawn from the testimony, will not authorize the disturbance of a finding.

On the other hand, whether, on the record, any factual finding, underlying order and requirement, is warranted by law, is a question of law, reviewable on exceptions. Hamilton v. Caribou, etc. Company, supra." *Gilman* v. *Telephone Co.,* 129 Me. 243, 248, 151 Atl. 440.

While we do not see substantial evidence to support the decree as written, we do see substantial evidence to support a modified decree. We feel that the part of the decree as to

Edmund Nadeau should stand in full, there being no objection made thereto, and that the part as to Bancroft & Martin Rolling Mills should stand in part only. While there seems to be substantial evidence to support a decree granting a permit to points not now reached by common carriers, there appears to be no evidence whatever to sustain the granting of a permit to carry to points already served by common carriers.

". . . 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: Chapman,* 151 Me. 68; *Re: John M. Stanley,* 133 Me. 91, 93, 174 A. 93.

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

JOAN NETA ROSENBERG, PETITIONER
vs.
JESSE M. ROSENBERG

Cumberland. Opinion, September 28, 1956.

Uniform Reciprocal Enforcement of Support Act. Conflicts. Age. Pleading. Decree. Jurisdiction.

The law which governs the obligations of a Maine father to support his New York daughter are those of the responding state (Maine) and not the laws of the initiating state (New York).

A "child" under Maine law is "a son or daughter under the age of 21 years and a son or daughter of whatever age who is incapacitated from earning a living and without sufficient means." R. S. 1954, Chap. 167A (1955 Amendment).

The allegation that a 28 year old female "is without means, unable to maintain herself and is likely to become a public charge" (N. Y.) is the legal equivalent of "incapacitated from earning a living and without sufficient means" (Me.).

ON EXCEPTIONS.

This is a petition under the Uniform Reciprocal Enforcement of Support Act. R. S. 1954, Chap. 167, P. L. 1955, Chap. 328. The case is before the Law Court upon exceptions to the overruling of a special demurrer. Exceptions overruled.

Frederic S. Sturgis, for plaintiff.

Richard S. Chapman, for defendant.

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

BELIVEAU, J. On exception. This is a petition for support brought by the petitioner, referred to hereafter as the obligee, against the defendant, her father, the obligor, under the Uniform Reciprocal Enforcement of Support Act, Chapter 167 of the Revised Statutes and amended by Chapter 328 of the Public Laws of 1955. New York has a similar reciprocal law.

The petition is dated January 5, 1956 and is addressed to the Domestic Relations Court of the City of New York, Family Court Division.

A hearing was had before that court on January 9, 1956 and it certified that $150.00 a week was needed by the obligee for support from the respondent. The petition and other necessary documents were transmitted to the Superior Court in the County of Cumberland in this state for action by that court in accordance with the act before referred to.

An order of notice was issued for service on the obligor returnable before the Superior Court in the County of Cumberland on the seventh day of February, 1956, at 10:00 o'clock in the forenoon.

On the return day the obligor filed a special demurrer to this petition which demurrer was overruled and exceptions seasonably taken.

The petition filed in New York alleges that under the laws of that state the obligor was liable for the support of his daughter, the obligee, and the obligor, in his special demurrer, alleges and claims that the laws of New York do not control in this respect because the father was and had been, for some time a resident of Portland, and was not at any time subject to the jurisdiction of the New York courts.

The laws which govern in a situation such as this, are those of the responding state (Maine) and not the laws of the initiating state (New York). The petition alleges that the petitioner "is without means, unable to maintain herself and is likely to become a public charge."

Section I of Chapter 167-A, R. S. (1955 amendment) defines "child" to mean, under this statute, "a son or daughter under the age of 21 years and a son or daughter of whatever age who is incapacitated from earning a living and without sufficient means."

The purpose of the Uniform Reciprocal Enforcement of Support Act, enacted by both Maine and New York, was to remedy a deplorable situation. Under the law, as it existed prior to its enactment, a child or child's guardian, could compel a father to support a child only by coming to the state having jurisdiction over the father and bringing proceedings in the courts of that state. This, in most cases, was an impossible situation because it involved much expense, trouble and time, and was impractical.

As the law is now, the child may in the state of his or her domicile initiate proceedings against the father in that state for action to be taken by the state having jurisdiction of the father.

The final decision, or judgment, must be made by the court having jurisdiction over the father and while the initiating state makes recommendations, as it did here, these are not binding on the responding state.

It is alleged in the petition that the child is a female 28 years of age and the allegations that she "is without means, unable to maintain herself and is likely to become a public charge" (New York law) is equivalent to the words, "incapacitated from earning a living and without sufficient means" (Maine law).

It seems to us that the allegations in the plaintiff's petition are sufficient to meet the requirements of our statute.

Exception overruled.

LEONA DUDLEY AND LAWRENCE BROWN
vs.
MAUDE H. VARNEY, ELEANOR R. VARNEY, AND ROBERT D. VARNEY

Cumberland. Opinion, October 8, 1956.

Writ of Entry. Damages. Warranty. Quitclaim.

A warranty deed to one from whom the plaintiff has a quitclaim deed is sufficient prima facie evidence of title to authorize a verdict in his favor.

R. S. 1930, Chap. 14, Sec. 79, required a tax collector as part of the sale to make a return to the Town Clerk within thirty days. Failure of the collector to date and sign his return results in a defect in title and renders it null and void.

ON EXCEPTIONS.

This is a plea of land before the Law Court upon exceptions to the allowance of a referee's report favorable to plaintiff. Exceptions overruled.

Wheeler, Tansey & Campbell,
Childs & McKinley, for plaintiffs.

John E. Hanscomb, for defendant.

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

BELIVEAU, J. On exceptions. This is a writ of entry brought by the plaintiffs to establish title in them to the real estate described in the writ.

The declaration consists of two counts. The first count alleges title in the plaintiffs and the second is for damages caused by cutting a large quantity of timber on the premises.

At the June 1955 Term of Cumberland County Superior Court, by agreement, the case was referred, with right reserved to except as to matters of law. The case was heard by a referee who found for the plaintiffs against all defendants on the first count and against the defendants, Maude H. Varney and Robert D. Varney on the second count.

The defendants filed, in writing, exceptions to the acceptance of the referee's report. This report was accepted by the justice presiding at the February 1956 Term of the Cumberland County Superior Court and exception taken by the defendants to that ruling.

The plaintiffs acquired title to this property from Willard Brown, John Brown and Susan E. Chick, only heirs at law of Mary E. Brown, by quitclaim deed, dated June 17, 1952.

Mary E. Brown's title to these premises is evidenced by a warranty deed, dated April 13, 1925, and duly recorded.

May v. *Labbe,* 112 Me. 209, reaffirmed the well-known rule of law that "a warranty deed to one from whom the plaintiff has a quitclaim deed, is sufficient prima facie evidence of title in the plaintiff to authorize a verdict in his favor, unless the defendant proves a better title." That being the rule, the plaintiffs made out a prima facie case which must stand unless the evidence shows the defendants to have the better title.

The defendants attempted to prove that title in this real estate was in Maude Henry Varney by virtue of quitclaim deed from Charles Giles to Maude H. Varney, dated July 21, 1941 and recorded on February 1, 1955.

Giles is alleged to have acquired title by a quitclaim deed from the town of Standish, dated March 2, 1940 and recorded in the Registry of Deeds July 13, 1953. The town of Standish's claim to the title is a tax collector's deed, dated February 16, 1932 and recorded in the Registry of Deeds, October 13, 1936.

It necessarily follows that title in one of the defendants, Maude H. Varney, is based on the tax assessment made on these premises prior to the deed from the tax collector to the selectmen of Standish.

The law as it existed then (Section 79, Chapter 14, Revised Statutes of Maine 1930) required that the tax collector, as part of the sale, "shall, within thirty days after such sale make a return, with a particular statement of his doings in making such sale, to the clerk of his town, who shall record it in the town records;"

The only evidence of a return, as then required by the law, was a statement introduced by the defense, showing sales for nonpayment of taxes, bearing no date and lacking the signature of the tax collector.

We need not concern ourselves with other defects claimed by the plaintiffs in the defendants' title. In *Old Town* v. *Robbins,* 134 Me. at page 287, the court in discussing failure of the tax collector to date and sign his return had this to say,—

> "The commands of the section are positive and direct; there is no limitation, no modification, attached to them.
>
> The section recites the form which the collector, in making his return, must, in substance, follow; the form is indicative that, to be complete, the return must be dated, and be signed by the tax collector."

And again on page 288:

> "All provisions of the statute, whether they relate to proceedings before, or subsequent to the sale, must be strictly complied with, or the sale will be invalid."

Failure by the tax collector to comply with one of the very essential provisions of the statute rendered the deed from the tax collector to the selectmen null and void, and the defendant, Maude H. Varney, took nothing in the conveyance from Giles to her.

The defense contends that damages found against the defendants, Maude H. Varney and Robert D. Varney are excessive.

There was much conflicting evidence as to the quantity of timber cut on the premises and the amount of damages suffered by the plaintiffs; however, this was essentially a question of fact for the referee to determine and there was sufficient evidence, apparently believed by the referee, to warrant and justify the verdict of $6,125.00.

Exceptions overruled.

STATE
vs.
GUY MELANSON

Androscoggin. Opinion, October 15, 1956.

Motor Vehicles. Speeding. Pleading. Demurrer. Waiver.

A speeding summons which fails correctly to set forth the statutory prima facie lawful speed is not a bar to the prosecution of an alleged violation of the statute, since the statutory requirement of R. S. 1954, Chap. 22, Sec. 113 II is directory not mandatory.

The complaint, not the summons, is the indispensable charge.

A plea that an officer's summons incorrectly stated the prima facie lawful speed is a special plea in bar or dilatory plea (and not in abatement).

In sustaining a demurrer to a special plea in bar or dilatory plea, the Trial Court in substance overrules it.

Where a defendant files exceptions and does not exercise his right to plead over as directed by the Trial Court after having been overruled in his special plea in bar or dilatory plea, he submits his cause for final determination and judgment.

See Dissent: Whether Law Court has jurisdiction to entertain exceptions in the face of an ignored mandate to plead over and without case being formally closed per R. S. 1954, Chap. 106, Sec. 19.

ON EXCEPTIONS.

This is a complaint for speeding before the Law Court upon exceptions to the overruling of a special plea in bar.

Exceptions overruled. Judgment for State.

Gaston M. Dumais,
William D. Hathaway, for State.

Louis Scolnick, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, TAPLEY, JJ., MURRAY, A. R. J. WEBBER, J., concurs specially. MURRAY, A. R. J., dissenting. CLARKE, J., did not sit.

WILLIAMSON, J. This criminal case is before us on exceptions by the respondent to the sustaining of the State's demurrer to his special plea in bar. The issue is whether a speeding summons which fails correctly to set forth the statutory prima facie lawful speed constitutes a bar to prosecution of the alleged violation of statute.

The respondent is charged on a complaint originating in the Lewiston Municipal Court with the misdemeanor of driving a motor vehicle at a speed not careful and prudent. R. S. c. 22, § 113, I, II, II-C, and II-D. Specifically, the charge is that the respondent drove a motor vehicle at a speed of 55 miles an hour, it being then and there prima facie lawful to drive at a speed not exceeding 25 miles an hour.

In the Municipal Court a demurrer by the State to a special plea in bar, identical with the plea later made in Superior Court, was sustained and the respondent ordered to plead over. The respondent thereupon pleaded not guilty, waived hearing, and appealed from a finding of guilty.

On appeal in the Superior Court the respondent filed a special plea in bar alleging that the complaining witness, a police officer, gave him a summons or notice to appear in the Municipal Court which incorrectly stated the prima facie lawful speed at the time and place of the violation to be 55 miles an hour. The State demurred and the respondent joined therein. The presiding justice made the following rulings and orders at the November Term 1955: "Demurrer to plea sustained. Respondent to plead over. Exceptions of respondent allowed. . . . Extended bill of exceptions to be filed on or before January 10, 1956." In January 1956 the extended bill was filed and allowed and the case marked "Law" on the docket. The respondent did not plead over in response to the order of the presiding justice.

We are not here concerned with the plea attached to the respondent's appeal from the Municipal Court. In receiving and acting upon the special plea in bar the presiding justice impliedly consented to the withdrawal of the "not guilty" plea. *State* v. *Schumacher,* 149 Me. 298, 101 A. (2nd) 196. Compare *State* v. *McClay,* 146 Me. 104, 116, 78 A. (2nd) 347 and *State* v. *Lawrence,* 146 Me. 360, 82 A. (2nd) 90.

The respondent's case rests upon the meaning of the portion of the statute reading:

> "Any speed in excess of the limits established by law shall be prima facie evidence that the speed is not reasonable and proper as defined in subsection I of this section. In every charge of violation of a speed limit, the complaint, also the summons or notice to appear, shall specify the speed at which the defendant is alleged to have driven; also the speed at which the statute declares shall be prima facie lawful at the time and place of the alleged violation." Section 113, II, *supra.*

The critical words *also the summons or notice to appear* were first enacted in P. L. 1939, c. 213, § 4. The remainder of the sentence may be traced to P. L. 1929, c. 327, § 16 (b).

The plea of the respondent is specially in bar, not in abatement. It is so entitled and so intended by him. In argument he urges that "prosecution is forever barred." *State* v. *Demerritt,* 149 Me. 380, 103 A. (2nd) 106.

We have no difficulty in construing the provision for a statement of prima facie lawful speed in a summons or notice to be directory and not mandatory. The purpose and intent of the Legislature to give the alleged violator notice of speed and the speed limit is apparent. It does not follow, however, that the Legislature intended that error by the officer should vitiate the proceedings.

The language of the statute does not compel such a strange result. Violators are not to go free for such an

unsubstantial reason, nor do they obtain from such an error by an officer an "immunity bath," to use a phrase from *State* v. *Boynton,* 143 Me. 313, 322, 62 A. (2nd) 182, 188.

We may test the correctness of our conclusion by examining possible harm to a respondent from an error in the summons. The summons does not take the place of a complaint properly drawn and issued. At most, the respondent in the instant case was misled until he read the complaint setting forth correctly the prima facie lawful speed. We may readily consider that in such a situation a court would give the respondent ample time to prepare his defense. What more could he fairly ask?

The respondent does not question the sufficiency of the complaint. The *complaint* is the *indispensable charge* of the crime. Jurisdiction was not lost by a mistake of the officer in issuing the summons or notice to appear in court. The exceptions must be overruled. *State* v. *Boynton, supra.*

The respondent's plea was a dilatory plea. *State* v. *Boynton, supra; State* v. *Thompson,* 143 Me. 326, 62 A. (2nd) 191. In sustaining the demurrer thereto the court in substance overruled the plea. The statute reads, "When a dilatory plea is overruled and exceptions taken, the court shall proceed and close the trial, and the action shall then be continued and marked 'law' . . ." R. S. c. 106, § 19.

The respondent confronted with the adverse ruling did not exercise his right to plead over. He chose instead to bring forward his exceptions without trial, and to submit his cause for final determination on the strength of his special plea.

The case is governed by the rule stated in *State* v. *Inness,* 53 Me. 536, 541, in which the respondent pleaded specially a former conviction, the court said:

> ". . . having entered his action in this Court, which he could not rightfully do unless it was in a condi-

> tion to be finally disposed of if his exceptions should be overruled, his right, if any, to answer further, must be regarded as waived."

See also *State* v. *Cohen,* 125 Me. 457, 134 A. 627 and *State* v. *Jellison,* 104 Me. 281, 71 A. 716.

The entry will be

Exceptions overruled.
Judgment for State.

MURRAY, A. R. J., DISSENTING

The majority opinion in this case, which we shall hereafter refer to as the opinion, has decided it upon the merits. With its contention that it has jurisdiction to do so we cannot concur.

Our contention is that the case is not in this court legally, therefore, not here at all, and all that this court can do is dismiss it from the docket for want of jurisdiction.

Following is the record of the lower court:

> 1955 Nov. T 2 Defendant's plea filed. State's demurrer to plea filed. Respondent's joinder filed. Demurrer to plea sustained. Respondent to plead over.
>
> 1955 Nov. T 8—Extended bill of exceptions to be filed on or before Jan. 10/56.
>
> 1956 Jan. T 6—Extended bill of exceptions filed and allowed.
>
> Jan. 9
>
> 8—Law Court notified. Law

The record does not show that evidence was filed before case was marked law. Rule 19 A. Nor does it show that respondent pleaded over. It does not show that the case was closed. It does not show a finding of guilty. It does not show judgment, that is the sentence.

R. S. 1954, Chap. 106, Sec. 19. "When a dilatory plea is overruled and exceptions taken, the Court shall proceed and close the trial and the action shall then be continued and marked Law."

The opinion appears to admit that this statute must be complied with by saying:

"The respondent confronted with the adverse ruling did not exercise his right to plead over. He chose instead to bring forward his exceptions without trial, and to submit his cause for final determination on the strength of his special plea. He cites as authority "* * * Having entered his action in this court, which he could not rightfully do unless it was in a condition to be finally disposed of if his exceptions should be overruled, his right, if any, to answer further, must be regarded as waived." *State* v. *Inness,* 53 Me. 536, 541.

The record shows what *Stowell* v. *Hooper,* 121 Me. 152, 156 calls a pardonable error by the clerk, in that the clerk marked the case Law, almost the moment the exceptions were filed, before the evidence was filed and before the case was closed by the court. This case also holds that the entering of the case in the Law Court was not a waiver by the respondent, this was the act of the clerk, and that the respondent finding his case in the Law Court and following it there, can hardly be regarded as a waiver. This has been affirmed in *Hutchings* v. *Libby,* 149 Me. 371, 377; *Augusta Trust Company* v. *Glidden,* 133 Me. 241, 242; *Kloput* v. *Scuik,* 131 Me. 499.

In *Kloput* v. *Scuik, supra,* defendant did not plead over nor was case closed. *Augusta Trust Co.* v. *Glidden, supra,* after holding that neither filing of exceptions nor erroneous certification of exceptions was a waiver, also held record did not show a refusal to plead.

In case at bar, the record does not show a refusal to plead over. Respondent could plead over at any time before trial unless directed by the court to plead over earlier. *Stowell* v. *Hooper, supra,* 154. The judgment of the court to plead over could hardly be called an order to plead at a definite time, because to plead over was the only judgment which the court could give.

We also add that if the plaintiff could waive his right to plead over, and if he did so, this could not be a waiver of the express command of the statute that the presiding justice close the case before it could be marked Law or sent to the Law Court. Not even the justice could waive that command. This case is now in the Law Court without an adjudication in the lower court of conviction. *Cushing* v. *Friendship,* 89 Me. 529, and without a judgment. Sentence is the judgment in a criminal case. *Jenness* v. *State of Maine,* 144 Me. 45; *State* v. *Stickney,* 108 Me. 136.

"This court has said many times, the Supreme Judicial Court sitting as a Law Court is of limited jurisdiction. As such, it is a statutory court and can hear and determine only those matters authorized by statute and brought to it through the statutory course of procedure." *Sears Roebuck & Co.* v. *Portland et al.,* 144 Me. 250, 254.

"There is nothing in our statutes which implies or contemplates that any case can go forward to the Law Court on an appeal or on exceptions until after final judgment below. And the authorities are practically unanimous in holding that this cannot be done in the absence of a statute authorizing it and that the entry of final judgment is a jurisdictional fact which the parties cannot waive * * * The existence on the record of a final * * * judgment * * * is jurisdictional, and in the absence thereof an appeal cannot be maintained even by consent or waiver of the parties. Although no objection may be made at the hearing and no motion may be made to dismiss, the court will on its own

motion dismiss the opinion." *Andreau et al.* v. *Dostie,* 142 Me. 271, 273, 274.

Not only is there no statute in this State allowing a case to go forward before final judgment, but there are two statutes forbidding it, R. S. 1954, Chap. 106, Sec. 19, and R. S. 1954, Chap. 148, Sec. 29. The latter "Sentence shall be imposed upon conviction * * * although exceptions are alleged."

If the opinion prevails, it is on the reasoning that there has been a final judgment in the lower court and therefore this court has jurisdiction. If this is so, the lower court has no jurisdiction in the matter not even to order a mittimus. When the mandate comes from the Law Court, the clerk of the lower court on its receipt, acting ministerially, issues a mittimus, which in this case is nonsense, because there would be no sentence in the mittimus, the court has lost its jurisdiction and the respondent would be free. On the other hand, according to the dissenting opinion, the case would be dismissed from this docket because of having been prematurely brought here, it would then go back to the lower court where the court could close the case. *State* v. *Cole,* 123 Me. 340.

"Cases should not therefore be entered in the Law Court on exceptions until they are in a condition to be finally disposed of if the exceptions are overruled." *Andreau et al.* v. *Wellman,* 142 Me. 271, 274. If this case is properly in the Law Court then it is finally disposed of by the mandate of the opinion "exceptions overruled." Although there is no record of a conviction or a sentence which is the judgment. We think the mandate should be dismissed from this docket having been brought here prematurely.

WEBBER, J., CONCURRING

I concur fully in the opinion of the court. I note that in the dissenting opinion there is no suggestion that *State* v.

Inness, 53 Me. 536, has been overruled and no effort is made to distinguish it from the case at bar. I am satisfied that it controls the situation now before us. There, as here, the State filed a demurrer to a dilatory plea in bar. There, as here, the demurrer was sustained and the respondent took exceptions. There, as here, there was a proper order to plead over which was ignored by the respondent. There, as here, there was no adjudication of guilt or imposition of sentence by the court below. Yet the mandate in Inness was "Exceptions overruled. Judgment final for the State." I take the latter portion of the mandate to be directory to the court below and pursuant to that mandate the respondent was to be adjudged guilty without further hearing, and sentenced. This summary action logically follows the waiver by the respondent of his right to plead over and have trial upon the merits as Inness clearly indicates.

The opinion in *Stowell* v. *Hooper*, 121 Me. 152, relied upon in the dissenting opinion, makes it clear that Inness is distinguished rather than overruled. The distinguishing feature emphasized by Stowell was the failure of the court in that case to order the party offering the dilatory plea to plead over. The court said at page 154: "In the instant case there was no direction to plead anew. The presiding Justice in effect sustained the demurrer. Judgment that the defendant answer further *should have, but did not follow.*" (Emphasis supplied.) The opinion reasons that the error being that of the court rather than of the party, the party cannot thereby be charged with waiver. However, the court recognized that waiver can and does arise from failure to respond to the order to plead over, but pointed out that it does not arise from the mere taking of exceptions. Whether Stowell is in all its aspects well reasoned is not in issue here. The important consideration is that it does not alter the rule in Inness and leaves Inness controlling of the situation which must here be decided.

JULIETTE A. GIGUERE
vs.
BISBEE BUICK CO., INC.

Androscoggin. Opinion, October 15, 1956.

Assumpsit. Contracts.

Where a defendant agrees to sell an automobile for the "best price he can obtain" and give plaintiff credit therefor, he cannot charge plaintiff with the loss sustained by him upon a trade-in accepted by him as part of the purchase price of the sale.

ON EXCEPTIONS.

This is an action of assumpsit before the Law Court upon exceptions. Exceptions overruled.

Frank W. Linnell, for plaintiff.

John A. Platz, for defendant.

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

WILLIAMSON, J. On exceptions. This is an action in assumpsit to recover for an alleged breach of contract for failure to allow the proper credit upon the purchase price of an automobile. The case is before us on exceptions (1) to the exclusion of evidence, (2) to the overruling of defendant's motion for a directed verdict, and (3) to portions of the charge.

The jury could find: The plaintiff purchased a 1954 Buick automobile from the defendant. Within a few weeks the car was involved in an accident. The parties then entered into the following agreement:

"December 18, 1954

Bisbee Buick Co., Inc.
201 Main Street
South Paris, Maine
Att: Mr. Philip Flock

Dear Phil:

This will confirm the understanding at which we have arrived today concerning the 1954 Buick, serial #4A702 3085, sold by your company to Miss Juliette Giguere on October 8, 1954. It is understood that you are to pick up the car which is presently at Wade & Dunton Carriage Company and *sell it for the best price that you can obtain,* and you are to immediately order a 1955 Buick of like model, style and equipment which you are to sell to Miss Giguere at your dealer's cost, against which you will apply the *proceeds of the sale of the 1954 Buick mentioned,* and Miss Giguere will pay to you the difference, if any, in the two amounts, not to exceed five hundred dollars, at which time you are to be relieved of all further liability in this matter.

Very truly yours,

Frank W. Linnell" (emphasis supplied)
fwl/ah

In January 1955 the defendant delivered a new 1955 Buick to the plaintiff at a cost of $2422 and gave the plaintiff credit for $1925, representing $2000 for the 1954 damaged Buick, less $75 for expenses. In the invoice to the plaintiff we find:

"USED CAR - TRADE-IN:

1954 Buick . . . Sold	1300.00
Plus 1951 Pontiac	700.00
	2000.00"

It appeared that the 1954 Buick was sold by the defendant to a third party, with the invoice in this instance show-

ing "price of car 2400.00" and credit under "settlement . . . Used Car (the 1951 Pontiac) 1100.00."

We are not concerned with finance charges and sales taxes in the sale of either the 1955 Buick or the 1954 Buick. The controversy between the parties arises from the $400 difference between the trade-in allowance of the Pontiac at $1100 and the credit of $700 for the Pontiac given by the defendant to the plaintiff on the sale of the 1955 Buick.

The parties disagree upon the meaning of the phrase "proceeds of the sale of the 1954 Buick" in their contract. The question is whether "proceeds of sale" means the stated sale price of the 1954 Buick of $2400, which includes $1300 in cash or its equivalent and a trade-in allowance of $1100 for the Pontiac, or $2000, which includes $1300 in cash or its equivalent and $700 presumably recovered by the defendant from disposition of the Pontiac. The presiding justice accepted the view that the stated sale price of the 1954 Buick was $2400 and that the Pontiac or its value did not enter the picture, and he so charged the jury. Accordingly, he excluded evidence offered by the defendant tending to show that the Pontiac was in fact sold by the defendant for a net of $700. The case went to the jury with the only evidence of "best price" and "proceeds of sale" of the 1954 Buick at $2400 (apart from taxes, financing charges, and expenses not in dispute).

In our view the plaintiff is correct in her claim. We find no error on the part of the presiding justice. To permit the defendant to say that the Pontiac was not the equivalent of $1100, and thus was not a part of a sale price of $2400 for the 1954 Buick, would be to open the case to collateral issues revolving about the resale of the Pontiac and any other cars which might appear in a series of transactions between the defendant and third parties.

The obligation of the defendant was to obtain the "best price" for the 1954 Buick. There is no suggestion that the

plaintiff in terms authorized the defendant to barter with a third person in making the sale. If, however, we accept the argument of the defendant that it was well understood that a car would be taken by the defendant in part payment, it does not follow that the sale price of the 1954 Buick depended upon the amount finally realized from the Pontiac.

If the defendant chose to overvalue the Pontiac to make a sale of the 1954 Buick, he must suffer the loss. The price of the 1954 Buick was $2400, and $1100 was the value placed upon the Pontiac by the defendant and the Pontiac owner at the time of the sale. The defendant cannot now reduce the value of the Pontiac, and hence the proceeds of sale, by facts occurring after the "best price" was obtained.

The entry will be

Exceptions overruled.

HOWARD T. BRIGGS, PLAINTIFF IN ERROR
vs.
STATE OF MAINE

Aroostook. Opinion, October 19, 1956.

Error. Driving Under Influence. Attempt. Pleading. Demurrer. Certainty. Waiver. Moot Question.

A criminal complaint charging in the words of the statute a respondent with attempting to operate a motor vehicle while under the influence of intoxicating liquor is legally sufficient even though the complaint fails to set forth the overt acts which constituted the "attempt." R. S. 1954, Chap. 22, Sec. 150.

A respondent waives objections to matters of form (i. e., a lack of certainty) in a complaint by proceeding to trial without making timely objection by demurrer.

See special concurring opinion. **The court has no jurisdiction to consider** alleged errors after sentence has been executed by the voluntary payment of fine and costs. The case then becomes moot.

ON EXCEPTIONS.

This is a writ of error before the Law Court upon exceptions to a dismissal of the writ. Exceptions overruled.

A. S. Crawford, for plaintiff in error.

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

SITTING: FELLOWS, C. J., WILLIAMSON, WEBBER, BELIVEAU, JJ. MURRAY, A. R. J. TAPLEY and CLARKE, JJ., did not sit. WILLIAMSON and WEBBER, JJ., concur specially.

MURRAY, A. R. J. In this case, a writ of error, the justice before whom it was heard dismissed the writ. To this ruling the plaintiff in error excepted. The case is before this court on the exceptions. The writ assigned the following errors:

1. The complaint was brought under R. S. 1944, Chapter 19, Section 121, which is now R. S. 1954, Chapter 22, Section 150, charging plaintiff in error with attempting to operate a motor vehicle, to wit: an automobile, while under the influence of intoxicating liquor. Said complaint nowhere alleges any overt act committed by plaintiff in error to constitute such attempt and is insufficient in law.

2. The complaint alleged no offense committed by plaintiff either at common law or under any statute of the State of Maine.

3. The court lacked jurisdiction to try and sentence the plaintiff.

Hearing was had in Houlton Municipal Court, respondent was found guilty, sentenced, and appealed to the Superior Court. In Superior Court after hearing, he was again found guilty, sentenced to pay fine and costs, which he has paid.

Later this writ of error issued, and as we have before said, it was dismissed. The record of both the Municipal Court and the Superior Court were before the justice who heard the writ and are before us.

The error which we shall pass upon is that designated by the plaintiff in error as Number 1; if it is sufficient in law, Number 2; and Number 3 would be the only result which could follow.

"Nothing is presented to a court of errors but a transcript of the record." *Nissenbaum* v. *State,* 135 Me. 393-396. "At common law, the record of a judgment was as the judgment roll." *Nissenbaum* v. *State, supra,* Freeman on Judgments, Section 75.

"Writ of error is the proper remedy for the correction of error on the record. Such writs lie, for errors in law, only for defects evident upon the face of the record." *Nissenbaum* v. *State, supra,* Page 396.

The plaintiff in error says that while the Statute is, "Whoever shall operate or attempt to operate a motor vehicle while x x x" and the charge in the complaint is in the words of the statute, that this is not sufficient that "attempt to operate" is setting out a conclusion, and the complaint should set out facts and not a conclusion. In other words, it should state what plaintiff in error did which was an attempt to drive.

He cites many cases which appear to bear out his contention, but they are cases in which somewhat similar defects were taken advantage of by demurrer.

A crime is charged. The words of the statute are used in charging the crime, but the plaintiff in error says the words in the statute do not describe the crime with certainty. At the most, the charge is not made with the certainty to which the plaintiff in error is entitled. He could

have taken advantage of this by demurring, or he could have waived it by going to trial. He chose the latter course, so we are not called upon to decide this as if we were doing so upon a demurrer.

In *State* v. *Thomes,* 126 Me. 163, respondent was charged with larceny. The property stolen, money, was not sufficiently described. Respondent demurred and demurrer was sustained.

In *State* v. *Woodworth,* 151 Me. 235, respondent was charged with embezzlement. He, after verdict, in Law Court argued that no crime was charged, because there was no description of money embezzled. The court held: "The absence of an allegation in this indictment of a particular description of the money alleged to have been the subject of embezzlement does not vitiate the indictment as this omission was cured by verdict," and court sites 27 Am. Jur. Section 191, Page 736, and further said, "It is equally well settled, however, that defects which are merely matters of form and not of substance, ambiguities, etc., in an indictment or information are cured by verdict; objection to such defects if made after verdict, come too late, regardless of the fact that they might have rendered the indictment bad had they been seasonably taken."

1. We hold that what plaintiff in error points out as error is, at most, uncertainty and has been cured by verdict.

2. That the plaintiff alleges an offense, and attempt to drive an automobile, etc.

3. That the court had jurisdiction to try and sentence the plaintiff in error.

Exceptions overruled.

CONCURRING OPINION

WILLIAMSON, J. I concur in the result but am unable to agree with the reasons on which the court places the decision.

The issue of the case, it seems to me, is this: Did the criminal case of State against Briggs, plaintiff in error, become moot upon the voluntary payment of fine and costs? The single justice in dismissing the writ answered the question in the affirmative. The court, in grounding the decision on the merits of the writ, has, as a prior step, necessarily answered the question in the negative.

On the pleadings before the justice and on the exceptions, the issues discussed and decided by the court were not, in my view, before us.

The writ came before the justice on a motion to quash. The State asserted—and there is no dispute upon the facts —that the record showed that the plaintiff in error had paid the fine and costs and that there was no sentence pending or any other form of restraint that the court could correct, recall, or annul.

In the bill of exceptions we find an agreement of counsel that a plea of *in nullo est erratum* was to be considered as filed in the event that the motion to quash was denied. The dismissal of the writ on the motion is equivalent to the granting of the motion. Hence there is no plea of "no error" in the case, and yet the opinion of the court appears to be based upon consideration of such a plea.

In his written opinion dismissing the writ, the justice said, in part:

> "The State's motion to quash raises the question as to the plaintiff's right to proceed by writ of error in view of the record in the case."
>
> * * * * *
>
> "The plaintiff was tried by jury, found guilty and as a result of this finding was sentenced to pay a fine and costs. This he paid and in so far as the record is concerned, without objection. He now says that the sentence was improper and seeks relief. A writ of error is in its nature similar to an appeal and although there are no cases in Maine

> directly concerning a writ of error involving the exact question here being considered, there is, however, the case of *State* vs. *Osborne,* 143 Me. 10, in which our court agreed with the weight of authority that an appeal from a sentence which had been complied with will not be entertained as a respondent, when he voluntarily pays a fine, brings to an end the case and there is nothing remaining from which to appeal. In conclusion, I find that the plaintiff in error was not at the time of instituting the writ under actual or technical restraint and that by his own act he has satisfied the sentence and judgment so that there is no judgment upon which a writ of error could operate.
>
> "In view of this conclusion, there remains no necessity to consider the validity of the complaint."

Plainly the merits of the writ were not touched upon by the justice. The court, however, as I read the opinion, in acting upon exceptions limited necessarily to the dismissal of the writ on a motion to quash, passes upon the errors asserted in the writ. On the theory so expressed, it seems to me the exceptions should be sustained, not overruled, and the case remanded for hearing and decision below on the merits. In my opinion, however, the justice correctly dismissed the writ on the grounds stated by him, and so I would uphold his decision by overruling the exceptions.

The case finally comes to this, as I see it: Is the rule of *State* v. *Osborne,* 143 Me. 10, 54 A. (2nd) 526, to stand or to be overruled? On the facts in *Osborne* we held that on voluntary payment of fine and costs the case ended. The court carefully considered the problem, noted the views in other jurisdictions, and anchored our law to the weight of authority. On page 14, the court said:

> "The court is in accord with the weight of authority that the present case reached finality upon confession of guilt and voluntary payment of the penalty imposed. There was nothing to appeal from."

There are differences, readily apparent, between appeals from municipal courts to the Superior Court, as in *Osborne,* exceptions and motions directed to the Law Court, and writs of error. From my study I am unable to discover any principle, however, that would yield a different result because the instant case involves a writ of error.

The underlying reason is that on carrying out of the sentence, whether it be payment of fine or completion of imprisonment or restraint, the litigation is ended, and thereafter action, as here by writ of error, is directed not to an existing but only to a moot case.

This view is strengthened by *ex parte Mullen,* 146 Me. 191, 79 A. (2nd) 173, in which the petitioner sentenced upon a plea of *nolo contendere* and on probation, was outside of the State with the sanction of the probation officer. It was held on report that the petitioner was entitled to the writ, and the case was remanded to the justice for its issuance. The court said, "One under the restraint of probation, as well as one confined under a sentence, has the right to test the sufficiency of the process under which he is restrained."

The emphasis placed upon restraint is significant. The applicability of the well recognized prohibition against action by a fugitive from justice was admittedly not in issue. If an exsting restraint was not a *sine qua non* for issuance of a writ of error, the court, it would seem, could without more have ordered the writ to issue.

A strong argument may be made for the minority rule under which the writ of error in the instant case would be open to consideration on the merits. The principle is precisely stated by Justice Holmes in *Commonwealth* v. *Fleckner* (Mass.), 44 N. E. 1053. See also *Barthelemy* v. *People* (N. Y.), 2 Hill 248, 255. The opportunity for a man at all times to clear his record is of course of great value. Against

this must be weighed the advantage to the State that litigation be ended at some stage.

The plaintiff in error argues that as a consequence of his "erroneous conviction" he has been damaged by the mandatory loss of his operator's license, and that if he should again stand convicted of driving under the influence of liquor, he would suffer enhanced punishment under the statute. Compare *U. S.* v. *Morgan,* 346 U. S. 502, 74 S. Ct. 247 (second offender case).

It is sufficient answer, as I see it, to say that when and if an outstanding criminal record is shown to handicap a person, he will not be precluded from testing its legality solely on the ground that the case is moot. At that point the case will not be closed. It will again have life in relation to another case or transaction. We are not here considering other reasons, such as limitations of time, which might prohibit the use of a writ of error.

In the present instance there is nothing to indicate that the petitioner is harmed in any way by the record, assuming it shows an unlawful conviction. There is neither allegation nor proof that he is thereby deprived of an operator's license, or that he is subject to additional punishment as a second offender.

It is not shown that he is suffering any loss or damage from the outstanding record, assuming error, apart from loss or damage to his general reputation. Such loss or damage under the majority rule is not sufficient cause to reopen the case.

In conclusion, I am of the view that the *Osborne* case is controlling and that any change in the rule therein expressed should come from the legislature and not the court. See 24 C. J. S., Criminal Law, § 1668; 2 Am. Jur., Appeal

and Error, §§ 230, 231, 232; Annotations 18 ALR 867 and 74 ALR 638; cases cited in *Osborne, supra.*

Justice Webber authorizes me to state that he joins in this concurring opinion.

STATE OF MAINE
vs.
KENNETH P. JONES

Hancock. Opinion, October 26, 1956.

Criminal Law. Hunting Accident. Gross Negligence. Statutory Construction.

The "negligence" referred to in R. S. 1954, Chap. 37, Sec. 146, (which defines as a felony the negligent or careless shooting and wounding of a human being while hunting) is criminal negligence of a degree which may be denominated as gross or culpable and not mere negligence of a degree required for civil liability.

In a criminal prosecution for a felony under a penal statute, the rule of strict construction is applicable and a respondent is entitled to an interpretation most favorable to him.

See dissent. Whether legislative intent requires a literal interpretation of the statute.

ON EXCEPTIONS.

This is a criminal action for violation of R. S. 1954, Chap. 37, Sec. 146. The case is before the Law Court upon exceptions. Exceptions sustained.

William Fenton, for State.

Silsby & Silsby,
Herbert T. Silsby II, for defendant.

SITTING: FELLOWS, C. J., WILLIAMSON, TAPLEY, JJ., MURRAY, A. R. J. WEBBER, and BELIVEAU, JJ., dissent. CLARKE, J., did not sit.

TAPLEY, J. On exceptions. The respondent was tried on an indictment charging that he, while being then and there on a hunting trip, did feloniously, negligently and carelessly shoot and wound a human being. The case was tried at the December Term, 1955, of the Superior Court within and for the County of Hancock. Upon conviction by the jury the respondent was sentenced. The case is before us on the following exceptions:

1. To a portion of the presiding justice's charge to the jury which, in substance, charged civil negligence and carelessness.

The excepted portion of the charge also contains instruction by the court that contributory negligence on the part of the victim is not an issue.

2. The respondent requested the following instruction which was denied:

> "Criminality is not predicated upon mere negligence necessary to impose civil liability, but upon that degree of negligence or carelessness which is denominated gross or culpable."

3. To the refusal of the presiding justice to direct a verdict of not guilty.

The basis of the prosecution is found in the provisions of Sec. 146, Chap. 37, R. S. 1954, the pertinent portion of which reads as follows:

> "Whoever, while on a hunting trip or in the pursuit of wild game or game birds, negligently or carelessly shoots and wounds, or kills any human being, shall be punished by a fine of not more than $1,000, or by imprisonment for not more than 10 years."

The first two exceptions concerning the charge as to negligence and carelessness and the refusal to instruct as to "criminal negligence" so-called, brings in sharp focus the interpretation of the words "negligently or carelessly" as used in the statute upon which the respondent was prosecuted and convicted.

The respondent claims prejudice and aggrievement because the jury was instructed on civil negligence and carelessness, while the State argues that such definitions were legally proper in light of their use in the statute. There can be no question that we are dealing with a penal statute. According to the terms of this statute, a person may be convicted for negligently or carelessly shooting and wounding a human being, such as in this case, or he may be convicted of homicide.

There would be no problem if the prosecution under Sec. 146, Chap. 37, R. S. 1954 was for the killing of a human being by the respondent while he was "then and there on a hunting trip." The instructions of the presiding justice would, no doubt, have followed the well accepted and recognized rule of gross or culpable negligence which it is necessary to establish in a conviction of involuntary manslaughter. *State of Maine* v. *Ela,* 136 Me. 303; *State of Maine* v. *Hamilton,* 149 Me. 218. Under the circumstances of this case we are dealing with a statutory creation which in effect defines a crime and provides punishment therefor. The essential element of the crime to be proven beyond a reasonable doubt is that the respondent did *negligently* or *carelessly* shoot and wound a human being.

The statute is not only penal but, by the punishment it prescribes, puts itself in the category of a felony statute. In order to approve the instruction of the presiding justice of civil negligence, we must say that this penal statute is divisible by interpretation to the extent that the homicidal portion requires instructions on gross and culpable negli-

gence, while the crime of a lesser degree is committed by a person who is guilty of civil negligence and carelessness.

We start wth the premise that we are considering a statute which defines a crime and provides punishment for its violation; in other words, it is a "criminal statute." The attorney for the respondent cites with confidence the case of *State* v. *Wright,* 128 Me. 404. The *Wright* case treats of the crime of manslaughter and holds that the degree of negligence or carelessness in such a case must be gross or culpable. The prosecution in the *Wright* case was based on Sec. 3, Chap. 129, R. S. 1930, the pertinent provisions of which are identical with the statute involved in the instant case. Sec. 146, Chap. 37, R. S. 1954. The late Chief Justice Sturgis wrote, on page 405:

> "At the trial, the prosecution relied upon involuntary manslaughter and offered evidence to prove that the respondent, while on a hunting trip, negligently shot the deceased as he rode by on horseback."

and following this statement he said:

> "Criminality is not predicated upon mere negligence necessary to impose civil liability but upon that degree of negligence or carelessness which is denominated gross or culpable. ****** In his charge to the jury, the presiding Justice inadvertently failed to observe this distinction between civil and criminal negligence, instructing the jury to measure the respondent's guilt by the rules of negligence applicable only to civil cases."

The interesting portion of this quote, insofar as the instant case is concerned, is not the degree of negligence or carelessness determined to be necessary in the manslaughter case in which these elements were involved but rather the reference to "*criminality* is not predicated upon mere negligence necessary to impose civil liability" and "the presiding Justice inadvertently failed to observe this distinction be-

tween *civil* and *criminal* negligence." (emphasis ours). *Turner* v. *State* (Ga.), 16 S. E. (2nd) 160. This case involved a statute prohibiting any person from unlawfully, carelessly or negligently setting fire to woods, land or marshes thereby causing injury to others and further providing that such acts shall be termed misdemeanors. The court determined that the words "carelessly or negligently" as used in the statute meant criminal negligence. In defining criminal negligence the court said:

> " 'Criminal negligence is something more than ordinary negligence which would authorize a recovery in a civil action. Criminal negligence as used in our Criminal Code is the reckless disregard of consequences, or a heedless indifference to the rights and safety of others and a reasonable foresight that injury would probably result.' Cain v. State, 55 Ga. App. 376, 190 S. E. 371, 372."

The legislature in enacting Sec. 146 of Chap. 37, R. S. 1954, has created a statute which makes the negligently or carelessly shooting and wounding of a human being a crime. It has without equivocation placed negligent and careless acts under the provisions of the statute as criminal acts without specifying the degree of negligence and carelessness. We must bear in mind that the statute concerns a crime and not civil liability; that the punishment indicates the crime a felony and not a misdemeanor; that a person charged with a violation of this statute is entitled to all the protection afforded him by the rules of criminal procedure. When the presiding justice delivered his charge to the jury he instructed that the State must prove its case beyond a reasonable doubt and also that any contributory negligence on the part of the respondent was not "at issue here as such." These instructions were entirely proper, this being a criminal case and involving negligence. He then departed from the criminal aspect of the case and instructed the jury on civil negligence which in effect permitted the jury to re-

turn a criminal verdict based on a criminal statute with instructions of a civil nature defining the criminal act.

The statute does not within itself define the words negligence or carelessness. They are words synonymous in meaning.

There are many cases defining the word "negligence" with such superlatives as gross, culpable, wanton, slight, ordinary, civil and criminal. We have seen that in Maine, negligence in involuntary manslaughter cases must be gross or culpable, *State* v. *Ela, supra,* and there exists a distinction between civil and criminal negligence, *State* v. *Wright, supra. People* v. *Pociask* (Cal.), 91 P. (2nd) 199, at page 203:

> "Negligence assumes countless forms and occurs in all walks of life and human endeavor. Generally speaking, when actionable, it is a violation of private rights and injuries for which there is a remedy only by civil action. That the legislature has the power to declare negligence the basis and subject matter of a crime there can be no question. When so declared such negligence becomes criminal."

State v. *Lancaster,* (N. C.), 180 S. E. 577, at page 578:

> "In recent decisions, this court has definitely and unequivocally declared that in criminal cases involving negligent injuries and killing that the difference between culpable and criminal negligence and civil negligence must be observed and applied at the trial."

Cooper v. *State* (Okl.), 67 P. (2nd) 981, at page 988:

> "Negligence is criminal because it constitutes a violation of an obligation to the State."

We are considering a penal statute and, what is more, a felony statute. The rule of strict construction is applicable. *Smith, Petitioner* v. *State of Maine,* 145 Me. 313.

This respondent is entitled to an interpretation of the words "negligently or carelessly" which would be most favorable to him. *State* v. *Wallace,* 102 Me. 299.

The respondent was indicted under the provisions of a felony statute and, according to the statute, he upon conviction could be subject to a sentence of great severity. Conformably to the rules of criminal procedure, the State had the burden of proving beyond a reasonable doubt every essential element necessary to establish the offense. The subject matter of the crime as defined by the statute is the *negligent* or *careless* shooting and wounding of a human being. We have determined that negligence as used in this criminal statute is criminal negligence. There is a definite line of demarcation between civil and criminal negligence and the two classes are not consistent one with the other. Good reasoning dictates that a criminal statute that could in effect deprive a person of his liberty should not be subjected to both civil and criminal procedures. It must fall within one category or the other. A conviction could more easily be obtained on instructions of that degree of negligence which would support civil liability than the degree necessary to establish criminal responsibility.

The court below was in error in instructing the jury on civil negligence, and refusing to give the requested instruction.

There appears to be no necessity to consider respondent's exceptions to the refusal to direct a verdict of not guilty.

Exceptions pertaining to instructions regarding civil negligence and refusal to instruct sustained.

WEBBER, J., DISSENTING

I find myself unable to agree with the opinion of the court. The issues presented seem to me of sufficient importance to

warrant some indication of the reasons which prompt a contrary view. The problem is one which has long troubled the justices at *nisi prius* as they faced the necessity of giving proper instructions to juries.

I do not understand that the court intends by its opinion to question the power of the legislature to define crimes so long as it keeps within the bounds of the constitution. That issue is not controversial. As was stated in 14 Am. Jur. 766, Sec. 16, "The legislature has the power to define what acts shall constitute criminal offenses and what penalties shall be inflicted on offenders, and generally to enact all laws deemed expedient for the protection of public and private rights and the prevention and punishment of public wrongs, the expediency of making any such enactment being a matter of which the legislature is the proper judge." The power of a legislature to define a crime based upon ordinary negligence has been recognized in other jurisdictions. *State* v. *Hedges,* 8 Wash. (2nd) 652, 113 P. (2nd) 530; *Clemens* v. *State,* 176 Wis. 289, 185 N. W. 209; *People* v. *Pociask,* 14 Cal. (2nd) 679, 96 P. (2nd) 788. I conclude that our legislature could then, if it saw fit, impose criminal penalties for ordinary negligence on the part of a hunter resulting in the shooting and wounding or killing of a human being. The issue is rather whether it has done so by the definition of the crime set forth in R. S. 1954, Chap. 37, Sec. 146.

The court holds that the negligence and carelessness referred to in that statute must be of the degree usually referred to as gross and culpable such as has always been required for a conviction for involuntary manslaughter at common law. *State* v. *Wright,* 128 Me. 404; *State* v. *Ela,* 136 Me. 303, 308; see *State* v. *Pond,* 125 Me. 453. The statute itself does not specify the degree of negligence. The question can be resolved only by ascertaining what the legislature intended by its use of the words "negligently or carelessly" in this particular enactment. The shooting and kill-

ing of another as the result of gross and culpable negligence spells involuntary manslaughter and is punishable under the provisions of R. S. 1954, Chap. 130, Sec. 8 by "a fine of not more than $1000 or by imprisonment for not more than *20 years.*" (Emphasis supplied). The maximum sentence to imprisonment imposable under R. S. 1954, Chap. 37, Sec. 146 is, however, but *ten years.* If the negligence referred to in Chap. 37, Sec. 146 means what the court now holds that it means, we have an interesting paradox, for the legislature is providing two different punishments for the same crime, i.e., involuntary manslaughter. If the respondent killer is a hunter and prosecuted as such, the maximum term of years to which he can be sentenced is ten, but if he is a non-hunter, he faces a maximum sentence of twenty years. I cannot believe the legislature so intended. In my view, the legislature had in mind the alarming increase in so-called hunting accidents in our Maine forests. The recreation industry is one of the most valuable assets of the State. It will most certainly be impaired if hunters fear to enter the woods. An even greater consideration is the protection of our Maine citizens and our guests from death or bodily harm. I think it can safely be asserted that most of these tragic accidents result, not from any wanton or reckless indifference to the safety of others such as would base a charge of manslaughter, but rather from a simple failure to exercise ordinary care in the use of a deadly firearm. All too often, the respondent and his victim are related by ties of blood or marriage or have for many years been close friends or hunting companions. Rare indeed would be the case in which the State could show that one was recklessly indifferent to the safety of another to whom he was bound by such relationship. Rather are we dealing for the most part with the respondent who was morally certain that he saw game and who merely failed to take that long and careful second look which reasonable prudence demands before pulling the fatal trigger. In my view, the legislature in its

wisdom has concluded that only by imposing rigorous penalties for the failure to exercise ordinary care and prudence can the hunters who roam our woods be compelled to be careful. It seems clear to me that the legislature has defined a new crime made purposely severe as to the degree of negligence to be proven and limited in its application only to hunters. The holding of the court, requiring as it does proof by the State of gross and culpable negligence and a wanton disregard of consequences, seems to me to depart from the practical realities of the situation and virtually to emasculate the statute.

Cases cited in the opinion of the court which relate either to the degree of negligence required at common law as a basis for conviction for manslaughter, or to specific statutory definitions of "criminal negligence" in other jurisdictions, do not seem to me controlling of the issue before us. I find no suggestion in any of them that a legislature may not in the exercise of the police power and under proper circumstances impose penalties for the failure to exercise ordinary care. That is exactly what our legislature intended to do by its enactment of this law. My interpretation of the legislative intent underlying this statute was obviously shared by the learned justice below. I would overrule the exceptions.

STATE
vs.
MUNSEY

Sagadahoc. Opinion, November 3, 1956.

Driving Under the Influence. Blood Test. Due Process.

R. S. 1954, Chap. 22, Sec. 150 (blood test statute) establishes no rights as to the making of tests and imposes no obligations on either party.

A blood test once properly made becomes available to either party exactly the same way other material evidence is available.

Whether a respondent's rights have been violated (in regard to an alleged refusal by officers to permit a blood test) must be determined by the Constitutional guarantee of "due process."

"Due Process" requires that one have a reasonable opportunity to attempt to gather evidence in his behalf.

What is reasonable depends upon circumstances.

State v. *Demerritt*, 149 Me. 380, compared.

ON EXCEPTIONS.

This is a criminal action for operating a motor vehicle while under the influence of intoxicating liquor. The case is before the Law Court, after verdict of guilty, upon exceptions. Exceptions overruled. Judgment for State.

George M. Carleton, for State.

Harold J. Rubin, for defendant.

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

WEBBER, J. The respondent here was charged with operation of a motor vehicle while under the influence of intoxicating liquor. A jury heard the evidence and adjudged the

respondent guilty. During the course of his charge to the jury the presiding justice gave the following instruction:

> "Now collaterally there has been comment in this case relative to the presence or absence or the circumstances involved as regards a blood test, and I want to disabuse your mind of one thing made in argument. The statute or the law in the case and applicable to these cases does provide that if a blood test is taken that under certain circumstances with which you are not now concerned, the result of that test is admissible in evidence and goes in with all the other facts to aid you in determining the issue. There is no law in Maine which gives the accused the right to have a blood test taken. There is no obligation on the part of the arresting officer to provide for a blood test. There is no obligation on the part of an arresting officer to run any errand for an accused. Anything that the officer does or does not do under those circumstances is purely a matter of courtesy, if you care to call it that, or an accommodation to an accused. So that I would have to tell you as a matter of law in the instant case no rights of this accused have, according to the evidence as we have it here, been violated in that regard."

Exceptions were taken to this portion of the charge. The respondent contends that he had a "right to have a blood test taken," which right, he argues, was vouchsafed to him by the statute dealing with the prima facie effect of blood tests in such cases.

The statute in question is R. S. 1954, Chap. 22, Sec. 150. The pertinent portion of the statute reads as follows:

> "Evidence that there was, at that time, 7/100%, or less, by weight of alcohol in his blood, is prima facie evidence that the defendant was not under the influence of intoxicating liquor within the meaning of this section. Evidence that there was, at that time, from 7/100% to 15/100% by weight of alcohol in his blood is relevant evidence but it is

> not to be given prima facie effect in indicating whether or not the defendant was under the influence of intoxicating liquor within the meaning of this section. Evidence that there was, at the time, 15/100%, or more, by weight of alcohol in his blood, is prima facie evidence that the defendant was under the influence of intoxicating liquor within the meaning of this section. All such tests made to determine the weight of alcohol in the blood shall be paid for by the county wherein the violation of the provisions of this section was alleged to have occurred. (Blood tests the expense for which has been paid for by, or charged to, the county or state may be admissible in evidence. Repealed by P. L. 1955, Chap. 94) The failure of a person accused of this offense to have tests made to determine the weight of alcohol in his blood shall not be admissible in evidence against him."

Obviously, the statute does but three things. (1) It establishes the prima facie effect of a showing of certain quantities of alcohol in the blood as tending to prove the presence or absence of influence from the alcohol consumed. (2) It provides protection for the respondent from any prejudice which might result from his refusal or failure to have tests made. (3) It provides for payment for such tests if they are made. The statute itself establishes no rights as to the making of tests and imposes no obligations on the part of either arresting officers or the respondent.

The test, once properly made, becomes available to either the State or the respondent in exactly the same way that other material evidence is available. It may be said that it is distinguishable from other types of evidence only in one particular and that has to do with the timing of the taking of the blood sample to be tested. By the express terms of the statute, the thing to be ascertained is the per cent by weight of alcohol in the blood "at the time" of the alleged offense. Obviously, there will always be some gap in time between the alleged unlawful operation and the moment of

the taking of the blood sample. The more remote the time of taking the sample, the less persuasive will be the result, especially where it is less than 15/100% by weight of alcohol in the blood and thereby tends to support the contentions of the respondent. If a test proves favorable to a respondent, it is of the utmost importance to him to be able to relate the result to a time as close as possible to the time of the alleged offense. In short, we are dealing with evidence of limited availability which, if not gathered promptly, either cannot be gathered at all or at least can readily lose its evidentiary effect.

We do not think the rights of the respondent are to be ascertained from an examination of the statute. Rather are they determined by the constitutional guarantee that one may be deprived of his liberty only by due process of law. "Due process of law is another name for governmental fair play." Re *John M. Stanley,* 133 Me. 91, 95. Fair play requires, for example, that a respondent in a criminal case must be given a reasonable opportunity to employ and consult with counsel before trial. *Chandler* v. *Fretag,* 348 U. S. 3, 75 S. Ct. 1. We think that for the same basic reasons a respondent charged with operation of a motor vehicle while under the influence of intoxicating liquor is entitled to a reasonable opportunity to attempt to procure the seasonable taking of a blood sample for test purposes. What is reasonable will of course depend on the circumstances. When the respondent is detained under arrest, the opportunity afforded him must be consistent with safe custody. Under ordinary circumstances, a respondent who is orderly and cooperative will be permitted to use the telephone to communicate with a qualified doctor of his own selection. In many places of temporary detention it is the practice of the officers to call a doctor at the request of the respondent. There is never certainty that these efforts will be successful or that a doctor will be procured in time to make an effective test. If all reasonable efforts fail and no blood sample is in

fact procured, no rights of the respondent are infringed for his right is not to have a test sample taken but *only to have a reasonable opportunity* to attempt to gather the desired evidence. When the respondent is held incommunicado and his requests for assistance in procuring a doctor are unreasonably ignored or refused by the detaining officers, it may be said that the respondent is denied the essentials of governmental fair play. Officers charged with law enforcement must always be mindful that the public has as great an interest in the vindication of the innocent as it does in the punishment of the guilty.

We find nothing in the foregoing statement which is not in harmony with the expressions in *State* v. *Demerritt,* 149 Me. 380. In that case the respondent made the ingenious contention that by not arresting him forthwith, the State lulled him into a feeling of security as a result of which he failed to procure a blood test. The case in essence holds that one who is free and not under restraint can hardly contend that he does not have a reasonable opportunity to obtain evidence; and that the State is under no obligation to make an immediate arrest but is only limited by the Statute of Limitations. It is true that in the opinion casual reference is made to a "right to have a blood test," but a reading of the phrase in context makes it obvious that the only "right" under consideration was the right to a reasonable opportunity to seek the desired evidence. In this respect the opinion made direct reference to the requirement of due process.

Applying these principles to the matter before us, we find no error below. The respondent took the stand in his own behalf. He testified that after being locked in his cell, he "hollered" to the officers and demanded a blood test; that one of the officers asked him what doctor he wanted; that he designated a "Dr. J. Smith" as his choice; that the officer at once instructed the desk man to call that doctor;

that the officer then reported that Dr. Smith was busy on a case and "you can't get him." The respondent does not contend that he called out to the officers again with reference to procuring a doctor, but he admits that within fifteen minutes thereafter upon his request he was permitted to use the telephone and communicate with his wife. He in no way suggests that he was prevented from using the telephone to call another doctor or from requesting his wife to procure one for him. In determining whether an issue arose to be submitted to the jury, we consider only the evidence most favorable to the respondent and disregard the testimony of the officers which indicated that the respondent in fact wanted no doctor except Dr. Smith. On this state of the evidence, then, no issue as to "reasonable opportunity" was presented as a jury question. That the respondent failed to take advantage of the reasonable opportunity which was available to him was a matter of his own choice. The officers were under no obligation to try to procure a doctor of their own selection regardless of the wishes or preferences of the respondent. Where the respondent failed to pursue the matter of a blood test further, one can only conclude that he no longer desired one. The decision was his to make and his alone.

There was no occasion for the presiding justice to instruct the jury on any issue pertaining to a blood test except as the necessity arose from the final arguments of counsel. The record does not disclose what these arguments were, but we infer from the statements in the charge that counsel for the respondent contended that essential rights of the respondent had been violated. Viewed in this light, the instructions were entirely accurate and sufficient. Had an issue been raised by the evidence, it would have been helpful and perhaps requisite to have distinguished for the jury between a right to have a blood test and a right to a reasonable opportunity to attempt to procure a blood test. On the state of the evidence, however, reasonable and reasoning minds

could not differ and could only find that the respondent had been afforded the reasonable opportunity to which he was entitled as a matter of fair play. Therefore no such additional and explanatory instruction was required and the respondent takes nothing by his exceptions to the instructions as given.

Exceptions overruled.

Judgment for the State.

MAINE POTATO GROWERS, INC.
vs.
H. SACKS AND SONS

Aroostook. Opinion, November 10, 1956.

Exceptions. Evidence. Statute of Frauds.

An exception "that the findings of a single justice are erroneous as a matter of law" is too general to be considered.

Where a contract for the sale of potatoes is single and entire the Statute of Frauds is satisfied by the delivery and acceptance of four out of ten carlots. R. S. 1954, Chap. 185, Sec. 4.

ON EXCEPTIONS.

This is an action of assumpsit before the Law Court, after findings by a single justice for plaintiff, upon exceptions. Exceptions overruled.

George V. Blanchard,
Floyd L. Harding, for plaintiff.

James P. Archibald,
Aaron A. Putnam, for defendant.

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

WEBBER, J. In this case we have before us a bill of exceptions in which it is first recited that a finding for the plaintiff by a single justice below was erroneous as a matter of law on the evidence presented. Nothing further appears to inform us of the nature of the alleged legal error. The exception is too general and cannot be considered. *Heath et al., Applts. From Decree,* 146 Me. 229, 233. Moreover, the report of the evidence is not made part of the bill of exceptions. The bill must be strong enough to stand alone. *Bradford* v. *Davis,* 143 Me. 124, 128; *Jones* v. *Jones,* 101 Me. 447. The first exception presents no issue for determination here.

The second exception is expressly waived and is not before us.

The third and last exception deals with the admission in evidence of a teletype message. The bill of exceptions fails to state the contents of the message, assigns no reason for error and indicates no basis of prejudice or harm to the excepting party. This exception has no merit.

As is often our custom where decision rests on purely technical grounds, we have carefully examined the report of the evidence (which has been made available to us although not incorporated in the bill of exceptions) in order to satisfy ourselves that no manifest injustice results from our decision. There is ample evidence of an oral contract made by a buyer and a seller for the sale of ten cars of potatoes of specified type at an agreed price. Delivery was to be made on buyer's request during February, 1953. The sale was consummated by a broker who acted for both buyer and seller. *Green & Bennett* v. *McCormack,* 83 N. H. 509, 144 A. 853. Agreement to the terms of sale was obtained from the seller by the broker by means of teletype, and from the buyer by the broker by telephone conversation. The

terms of the sale were confirmed by written memorandum sent by the broker to both buyer and seller. Pursuant to the oral contract, the buyer requested delivery of four cars and paid for them at contract price. The buyer subsequently requested extension of subsequent delivery dates to March, 1953, which request was granted by the seller and the contract modified to that extent. In March, however, the buyer repudiated the contract and refused to perform further. The seller, after due notice to the buyer, then sold the remaining six cars at the market and began action to recover his loss. The justice below properly treated the oral contract as single and entire and found that the Statute of Frauds was satisfied by delivery of and payment for the four cars accepted. *Weeks* v. *Crie,* 94 Me. 458, 463; *Ford* v. *Howgate,* 106 Me. 517, 523; R. S. 1954, Chap. 185, Sec. 4, Subsec. I. It is manifest that exceptions in proper form to raise legal issues would not have availed the defendant buyer.

The entry will be,

Exceptions overruled.

BOUCHARD ET AL.
vs.
SARGENT, INC., AND HARTFORD ACCIDENT INDEMNITY CO.

Kennebec. Opinion, November 20, 1956.

Workmen's Compensation. Scope of Employment. Frolic. Knowledge.

An employee engaged in cutting and burning brush in the woods on returning to the work area during lunch hour decided not to use one of the boats provided by his employer for crossing a stream. In attempting to swim across the stream he drowned. Decree denying compensation affirmed.

For an accident to arise out of employment, there must be some condition, risk or hazard of the employment, except for which the injury would not have occurred.

Where the accident arises out of an independent frolic or bit of horse play entered into by an employee and unrelated to his work, it has been held not to be compensable.

Mere knowledge by the employer of the act causing injury does not make compensable an otherwise non-compensable injury.

ON APPEAL.

This is an appeal from the dismissal of a petition for compensation.

The case is before the Law Court upon appeal from a *pro forma* Superior Court decree approving the action of the Industrial Accident Commission. Appeal denied.

Gaston M. Dumais,
William D. Hathaway, for petitioner.

Francis Rocheleau, for Insurance Company.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

WEBBER, J. This was an appeal from a *pro forma* decree of the Superior Court affirming a decision of the Industrial Accident Commission which dismissed appellants' petition for an award of compensation. The facts are not in dispute. On May 25, 1955, Alphie Bouchard, Jr. was employed as one of a crew engaged in cutting and burning brush in the vicinity of Winthrop. In order to reach the location of the work operation from Winthrop, the members of the crew customarily crossed a stream in boats borrowed by their employer from the owner and provided for that purpose. Just before noon on the day of the fatal accident, Bouchard left the work area, crossed the stream in one of the boats, and walked to Winthrop where he obtained a soft drink. The employees had no regular lunch hour, but no issue is raised as to the right and privilege to leave the work area at this time of day to procure refreshments. Bouchard returned to the stream and consumed his drink. While he was so engaged, he was joined by his foreman and together they started to return across the stream to the work location. At this point Bouchard suddenly decided to swim the stream although he was fully clothed. He waded into the stream and then returned to deposit his wallet and watch in the boat. He then waded upstream for some distance, stood on some tree roots, and dived into the water. He came to the surface, took another dive, and reappeared in midstream "hollering for help." The foreman was unable to swim and his efforts to rescue Bouchard were unsuccessful. Bouchard was drowned. Neither Bouchard nor any other employee had ever before engaged in swimming the stream.

On these facts the Commission determined that the accidental death did not arise out of or in the course of the employment and was not compensable.

For an accident to arise out of the employment there must be some condition, risk or hazard of the employment except for which the injury would not have occurred. "To

arise out of the employment the injury must have been due to a risk of the employment." *Boyce's Case,* 146 Me. 335 at 341; *Riley* v. *Oxford Paper Co. et al.,* 149 Me. 418. In other words, there must be a causal connection between the conditions under which the employee worked and the injury which he received. *Westman's Case,* 118 Me. 133; *Washburn's Case,* 123 Me. 402, 404. Where the accident arises out of an independent frolic or a bit of horseplay entered into by the employee and unrelated to his work, it has been held not to be compensable. *Washburn's Case, supra.* Where, however, there have been a series of incidents of such prankish conduct or activity so that it may be said that a custom or practice has grown up and become accepted, it has been held that such custom or practice becomes integrated into the climate of employment and becomes a risk or hazard under which the work is performed. *Petersen's Case,* 138 Me. 289; *Ognibene* v. *Rochester Manufacturing Co.,* 298 N. Y. 85, 80 N. E. (2nd) 749. That some types of horseplay will occur under some conditions of employment must perhaps be considered inevitable. However, where one deliberately and substantially steps outside of his employment to engage in a personal prank or frolic of his own, he has for the moment abandoned his work and the resulting accident cannot be said to arise out of or in the course of his employment. The New York court in *Davis* v. *Newsweek Magazine et al.,* 305 N. Y. 20, 110 N. E. (2nd) 406, a case involving death by drowning, held the swim for purely personal pleasure not to be "work-connected." In *Gaurin* v. *Bagley & Sewall Co.,* 298 N. Y. 511, 80 N. E. (2nd) 660, the court had no difficulty in determining that where an employee left his work of piling lumber on a river bank to engage in the prank of pushing an old wagon into the stream and in so doing was drowned, the accident did not arise out of or in the course of employment. See also Larson's Workmen's Compensation Law, Vol. 1, Page 365, Sec. 23.64.

We think that upon these facts the Commission was compelled to find as it did that this fatal accident was not compensable. The employee was under no direction or compulsion to swim the stream. A relatively safe and reasonable method of crossing the stream by boat had been provided by the employer and without exception had been used previously by the decedent and all other employees. There had been no previous incidents of swimming the stream which could give rise to any suggestion that any new or additional risk or hazard of employment had been added as a part of the work environment. The hazard here was of course that anyone who went swimming in the stream might drown. This hazard was common to all who came to the stream to swim. There was nothing about the employment which required or even contemplated that any employee would swim the stream. " 'The causative danger must be peculiar to the work, not common to the neighborhood.' " *Westman's Case, supra,* at 143; *Ferreri's Case,* 126 Me. 381 at 383. The unfortunate victim of this accident suddenly decided to engage in a frolic of his own. In so doing he substantially and deliberately abandoned his work and incurred a risk entirely disassociated from his employment.

The appellants place great emphasis on the fact that the employer's representative stood by and did nothing as the employee entered the stream. At the outset serious doubt arises as to whether there was any occasion for any action by the foreman. The employee was not engaged in the direct performance of his tasks. It is apparent that employees were permitted considerable latitude and relative freedom from control and discipline by the employer with respect to a lunch period. The employee apparently was not in violation of any of his employer's prohibitions if he sought some personal recreation at about this hour of the day. The risks were as obvious to one person as to another. In fact, the risks were slight to a relatively good swimmer. But in any event the real issue is not whether the employer through

his agent had knowledge of this particular act. Knowledge of the employer plays a part primarily as it tends to show that certain customs and practices have gained such acceptance as to become an incident of the employment. Mere knowledge of the very act for which compensation is now sought is not enough to make the injury compensable if the act, not otherwise compensable, is not part of a stream of similar incidents which create a hazard of employment. This theory of a chain of incidents actually underlies the result reached in such cases as *Petersen's Case, supra,* even though the language of the opinion seems to emphasize knowledge of the employer. In the realm of workmen's compensation we are not dealing with questions of negligence on the part of employers. The test is always whether or not the employee was injured as a result of a hazard of his employment. As was well stated by Mr. Justice Cardozo in *Leonbruno* v. *Champlain Silk Mills,* 229 N. Y. 470, 128 N. E. 711, 712: "The test of liability * * * is not the master's dereliction, whether his own or that of his representatives acting within the scope of their authority. The test of liability is the relation of the service to the injury, of the employment to the risk." It is necessary to distinguish the situation in which the employer impliedly authorizes a particular act which benefits the employer and is related to the employment. It is upon this basis that we distinguish *Pridgen* v. *Murphy,* 44 Ga. App. 147, 160 S. E. 701. In that case the employee was riding a horse to ascertain the suitability of the horse for the employer's work. The general manager stood by and offered no objection. The court held that this conduct of employer's agent was implied authorization to the employee to perform this service for the employer. Therefore the act of riding became a function of his employment and his resultant injury upon being thrown from the horse arose out of and in the course of that employment. Quite different is the situation where the employee, without objection on the part of his foreman, sub-

stantially departs from his employment and engages in a frolic of his own which is of no possible service or benefit to the employer and bears no relation whatever to the functions of his employment. In such a case the knowledge of the employer does nothing to make compensable an otherwise non-compensable injury.

We must conclude therefore, as did the Commission, that no risk or hazard of the employment caused the death of this employee and that the personal activity in which the employee was engaged at the time of his death was not in the course of his employment.

Appeal dismissed.

Decree below affirmed.

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

* * * * * *

QUESTIONS PROPOUNDED BY THE
GOVERNOR AND THE EXECUTIVE COUNCIL
ON NOVEMBER 27, 1956
ANSWERED DECEMBER 3, 1956

LETTER PROPOUNDING QUESTIONS

STATE OF MAINE
OFFICE OF THE GOVERNOR
AUGUSTA

November 27, 1956

To the Honorable Justices of the Supreme Judicial Court:

In accordance with the provisions of Chapter 5, of the Revised Statutes of 1954, a general election was held

throughout the State on Monday, September 10, 1956. Subsequent to the election, on September 26, 1956, in accordance with the provisions of Section 50 of said Chapter, the Governor and Council opened and compared the votes returned, had the same tabulated, and found by those returns that Robert Hale of Portland appeared to be elected as Representative to the Congress of the United States from the First District by a plurality of 29 votes over James C. Oliver of Cape Elizabeth.

Within twenty days after the ballots were tabulated, Mr. Oliver appeared and filed a written application with the Secretary of State requesting an inspection and recount of the ballots cast for Representative to Congress in the First Congressional District, alleging that the returns of the votes cast did not correctly state the votes as actually cast.

In accordance with the request of Mr. Oliver, an inspection of all of the votes cast in the First Congressional District was conducted in the presence of the Deputy Secretary of State in charge of elections by counsel representing Mr. Hale and Mr. Oliver.

This inspection was conducted over a period of fourteen days during which time all ballots cast in the First Congressional District were examined and tabulated. During the course of the inspection the validity of 3637 absent voting ballots and 451 regular ballots was questioned by one candidate or the other. A determination of the validity of these ballots would affect the outcome of the election.

The inspection disclosed that a certain number of absent voting ballots were cast in various voting precincts, but that the envelopes and applications pertaining to such absent voting ballots were not returned to the Secretary of State in the containers which contained the ballots from such voting precincts.

The inspection also disclosed various other facts pertaining to absent voting ballots, the effect of which is disputed between the candidates.

The inspection also disclosed certain ballots, the effect of which is disputed by the two candidates by reason of the manner in which the same were marked.

There has been no claim by either party that any of the voting officials acted fraudulently. Laxity, custom and usage in the handling of absent voting ballots have produced a part of the problem which now confronts the Governor and the Executive Council.

On November 8, 1956, Mr. Robert Hale made a written demand of the Secretary of State that a certificate of election be issued to him at that time as Representative to the Congress of the United States from the First Congressional District of the State of Maine in accordance with the provisions of Chapter 5, Section 50 and Chapter 21, Section 4 of the Revised Statutes of Maine (1954) and all acts amendatory thereof and additional thereto.

On November 19, 1956, Mr. Oliver, through his counsel, by a letter addressed to the Governor and the Executive Council formally objected to the issuance of a certificate to Mr. Hale. It was alleged on Mr. Oliver's behalf that certain absent voting ballots and certain ballots allegedly marked in an improper manner should not be counted.

On the same date, Mr. Oliver made written demand on the Secretary of State, for the issuance to him of a certificate of election as Representative to the Congress of the United States from the First Congressional District of the State of Maine.

On November 20, 1956, at a meeting of the Governor and the Executive Council, the Governor declined to issue at that time any certificate of election, stating as the reason that the

Governor and the Executive Council were uncertain whether or not they had the authority to determine the legal effect of the absent voting ballots. The Governor and the Executive Council are also in doubt as to the legality of certain other ballots cast in the First Congressional District and, hence, whether or not such ballots should be counted.

With respect, therefore, to these ballots, and the right of the Governor and the Executive Council to accept or reject disputed ballots, important questions of law having arisen, and believing the occasion to be a solemn one within the meaning of the Constitution, the Governor and the Executive Council respectfully request the Honorable Justices of the Supreme Judicial Court to advise them thereon.

QUESTIONS

(1) Do the Governor and the Executive Council have the power and the authority to decide whether any ballots cast in an election for Representative to the Congress of the United States shall be counted or rejected?

(2) If the answer to the first question is in the negative, thus leaving open the question of validity of certain ballots, must the Governor and Council issue a certificate of election to the apparent winner in the tabulation of September 26, 1956, or must the certificate of election be withheld until the validity of such ballots is determined by the appropriate tribunal?

Respectfully submitted,

s/ EDMUND S. MUSKIE
Governor of Maine

s/ SIDNEY R. BATCHELDER
Chairman

s/ LEON M. SANBORN

s/ W. HAYNES
s/ ARTHUR E. ELA
s/ DAVID A. NICHOLS
s/ ROSWELL P. BATES, D.O.
s/ CARROLL B. PEACOCK
Members of the
Executive Council

To the Honorable Edmund S. Muskie, Governor of Maine, and the Executive Council:

We, the undersigned, Justices of the Supreme Judicial Court, have the honor to submit the following answers to the questions propounded on November 27, 1956 relative to the election of a Representative to Congress from the First District:

QUESTION (1):

Do the Governor and the Executive Council have the power and the authority to decide whether any ballots cast in an election for Representative to the Congress of the United States shall be counted or rejected?

ANSWER:

We answer in the negative. Under R. S., c. 5, Sec. 51 (1954) the law requires that a certificate be given by the Governor after a Representative to Congress has been declared elected. The pertinent part reads:

> "In case of United States senators, representatives to congress, members of the legislature and county and state officers, except where a different rule is prescribed in the constitution, the person or persons, not exceeding the number to be voted for at any one time for any such office, having the highest number of votes given at such election shall be declared elected, and the governor shall issue a certificate. . ."

In 1932, in the case involving the election of a Representative to Congress from the Third District, five of the Justices of the Supreme Judicial Court (the sixth not participating) in an unanimous opinion to the Executive Council, said in 131 Maine 506, 510:

> "The right, power, authority and duty of the Governor and Council in canvassing the returns of an election, so far as Representatives to Congress are concerned, are defined and limited by the provisions of Sections 43, 44 and 55, Chapter 8, Revised Statutes 1930, supplemented in the cases of plantations by the provisions of Sections 79, 80 and 81 of the same chapter. These statutes convey no right, power, authority or duty upon the Governor and Council to investigate and pass upon questions of irregularities, illegal practices or fraud in the conduct of a Congressional election. By express provision of the Federal Constitution, the determination of such questions is exclusively within the jurisdiction of the House of Representatives of the Congress of the United States."

We are not here concerned with the law relative to plantations. The other statutes referred to in the opinion are in substance in force at present. R. S., c. 5, Sections 50 and 51.

In 1948 under somewhat similar circumstances, the six Justices of the Supreme Judicial Court gave an unanimous opinion to the Governor and Council in the course of a controversy over the election of a Representative to the Legislature. At 143 Maine 417, 422, the Justices said:

> "Under the Constitution the House of Representatives of the Legislature is the sole judge of the elections and qualifications of its own members. R. S., 1944, Chap. 5, Sec. 50 recognizes the controlling force of these constitutional provisions by limiting its application, in determining the election of a Representative to the Legislature, to the examination and correction of returns. Neither

> the Constitution nor any statute confers right, power or authority on the Governor and Council to decide whether any ballots cast in an election of a Representative to the Legislature shall be counted or rejected. We, therefore, deem further answer unnecessary."

In our view the Opinion of the Justices in 1943 in the case of a Representative to the Legislature applies with equal force in the present case of a Representative to Congress. Under the U. S. Constitution, Article I, Section 5, "Each house shall be the judge of the elections, returns and qualifications of its own members, . ."

The Governor and Council in the case of an election for Representative to Congress by statute are given no power to do more than examine and correct the returns. To decide whether ballots cast in the election should be counted or rejected would be action on their part unauthorized by law.

QUESTION (2):

If the answer to the first question is in the negative, thus leaving open the question of validity of certain ballots, must the Governor and Council issue a certificate of election to the apparent winner in the tabulation of September 26, 1956, or must the certificate of election be withheld until the validity of such ballots is determined by the appropriate tribunal?

ANSWER:

The answer to the first question being in the negative, the validity of certain ballots is thus left open insofar as any act on the part of the Governor and Council is concerned.

From your communication it appears that on the examination and correction of the returns, Mr. Hale has the highest number of votes given in the election and is "the apparent winner in the tabulation of September 26, 1956." The provision of statute in Section 51 that such a person

"shall be declared elected, and the governor shall issue a certificate thereof. . ." thus becomes at once applicable.

Respectfully submitted:

ROBERT B. WILLIAMSON
DONALD W. WEBBER
ALBERT BELIVEAU
WALTER M. TAPLEY, JR.
FRANCIS W. SULLIVAN

Dated at Augusta, Maine, this 3rd day of December, 1956.

MEMORANDUM.

Mr. Justice Dubord did not participate for the reason that his son is counsel for Mr. Oliver.

ROBERT B. WILLIAMSON

OPINION

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

* * * * * *

QUESTIONS PROPOUNDED BY THE
GOVERNOR AND THE EXECUTIVE COUNCIL
ON NOVEMBER 27, 1956
ANSWERED DECEMBER 11, 1956

LETTER PROPOUNDING QUESTIONS
STATE OF MAINE
OFFICE OF THE GOVERNOR
AUGUSTA

November 27, 1956

To the Honorable Justices of the Supreme Judicial Court:

In connection with the examination by the Governor and Council of the ballots cast for County Attorney of Kennebec

County in the general election held September 10, 1956, questions have arisen as to the validity of certain absent voting and physical incapacity voting ballots. These ballots have been challenged on the ground that the envelopes and applications pertaining thereto were not returned to the Secretary of State in the containers which contained the ballots from the voting precincts in which the same were cast; in some instances these applications and envelopes were destroyed or missing; in those instances where the applications and envelopes have been returned to the Secretary of State following arrival of the official ballots, they have not been in sealed packages and have not been in sealed boxes.

No fraud is charged in the conduct of the election and none of the disputed ballots was challenged at the ballot box.

With respect, therefore, to these ballots, and the right of the Governor and the Executive Council to accept or reject disputed ballots, important questions of law having arisen, and believing the occasion to be a solemn one within the meaning of the Constitution, the Governor and the Executive Council respectfully request the Honorable Justices of the Supreme Judicial Court to advise them thereon.

QUESTIONS

(1) Should absentee ballots be counted in voting precincts in which the absentee applications and envelopes were not in the box delivered to the Secretary of State containing the ballots cast in such precinct?

(2) Should absentee ballots be counted in voting precincts in which the absentee applications were not in the box delivered to the Secretary of State containing the ballots cast in such precincts?

(3) Should absentee ballots be counted in voting precincts in which the absentee envelopes were not in the box delivered to the Secretary of State containing the ballots cast in such precincts?

(4) Should absentee ballots be counted in voting precincts in which the absentee applications and envelopes were not in the box delivered to the Secretary of State containing the ballots cast in such precincts, but were subsequently transmitted to the Secretary of State, not in sealed packages and not in a sealed box, and were available for inspection at the time of the tabulation?

(5) Should absentee ballots be counted in voting precincts in which the absentee applications were not in the box delivered to the Secretary of State containing the ballots cast in such precincts, but were subsequently transmitted to the Secretary of State, not in sealed packages and not in a sealed box, and were available for inspection at the time of the tabulation?

(6) Should absentee ballots be counted in voting precincts in which the absentee envelopes were not in the box delivered to the Secretary of State containing ballots cast in such precincts, but were subsequently transmitted to the Secretary of State, not in sealed packages and not in a sealed box, and were available for inspection at the time of the tabulation?

(7) Would the answers to questions (1), (2) and (3) be the same where the applications and envelopes were not enclosed with the ballots and were destroyed or missing?

(8) Should absentee ballots be counted in voting precincts in which the certificate required to be executed upon the application by officials charged by law with the regis-

tration and enrollment of voters, pursuant to R. S., c. 6, Sec. 7, is executed by only one such official?

Respectfully submitted,

s/ EDMUND S. MUSKIE
Governor of Maine

s/ SIDNEY R. BATCHELDER
Chairman

s/ LEON M. SANBORN
s/ W. HAYNES
s/ ARTHUR E. ELA
s/ DAVID A. NICHOLS
s/ ROSWELL P. BATES, D.O.
s/ CARROLL B. PEACOCK
Members of the Executive Council

To the Honorable Edmund S. Muskie, Governor of Maine, and the Executive Council:

We, the undersigned, Justices of the Supreme Judicial Court, have the honor to submit the following answers to the questions propounded on November 27, 1956 relative to the election of a county attorney in the County of Kennebec:

QUESTION (1):

Should absentee ballots be counted in voting precincts in which the absentee applications and envelopes were not in the box delivered to the Secretary of State containing the ballots cast in such precinct?

ANSWER:

We answer in the affirmative.

QUESTION (2):

Should absentee ballots be counted in voting precincts in which the absentee applications were not in the box delivered to the Secretary of State containing the ballots cast in such precincts?

ANSWER:

We answer in the affirmative.

QUESTION (3):

Should absentee ballots be counted in voting precincts in which the absentee envelopes were not in the box delivered to the Secretary of State containing the ballots cast in such precincts?

ANSWER:

We answer in the affirmative.

QUESTION (4):

Should absentee ballots be counted in voting precincts in which the absentee applications and envelopes were not in the box delivered to the Secretary of State containing the ballots cast in such precincts, but were subsequently transmitted to the Secretary of State, not in sealed packages and not in a sealed box, and were available for inspection at the time of the tabulation?

ANSWER:

We answer in the affirmative.

QUESTION (5):

Should absentee ballots be counted in voting precincts in which the absentee applications were not in the box de-

livered to the Secretary of State containing the ballots cast in such precincts, but were subsequently transmitted to the Secretary of State, not in sealed packages and not in a sealed box, and were available for inspection at the time of the tabulation?

ANSWER:

We answer in the affirmative.

QUESTION (6):

Should absentee ballots be counted in voting precincts in which the absentee envelopes were not in the box delivered to the Secretary of State containing ballots cast in such precincts, but were subsequently transmitted to the Secretary of State, not in sealed packages and not in a sealed box, and were available for inspection at the time of the tabulation?

ANSWER:

We answer in the affirmative.

QUESTION (7):

Would the answers to questions (1), (2) and (3) be the same where the applications and envelopes were not enclosed with the ballots and were destroyed or missing?

ANSWER:

We answer in the affirmative.

QUESTION (8):

Should absentee ballots be counted in voting precincts in which the certificate required to be executed upon the application by officials charged by law with the registration and enrollment of voters, pursuant to R. S., c. 6, Sec. 7, is executed by only one such official?

ANSWER:

We answer in the affirmative.

In your communication we note that "no fraud is charged in the conduct of the election and none of the disputed ballots was challenged at the ballot box." The issue is raised, therefore, whether the failure of the election officials to carry out their duties strictly in accordance with the "Absent Voting. Physical Incapacity Voting" statute shall invalidate ballots in the stated categories. R. S., c. 6 (1954).

We conclude that the provisions of the statute touching the procedure to be employed at the polls and the disposition of applications and envelopes following an election are directory and not mandatory in nature. In other words, violation of the statute by election officials in the situations here under consideration, at least in the absence of fraud, is not a sufficient ground for invalidating ballots.

We distinguish between acts of the voter and acts of the election officials. The voter must comply with the statute insofar as his acts are concerned. Failure, for example, of the voter to take the prescribed oath invalidates his vote. *Miller* v. *Hutchinson,* 150 Me. 279.

In the cases presented there has been no failure whatsoever of the voter to do his part. The errors complained of in each instance came from action or failure to act by election officials after the casting of the ballots (questions 1 to 7 inclusive), or before the casting of the ballots (question 8). There is, however, no difference in principle between the two situations. In both cases, the errors occurred after the voter had placed his ballot beyond his possession and control and in the possession and control of public officials charged with solemn duties and obligations in the conduct of elections.

There is not the slightest suggestion in your communication, or in the questions, that the ballots themselves are other than in proper form. Plainly, apart from the errors complained of, they would be counted for one candidate or the other. The intention of the voter was clearly expressed. Further, and this is a fact of importance, the ballots in dispute were not challenged at the polls. By a timely challenge the particular ballot with supporting papers would have been suitably marked and made available for examination and decision. R. S., c. 6, Sec. 12. Such was the case in *Miller* v. *Hutchinson, supra.*

The governing rules have been well stated by Chief Justice Rugg of the Supreme Judicial Court of Massachusetts in *Swift* v. *Registrars of Voters of Quincy,* 281 Mass. 271, 183 N. E. 730, at p. 735:

> "This failure on the part of election officers to perform the precise duty imposed on them with respect to the envelopes does not invalidate the votes or afford any ground for nullifying the count."

and again in *Swift* v. *Registrars of Voters of Milton,* 281 Mass. 264, 183 N. E. 727, 728, 729:

> "The main purpose of the election statutes is to provide a convenient method for the voter qualified according to law to express in secret his preference for persons to be elected to the several offices to be filled and on the questions to be answered at an election and to have that expression of preference counted fairly and honestly, all in conformity to reasonable regulations. The statutes of this commonwealth contain in great detail requirements as to the preparation and distribution of ballots, the marking and deposit of them in ballot boxes, the counting of those ballots and the making of official returns of the results of the voting. . . . 'As stated by Andrews, C. J., in People v. Wood, 148 N.Y. 142, 147, 42 N.E. 536, 537: 'The object of elections is to ascertain the popular will, and not to thwart it. The object of election laws is to secure

> the rights of duly qualified voters, and not to defeat them.' This must be borne in mind in the construction of such statutes, and the presumption is that they are enacted to prevent fraud and to secure freedom of choice, and not, by technical obstructions, to make the right of voting insecure.' Blackmer v. Hildreth, 181 Mass. 29, 31, 63 N.E. 14, 15; . ."
>
> * * * * * * * * * * *
>
> "The design of the recount is to verify, not to destroy, the result of an election as previously declared by the election officers. Where without culpability verification has become impossible as to any part of an election that part of the election does not become a nullity."

Respectfully submitted:

ROBERT B. WILLIAMSON
DONALD W. WEBBER
WALTER M. TAPLEY, JR.
FRANCIS W. SULLIVAN

Dated at Augusta, Maine, this 11th day of December, 1956.

To His Excellency, Governor Edmund S. Muskie,
and the Honorable Executive Council:

The undersigned Justices of the Supreme Judicial Court have the honor to submit the following answers to the questions propounded to the several members of this Court bearing date of November 27, 1956, in connection with the examination of the ballots cast for County Attorney of Kennebec County in the general election held September 10, 1956, questions having arisen as to the validity of certain absent voting and physical incapacity voting ballots.

Being unable to subscribe to the answers submitted by our associates, and because of the gravity and importance we attribute to the issues presented by your questions, we

consider it advisable to submit our views upon the questions in a separate reply, together with the reasons, at some length, for our conclusions.

The questions propounded to us are as follows:

(1) Should absentee ballots be counted in voting precincts in which the absentee applications and envelopes were not in the box delivered to the Secretary of State containing the ballots cast in such precinct?

(2) Should absentee ballots be counted in voting precincts in which the absentee applications were not in the box delivered to the Secretary of State containing the ballots cast in such precinct?

(3) Should absentee ballots be counted in voting precincts in which the absentee envelopes were not in the box delivered to the Secretary of State containing the ballots cast in such precincts?

(4) Should absentee ballots be counted in voting precincts in which the absentee applications and envelopes were not in the box delivered to the Secretary of State containing the ballots cast in such precincts, but were subsequently transmitted to the Secretary of State, not in sealed packages and not in a sealed box, and were available for inspection at the time of the tabulation?

(5) Should absentee ballots be counted in voting precincts in which the absentee applications were not in the box delivered to the Secretary of State containing the ballots cast in such precincts, but were subsequently transmitted to the Secretary of State, not in sealed packages and not in a sealed box, and were available for inspection at the time of the tabulation?

(6) Should absentee ballots be counted in voting precincts in which the absentee envelopes were not in the box delivered to the Secretary of State containing ballots cast

in such precincts, but were subsequently transmitted to the Secretary of State, not in sealed packages and not in a sealed box, and were available for inspection at the time of the tabulation?

(7) Would the answers to questions (1), (2) and (3) be the same where the applications and envelopes were not enclosed with the ballots and were destroyed or missing?

(8) Should absentee ballots be counted in voting precincts in which the certificate required to be exceuted upon the application by officials charged by law with the registration and enrollment of voters, pursuant to R. S., c. 6, § 7, is executed by only one such official?

At the outset, we express our opinion that in view of the statutes, to which we will refer later, the application for an absent voting ballot or for a physical incapacity voting ballot, together with the envelope to which said application is attached, upon which envelope is printed the jurat of the voter, is an integral part of the absent voting ballot itself. Without the envelope and the attached application, there is no ballot.

We answer all questions except the seventh question in the negative. We answer the seventh question in the affirmative.

The laws relating to absent and physical incapacity voting are now embodied in Chapter 6, Revised Statutes, 1954. The law originally establishing the right of absent voting was enacted in 1921, under the provisions of Chapter 38, Public Laws, 1921. Subsequently, in 1937, the act was amended providing for absent voting on the part of persons physically incapacitated. This amendment was enacted under the provisions of Chapter 183, Public Laws of 1937.

The pertinent section of the statute now applicable to issues presented by your questions, is found in Section 11 of Chapter 6, R. S. 1954, and reads as follows:

> "All envelopes, opened or unopened, shall be retained with the ballots cast at the election, and preserved and destroyed in the manner provided by law for the retention or preservation and destruction of official ballots."

This sentence has been preserved intact since the original enactment of the absent voting law in 1921.

We should bear in mind, that the right of voting by absent voting ballot or physical incapacity ballot, is a special privilege. As was said by the Supreme Judicial Court of the State of Maine in the case of *Miller* v. *Hutchinson,* 150 Me. 279, 110 A. (2nd) 577:

> "The absentee voting law gives the voter a right that did not exist before its enactment and, if perchance, this law is repealed no voter could claim the right to vote in absentia as a matter of right."

In the *Miller-Hutchinson* case, the Court rejected all absent voting ballots cast in the particular election then in issue, because of an inadequate jurat on the envelopes containing the absent voting ballots and the Court said:

> "The Legislature well knew this method of voting is open to abuse and fraud."

Because the Legislature in 1921 could well foresee that this method of voting was open to abuse and fraud, it enacted into law the very wise provision, previously referred to, to the effect that all envelopes shall be retained with the ballots cast at the election and preserved and destroyed in the manner provided by law for the retention, preservation and destruction of official ballots.

We feel that it probably would be of value for us to briefly set forth some of the provisions of the law relating to elections in general, and particularly to the provisions of the statutes relating to absent voting and physical disability voting.

Section 39, Chapter 5, R. S. 1954, sets forth the procedure as to how ballots shall be preserved. The pertinent portions of this section read as follows:

> "When the ballots have been sorted and counted and the result declared and recorded, each lot of ballots together with a signed statement of the count of that lot thereof shall in open meeting be sealed in a package by the election official, or officials who counted the same. The packages so sealed shall be placed in the container in which the ballot had been delivered at the voting place together with all unused ballots and the container shall be sealed before removal from the voting place to the office of the city, town or plantation clerk. The check lists which have been used at such voting place shall likewise be sealed and forthwith returned to the city, town or plantation clerk. In case two or more kinds of official ballots are used in any election, each kind shall be sealed in a separate package. All such ballots, check lists and signed statements of officials shall be so sealed that the packages and check lists cannot be opened or examined without first breaking the seal; and the sealed packages of ballots cast at any state election or at any election of presidential electors shall have an endorsement of substantially the following tenor indorsed thereon or securely affixed thereto:
>
> 'This package contains the ballots cast at an election for held in the of (or in ward of the city of) on the day of 19 ; said ballots were sorted, counted, result declared and recorded, and this package sealed in open meeting in accordance with section 39 of chapter 5 of the revised statutes.'
>
> Such indorsement shall be signed by the ward, town or plantation clerk and by the wardens in cities or voting precincts, or by a majority of the selectmen of towns and of the assessors of plantations. The ballots, check lists and signed state-

ments of officials returned to the city clerk after any city election and all other ballots returned to him shall be preserved by him as a public record for 6 months. The provisions of this section shall apply to all elections, including primary elections and elections for determining initiated and referendum questions."

At this point it should be noted that the foregoing provision of Section 39, Chapter 5, is the one which ties in with the provisions of Section 11 of Chapter 6, which provides that all envelopes, bearing the jurat of an absent or physical disability voter, to which must be attached the application for such ballot, shall be preserved in the same manner provided by Section 39, Chapter 5, R. S., 1954, for the retention, preservation and destruction of official ballots.

It is the failure of various clerks to comply with this very simple procedure, which has led to the propounding of the questions we are now called upon to answer.

Now, let us take a look at the statutes which set forth the procedure to be followed by a person who desires to vote with an absent voting ballot or a physical incapacity ballot, and the duties required of the election officials including the city, town and plantation clerks.

Section 2, Chapter 6, R. S., 1954, sets forth in detail the forms to be used for the applications, the certificate of the registration officials, the certificate to be signed by the physician in the case of physical incapacity applications, and the form of the jurat on the envelope which is to contain the voted ballots.

If a person desires to vote with an absent voting ballot or a physical incapacity ballot he secures an application. This application has to be signed by the voter. At the bottom of the form is a certificate to be signed by a majority of the officials having charge of the registration of voters. On an

application for a physical incapacity ballot there is a certificate to be signed by a physician duly admitted to practice.

When the application has been signed by the voter, and in the case of physical incapacity ballot, when the application has been certified by a physician duly admitted to practice, a ballot is delivered or mailed to the voter.

Sections 6 and 7, Chapter 6, R. S., 1954, provide that before the closing of the polls on election day, the clerk shall deliver to the officials charged by law with the registration and enrollment of voters in the city, town or plantation all applications for absent voting and physical incapacity voting ballots, which have been received by him. If these officials are satisfied, after examination of the application, that the signature is genuine, and the statements made by the applicant are true, they shall execute the certificate thereon and return it to the clerk. Note that the certificate must be certified by a majority of the officials.

Section 8, Chapter 6, R. S., 1954, provides for the procedure to be followed by the voter. The ballot must be marked, that is voted, in the presence of an official authorized by law to administer oaths. If the marking is done within the state, a justice of the peace will suffice. If the marking is done outside of the state, the official must be a notary public, who has a seal, which seal must be affixed. There is also provision for voting on the part of persons in the Armed Forces of the United States. No other person may be present at the time of the marking of the ballot except the voter and the official authorized by law to administer oaths. Before marking the ballot, the voter must exhibit it to the official, who shall satisfy himself that it is unmarked. The voter shall not allow the official to see how he marks it. Having marked, that is, voted the ballot, the voter shall enclose the ballot in the envelope provided, and seal it. The jurat is then completed and signed by the voter, and signed by the official. The jurat contains the reasons

why the voter is voting with an absent voting or physical incapacity ballot.

The ballot having been voted and properly sealed in the envelope provided, it is then delivered to the clerk of the city, town or plantation.

Section 10, Chapter 6, R. S., 1954, provides that:

> "Upon receipt of an envelope purporting to contain an official absent voting ballot or physical incapacity voting ballot, the city clerk shall attach thereto the corresponding application and shall keep a list of names and addresses, arranged by voting precincts of all voters whose names appear thereon, together with the date when such envelopes were received, and these lists shall be public records and shall be preserved by the clerk until the time fixed by law for the destruction of ballots cast in the coming election. All such envelopes shall be preserved unopened. Upon election day before the hour for closing the polls, the clerk shall deliver all such envelopes received by him to the election officials in the several voting precincts in which the voter named therein assert the right to vote, together with a list signed by him of the voters' names and addresses as shown thereon."

The procedure in towns and plantations is practically the same, except that there is no provision in the case of towns and plantations for the lists provided for in the case of cities.

Section 11, Chapter 6, R. S., 1954, outlines the procedure to be employed by the election officials at the polls in respect to absent voting ballots and physical incapacity ballots. The first part of this section provides in substance, that immediately after the closing of the polls, and after the regular ballots cast have been removed from the ballot box, the presiding officer shall open all envelopes delivered to him and shall compare the signatures on the envelopes therein

enclosed with the signatures on the applications attached thereto, and shall examine the affidavits. If the affidavits are properly executed and the signatures on the affidavits compare with the signatures on the applications, the ballots are deposited in the ballot box. Of course, if it does not appear that the affidavit is properly executed, or if it appears that the signatures do not agree, the ballot will be rejected. It is provided that the envelope shall be opened in such a manner as not to destroy the affidavit thereon.

As previously stated, the statute then provides that all the envelopes shall be retained with the ballots cast at the election and preserved and destroyed in the manner provided by law for the retention, preservation and destruction of official ballots. While there is no mention in this sentence of the applications, as Section 10 provides that the application must be attached to the envelope, it follows that the application continues to be attached to the envelope and is to be preserved along with the envelope, in conformity with the manner in which other official ballots are preserved.

The requirement of the statute, that the envelope and application be preserved is such a simple requirement, that there is no valid excuse for non-compliance, and non-compliance may well be an incident sufficient to arouse suspicion.

The undoubted purpose of the provisions of the statute that the envelopes and applications be retained and preserved is to protect the purity of the ballot and to guard against abuse and fraud.

If affirmative answers to your questions are predicated on lack of an allegation of fraud, our answer is, that fraud is not likely to be discovered, in the absence of the envelopes and the applications. In our opinion no strength is added to the position of a contestant to elective office by merely adding a general allegation of fraud, which perhaps he may

not be able to prove until he has had an opportunity to examine the ballots, the envelopes and the applications.

No doubt when the Legislature enacted this very wise provision of the law, there was envisioned the many abuses to which absent voting procedure is susceptible. Among these abuses may we suggest the following:

1. Applications for absent voting ballots may be approved in blank by the registration officials, in advance of the signature of the prospective voter.

2. An application may be approved by only one member of the board of registration, in spite of the fact, that the statute definitely provides that the approval must be by a majority. Incidentally, this is an added reason for our negative answer to question number eight.

3. Partisan political workers may secure absent voting ballots or physical disability ballots and have the ballots voted without the presence of an official authorized to take an oath, and some notary public or justice of the peace may sign the jurat without ever having seen the voter.

4. A physically incapacitated voter may be voted without a certificate from an attending physician.

5. The person who purports to sign as a physician, may not be a physician at all.

6. Applications and absent voting ballots may be procured and fraudulently voted in the names of persons who are out of town election day, and who have not applied for an absent voting ballot. In such cases there would be no way for the election officials to discover the fraud before the ballot was cast.

7. Persons may be allowed to vote, who are not, in fact, legally qualified to do so. If this be the fact, it cannot be discovered without an opportunity to see the envelopes and the applications.

8. There may be no signature on the application.

9. There may be no signature on the jurat.

10. The application may not be in proper form.

11. There may not be listed a valid reason in the jurat for voting by absent voting ballot.

12. The person purporting to administer the oath may not be an authorized official.

These are only some of the abuses and frauds which could exist, some, perhaps due only to negligence, without bad faith, and others due to evil machinations, but in either event nullifying the ballot.

That the election officials presiding at the polls allowed all of these ballots to be cast carries no presumption of regularity. The presumption of irregularity is just as consonant.

We repeat that if any fraud exists, it cannot be discovered without an opportunity, in the event of a contest, to see and examine the envelopes and the applications.

It is our opinion that the right, provided by statute, to challenge absent voting ballots and physical incapacity ballots before they are cast, is not an adequate protection against the evils to which the absent voting law is subject.

We are aware there is a statute which makes it a criminal offense for an election official to negligently fail to perform his duties, but during the thirty-five years that this law has been in existence, there has not come to our attention or knowledge any prosecution for such offense.

No one is more reluctant that we are, to disfranchise an honest voter, who through no fault of his own, now finds that the legality of his ballot is being questioned.

It is well known that in many close elections, the result may be determined by the absent voting ballots, the pro-

curement of which is limited only by the aggressiveness and ingenuity of political workers. In this case, approximately 500 absent voting ballots are in question. Approximately 29,000 other ballots were voted in person. The rights of approximately two percent, who voted by absent voting ballot are not paramount to the rights of the approximately ninety-eight percent, who appeared at the polls in person. These ninety-eight percent have every reason to expect that they will be protected from the abuses and frauds inherent in the absent voting procedure.

At this point, we digress to discuss briefly questions 4, 5, and 6, which relate to a situation where the envelopes and the applications were returned at a date subsequent to the return of the other ballots, in unsealed packages and unsealed boxes. The law definitely provides that such applications and envelopes should be placed in the container with the ballots, and sealed in such a manner that they cannot be examined without first breaking the seal. To accept the applications and envelopes in unsealed packages, is to condone the possibility of correction of existing errors, such as, absence of signature on the application, absence of signature on the jurat, improper jurat, supplying physician's certificate, and the adding of another name of a registration official when only one has previously signed.

It has been said, and we recognize the doctrine, that in the determination of whether or not a ballot is to be rejected as invalid, a distinction is to be made in cases where the voter, himself, has done or performed some act for which he can be blamed, or where, being blameless himself, and having done everything he is supposed to do, his vote is placed in jeopardy, through the act of some election officials over which he has no control.

Should this argument be advanced against our opinion that the ballots described in your eight questions should be rejected, we respectfully call your attention to a prior de-

cision of the Supreme Judicial Court of this State as well as opinions rendered by Justices of this Court.

In the case of *Miller* v. *Hutchinson,* previously referred to, all of the absent voting ballots cast in a city election were rejected as void, because of a form of jurat which did not comply with the form prescribed by the statute. In this particular case, how can any culpability or blame be attached to the voter? He cast his absent voting ballot or his physical incapacity ballot, and completed what he supposed was a valid jurat on a form furnished by the city clerk. Yet, this Court ruled all of the ballots invalid.

Sections 61 and 62, Chapter 5, R. S. 1954, provide for the organization of plantations for the purpose of holding elections. According to the provisions of Section 61, certain acts must be performed by the plantation officials in preparation for holding an election. After the congressional election in the Third Congressional District of Maine in 1932, a contest ensued, and the contention was advanced that certain plantations in one of our counties had not complied with the law in organizing, in accordance with the provisions of what is now Section 61. In response to questions propounded by the Executive Council, the Justices of this Court, at that time, answered, that because of the failure of these plantations to organize, the entire vote should be rejected. Surely, the people who came to the polls on election day were not to blame for the fact, that the plantation officials had not properly organized the plantation.

Section 5, Chapter 5, R. S., 1954, provides how our official ballots shall be printed and stamped. Section 40, Chapter 5, R. S., 1954, definitely provides that no ballot except an official ballot shall be counted. Let us suppose that in some manner a city clerk, or the secretary of state, fails to provide proper official ballots for some voting precincts. Let us further suppose, that the voters go to the polls as they customarily do, and after being individually checked are

given these ballots, which do not comply with the law and, the ballots are voted with all due honesty and intent. This Court has ruled, that such ballots shall not be counted.

After the primary election of 1924, a contest developed over the nomination for Governor. It was discovered that in one town no voting booths had been provided, and the voters marked their ballots upon tables. The entire vote of the town was rejected as a result of an answer given to the Governor and Council, by the Justices of the Supreme Judicial Court. Were the voters to blame, when they arrived at the polling place to discover that there were no voting booths? Had they not done everything that they were supposed to do? Were not their votes rejected because of what other persons had done?

See 124 Me. 475, for the language of the Justices of this Court, used in throwing out the vote of this town which had not provided booths:

> "If one municipality can do this with impunity, all can, and the Australian ballot law is virtually repealed, and the safeguards against bribery and fraud are swept away."

The Justices expressed the thought that it was a hardship upon the innocent voters who came to the polling places expecting that the officers had done their duty and erected the necessary booths. Nevertheless, the voters were disfranchised.

To paraphrase the Justices in the decision in 124 Me. 475, if one or more town clerks can disregard a definite provision of the statute, then all can.

In arriving at our conclusion, we have given consideration to the decision of the Supreme Judicial Court of Massachusetts in the case of *Swift* v. *Registrars of Voters of Quincy,* 281 Mass. 271, 183 N. E. 730. In this case there were two issues involved. A number of ballots were chal-

lenged because the ballots were not cancelled as required by law. The lack of cancellation was due to the breakdown of the mechanism of voting machines. The Court said, and we think rightly so, that the failure to cancel the ballots by imperfect machines would not impair the safeguard for the purity of the election established by the statute. Failure of the machine to cancel the ballots did not open the door to cheating or laxity of conduct.

Other ballots were challenged for the same reasons set forth in the contest now under your consideration. The Court, in considering a statute similar to ours, declined to reject the ballots.

In our judgment, this portion of the Massachusetts opinion is ill considered. It is not good law. We do not subscribe to it. We feel that a failure on the part of the election officials to comply with the positive requirement of the law opens the door to cheating and laxity of conduct and goes to the very heart of the purity of the ballot.

To rule that the ballots described in your questions should be counted, is to repeal in effect, the laws enacted to protect the purity of the ballot. It is to put the stamp of approval on failure to comply with the law. It is to give the green light to election officials in the future to disregard the provisions of the statute and to sweep away the safeguards against the abuse and fraud, to which this Court referred in *Miller* v. *Hutchinson.*

It is, therefore, our position, that the absent voting and physical incapacity ballots described in your questions, should not be counted.

Respectfully submitted,

ALBERT BELIVEAU
F. HAROLD DUBORD

Dated at Augusta, Maine, this 11th day of December, 1956.

ELIZABETH ROYAL, ET AL., APPELLANTS
FROM DECREE OF JUDGE OF PROBATE
FOR THE COUNTY OF SOMERSET
ALLOWING THE WILL OF LYMAN C. HURD, JR.

Somerset. Opinion, December 5, 1956.

Wills. Testamentary Capacity. Undue Influence. Bonds. Executors.

The burden of proving testamentary capacity is upon the proponents of a will and whether the testator had such capacity is a question of fact.

The burden of proof is upon the party alleging undue influence.

Influence to be "undue" must be such as to amount to moral coercion destroying free agency so that the testator was constrained to do that which was not his actual will but against it.

Whether an executor is "legally competent" within the meaning of R. S. 1954, Chap. 154, Sec. 9, is a question for determination by the Court of Probate and if its determination is supported by evidence it is not vulnerable to attack by exceptions.

The directions of a will that one serve as executor without bond do not bind the Judge of Probate and whether the Judge follows such directions involves a matter of judicial discretion. R. S. 1954, Chap. 154, Sec. 11.

ON EXCEPTIONS.

This is a petition for probate of a will before the Law Court upon exceptions. The Probate Court allowed the will. The contestants appealed. The Supreme Court of Probate denied the appeal. The contestants excepted. Exceptions overruled.

Theodore Goyna,
Ernest L. Goodspeed,
Ian MacInnes, for plaintiff.

Linnell, Brown, Perkins,
Thompson & Hinckley, for defendants.

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

TAPLEY, J. On exceptions, Lyman C. Hurd, Jr., died at Waterville, Maine on January 4, 1954 while in his 74th year. He executed his last will and testament, dated February 12, 1952, at Boston, Massachusetts at the office of Israel N. Samuels, a practicing attorney and member of the Massachusetts Bar. The testator nominated Mr. Samuels as executor and directed that he be exempt from furnishing sureties on his official bond. Mr. Hurd made certain bequests, some of which could be classified as charitable, and named his two children, Lyman C. Hurd, III and Elizabeth Royal, as residuary legatees. These children, his residuary legatees, are contesting the will.

The will was presented for probate to the Judge of the Probate Court within and for the County of Somerset and State of Maine on petition of Israel N. Samuels, the named executor. A hearing was had before the Judge of Probate as to the allowance of the will and whether the named executor was qualified to act as such. A full and complete hearing was had involving these issues which resulted in a decree approving and allowing the will with appointment of Israel N. Samuels as executor. Dissatisfaction with these findings actuated the contestants to file an appeal to the Supreme Court of Probate. The necessary appeal and reasons of appeal were seasonably filed. The reasons of appeal alleged by the contestants are substantially as follows:

1. That the instrument dated the twelfth day of February, 1952, which was approved and allowed as the last will and testament of the late Lyman C. Hurd, Jr., was not in fact and in law his last will and testament.

2. That at the time of the alleged execution of the instrument purporting to be the last will and testament of

Lyman C. Hurd, Jr., he, because of his age, physical and mental disease and infirmity, was not of sound and disposing mind and did not have testamentary capacity in fact and in law.

3. That at the time of the execution of the instrument purporting to be the last will and testament of Lyman C. Hurd, Jr., he was old, frail, ill, both physically and mentally, and did not have the ability to resist undue influence which was exerted upon him in connection with the preparation and execution of his last will and testament.

4. That the alleged last will and testament of Mr. Hurd was designed and drafted by one Israel N. Samuels, acting in his capacity as attorney and counsellor for Mr. Hurd, and that the execution of the instrument was not the free and deliberate act of the testator but was the result of undue influence exerted upon him by his attorney, Mr. Samuels, who was also one of the attesting witnesses to the will and under its terms named executor without bond.

5. That Israel N. Samuels, appointed executor of the last will and testament of Lyman C. Hurd, Jr., is not legally competent to act in said capacity, is not a disinterested person and, further, is not a fiduciary satisfactory to the appellants in view of the nature and magnitude of the estate and in view of their interest therein as residuary legatees.

6. That the appellants as residuary legatees have no protection as a result of the decree of the Judge of Probate ordering the executor, Israel N. Samuels, to file a bond without sureties in the sum of $600,000.00 and approving such bond so filed, complaining that such order is completely inadequate and insufficient in view of all the circumstances of the case.

The contestants' exceptions are four in number, all based on the complaint and contention of legal error in the decree of the Supreme Court of Probate. The contestants argue as

to the first three exceptions that there is legal error in the decree because the findings are against the law and are not supported by the evidence but conversely are inconsistent with all of the credible evidence of probative value. The fourth exception concerns itself with the contention that the decree is erroneous, legally untenable and constitutes an abuse of judicial discretion.

The problem of this court is to review the evidence in order to ascertain if there was any evidence to support the findings of the justice below in his ruling that Lyman C. Hurd, Jr. was possessed of testamentary capacity on February 12, 1952; that there was no undue influence exerted upon him in connection with the preparation and execution of his last will and testament; that Israel N. Samuels is legally competent to act in the capacity as executor under the last will and testament of Lyman C. Hurd, Jr. and finally, does the finding of the presiding justice that the executor may furnish a bond in the penal sum of $600,000.00 without sureties constitute an abuse of judicial discretion.

EXCEPTION 1. TESTAMENTARY CAPACITY

The burden of proving testamentary capacity rests upon the proponents. This rule is well established in this State, *Pliny Crockett, Applt.*, 147 Me. 173.

The question as to whether or not the testator was possessed of testamentary capacity is one of fact. *Chandler Will Case*, 102 Me. 72.

The contestants lay great stress on the testimony of Dr. Rupert A. Chittick to sustain their contention that Mr. Hurd, Jr. was lacking in testamentary capacity. Dr. Chittick is an acknowledged specialist in psychiatry. He first met Mr. Hurd in January of 1951 when he was admitted as a patient to the Vermont State Hospital where Dr. Chittick was superintendent. He remained a patient in the in-

stitution until March 23, 1951. Mr. Hurd was experiencing the effects of alcoholism and demonstrated the usual complications that many times arise from such a condition. The doctor was of the opinion that Mr. Hurd was suffering from a psychosis identified as Korsakoff's psychosis when he left the hospital in March of 1951. He then described the effect of such a disease in relation to the mental activity of the patient and the prospects of recovery from the damage brought about by such a condition. Cross-examination of Dr. Chittick produced some interesting testimony which may be considered in evaluating the opinion of the doctor:

"Q. Surely he would know, even if he suffered from this as you say he did, there would be certainly times when he would know about his business enough so that he could transact simple business, wouldn't he?

A. It is possible.

Q. Surely. And he could travel around himself alone, he could pay a hotel bill or something like that, couldn't he?

A. He probably could, yes.

Q. He could discuss business matters with attorneys, wouldn't you think?

A. He could discuss most any matters with anybody as far as that goes.

Q. And he could with reference to the truth of their existence, couldn't he?

A. I am sorry, sir, I don't understand.

Q. I say he would be able to discuss them with complete reference to the truth of their existence?

A. That one cannot be sure about. He might or he might not.

Q. You wouldn't say that if he owned a woodlot in Detroit, Maine that he couldn't talk with an attorney about the existence of that woodlot and his ownership of it, would you?

A. He might be able to discuss it perfectly proper at times."

The materiality and relevancy of Dr. Chittick's testimony must be accepted in the light of the fact that his opinion is based on observations made during a period between January and the latter part of March of 1951 which was the only time the doctor was in contact with Mr. Hurd. There must be also borne in mind the fact that the will was executed on the twelfth day of February, 1952. The trial judge is asked to determine on the testimony of Dr. Chittick that Mr. Hurd, on February 12, 1952, was possessed of a legally unsound mind which would make him incapable of executing a will. The doctor by letter dated March 15, 1951 did express his opinion to Judge Davis of the Probate Court that Mr. Hurd at that time was mentally incompetent and that a guardian should be appointed. Nowhere in the testimony of Dr. Chittick does there appear a statement that on the twelfth day of February of 1952 Mr. Hurd was legally of unsound mind and lacking testamentary capacity.

Martin, Applt., 133 Me. 422, at page 428:

> "The want of capacity, when urged as a ground for invalidating a testamentary act, must relate to the time of the act. Incompetency may exist before or after, and still the will be valid."

Flood, et al. Applts., 139 Me. 178, at page 184:

> "The general rule whether evidence tending to show the insanity of a testator is too remote from the time of the execution of the will is a matter resting very largely in the discretion of the trial court."

The words of Chief Justice Fellows in *Waning, Applt.*, 151 Me. 239, at page 250, are most illuminating:

> "In law, every mind is sound that can reason and will intelligently, in the particular transaction being considered; and every mind is unsound or in-

> sane 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."

The attesting witnesses to Mr. Hurd's will were his attorney, Israel N. Samuels, Irving L. Morse, a real estate broker, and Michael A. DeSimone, a lawyer.

Israel N. Samuels is a lawyer, a member of the Massachusetts Bar and practicing in Boston. He became acquainted with Mr. Hurd, Jr. in 1943 and saw him infrequently until 1948 when he was retained by Mr. Hurd as an attorney to handle the administration of Mr. Hurd's sister's estate. During the administration of the sister's estate, Mr. Samuels had many occasions to confer with Mr. Hurd in reference to estate matters. Some discussions were had between them during 1951 or 1952 concerning a lumber business in which Mr. Hurd was financially interested. Mr. Samuels was also concerned in behalf of Mr. Hurd in the dismissal of the guardianship proceedings in the early part of June, 1951, Mr. Hurd having previously in March of that year been placed under guardianship. This dismissal took place by agreement of all parties concerned. Mr. Samuels stated that during the months of February

and March of 1951 he saw Mr. Hurd quite regularly. He testified that Mr. Hurd handled his own bank account, which was of a substantial amount. The witness related conversation with Mr. Hurd concerning the estate of his sister, Edith Hurd, his Masonic and Knights of Pythias connections, politics and current events of mutual interest. Much discussion was had as to the provisions of his last will and testament before its drafting and execution. After Mr. Samuels recited the circumstances of his relationship with Mr. Hurd and some facts within his knowledge of Mr. Hurd's business activities, he testified that in his opinion Mr. Hurd at the time he executed his last will and testament was of sound mind.

Irving L. Morse, a real estate broker and an acquaintance of Mr. Hurd's for eight or ten years, testified that on February 12, 1952 in his opinion Mr. Hurd was of sound mind.

Michael A. DeSimone, a lawyer and the third witness to the will, corroborated the other witnesses with an opinion that Mr. Hurd at the time of the execution of the will was of sound mind.

Guardianship proceedings were instituted against Mr. Hurd in the Probate Court for Somerset County and on March 21, 1951 a guardian was appointed. Later in May of that year, on petition of the ward alleging that he was fully able to manage his own estate and that guardianship was no longer necessary and should be terminated, the Porbate Court decreed a termination of the guardianship by decree dated June 6, 1951. This termination of guardianship occurred without contest although all interested parties had notice of the proceedings.

There is substantial evidence to be found in the record to support the findings of the Justice of the Supreme Court of Probate on the question of testamentary capacity and so this exception must fail. *Waning, Applt., supra. Thibault,*

Applt. v. *Est. of Fortin,* 152 Me. 59. *Pliny Crockett, Applt., supra.*

EXCEPTION 2. UNDUE INFLUENCE

This exception attacks the findings and conclusion of the justice below as to the element of undue influence. The burden of proof is on the party alleging undue influence. *Thibault, Applt., supra.*

Rogers, Applt., 123 Me. 459, at page 461:

> "By undue influence in this class of cases is meant influence, in connection with the execution of the will and operating at the time the will is made, amounting to moral coercion, destroying free agency, or importunity which could not be resisted, so that the testator, unable to withstand the influence, or too weak to resist it, was constrained to do that which was not his actual will but against it."

The accusation of undue influence exerted against a testator in the preparation and execution of his last will and testament is one of great and serious moment. The evidence necessary to support such a contention must rise to a degree much higher than mere conjecture and surmise. Attorneys for the contestants in their brief say there is no direct proof of undue influence in the case but they believe the proven facts and circumstances are such that undue influence should be inferred. A careful scrutiny of the record fails to disclose there is any evidence showing the exertion of undue influence upon the mind of the testator. This exception is overruled.

EXCEPTIONS 3 AND 4. COMPETENCY OF EXECUTOR. BOND.

Exceptions 3 and 4 pertain to the appointment of Israel N. Samuels as executor, claiming he is not legally competent to act in such capacity and to that portion of the decree

which directs him to furnish a bond in the sum of $600,-000.00 without sureties. The exceptors argue that Mr. Samuels is legally incompetent to act as executor because (1) he claims the decedent was indebted to him in the sum of $9,000.00 for legal services; (2) that there exists an antagonism of interest between themselves and Mr. Samuels as shown by the record and that from past experiences they cannot expect him to represent their best interests as beneficiaries of the estate; and (3) that part of his testimony as a witness is incredible, evasive, lacks sincerity and a reading of the record of his testimony will show lack of legal competency.

A charge of abuse of judicial discretion is made because the executor was ordered to furnish bond without sureties, the claim in substance being that the contestants received no protection as residuary legatees in view of all the circumstances indicated by the evidence.

The "Eighth" paragraph of the last will and testament of Lyman C. Hurd, Jr. nominates and appoints Israel N. Samuels as executor with the provision that he be exempt from furnishing any surety or sureties on his bond.

The pertinent portion of Sec. 9, Chap. 154, R. S. 1954, reads:

> "When a will is proved and allowed, the judge of probate may issue letters testamentary thereon to the executor named therein, if he is legally competent ***."

The contestants except to that portion of the decree that directs letters testamentary issue to Israel N. Samuels, the person nominated in the will as executor.

The statute provides that the Judge of Probate may issue letters testamentary to the executor if he is legally competent.

Chadwick v. *Stilphen,* 105 Me. 242, at page 247:

> "the executor named therein must be legally competent *in the opinion of the judge of probate* ***." (Emphasis ours.)

The question of legal competency is one of determination by the judge. If the opinion of the judge is based upon supporting evidence, it is then not vulnerable to attack by exceptions. The evidence in this case on the qualifications of the executor is of such quality that it supports the findings and decree.

The provisions of the will are clear that it was the testator's intention his nominee for executor should be permitted to qualify without the necessity of furnishing any surety or sureties on his official bond. This direction, however, does not bind the Judge of Probate but if upon consideration of the evidence there appears no necessity to require bond with sureties, he, no doubt, follows the intention of the testator. The statute governing the question of giving bond with or without sureties is found in Sec. 11, Chap. 154, R. S. 1954 and reads as follows:

> "BOND EXECUTOR SHALL GIVE.—Letters testamentary may issue and all acts required by law or otherwise under the provisions of the will may be done and performed by the executor without giving bond, or by his giving one in a specified sum, or without sureties, when the will so provides; but when it appears necessary or proper, the judge may require him to give bond with sureties as in other cases."

This statute confers upon the court judicial discretion regarding executor's bonds and when it appears to the judge that it is necessary or proper, he may require an executor to give bond with sureties irrespective of a testator's expressed intention. The contestants contend that the judge abused his discretion when he did not require the executor to give bond with sureties.

Chaplin, Applt., 133 Me. 287, at page 289:

> "It is settled law in this state that 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. When the law invests him with the power to exercise discretion, that exercise is not reviewable on exceptions. If he finds facts without evidence, or if he exercises discretion without authority, his findings may be challenged by exceptions."

There is ample and sufficient evidence to support the findings of the justice below and to negative the charge that he abused his discretionary powers. Exceptions 3 and 4 are ineffectual.

Exceptions overruled.

DONALD F. POOLER
vs.
ANTHONY CUCCINELLO

Knox. Opinion December 5, 1956.

Assault and Battery. Damages.

A new trial will not be granted where the verdict is supported by the evidence and the damages are not excessive.

A verdict of $55,000 is not excessive in an assault and battery action where the plaintiff, a young man of 22 years was wrongfully shot in the chest and the bullet became lodged near the liver, where its removal would be dangerous to life, thereby creating a constant source of worry and apprehension; and where it is probable that plaintiff will suffer mental and physical pain for life with a greatly impaired earning capacity.

ON MOTION FOR NEW TRIAL.

This is an action for assault and battery before the Law Court upon general motion for a new trial following a plaintiff's verdict. Motion denied.

A. Alan Grossman, for plaintiff.

Anthony Cuccinello, for defendant pro se.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

BELIVEAU, J. On motion for a new trial alleging the usual grounds. This is an action for damages resulting from an assault and battery committed by the defendant on the plaintiff October 9, 1955, and resulted in a verdict for the plaintiff in the sum of $55,000.

While several exceptions were taken by the defendant during the trial, these have been abandoned and there is before this court only the motion.

Just before midnight on the 8th of October, 1955, the plaintiff, a member of the Coast Guard, and at that time stationed in Rockland, in company with another young man and two young women, parked his Buick automobile on the Breakwater Road near the Samoset Hotel in the city of Rockland, on land owned by the Samoset Hotel and situated some distance from the dwelling at that time occupied by the defendant and his family. At about one o'clock on the morning of October 9, 1955, the defendant came from his home to this car with a powerful flashlight in one hand and a loaded revolver in the other. There is no evidence or intimation that the plaintiff or the other occupants of the car were creating any disturbance, or in any way conducting themselves so as to cause worry or apprehension to anyone in that neighborhood. They were peaceful and quiet, and this was the situation when the defendant made his demands on the plaintiff. The defendant was attracted to the car by its mere presence and not because of the behavior or conduct of its occupants. This place had been frequented before by the plaintiff and while it was not a public spot, in a narrow sense of the word, it was apparently a place

frequented by people for parking, without objection from the owner. The plaintiff testified that he had done this frequently. As he approached the car the defendant, equipped with the flashlight, and loaded revolver, demanded of the plaintiff that he identify himself, and that he deliver his automobile license, registration and the keys to the car to the defendant. The testimony shows that the plaintiff offered to identify himself but would not surrender the keys or his license. The defendant refused to make himself known and claimed to the plaintiff and the others that he had the right to proceed and act as he did.

If the plaintiff was a trespasser so was the defendant. The defendant had no authority such as he assumed, and the plaintiff was justified in refusing to comply with his demands.

The plaintiff and the young man with him were ordered to leave the car with their hands in the air. After they reached the ground, the defendant, before the assault, fired one shot in the ground, apparently to impress those present. While the two young men were standing on the ground and the plaintiff with his hands resting on the top of the car and more discussion was going on, the defendant again fired his revolver and struck the plaintiff in the chest just above the right nipple. Before this happened, according to the plaintiff's testimony, he asked the defendant that the police be called immediately and this the defendant refused to do.

The plaintiff was taken to the Knox County General Hospital where he was under constant medical and nursing care for six days. He was then taken by ambulance to the Brighton Marine Hospital in Boston where he was a patient and under the same care until he was discharged on April 2, 1956.

While at the Rockland Hospital he was a patient of Dr. Robert Allen, who testified as to the treatment given the

plaintiff while he was there. He was under observation for six days, so Dr. Allen testified, and was constantly administered antibiotics and considerable opiates. An X-Ray was immediately taken which showed the fracture of two ribs and the presence of a metallic foreign body near the liver.

It is clear that the metallic object testified to by Dr. Allen was the bullet fired by the defendant from his revolver.

Dr. Allen further testified that an attempt to remove the bullet by surgery would be "difficult procedure surgically, technically, and otherwise." He further testified that such an operation might endanger the plaintiff's life.

The plaintiff testified that during his stay at the Brighton Marine Hospital the presence of the bullet caused much inconvenience and pain. This pain is in the area where the bullet now is located, and is ever present. At the time of the trial he was still handicapped in performing his usual duties and for that reason was given easier and lighter work.

Dr. Allen further testified that any movement of the bullet, now in the body of the plaintiff, would endanger his life.

The plaintiff at the time of the assault was 22 years of age and in good health. It does not appear in evidence what this young man's life expectancy is but it may be assumed that if this assault had not taken place he might well expect to enjoy a healthy and productive life for some 40 or 50 years. The presence of the bullet is of necessity a source of constant worry and apprehension. This is an important element of the damages suffered by the plaintiff. Again it is probable that he will suffer physical and mental pain as long as he lives and upon return to civilian life his earning capacity will be greatly impaired.

The damages, at first glance, seem to be large. However, having in mind the extent of the injuries which the plaintiff has suffered and will suffer for many years, his limited

ability to earn a living and the constant worry and apprehension of immediate death because of the presence of the bullet in his body, we feel the damages are not excessive. We have not considered the other grounds advanced by the defendant for a new trial because it is difficult to conclude that the jury could have done anything else but find the defendant responsible for the assault and battery.

Motion for new trial denied.

ELZEAR J. PICARD, ADMR.
ESTATE OF PHILIP PICARD
vs.
ALBERT LIBBY

Kennebec. Opinion, December 5, 1956.

Negligence. Wrongful Death. Amendments. Rule 8. Pleading.

Rule 8 does not apply where the Court at the February Term issues an order "Motion granted, Amendment allowed," and there was no continuance of the case with leave to amend. The legal situation is not changed by the plaintiff's filing a paper entitled "Amended Declaration" which included the original declaration plus the two amendments, at the April Term.

The plaintiff in an action of negligence must inform the defendant of the facts sufficient in law to establish a duty of the defendant towards plaintiff and that the act complained of was a violation of that duty.

The allegation in a wrongful death declaration that defendant operated his automobile "so as to drive it off said highway and strike and run into the plaintiff's said intestate" sufficiently apprises the defendant of the particular acts of negligence.

The phrase in the pleadings "for whose exclusive benefit this action is brought" is legally equivalent to the words of the statute, "the amount recovered xxx shall be for the exclusive benefit of xxx (the father and mother)" R. S. 1954, Chap. 165, Sec. 10.

The better practice in pleading is to place the death claim for the statutory beneficiaries and the funeral and other expenses in separate counts although separate counts are not required.

The jury must be directed to find and report the damages found in each type of claim.

Good pleading is designed to make clear and certain the issues.

ON EXCEPTIONS.

This is a death action under R. S. 1954, Chap. 165, Secs. 9, 10. The case is before the Law Court upon exceptions (1) to the allowance of an amended declaration and (2) overruling of a special demurrer. Exceptions overruled.

Niehoff & Niehoff, for plaintiff.

Bartolo M. Siciliano, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

WILLIAMSON, C. J. This is an action under the Death Statute, so-called, arising from the death of a child four years of age. R. S., C. 165, Secs. 9, 10. The case is before us on exceptions first, to the allowance of the filing of an amendment and second, to the overruling of a special demurrer.

FIRST EXCEPTION

At the February Term 1956 of the Kennebec Superior Court the plaintiff, administrator of the child's estate, filed a motion to amend his writ by adding two counts. The presiding justice at the same term entered the following order: "Motion granted. Amendment allowed." On the second day of the April Term the plaintiff filed a paper entitled "Amended Declaration," which includes the first count under the original declaration and the two counts of the February amendment.

The defendant asserts that the Court was without authority to allow the amendment to be filed at the April Term under Rule 8 of the Rules of Court, 147 Me. 466. The Rule covers the situation when an action shall be continued "with leave to amend," with limitations upon time of filing and penalties for failure to comply. If the Rule applied, the filing was late; but in our view the Rule does not touch the case.

There was no continuance of the case at the February Term with leave to amend. The amendment was then and there allowed by the presiding justice. The decision "amendment allowed" speaks for itself. In *Tibbetts* v. *Ordway Plaster Company,* 117 Me. 423, 425, 104 A. 809, we said:

> "The next question that arises is when the amendment itself should be filed, because there is a distinction between granting leave to amend and the allowing of the amendment itself. The former is an order permitting an act to be done, the latter is the doing of the act itself."

Nothing was changed or altered by the filing of the "Amended Declaration." The plaintiff's pleadings long since had been settled by the allowance of the amendment at the February Term. The first exception is overruled.

SECOND EXCEPTION

The defendant places the exception to the overruling of his special demurrer on 27 grounds, most of which are applicable to each of the three counts.

The plaintiff must bring his pleadings within the principle set forth in *Nadeau* v. *Fogg,* 145 Me. 10, 70 A. (2nd) 730. The court said, at page 13:

> "Under the law of this state it is the duty of the plaintiff in an action of negligence to inform the defendant of the facts upon which he relies to

> establish liability for the injuries alleged and a plaintiff must set out a situation sufficient in law to establish a duty of the defendant towards the plaintiff and that the act complained of was a violation of that duty."

See also *Glidden* v. *Bath Iron Works,* 143 Me. 24, 54 A. (2nd) 528, and cases cited.

The procedure open to the defendant is found in *Couture* v. *Gauthier,* 123 Me. 132, 122 A. 54. The court said, at page 133:

> "In actions for the negligent driving of teams upon the highway it has never been deemed necessary to specify in what particular the defendant was negligent. . . . There may be more reason in actions for alleged negligence in the operation of automobiles than in the case of horse drawn vehicles why the plaintiff should set forth in what respect the defendant was negligent,—whether for operating his automobile on the wrong side of the road, or for failing to give warning of his approach, or for operating it at an excessive speed,—in order that the defendant may be appraised of what he has to meet, and we think it the better form of pleading so to do; but we deem a lack of certainty in this respect a matter of form and not of substance, and hold that, at least, in this class of cases, a general allegation of negligence must be held good upon general demurrer. Lack of certainty and definiteness in this respect must be taken advantage of by special demurrer or by motion to make more definite and certain."

See *Cratty* v. *Aceto and Co.,* 148 Me. 453, 95 A. (2nd) 689; *Reynolds et al.* v. *Hinman Co.,* 145 Me. 343, 75 A. (2nd) 802.

"A special demurrer is one which denies the legal sufficiency of the previous pleading in certain matters of form specially assigned and pointed out by the demurrer." Martin, Common Law Pl., 6 Me. Law Review, p. 175.

The first count of the declaration reads:

"In a plea of the case for that the said plaintiff is the duly qualified Administrator of the Estate of Philip Picard, . . ; that the said defendant at Unity Plantation, . . on the 24th day of July A.D. 1955 was the operator of a certain automobile, to-wit, a 1950 Mercury Sedan, then and there operating the same in a northeasterly direction upon a public highway, being Route 139, so-called, and leading from Benton Station, Maine to Unity, Maine; that the plaintiff's intestate, being then and there a child of tender years, to-wit, of the age of four years, was standing or walking on the side of said public highway, at a point nearly in front of the residence of Elzear Picard in said Unity Plantation, and off the traveled portion of said highway; and the plaintiff avers that his said intestate was then and there in the exercise of due care; that it was then and there the duty of said defendant to operate his said automobile with due care and caution so as not to endanger the life and safety of others upon said highway, including the plaintiff's intestate; (1) (the plaintiff further avers that the said defendant, unmindful of his duty aforesaid, operated and propelled his said automobile in a careless and negligent manner) so as to drive it off said highway and strike and run into the plaintiff's said intestate inflicting injuries upon him from which he died on the said 24th day of July 1955, without conscious suffering; and the plaintiff further avers that the injuries sustained by his intestate, and his ensuing death, without conscious suffering, were caused solely by the negligence of the defendant and in no way contributed to by either the plaintiff or the plaintiff's intestate who were at all times in the exercise of due care; and the plaintiff avers that his said intestate (2) left surviving him his father and mother who were and are his sole heirs at law and for whose exclusive benefit this action is brought; and the plaintiff further avers that the funeral expenses amounted to two hundred thirty-two dollars and ninety cents

($232.90); and the plaintiff avers that this action brought by him is instituted within two years from the date of the death of his said intestate in accordance with the provisions of the Statutes of Maine, and by force of which an action hath accrued to the plaintiff to have and recover the damages sustained against the said defendant as herein above set forth."

In the second count the following replaces the clause in the first count in parentheses at (1):

". . . and more specifically the plaintiff avers that it was then and there the duty of the defendant to operate his automobile at a reasonable and proper rate of speed, and with due regard to the conditions then and there existing, and to have his said automobile under control, and to have his automobile free from mechanical defects; (3) the plaintiff further avers that the said defendant unmindful of his duty aforesaid, and wholly disregarding his duties aforesaid, operated and propelled his said automobile at a great and unreasonable rate of speed, and failed to keep his automobile under control, and operated his said automobile in disregard to the conditions then and there existing, and the defendant failed to have his said automobile free from mechanical defects, (4) and the defendant carelessly and negligently drove, operated and propelled his said automobile. . ."

Also in the second count there is inserted at the place marked (2) in the first count, the following: ". . left no widow or children surviving him but . . ."

The third count is like the second count with the addition of the following at (3) and (4):

(3) ". . . and not to operate his automobile while he, the defendant, was under the influence of intoxicating liquor; . . ."

(4) ". . . and the defendant operated his said automobile while he, the defendant, was under the influence of intoxicating liquor, . ."

The objections by the defendant are that the allegations of negligence in the first count are insufficient. He insists that he is not properly apprised of the particular acts of carelessness or negligence which he allegedly has committed. With this view we are unable to agree. Surely the phrase "so as to drive (his automobile) off said highway and strike and run into the (child)" is descriptive, and vividly so, of an act which may well be negligent. What further detail does the defendant require to apprise him of the alleged acts of negligence?

In the second and third counts the acts of negligence are more specifically set forth. The first count in our view is sufficient, and so are the second and third counts.

It will serve no useful purpose to discuss in detail the many other objections urged by the defendant. It is sufficient to say that in each count there is satisfactorily set forth the duty owed, the breach, and damages. Objections that the location of the child and the location of the defendant's automobile are vague and uncertain, that there is lack of time and place of negligence by defendant, and that the duty of defendant is specifically limited to operation on the highway and not where the child was struck and killed seem completely unrealistic. The defendant reasonably requires nothing more in plaintiff's pleading to enable him to defend.

There is also the question whether the plaintiff has sufficiently pleaded damages. The point is urged that since the statute, R. S., c. 165, Sec. 10, states that "the amount recovered . . . shall be for the exclusive benefit of . . .", in this instance the father and mother, the phrase "for whose exclusive benefit this action is brought" in the pleadings fails to state a case. We can unearth no consequential dis-

tinction between the words of the statute and the words of the plaintiff. We are told that the action is brought under the provisions of statute. It is common knowledge that the statute referred to is the Death Statute or Lord Campbell's Act, R. S., c. 165, Secs. 9, 10. *Hammond* v. *Lewiston, Augusta & Waterville Street Ry.*, 106 Me. 209, 76 A. 672; *Danforth* v. *Emmons*, 124 Me. 156, 126 A. 821.

The defendant further urges that the only claim for damages is for funeral expenses, and such damages are not properly pleaded. On the first point it is obvious to one who reads that the heart of the case lies in the death of the child and the damages flowing therefrom to the father and mother. The child suffered death and the parents thereby were presumably damaged. *Joseph Carrier, Admr.* v. *Bornstein*, 136 Me. 1, 1 A. (2nd) 219; *Curran* v. *Railway Company*, 112 Me. 96, 90 A. 973.

There remains the question whether the plaintiff sufficiently set forth his claim as administrator of the estate for funeral expenses. Until amended by Laws 1939, c. 252, there was no recovery for this item in a claim under the Death Statute. The statute reads:

> "The jury may give such damages as they shall deem a fair and just compensation, not exceeding $10,000, with reference to the pecuniary injuries resulting from such death to the persons for whose benefit such action is brought, and in addition thereto, shall give such damages as will compensate the estate of such deceased person for reasonable expenses of medical, surgical and hospital care and treatment and for reasonable funeral expenses, provided that such action shall be commenced within 2 years after the death of such person." R. S. c. 165, Sec. 10.

The usual practice, and the better practice we believe, is to place the death claim for the statutory beneficiaries and the funeral and other expenses in separate counts. In bring-

ing the action the administrator acts in two capacities—first, as trustee to recover damages for the statutory beneficiaries, and second, as administrator to recover expenses chargeable to the estate. Whether the death claim and expenses are included in one count or are separated in two counts, in either event, the jury must be directed to find and report the damages found in each type of claim. See 1 Maine Civil Officer (8th ed.) 226. Separate counts are not required in terms by the statute, nor are they essential in our view to a full and complete understanding of the issues by the parties, jury and the court.

Good pleading is designed to make clear and certain the issues. It does not demand the impossible of the draftsman, nor allow his opponent to stop, or slow to a discouraging pace, the businesslike dispatch of litigation. The defendant takes nothing from the second exception.

The entry will be

Exceptions overruled.

JACOB H. BERMAN, ADMR., ET AL.
vs.
LEWIS B. SHALIT

Cumberland. Opinion, December 1, 1956.

Wills. Remainders. Contingent. Vested.

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

The law favors vested remainders.

A test of a contingent remainder is that it is so limited as to depend on some event which is uncertain to happen or a condition which may not be performed.

Where a father by will left a life estate to the mother with remainders to two sons or the sons' heirs, depending upon whether the sons were living at the mother's death, said life estate to terminate upon the mother's death or remarriage, the sons take a contingent, not a vested remainder. Where the son dies before the mother dies or remarries, the property passes to the son's heirs via the father's will, and not to devisees via the son's will.

ON REPORT.

This is a bill in equity for the construction of two wills. It is before the Law Court upon report and agreed statement. Case remanded.

Berman, Berman & Wernick, for plaintiff.

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

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

MURRAY, A. R. J. This case came to this court on report on an agreed statement of facts. It is a bill in equity for

the construction of two wills. It was brought by Jacob H. Berman, Admr. et al. vs. Lewis B. Shalit. Jacob Berman, since the bringing of the bill, has deceased, and Sidney W. Wernick has been appointed Admr. C. T. A. and succeeds Berman as party plaintiff.

The first will is that of Bernard L. Shalit, the second that of his son Harold M. Shalit. The bill alleges, in substance, that both wills are so interwoven on account of taxes that it is necessary that both be construed.

There does not seem to be any issue of fact. The issue seems to be one of law, viz.: Whether the son Harold M. received anything under paragraph three of the father's will, which he the son Harold conveyed by his will.

The father, Bernard L. Shalit died, and there survived him his widow, Annie R. Shalit, his two sons Harold M. and William A. Shalit. The widow Annie R. and the son William A. are still living. The son Harold M. died after the death of his father Bernard L.

The first thing to consider is the following part of the will of the father, Bernard L., — this will answer the question as to both wills:

> "Third: The rest, residue and remainder of the Estate of which I shall die seized or possessed, real, personal and mixed, I give, bequeath and devise to my wife, Annie R. Shalit, to have and to hold and to enjoy the income of during the period of her natural life. Upon the death of my said wife the said property so held by her shall go in equal parts to my said sons, Harold and William, to them and their heirs forever. If either of said sons shall die before my said wife, said deceased's son's share shall go to his legal heirs. The said provision for my wife, Annie R. Shalit, is made subject to the following conditions:
>
> a. If she shall remarry, all of the property held by her shall, on the date of such marriage,

> vest in equal parts in my said wife and my said sons, to be held by them and their heirs forever. Provided, however, that if either of my said sons shall have died before such time, the share of said deceased son shall vest in his legal heirs."

Again repeating what has been many times repeated: "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." *Cassidy* v. *Murray,* 144 Me. 326-328.

In addition to the will, we have taken into consideration the circumstances surrounding the making of the will and the agreed statement of facts. The parties have cited many cases which we have carefully considered. We feel that it is unnecessary to cite all of them in this opinion. Some have been helpful, some have not. The reason is that they lack the authority properly accorded to precedents in the application of legal principles generally, because it is the intention of the testator in the particular will under consideration, which is being sought. *Abbott* v. *Danforth,* 135 Me. 172, 192 Atl. 544.

We agree with the contention of the plaintiffs, that the law favors vested remainders, particularly when the distribution is to be made to heirs of the testator. We also agree that it is the intention of the testator which takes precedence over all else. "Of course there are rules of law which are to be applied to all wills; but if you once get at a man's intention, and there is no law to prevent you from giving it effect, effect ought to be given to it." *Merrill Trust Co.* v. *Perkins,* 142 Me. 363, 368.

The question is simply did the sons receive a contingent or a vested remainder. If the son Harold received a vested remainder under his father's will it could be conveyed by

Harold's will. If he received a contingent remainder it could not be conveyed by his will.

"A test of a contingent remainder is that it is so limited as to depend on some event which is uncertain to happen or a condition which may not be performed." *Merrill Trust Co.* v. *Perkins,* 142 Me. *supra* 369.

The life estate in this case could be terminated by the remarriage of the widow or by her death. The deceased son, Harold, had a contingent remainder, the contingency being that he would be alive at the time of the remarriage or death of his mother. Of course if Harold's remainder was contingent he had taken nothing before his death because under the terms of the father's will the father provided: "If either of my said sons die before my said wife, said deceased son's share shall go to his legal heirs." Also, "If she shall remarry, x x x provided, however, that either of my said sons shall have died before such time the share of said deceased son shall vest in his legal heirs."

At the time of Harold's death his mother had neither died nor remarried.

As to the will of Harold we hold he took nothing under paragraph three of his father's will therefore conveyed nothing.

Fees are to be allowed to counsel to be set by a single justice below, to be charged to estate of Bernard L. Shalit. *A decree may be drawn according to this opinion.*

Case remanded.

CECIL DUNBAR
vs.
DR. WILLIAM GREENLAW

Somerset. Opinion, December 15, 1956.

Torts. Privileges. Insanity Commitments. Certificates. Physicians. Municipal Officers. Witnesses. Judicial Power.

A physician, who erroneously certifies pursuant to R. S., Chap. 27, Secs. 105, 113 that a person is insane, enjoys an absolute privilege of freedom from tort liability, even though his conduct may amount to gross negligence tantamount to legal malice.

The doctrine of the privilege of protection from tort liability to witnesses for pertinent recitals in judicial proceedings is applicable to physicians who issue certificates of insanity under R. S., Chap. 27, Sec. 105.

Municipal officers of towns are constituted judicial tribunals in insanity commitment cases.

Certifying physicians under R. S., Chap. 27, Secs. 105 and 113 are expert witnesses in emergency restraint and detention proceedings and municipal officers are the judges.

On the occasion of certification under R. S., Chap. 27, Sec. 105, the relation of physician and patient does not obtain.

A witness is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding in which he is testifying, *if it has some relation thereto.* (Emphasis supplied.)

ON EXCEPTIONS.

This is tort action before the Law Court upon defendant's exceptions to the overruling of a demurrer to the amended declaration. Exceptions sustained.

Jerome G. Daviau, for plaintiff.

Locke, Campbell, Reid and Hebert, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

SULLIVAN, J. The defendant excepts to the overruling of his demurrer to the plaintiff's amended declaration in tort.

Defendant is a physician. The plaintiff accuses him of having erroneously certified in ancillary, emergency, insanity, detention proceedings, R. S., Chap. 27, Sec. 105, without sufficient inquiry or examination, that the plaintiff was insane. Plaintiff was detained in a state hospital and claims resultant damage.

The amended declaration contains the following recitation of the standard of care legally required by the plaintiff from the defendant and of the defendant's failure to fulfill it:

> "It had then and there become the duty of the defendant
>
> *to exercise reasonable and ordinary care, skill and diligence*
>
> in an examination of the plaintiff to ascertain his true mental condition
>
> *to make a prudent and careful* inquiry and to obtain proof whether he was sane or insane and
>
> it also became the duty of the defendant *to exercise his best and reasonable and proper judgment* to the plaintiff's sanity
>
> - - - - -
>
> the said defendant - - - - - *made a false, pretended and grossly negligent examination* of the plaintiff as to his mental condition
>
> - - - - -
>
> the defendant failed and neglected *to use or to exercise reasonable and ordinary care, skill and diligence* in such examination - - - - and
>
> the defendant failed *to make a prudent and careful inquiry* and to obtain proof as to the sanity or in-

> sanity of the plaintiff, and failed *to exercise his best, reasonable and proper judgment* as to the plaintiff's sanity but
>
> *with gross and culpable negligence* without adequate and proper examination of the plaintiff, the defendant made and delivered said certificate" - - - - (emphasis supplied)

In insanity commitment cases the municipal officers of towns are constituted a judicial tribunal. R. S., Chap. 27, Sec. 104 ff; *Eastport* v. *Belfast,* 40 Me. 262, 265. See, also, *Rockport* v. *Searsmont,* 101 Me. 257, 259; *Reycraft* v. *McDonald,* 194 Mich. 500; *Corcoran* v. *Jerrel,* 185 Iowa, 532; *Fisher* v. *Payne,* 93 Fla. 1085; Cooley on Torts, 4th ed., Chap. 7, Sec. 153, Page 532.

Eastport v. *Belfast, supra,* is a decision based upon the provisions of Chap. 33, Sec. 8 of the Acts of Maine of 1847, a statute which is in substance sufficiently congruous with R. S., Chap. 27, Sec. 104 so as not to affect the continuing applicability of *Eastport* v. *Belfast.*

The municipal officers of towns, R. S., Chap. 10, Sec. 22, Subsec. XIX, XXVI, conduct hearings for the emergency restraint or indeterminate commitment of the insane and make decisions and appropriate commitments. R. S., Chap. 27, Sec. 104, 105; *Sleeper, Applt.,* 147 Me. 302, 304, 310, 312.

> - - - - - "(T)hey shall immediately inquire into the condition of any person in said town alleged to be insane; shall appoint a time and place for *a hearing by them* of the allegations of said complaint, - - - - shall *call before them all testimony necessary for a full understanding of the case;* and *if they think* such person insane and that his comfort and safety or that of others interested will thereby be promoted *they shall forthwith send him* to either the Augusta or the Bangor state hospital" - - - - - (emphasis supplied)
>
> R. S., Chap. 27, Sec. 104

> "Pending the issue of such certificate of *commitment by the municipal officers,* such superintendent may receive into his hospital any person so alleged on complaint to be insane, provided such person be accompanied by a copy of the complaint and physicians' certificate; which certificate shall set forth that in the judgment of the physicians the condition of said person is such that immediate restraint and detention is (sic) necessary for his comfort and safety or the safety of others; - - - - - Said municipal officers shall keep a record of their doings and furnish a copy to any interested person requesting and paying for it." (emphasis supplied)
>
> R. S., Chap. 27, Sec. 105.

Jurisdiction to summon, inquire, hear, adjudge, detain and, where warranted, commit is the judicial authority conferred upon the municipal officers by the two statutory sections. Necessary to such functions are the right and duty to subject witnesses to examination and to accept or reject evidence. Otherwise to what purpose would it be to empower those officers to "call before them all testimony necessary for a full understanding of the case" or to require decisions from them?

To sustain the municipal officers in an emergency detention, an examination and certificate of insanity by two reputable physicians licensed and practicing in this state and appointed by such municipal officers are a preliminary requisite. R. S., Chap. 27, Sec. 113. The examination and certificate by the physicians are "imperative and mandatory." *Rockport* v. *Searsmont,* 101 Me. 257, 260. But the act of detention in an institution for the insane, if any be made, is performed by the municipal officers. *Pennell* v. *Cummings,* 75 Me. 163, 166; *Sleeper, Applt.,* 147 Me. 302, 310, 312. In the discharge of their judicial duties it may be necessary for the municipal officers to subject the physicians to questioning.

Chap. 27, Sec. 105 read with Sec. 113, demonstrates that the certifying physician is a witness in emergency restraint and detention proceedings as in indeterminate commitment cases and that the municipal officers are the judges. Speaking of emergency detention under the present R. S., Chap. 27, Sec. 105, our court said, in *Sleeper, Applt.*, 147 Me. 302, 310, 312:

> Page 312. - - - - - "It could be taken only in those cases where two physicians certified *to the municipal officers* that immediate restraint and detention was (sic) necessary for the comfort and safety of the person alleged to be insane and for the safety of others."
>
> Page 310. - - - - - "As we have heretofore shown, the original law" (now R. S., Chap. 27, Sec. 105) "authorized the municipal officers on petition to them, and after notice and hearing to commit in all cases emergent or otherwise. It also provided for temporary commitment in emergency cases pending such hearing. Along with these provisions for commitment by the municipal officers," - - - - -

The rôle and function of the examining and certifying physician in insanity detention and commitment cases are those of a witness. He does not institute the process. That is reserved to a blood relative, husband, or wife of the alleged insane person or to a justice of the peace. R. S., Chap. 27, Sec. 104. The physician is not the judge; the municipal officers are the judges. His relation to the alleged insane person is not, *pro hac vice*, that of physician with patient. He is appointed by the municipal officers. R. S., Chap. 27, Sec. 113. His opinion is of serious public interest. It is of grave import to the individual alleged to be insane. Immediate treatment for the benefit of one mentally ill, danger to him or to others from his enlargement, the exercise of proper police power by the state and the safeguarding of the inviolable, personal rights of an individual are some of the urgent consults. *Sleeper, Applt.*, 147 Me. 302, 315. The

physician is an expert witness. *Mezullo* v. *Maletz,* 331 Mass. 233; *Springer* v. *Steiner,* 91 Ore. 100, 112. He is one of two such required by the statutes. R. S., Chap. 27, Sec. 106, 113. He is entrusted with a learned problem where there is often all too little certitude.

This plaintiff avers that he was sane but that the defendant, as a certifying physician in the ancillary, emergency proceedings held, erroneously certified that the plaintiff was insane and should be immediately confined and that the plaintiff was restrained and detained in a state hospital, to his defamation and personal suffering. The plaintiff seeks to hold the defendant to the standard of due care under the circumstances of the certification and accuses the defendant of gross negligence tantamount to legal malice. *Jellison* v. *Goodwin,* 43 Me. 287, 288; *Toothaker* v. *Conant,* 91 Me. 438, 439. The plaintiff presents his case as a malpractice suit. The nature of the charge would seem to be that of libel, *Perkins* v. *Mitchell,* 31 Barb. (N. Y.) 461, 465; Cooley on Torts, 4th ed., Chap. 7, Sec. 145, Page 494; rather than of false imprisonment, *Pennell* v. *Cummings,* 75 Me. 163, 166; or malicious prosecution, *Fisher* v. *Payne,* 93 Fla. 1085, 1093. The defendant by his demurrer admits all facts well pleaded, *Brown* v. *Rhoades,* 126 Me. 186, 187.

Pennell v. *Cummings,* 75 Me. 163, is a case of indeterminate insanity commitment. It is concerned immediately and strictly only with the admissibility of some evidence. It contains dicta which support the theory of this plaintiff in his declaration as to the standard of care and liability with which this defendant is chargeable. However, the dicta contemplate a mere relation of physician with patient and a typical malpractice charge resulting therefrom, without consideration of the certifying physician as a witness and

without recognition of any consequential privilege. At page 168 of the case is the following language:

> - - -. "the law would undoubtedly hold the defendants in such a case to the usual professional liability for due care and skill, and when the serious consequences that may flow from reliance upon such a certificate by the municipal officers, the imprisonment of a sane person in an insane asylum, perhaps for a long time, the standard of care required, and of professional learning and ability to deal with such a subject, would certainly be an exacting one."

In *Barnes* v. *McCrate,* 32 Me. 442, a slander case and one widely cited, this court said, at Page 446:

> "There can be no question that if a witness, taking advantage of his position, and departing from what rightfully pertains to the case, should voluntarily slander one of the parties, he would be liable. "But when called upon, in the progress of a cause, and under the rules of the court, and confining himself to that which rightfully pertains to the case, he is not liable for the testimony he may give. To hold otherwise would tend to intimidate a witness and to deter from a disclosure of the whole truth - - - - This is a doctrine of the highest legal policy."

In *Garing* v. *Fraser,* 76 Me. 37, it is said, at Page 42:

> - - - - - "words spoken in the course of judicial proceedings, though they impute crime to another, and therefore, if spoken elsewhere, would import malice and be actionable in themselves, are not actionable if applicable and pertinent to the subject of inquiry. Barnes vs. McCrate, 32 Maine, 442; Hoar vs. Wood. 3 Met. 193. So in the case at bar, while the law declares that every person shall have a remedy for every wrong, public policy requires that witnesses shall not be restrained by the fear of being vexed by actions at the instance of those who are dissatisfied with their testimony; but if they perjure themselves they may be indicted and punished therefor."

In the instant case the declaration reveals that the certificate of the defendant physician was pertinent to the subject matter.

The absolute privilege of witnesses as defined in *Barnes* v. *McCrate* and *Garing* v. *Fraser, supra,* is supported by the great weight of American authority. *Rice* v. *Coolidge,* 121 Mass. 393, 395; *Laing* v. *Mitten,* 185 Mass. 233, 235; *Cooper* v. *Phipps,* 24 Ore. 357; *Cooley* v. *Galyon,* 109 Tenn. 1; *Hager* v. *Major,* 353 Mo. 1166; and cases cited in 25 Cyc. 381, 12 A. L. R. 1247, 81 A. L. R. 1119, 158 A. L. R. 584, and 22 L. R. A. 836n, Cooley on Torts, 4th ed., Chap 7, Sec. 153, Page 527.

> "A witness is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding and as a part of a judicial proceeding in which he is testifying, *if it has some relaton thereto.*" (emphasis supplied)
>
> Restatement of the Law, Torts, Sec. 588. Kinter vs. Kinter, (Ohio), 87 N. E. 2d 379, Strycker vs. Levell, (Oregon), 190 P. 2d 922; Schmitt vs. Mann, (Ky.), 163 S. W. 2d 281. Mezullo vs. Maletz, 331 Mass., 233.

Physicians in lunacy commitment proceedings have been accorded such privilege from civil liability for their pertinent certificates and testimony. *Dyer* v. *Dyer,* 178 Tenn. 234; *Corcoran* v. *Jerrel* (Iowa), 170 N. W. 776; *Fisher* v. *Payne,* 93 Fla. 1085; *Hager* v. *Major,* 353 Mo. 1166; *Perkins* v. *Mitchell,* 31 Barb. (N. Y.) 461 *(dictum); Linder* v. *Foster,* 209 Minn. 43 (physician regarded as a quasi judicial officer). See *Reycroft* v. *McDonald,* 194 Mich. 500.

There is contrary authority. *Ayers* v. *Russell,* 3 N. Y., Supp. 338; *Williams* v. *LeBar,* 141 Pa. 149, 151 and *Miller* v. *West,* 165 Md. 245 *(dictum),* were decided upon the issue of ordinary or reasonable care of the physician without cognizance of the witness privilege. *Hall* v. *Semple,* 3 F. & F.

Rep. 337, also, but in respect to a physician acting under a lunacy statute very different from the Maine act. *Brandt* v. *Brandt,* 286 Ill., App. 151, 161 *(dictum)* would require good faith of the physician and *Comfort* v. *Young,* 100 Iowa 627, demanded honesty, good faith and probable cause.

Some authorities deny the pertinent witness privilege to a physician in a lunacy complaint procedure if the tribunal lacks jurisdiction. *Beckham* v. *Cline* (Fla.), 10 So. (2nd) 419; *Hager* v. *Major,* 353 Mo. 1166; *Perkins* v. *Mitchell,* 31 Barb. (N. Y.) 461; 158 A. L. R. 592 n.

In *Mezullo* v. *Maletz,* 331 Mass. 233, 236 (1954), 118 N. E. (2nd) 356, 358, upon demurrer, it was held that a physician signing a pertinent certificate in lunacy commitment proceedings is not liable in tort even if he act maliciously or in bad faith.

The court said:

> "But whatever the law may have been formerly on this subject it is now settled that words spoken by a witness in the course of judicial proceedings which are pertinent to the matter in hearing are absolutely privileged, even if uttered maliciously or in bad faith."

The doctrine of the privilege of protection from tort liability to witnesses for pertinent recitals in judicial proceedings is well established. It is stated without condition in *Barnes* v. *McCrate* and *Garing* v. *Fraser, supra.* In the former case it is defined as a "doctrine of the highest legal policy." It is an absolute privilege and thereby different from the qualified privilege in *Hodgkins* v. *Gallagher,* 122 Me. 112 *(dictum); Elms* v. *Crane,* 118 Me. 261; *Sweeney* v. *Higgins,* 117 Me. 415; *Toothaker* v. *Conant,* 91 Me. 438. Cooley on Torts, 4th ed., Chap. 7, Sec. 151. The privilege includes the certifying physician in lunacy proceedings who acts within the scope of the privileged occasion. Non conformity in some of the decided cases seems to obtain be-

cause of a failure to recognize the physician as the witness that he is, because of a reluctance to accept the doctrine of privilege, as above, 33 Am. Jur., Sec. 146, Page 142; American State Reports, Vol. 123, Page 640 et seq., and because of a fear of dire consequences to the individual victim of any carelessness or malice on the part of a physician. Slanderous or libelous words of any witness, physician or not, in a judicial proceeding are prolific of unfortunate results and in the rationale of the rule of privilege above described such a hazard was weighed. *Mezullo* v. *Maletz,* 331 Mass. 233; *Hoar* v. *Wood,* 3 Metc. (Mass.) 193; Restatement of the Law, Torts, Sec. 588, Comment a; Cooley on Torts, 4th ed., Chap. 7, Sec. 151, P. 524. The law, no doubt, deems it prudent to provide against the possibility of a too apprehensive physician depriving a person mentally ill of any speedy care, treatment or protection indicated or failing to protect the public from a serious menace. There is a dearth of psychiatrists available and it falls upon practicing physicians for want of specialists to furnish the certificates in lunacy cases. If there is sufficient sanction for the general doctrine exempting witnesses in judicial proceedings from tort liability for pertinent testimony, the rule is equally cogent for obtaining the objective judgment of physicians in lunacy commitments and detentions.

Against the likelihood of intentionally false certificates there is a strong deterrent in the criminal law. Conspiracy, wilful perjury, intentional, false certifications and deliberate, false reports in lunacy commitment proceedings and the wilful attempt to cause or the causing of the commitment of the same are constituted and made punishable as criminal felonies. R. S., Chap. 27, Sec. 114.

The plaintiff's amended declaration is insufficient in law; the language used does not state a cause of action. *Brown* v. *Rhoades,* 126 Me. 186, 187.

Exceptions sustained.
Case remanded.

INHABITANTS OF TOWN OF NORRIDGEWOCK
vs.
INHABITANTS OF TOWN OF HEBRON

Somerset. Opinion, January 2, 1957.

Pauper Settlement. Referees. Interest. Awards. Separability. Law Court. Mandate. Remand. Remittitur.

Interest is compensation fixed by agreement, or allowed by law, for the use or detention of moneys, and our law imposes it as damages in proper cases, when the debtor is in default, or guilty of fraud.

The date when interest is legally due does not always coincide with the date of demand.

It is error for a referee to award interest from the date of the writ where no claim for interest is set forth in the declaration, and the case is submitted to the referee upon the issue of pauper settlement, so that it cannot be said that there was a default until that issue had been determined.

Where the error of a referee consists merely in the erroneous awarding of interest the award may be accepted in part and rejected in part notwithstanding the rule that in cases heard by referees the authority of the Law Court is limited to remand and no remittitur can be ordered.

Courtenay v. *Gagne*, 141 Me. 302 distinguished.

In the instant case the Law Court ordered that interest be allowed from the date of the referee's award to the date of judgment.

ON EXCEPTIONS.

This is an action on an account for pauper supplies before the Law Court upon exceptions to the allowance of a referee's report. Exceptions to award of interest sustained. Cause remanded with judgment to be entered with interest as ordered.

Ames and Ames, for plaintiff.

Berman & Berman,
George C. West, Asst. Atty. General, for State of Maine.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

DUBORD, J. On April 13, 1949, one Thomas E. Noyes, while a resident of the Town of Norridgewock, fell into distress, and being in need of immediate support and relief, the Town of Norridgewock, through its overseers of the poor, furnished help to him, between April 13, 1949 and November 4, 1950 in the amount of $796.47.

The Inhabitants of the Town of Norridgewock, claiming that the pauper settlement of Thomas E. Noyes, was in the defendant Town of Hebron, gave the proper statutory notice to the Town of Hebron. Liability being denied, the Inhabitants of the Town of Norridgewock brought suit against the Inhabitants of the Town of Hebron, by writ dated November 4, 1950, to recover the amount of $796.47. There is no claim for interest in plaintiffs' declaration.

The defendant pleaded the general issue.

The case remained dormant, until May 20, 1954, at which time, by rule of reference, the cause was referred to a referee for determination, with the right of exceptions on questions of law, reserved to both parties. No further action was taken, until, on October 7, 1955, the parties agreed to submit the cause to the referee previously selected, upon a written agreed statement of facts.

No explanation is made for the long delay, and as far as the record is concerned, no blame for the delay can be placed on either party.

Hearing was had before the referee, and on November 4, 1955, the referee made a finding to the effect that Thomas E. Noyes had a legal pauper settlement in the town of Hebron and that the plaintiff was entitled to recover the amount of $796.47, plus interest, at the legal rate from November 4,

1950 (the date of the writ) to the date of the award, in the amount of $238.94, a total debt or damage of $1035.41.

In due course, the plaintiff filed a motion addressed to the Superior Court asking that the report of the referee be accepted. In accordance with Rule XXI, defendant filed written objections to the acceptance of the report, specifying, in substance, that the referee erred in awarding interest in the amount of $238.94.

The report of the referee was accepted over the objections of the defendant, and, to this ruling, the defendant filed exceptions.

No other objections were filed to the report of the referee, so that the only issue for determination, is the legality of the awarding of interest, in the definite amount of $238.94.

The agreed statement of facts indicates that there were many difficult and complex questions of fact for the referee to pass upon in the determination of whether or not the pauper settlement of Thomas E. Noyes was in the defendant town.

In the agreed statement of facts is to be found the following statement:

> "The sole issue in the case is whether or not Thomas E. Noyes was, at the time of furnishing of the pauper aid, a person having his legal pauper settlement in the Town of Hebron so as legally to charge the Inhabitants of the Town of Hebron with the expense of his necessary care and support during the period above recited. If Thomas E. Noyes did have his legal pauper settlement in the Town of Hebron during the time the pauper supplies were furnished, as above mentioned, then the Town of Hebron is liable to the Inhabitants of the Town of Norridgewock for the amount claimed in this action; otherwise not. Such appears to be the primary issue in the case."

The defendant now argues that if it should be found that the referee was in error in awarding interest, that its exceptions must be sustained and the cause remanded to the Superior Court in accordance with the rule laid down in *Courtenay* v. *Gagne,* 141 Me. 302, at 305.

In that case, a referee had made an award for damages in a suit for personal injuries, and objection was made that the award was grossly excessive. The court said:

> "In cases heard by referees, no remittitur can be ordered. If the exceptions were sustained, the authority of this Court only goes to remanding the case to the Superior Court, where, in the discretion of the presiding Justice, the reference may be stricken off and the case heard by a jury, or there might be a recommittal to the same referees, or with the consent of the parties, a reference to new referees."

We take up first the issue of whether or not the plaintiff was entitled to interest from the date of the writ. Interest is the compensation fixed by agreement, or allowed by law, for the use or detention of moneys. It is interesting to note that by the ancient common law, it was not only unlawful, but criminal, to take any kind of interest. It was not until 1545, that the Statute of 37 Henry VIII was passed legalizing, within certain limitations, the taking of interest. *Sutherland on Damages,* Vol. I, Page 535. In the absence of a definite agreement to pay interest, our law now recognizes the use of money as valuable and allows interest, in proper cases, as damages for detention of money, when the debtor is in default, or guilty of fraud. Interest is imposed by law, as damages, for not discharging a debt when it ought to be paid. The principle has long been settled, that if a debt ought to be paid at a particular time, and is not then paid, through the default of the debtor, compensation in damages, equal to the value of money, which is the legal interest upon it, shall be paid during such time as the party

is in default. The important practical inquiry, in each case, in which interest is in question, is, what is the date at which this legal duty to pay, as an absolute present duty, arose. This date does not always coincide with that at which the demand is legally due and suable.

In the instant case, which was submitted to the referee, by agreed statement, upon the issue of the pauper settlement of the one to whom assistance has been rendered, it cannot be said that the defendant was in default until that issue had been determined by the finding of the referee on November 4, 1955.

It is, therefore, our opinion that the referee erred in awarding interest from the date of the writ.

However, by virtue of Sec. 20, Chap. 106, R. S. 1954, plaintiff is entitled to interest on the award reported by the referee, from the time of making such award, to the time of judgment.

Plaintiff, is, therefore, entitled to recover the amount of $796.47 together with interest, at the legal rate, from November 4, 1955, to the day judgment is entered.

Having determined that the referee was in error in adding the amount of $238.94, by way of interest, to his award, we pass now to the question of the practical disposition of the case, particularly in the light of the decision in *Courtenay* v. *Gagne, supra,* and other decisions of similar import.

In all the cases, previously before this court, in which the rule laid down in *Courtenay* v. *Gagne, supra,* has been applied, it is clear that in these cases, it was impossible to determine where the error, if any, on the part of referee, lay. In the instant case, however, we know the exact amount of the error, viz.: "$238.94."

The rights of the plaintiff have been properly determined, but for the erroneous entry of interest.

In the case of *Kennebec Housing Co.* v. *Barton,* 122 Me. 374, at 377, this court ended its opinion with this statement:

> "This case has once been fully heard before a tribunal selected by the parties. It is unnecessary and would be unfortunate to require a new trial on account of an inadvertent omission in a referee's report."

A study of this case does not seem to indicate that this particular statement on the part of the court was applied to the case under consideration. However, it is our opinion that it should be applied in this case. It appears to us that the primary purpose of court procedure is to secure justice, as expeditiously and promptly as possible. Surely it is unnecessary and would, indeed, be unfortunate to require a new trial.

This court is not without precedent in support of the principle, that the award of a referee may be accepted in part and rejected in part.

In *Orcutt* v. *Butler,* 42 Me. 83, the court said: "It has been determined by a series of decisions that an award may be good for part and bad for part. The Court will sustain the part which is good, if it can be so disconnected from the remainder of the award, that no injustice shall be done." See also, *Stanwood* v. *Mitchell,* 59 Me. 121 where the court said: "An award may be good in part and bad in part, and if separable the good will be affirmed." See also, *Day* v. *Hooper,* 51 Me. 178. True, these were cases in which actions had been brought upon awards made by referees appointed by agreement of the parties pursuant to what is now Chap. 121, R. S. 1954. However, the principle involved is analogous to the issue in this case. See also, *Rawson* v. *Hall,* 56 Me. 142, which was a reference by rule of court, in which the court, applied the principle that an award will be sustained, so far as the same is good, if it can be so disconnected from the remainder that no injustice will be done.

The exceptions of the defendant, to the award of interest, are sustained, with costs to the defendant. The award being good in part, and bad in part, and the good being separable from the bad, the cause is remanded to the Superior Court of Somerset County, judgment to be entered therein for the plaintiff, in the amount of $796.47, plus interest at the legal rate, from November 4, 1955, and less the amount of the legal costs to which the defendant is entitled.

So Ordered.

LOIS H. MORRISON
vs.
WILLIE J. JACKSON

Penobscot. Opinion, January 9, 1957.

Equity. Res Judicata.

The issue of judgment by estoppel or *res judicata* cannot be considered by the Law Court on an equity appeal, where there is no evidence in the record of the proceedings of any other case such as pleadings, docket entries, or evidence to inform the court of the issues or identity of the litigating parties, or whether present parties were parties or privies or whether there was a final judgment.

ON APPEAL.

This is a bill in Equity before the Law Court upon appeal. Equity appeal denied.

M. A. Beverage, for plaintiff.

Oscar Walker, for defendant.

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

WEBBER, J. In this case the plaintiff in equity asserts the fraudulent alteration of a deed given by her to the defendant. The effect of alteration was to give the defendant more property than he asked to buy, more than the plaintiff contracted to sell, and in fact more than the deed purported to describe and convey before its alteration. The defendant denied the accusation. The testimony of experts on ink eradication was inconclusive. Here was a typical factual issue to be determined by a fact finder who had opportunity to listen to the witnesses and observe their demeanor. The credibility of witnesses was determinative of the factual issues. There were straws in the wind blowing in the direction favorable to and corroborative of plaintiff's version. The justice below found for the plaintiff and ordered appropriate relief. The record affords ample support for his determination.

The defendant has inserted into the case by pleading and argument the suggestion that a grantee of the plaintiff engaged in litigation with the defendant in which the issues here presented were determined. As matters stand, however, the issue of estoppel by judgment is not before us. No effort was made to introduce into evidence anything which might support defendant's contention. We do not find in the record before us the pleadings in any other case, the docket entries, or any other evidence which would inform us as to the identity of the litigating parties, the issues therein determined, the connection of the present plaintiff as party or privy or whether the judgment therein ever became final. The proof of such an affirmative defense as *res judicata* cannot rest on conjecture and surmise. The record must disclose the essential elements of proof.

The entry will be

Appeal denied.

Decree below affirmed, with additional costs.

RALPH E. JENKINS
AND
ROBERT S. BANKS
D/B/A GENERAL MODERNIZING CO.
vs.
HARDWARE MUTUAL CASUALTY CO.

Cumberland. Opinion, January 12, 1957.

Equity. Insurance. Reformation. Waiver. Estoppel.

R. S. 1954, Chapter 60, Section 303, is not designed to afford reformation of an insurance policy so as to provide coverage for injuries suffered by an alleged employee (where the policy excepted from coverage injuries to employees, *qua* employees) upon the alleged ground that the company had agreed to issue a policy to cover such individual.

The remedy against an insurer for expenses incurred in the defense of an action covered by an insurance policy is at law and not in equity.

A defendant insurer does not waive his right to contest coverage where he undertakes the defense of an action with reservations of such right.

ON APPEAL.

This is a bill in equity by an alleged insured (judgment debtor) and a judgment creditor to reform a policy of insurance and reach and apply benefits under such policy as reformed. The case is before the Law Court upon an appeal from a decree denying relief. Appeal denied. Decree below affirmed with additional costs.

Raymond S. Oakes
Robert Milliken, for plaintiff.

Robinson, Richardson & Leddy, for defendant.

SITTING: WEBBER, BELIVEAU, SULLIVAN, DUBORD, JJ. WILLIAMSON, C. J., and TAPLEY, J., did not sit.

WEBBER, J. This was a bill in equity in which the plaintiff Jenkins, a judgment creditor, sought to reach and apply the proceeds of a liability policy as provided by R. S. 1954, Chap. 60, Secs. 302 and 303. The policy was issued by the defendant insurance company to the plaintiff Banks, the judgment debtor. Banks as plaintiff sought to recover his expenses incurred in defending the original action brought against him by Jenkins. The justice below dismissed the bill and the matter is before us on appeal.

On December 1, 1950 Jenkins suffered personal injuries while doing work for Banks. He brought suit, charging Banks with negligence. The declaration in the tort action is not a part of the record here. However, when notice of the suit was given to the defendant, its counsel took the position that Jenkins as plaintiff was asserting a relationship of master and servant as between him and Banks, and that the policy would not cover injury to an employee. Accordingly, the assured Banks employed counsel who conducted the defense. Upon the first trial, a verdict was directed for the then defendant Banks and the case was reviewed by the Law Court upon exceptions. By stipulation the opinion which appears in 147 Me. 438 was made a part of the record in this case. On page 439, the opinion states, "The plaintiff claims that the relationship existing between the defendant (Banks) and himself was that of master and servant. The defendant claims that the plaintiff and those working with him were independent contractors." And on page 443, the following appears, "There was sufficient evidence in this case if the issues of fact be resolved in favor of the plaintiff to justify a verdict in his favor, whether the relationship between him and the defendant was that of master and servant or that of independent contractor and contractee." The exceptions were sustained and a new trial ordered. Upon the second trial the plaintiff obtained a verdict. The verdict was general and, in the light of the lan-

guage of the opinion quoted above, left unresolved the issue as to whether the plaintiff was an employee or an independent contractor.

This issue as to the status of the plaintiff Jenkins has now, however, been resolved by the pleadings in the case before us. In the second paragraph of the bill, the plaintiffs allege the personal injury to Jenkins "while employed by said Banks * * * as an applicator affixing shingles for said Banks * * *." This allegation is admitted by the defendant insurance company. In the third paragraph of the bill it is alleged that Banks "was insured by said defendant against such liability, to wit for injuries to employees." This allegation was denied. There is no allegation that plaintiff Jenkins was an independent contractor. There is no qualification or clarification of the words "employed" or "employees" such as would suggest that they were intended to be synonymous with "independent contractor" or the equivalent thereof. The language employed in the bill was used with full awareness of the importance of the status of Jenkins. In fact, in paragraph 7, the bill alleged that the defendant company "has stated to said plaintiff Banks * * * that said policy does not cover the employment and accident of said plaintiff Jenkins." The language used in the allegations of the bill is plain and unambiguous and ordinarily imports a relationship of master and servant. That such was the intended meaning is entirely consistent with the position taken by plaintiff Jenkins from the inception of the controversy. As noted above, his contention in the original suit was that his status was that of servant to the master Banks. We conclude that the pleadings have effectively removed the status of Jenkins from the realm of controverted issues. The policy introduced into evidence contains the following exemption from coverage, "This policy does not apply * * * to bodily injury to * * * any employee of the insured while engaged in the employment of the insured, or any obligation for

which the insured or any company as his insurer may be held liable under any workmen's compensation law." The policy as written, therefore, clearly excludes the right of the employee Jenkins to reach and apply the proceeds in satisfaction of his judgment.

Apparently anticipating such a result, the plaintiffs have inserted other allegations which in substance assert (1) that the defendant company with knowledge of the status of Jenkins agreed to issue a policy which would cover such a situation as is here presented, and (2) undertook the defense and by its conduct waived the right to rely upon non-coverage. Neither party offered any evidence dealing with the status of Jenkins at the time of the accident or the circumstances under which the injury was received. All of the evidence from both sides dealt with the circumstances under which the policy was written and with the conduct of the insurer with relation to the defense of the original action brought by Jenkins against Banks.

It is clear that prior to May 31, 1950 Banks was an assenting employer under the Workmen's Compensation Act and carried insurance therefor in usual form with defendant company. Sometime in the spring of 1950, Banks at the suggestion of his accountant sought and obtained from the Bureau of Internal Revenue a ruling that persons who, like Jenkins, were employed by him as applicators did not fall within the category of employees for purposes of federal taxation. Banks was thereby relieved of his liability for payroll taxes on his applicators. There is no suggestion that the relationship between Banks and his applicators had in any way changed, especially with reference to the control and direction exercised by Banks as to how the workmen should perform their tasks or as to the right of Banks to employ and discharge the applicators. These elements ordinarily determine whether the relationship is that of master and servant or independent contractor and contractee.

Lunt et al. v. *Fidelity & Casualty Co.,* 139 Me. 218, 224. It seems reasonable to infer that Banks felt that his insurance coverage should be consistent with his representations to the Bureau of Internal Revenue. Accordingly, Banks informed the defendant company that he would not continue compensation insurance. There was discussion as to what form of substitute insurance should be written. The evidence is in conflict as to what was said and as to what the parties understood was to be done. In any event the workmen's compensation policy was discontinued as it pertained to applicators and the policy now in issue and which excludes employees was written and issued. The plaintiffs have prayed for reformation of the policy contract to afford coverage to Jenkins. In this connection the findings of the justice below stated, "There are no grounds established requiring reformation of the policy. As stated, in my opinion the policy covered Jenkins as an independent contractor, but not as an employee. As an applicator, he was one or the other within the intention and understanding of the insured and insurer in writing the policy. There was no mistake in the exclusion of employees from coverage. It was not intended that the policy give the same coverage as a workmen's compensation policy, for example." There is ample evidence to support the finding.

The plaintiffs contend that by its conduct the defendant insurer has waived the right to contest coverage. The defendant did not undertake the defense without reservation of the right to contest coverage. Such conduct may work an estoppel. *Colby, Pro Ami* v. *Insurance Co.,* 134 Me. 18. On the contrary, the defendant's counsel raised the question of coverage on first inspection of the declaration and thereafter took no part in defense of the action. Other counsel then employed by the insured then took over preparation and trial and conducted all the proceedings to the point of final judgment. On this issue, the justice below correctly

found that "The insurer lost no rights by waiver or estoppel through its activity in defense to the time of denial of coverage."

If plaintiff Banks has a valid claim against the defendant for expenses incurred in defense of the action brought by Jenkins, his remedy therefor is at law and not in equity. The statute under which this bill is brought is not designed to afford to the insured the requested relief.

The entry will be

Appeal denied.

Decree below affirmed with additional costs.

STATE OF MAINE
vs.
PETER VICNIERE

Somerset. Opinion, January 16, 1957.

Night Hunting. Directed Verdict. Circumstantial Evidence. Principal and Accessories.

Where the State presents evidence, direct and circumstantial, sufficient to prove that the respondent was in the area of the offense charged at night-time, and that there were present and available spot lights, dash board socket, batteries and carrying case, a rifle with ammunition to fit and a mounted scope, that the respondent drove his car slowly whilst a spot light illuminated fields and apple trees where deer were known to resort, the jury were warranted in rendering a verdict of guilty.

Where the case is one of misdemeanor, all participants are principals.

Upon exceptions to the denial of directed verdict the issue is whether there was sufficient evidence to warrant a jury verdict of guilty.

ON EXCEPTIONS.

This is a criminal action for night hunting before the Law Court upon exceptions. Exceptions overruled. Judgment for the State.

George W. Perkins, for State.

Joseph H. McGonigle, for defendant.

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

SULLIVAN, J. The respondent was found guilty of night hunting and comes to this court upon exceptions to his denied motion for a directed verdict of acquittal.

Other exceptions taken by the respondent "were not argued or briefed, and counsel for the respondent, having informed the court that they were not relied upon, they are regarded as abandoned." *State* v. *Bobb,* 138 Me. 242, 244.

"The question, therefore, is whether in view of all the testimony, the jury were warranted in believing beyond a reasonable doubt, and therefore in declaring by their verdict, that the respondent was guilty of the crime with which he was charged."

State v. *Bobb,* 138 Me. 242, 251.

> "The only issue raised by the exceptions is, whether there was sufficient evidence to warrant the jury in rendering a verdict of guilty."

State v. *Clancy,* 121 Me. 362, 363.

Upon the trial there was presented to the jury credible testimony to yield the following narrative:

> On October 7, 1955, after sundown, the respondent, in company with his wife and another married couple, was operating his automobile northerly

along a road in the Town of Solon. In the immediate vicinity were a farm with buildings, open field and an orchard frequented by deer. The car came almost to a stop. Within it a spot light flashed revealing the respondent at the wheel. The light was shone upon the farm door-yard and buildings. A witness concealed behind a tree recognized the respondent, took special notice of the car and noted the registration number. After a half minute or so the automobile went north along the road, to return four or five minutes later. The spot light was played in the fields and amongst the apple trees south of the buildings. The car was not "going very fast." The witness telephoned a warden and the latter had the State Police stop respondent's car down the road a few minutes later. The operating respondent and the three passengers were in the automobile with the male guest riding in front. Between the two men was a 30-30 Stevens rifle with mounted scope, wrapped in a blanket. The rifle was empty. Beneath the front seat were found two, seal-beam spotlights, wrapped. In the car were a 3 cell, compact, hotshot battery and a case for carrying it upon a person's back. One spotlight was suitable for use with a hotshot battery or car battery. One spotlight was for use from a cigarette-lighter, dashboard socket. There were such a lighter and socket in the automobile. The male passenger and the respondent both denied having any ammunition but, when threatened with search, the passenger produced from his person a 30-30 caliber clip for a Stevens rifle, containing 3 shells. The shells fitted the rifle commandeered.

In *State* v. *Allen et al.*, 151 Me. 486, 489, this court has catalogued the elements which must be established to demonstrate guilt in night hunting. We entertain those postulates with the transcript in this case. The State presented evidence, direct and circumstantial, sufficient to prove that the respondent was in the area of the offense charged, that the time was nighttime as distinguished from daytime and within the limits set by statute and that there were present

and available certain instrumentalities, that is, spotlights, dashboard socket, battery and carrying case, a rifle with ammunition to fit and a mounted scope. To prove a purpose to search, find and possess game, the prosecution produced testimony that the respondent drove the car slowly whilst a spotlight from within the automobile was used to illuminate fields and apple trees where deer were known to resort. The case is one of misdemeanor and all participants in such are principals. The jury concluded that an intention to hunt deer was evidenced by the acts of the respondent and that integrated, credible evidence, real and circumstantial, was sufficient to exclude every other reasonable hypothesis except that of the respondent's guilt.

We cannot say that there was not "sufficient evidence to warrant the jury in rendering a verdict of guilty." *State* v. *Clancy, supra.*

Exceptions overruled.

Judgment for the State.

HERMINIE E. BERGERON
vs.
LUCIEN ALLARD

York. Opinion, January 21, 1957.

New Trial. Damages.

It is now generally held that verdicts may be set aside and new trials granted for inadequate damages as well as excessive damages, where the jury either disregards testimony or acts with passion or prejudice or reaches its verdict by compromise.

Damages of $1,000.00 are inadequate where the evidence shows:

(1) A compressed fracture of seventh dorsal vertebra, a painful injury, which increased to some extent a spinal curvature, affected the tissue, and may have aggravated a previous arthritic condition; use of back brace for six months;

(2) Medical and hospital expenses of $369.00;

(3) Lost Earnings of
5 weeks at $25.00 per week plus room,
Nine months value of room,
Four months further disability, and
10% future disability;

(4) Pain and suffering.

ON MOTION FOR NEW TRIAL.

This is a negligence action. The case is before the Law Court upon plaintiff's motion for a new trial because of inadequate damages. Motion sustained. Verdict set aside. New trial ordered.

Simon Spill, for plaintiff.

Hilary F. Mahaney, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, DUBORD, JJ. BELIVEAU AND SULLIVAN, JJ., did not sit.

DUBORD, J. The plaintiff, a woman fifty-nine years of age, suffered personal injuries resulting from an accident while riding as a gratuitous passenger in an automobile operated by her nephew on August 17, 1954.

The cause was heard by a jury and a verdict in the amount of $1,000.00 was rendered.

The case is before this court on plaintiff's motion that the verdict be set aside because of inadequacy of damages.

Defendant filed no motion for new trial, and during the course of oral argument, counsel for defendant conceded liability.

The sole issue, therefore, before us is the question of damages. While, by the general common law rule, new trials were not granted upon the ground of inadequate damages in actions of trespass and perhaps in all actions of tort, it is now recognized that the rule has been relaxed, and it is now generally held that no reason can be given for setting aside verdicts because of excessive damages, which does not apply to setting them aside for inadequacy of damages.

This principle has been adopted by this court as evidenced by several decisions. *Leavitt* v. *Dow,* 105 Me. 50; *Conroy* v. *Reid,* 132 Me. 162; *Chapman* v. *Portland Country Club,* 137 Me. 10; *Johnson, et al.* v. *Kreuzer,* 147 Me. 206.

In *Leavitt* v. *Dow, supra,* our court cited with approval the following statements:

> "It is the duty of the court in case of both excessive and inadequate damages to set aside the verdicts if the jury in rendering them either disregarded the testimony or acted from passion or prejudice." "When the smallness of a verdict shows that the jury may have made a compromise, a new trial will be granted."

In *Conroy* v. *Reid, supra,* the court said:

> "This Court has long held that, when the smallness of a verdict shows that the jury may have made a compromise, a new trial will be granted."

This principle was reiterated in *Chapman* v. *Portland Country Club, supra,* and as well as in *Johnson, et al.* v. *Kreuzer, supra.*

In this case no contention is made that the jury acted from bias, passion or prejudice. However, it is contended by the plaintiff that the jury either disregarded the testimony or reached its verdict by compromise.

Prior to the accident upon which this action is based, plaintiff, an unmarried woman, earned her living as a hotel chambermaid. Her testimony is that her earnings were $25.00 per week, together with her room. She testified that immediately after the accident, although badly shaken up, she did not think her injuries were serious, so she did not seek medical attention for about a week. At that time she consulted a chiropractor and received from him treatments during a period of a few days. She then consulted a medical doctor, and on his advice went to a hospital where x-rays were taken. She was then attended by an orthopedic surgeon, and was finally discharged by him in March of 1955, approximately seven months after the accident. She was also examined at various times by another physician. As a result of her injuries she was out of employment from the time of the accident until September 22, 1954, a period of approximately five weeks. Her special damages for medical and hospital services, not including lost earnings, amounted to $369.00.

The evidence discloses that as a result of the accident, she suffered contusions and abrasions on various parts of her body, and as the most serious part of her injuries, a compressed fracture of the seventh dorsal vertebra. The medical testimony before the jury was that this fracture, besides being painful, affected the posture of the plaintiff, increased

to some extent the curvature of her spine, and affected the tissues in the vicinity of the fracture.

The x-ray pictures disclosed an arthritic condition in plaintiff's spine, and while there is no direct evidence to establish that the injuries either brought about or aggravated this arthritic condition, the medical testimony is to the effect that previously existing conditions of arthritis may well be aggravated by injuries such as were suffered by the plaintiff.

The plaintiff testified that she suffered great pain and discomfort. She testified that shortly after she returned to work on September 22, 1954, she found it impossible, because of her injuries, to continue the type of work she had previously performed. She secured other employment somewhat of like nature where the work was not so difficult. Her weekly wages were the same, but no room was furnished to her, so that the value of her room rent became an element of damage. She continued to work in this new position until sometime in June of 1955, at which time she said she "loafed" until July "because her back hurt her." It then appears that she resumed her work and continued her employment until the first week in September, at which time she went to live with her son, where she remained until early in December. At this time she left for Florida where she secured employment as a chambermaid in a hotel, beginning her employment on December 11, 1955, and continuing it until April 9, 1956.

Both medical men testified that they advised her to continue to work as part of her treatment, and one of the doctors testified he had suggested a warmer climate. It was recommended that she wear a back brace for a period of at least six months. A careful reading of her testimony seems to indicate that it was her contention that the reason why she did not work during a short period in the summer of 1955, and from early in September of the same year to

December, a period of about three months, was because of disability due to the accident. She also testified that her back continued to pain her during and after her Florida employment, and that because of this pain, she intended to "loaf" again.

It would appear that her difficulty with the English language may account to some extent for her inability to properly and clearly explain her contentions.

That she lost five weeks from her employment immediately after the accident is conceded. This item amounts to $125.00 to be added to the other special damages making a total of $484.00. Upon the question of special damages there remained to be considered by the jury, plaintiff's contentions that as a result of her injuries, her earnings were reduced for a number of months, by an amount representing the equivalent of the value of her room, which amount was lost when she gave up her first employment. There was also her contention of inability to work for a period of three to four months during 1955, as a result of her injuries. Remaining elements of damage for the consideration of the jury were pain and suffering, past, present and future, permanent impairment and future loss of earnings.

Both medical witnesses testified that plaintiff was left with a ten percent disability as a result of the accident. No claim is made that plaintiff is a malingerer.

A careful study of all the evidence convinces us that the damages awarded the plaintiff are inadequate.

It is our opinion that in finding a verdict of $1,000.00, the jury either disregarded vital and important evidence or reached its verdict as a result of compromise. There is every indication that this is not a well reasoned and considered judgment.

Motion sustained.
Verdict set aside.
New trial ordered.

OPINION

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

QUESTION
PROPOUNDED BY THE
HOUSE OF REPRESENTATIVES
IN AN ORDER PASSED JANUARY 16, 1957
ANSWERED JANUARY 22, 1957

HOUSE OF REPRESENTATIVES ORDER

PROPOUNDING QUESTION

STATE OF MAINE

In House of Representatives

ORDERED,

WHEREAS, there is now pending before the 98th Legislature H. P. 42, a joint order under the provisions of which Members of the House and Senate would be paid 8c per mile for travel at each legislative session, once each week, the same being an increase of 3c per mile over the authorized statutory sum of 5c per mile. The Text of the joint order being as follows:

> "ORDERED, the Senate concurring, that each Member of the Senate and House of Representatives of the 98th Legislature shall be paid for travel at each legislative session once each week at the rate of 8c per mile to and from his place of abode; the mileage to be determined by the most reasonable direct route; and be it further ORDERED, That the provisions of this Order shall be retroactive to the first Wednesday of January, 1957."

WHEREAS, Article IV, Part Third, Section 7, Maine Constitution, provides that

> "The senators and representatives shall receive such compensation, as shall be established by law; but no law increasing their compensation shall take effect during the existence of the legislature, which enacted it. The expenses of the members of the house of representatives in traveling to the legislature, and returning therefrom, once in each week of each session and no more, shall be paid by the state out of the public treasury to every member, who shall seasonably attend, in the judgment of the house, and does not depart therefrom without leave."

WHEREAS, Chapter 10, Section 2, Revised Statutes of 1954, provides that

> "Each member of the Senate and House of Representatives shall receive $1,250 for the regular session of the Legislature, and shall be paid for travel at each legislative session once each week at the rate of 5c per mile to and from his place of abode; the mileage to be determined by the most reasonable direct route. He is entitled to mileage on the 1st day of the session, and $100 of his salary on the 1st day of each month thereafter, during the session, and the balance at the end thereof; but $2 shall be deducted from the pay of every member for each day that he is absent from his duties, without being excused by the House to which he belongs."

WHEREAS, it is important that the Legislature be informed as to the Constitutional validity of said Order now pending;

WHEREAS, it appears to the House of the 98th Legislature that the following is an important question of law and the occasion a solemn one;

NOW, THEREFORE, BE IT

ORDERED, That the Justices of the Supreme Judicial Court are hereby requested to give to the House according

to the provisions of the Constitution on this behalf, their opinion on the following question to wit:

QUESTION

Is it within the power of the Legislature to provide for an increase in the amount of money to be paid the Senators and Representatives for travel in attending the legislative session, as provided in the pending joint order?

ANSWER OF THE JUSTICES

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

The undersigned Justices of the Supreme Judicial Court, in accordance with the provisions of the Constitution, respectfully answer herein the question propounded by the House of Representatives in an Order passed by the House January 16, 1957 relative to House Paper No. 42, a proposed joint Order under the provisions of which members of the House and Senate would be paid for travel at each legislative session once each week at the rate of 8c per mile to and from his place of abode, retroactive to the commencement of the present session of the Legislature. The present rate of 5c per mile was established by statute in 1949. Laws of 1949, Chap. 406.

Mileage of legislators for travel to the Legislature is personal expense as distinguished from legislative expense. It is not expense "necessary to enable the legislature to properly perform its functions" but expense "that must be incurred by a member of the legislature in order to be present at the place of meeting." The appropriation or payment of money for such a purpose is a matter "of public concern and one which can be effected only by an act or resolve of the Legislature passed as a law by both branches thereof and submitted to the Executive for his executive approval in ac-

cordance with the Constitution." Opinion of the Justices, 148 Me. 528, 530, 531.

Our views are strengthened by the course of our legislative history. From at least 1823 (Laws of 1823, Chap. 216) the travel expense of members of the Legislature has been fixed in amount by statute. As was said by the Justices in 1953, on page 530: "It is common knowledge that it has been the practice of the Legislature by order as distinguished from act, bill or resolve to provide for payment of legislative expenses, as above defined, from current legislative appropriations."

To say now that travel expense is a legislative expense as distinguished from a personal expense of the legislator would put aside the practice, and we may say the conviction, of the Legislatures of the past. A Legislature by order, as here, if such a view prevailed, could destroy completely the mandate of the statute.

On the reasoning of the 1953 opinion, we reach a like result. We quote with approval therefrom on page 531:

> "The nature of the expenses for which reimbursement is provided in the proposed Order being personal, they cannot be authorized or payment thereof directed by a joint legislative order."

In our opinion the travel expense sought in the Order is not compensation within the meaning of the Constitution. Provision therefor may properly be made by Act or Resolve. Constitution, Art. IV, Part Third, Section 7.

Dated at Augusta, Maine, this 22nd day of January, 1957.

Respectfully submitted:

ROBERT B. WILLIAMSON
DONALD W. WEBBER
ALBERT BELIVEAU
WALTER M. TAPLEY, JR.
FRANCIS W. SULLIVAN
F. HAROLD DUBORD

RAYMOND M. STINSON
vs.
FRANK C. BRIDGES, ADMR. OF
DORA C. STINSON ESTATE

Hancock. Opinion, January 24, 1957.

New Trial. Damages.

A new trial will not be granted where the evidence is sufficient to sustain a verdict and the Law Court cannot say that the amount was excessive to the extent that the jury acted under some bias, prejudice or improper influence, or have made some mistake of law or fact.

Where a topic of damage analysis indicates that the jury computed from $2.00 to $4.00 per day for services rendered, it cannot be said that the jury were manifestly wrong.

ON MOTION FOR NEW TRIAL.

This is an action of assumpsit before the Law Court upon general motion for a new trial. Motion overruled.

Blaisdell & Blaisdell, for plaintiff.

Harry E. Wilbur, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

SULLIVAN, J. Plaintiff has been awarded a jury verdict in his action of assumpsit to recover from the estate of Dora C. Stinson the fair value of services which he asserts he performed for the intestate during her last four years of life. The pleading was the general issue. Defendant has addressed to the Law Court his motion for a new trial.

Defendant contends that the verdict was against the evidence and the weight of the evidence and that the damages granted were excessive.

Defendant's intestate died at the age of 86. She was not a relative of the plaintiff.

Plaintiff did not testify. There was real evidence consisting of four written exhibits and of transcribed interrogatories and answers thereto of the plaintiff's sister, admitted without objection. The oral evidence was supplied by one witness for the plaintiff and one witness for the defense.

The account annexed of the plaintiff claims the amount of $6,255 for labor performed through the period ranging from February 5, 1950 to September 8, 1954. Defendant's intestate died on May 12, 1954. The verdict was for $3,000.

The four exhibits are evidence that during the relevant span of time the defendant's intestate requested the plaintiff to send to her a meter reading, the defendant's intestate paid to the plaintiff the aggregate sum of $96 and that the defendant's intestate paid $58.37 to one Joyce inferentially for lawn mowing.

The plaintiff's single, attending witness contributed testimony which, in paraphrase and by excerpts, was as follows:

> After the death of Isaac, husband of Dora Stinson, the plaintiff performed services about her home for the three or four year period until Dora's death.
>
> "The only way I can answer that is by being there all through the years and almost every day going to the home myself and what I see, and I see him there almost continually during that three or four year period."
>
> "I have seen him to work in the garden at times, I have seen him helping on a hundred and one different small jobs. Such as taking the banking boards, putting them on in the fall and taking them off in the spring."
>
> "I have seen him working on the storm windows, putting them on in the fall and taking them off, and

I can go down the line a dozen things, small things like that."

"I have seen him tend the stoves and the furnace."

"I could name a list of small things."

"Well, if they wanted an errand, going to the store, he did that a number of times. I would say anything that come up a man should do with an old lady that could not do a man's work of any kind that he was there a big part of the time during the four year period to do it."

"Never had occasion to keep any track of it except what I see day after day, I wasn't interested in it."

"I don't think there was a day or a night very often during that period but what he was there sometime through it."

Asked how long the plaintiff would stay the witness replied that he could not state exactly but that it would vary from day to day from one hour to five or six. He said that Dora Stinson was at the place all the time, that plaintiff was there only when Dora was and that the residence was larger than ordinary. The witness was a next door neighbor for twenty years and was at Dora's house almost every day. He carried the mail there almost every night and kept track of the situation. Dora was at Rockland in later years in the winter, from October or November to April or May and during such absences the home was closed. The witness paid little attention to the house during Dora Stinson's absences. Dora Stinson hired the lawn mowed. Witness saw the plaintiff at times working in Dora's gardens.

"I would say he was around every day a certain period of it as far as I know during the four years."

"I couldn't swear all them days he was working."

"As far as one neighbor knows another's affairs he was there and filling the gap."

"Between Isaac's death and her death that is what he was doing."

Plaintiff's sister in response to written interrogatories had made answers which were admitted at the trial without objection and which in tenor or quotation are as follows:

> Witness lived near the intestate for the last five years of the latter's life. Dora Stinson was the widow of an uncle of the witness and plaintiff and "a very hard person to live with, very demanding."
>
> "I could not live all the time with her. I was there every day and nearly every night."

From 1950 until the time of Dora Stinson's death the witness was at Dora's house every day at least once.

> "Well, kind of company for her, kind of cleaning up the house and you know, taking over like that."

The plaintiff was at Dora's house "about every day" and more than once, doing the following:

> "Everything, he painted, made door steps, he shingled, why he was always doing something, things that she wanted him to do, planting a garden, he used to hoe the garden."

Plaintiff took care of the place generally for Dora. As to the fires:

> "Yes, she had oil and he kept the thing filled up, used to go there every night and do that."

Plaintiff "did carpentry work around the place."

Raymond did all the work except the housekeeping and "then he was caretaker when they would go to Rockland in the winter."

Nobody but the plaintiff did any of the chores around Dora Stinson's place after Isaac died.

> "When she was in her bed, that was two or three days before she died, she could look out of her window and see the buildings and would say, 'Oh dear, that needs fixing, or that needs painting, but Raymond will see to that.' "

Defendant presented one witness, a near neighbor, who testified that in the falls, springs and summers from September 1952 until the death of Dora Stinson the plaintiff in the observation of the witness did no work for Mrs. Stinson save for isolated instances of his shingling of the roof, of his putting banking boards about the house and of his trimming some tall grass.

In cases such as this where claims for compensation are made after death of the alleged debtor who can no longer dispute the matter the tasks of the jury and court are not light or enviable.

The principles of law involved here have been fully and repeatedly stated throughout our reports so as to be commonplace far beyond any need of any considerable citation.

The record reveals that the parties were accorded a fair trial without prejudicial error in law. The evidence which left much to be desired in amount and quality was conflicting and sufficient, although little more, to support a verdict. The jury saw and heard the witnesses. This court did not. The case presented issues of fact which the jury decided. We cannot substitute our judgment for theirs. We are not a deferred or sublimated jury.

From the decided cases we cite at random a few of the many controlling authorities.

> "It is an elementary principle that when valuable services are rendered by one person at the request, or with the knowledge and 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."
>
> *Saunders* v. *Saunders,* 90 Me. 284, 289.

"In such cases, as neither the justice of the plaintiff's claim, nor the moral obligation or duty of the defendant, is at once apparent, the law creates no contract in favor of the plaintiff, and aside from the ordinary burden of proof raises no presumption against him. It simply leaves it as a question of fact to be determined by the jury upon the peculiar circumstances and conditions existing in each case. It is then incumbent upon the plaintiff to satisfy the jury that the services were rendered under circumstances consistent with contract relations between the parties, and that the defendant either expressly agreed to pay for the services, or to give certain property therefor, or that they were rendered by the plaintiff in pursuance of a mutual understanding between the parties that he was to receive payment, or in the expectation and belief that he was to receive payment, and that the circumstances of the case and the conduct of the defendant justified such expectation and belief."

Saunders v. *Saunders,* 90 Me. 284, 290.

- - - - -"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 a mutual understanding or otherwise, or that under the circumstances he ought so to have understood. Both propositions are essential and must be proved. This is the law of implied contracts. Whether the plaintiff expected compensation, and whether the defendant's intestate so understood, or ought so to have understood, are questions of fact, and must be determined in a case like this, where there is no testimony from either of the parties, by a consideration of the circumstances, of their relations to each other, of their conduct respectively, and of the probabilities."

Leighton v. *Nash,* 111 Me. 525, 528.

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.

Colvin v. *Barrett, Admr.*, 151 Me. 344, 352.

"A verdict by a jury on a properly submitted issue should not be set aside even when there is strong doubt of the actual occurrence or existence of a fact found by a jury. If the evidence is conflicting, their finding will not be disturbed on that ground. A new trial will not be granted unless the verdict is clearly wrong. Where there is evidence to support a verdict and there is nothing in the case which would justify the substitution of the judgment of the court, who did not see nor hear witnesses, for that of the jury who did, and it appearing that the parties have had a fair trial without prejudicial error in law, the verdict should not be disturbed. See Cobb vs. Coggswell, 111 Me. 336; Sanford vs. Kimball, 106 Me. 355; Lewis vs. Railroad Co., 97 Me. 340; Stone vs. Street Railway, 99 Me. 243; Atkinson vs. Orneville, 96 Me. 311. The burden is on the moving party to show that the adverse verdict is clearly and manifestly wrong. Day vs. Isaacson, 124 Me. 407. See also Perry vs. Butler, 142 Me. 154 and Jannell vs. Myers, 124 Me. 229."

-----"The evidence in this case was such that intelligent and fairminded persons might differ thereon."

Bowie v. *Landry,* 150 Me. 239, 241, 242.

-----"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, 82A (2nd) 98 (1951)."

Birmingham v. *Sears, Roebuck & Co.*, 151 Me. 460.

The sound, legal principles arrayed above and a considered review of the evidence in the instant case decide us that the jury was not manifestly or clearly wrong in its conclusion that an implied contractual relation and a legal obligation obtained between the plaintiff and the defendant's intestate.

Upon the topic of damages analysis demonstrates that from February 5, 1950 to May 12, 1954 were some 1557 days. The amount of the verdict is $3,000. Allowance may be made for payment to the plaintiff of the aggregate sum of $96 in accordance with two exhibits introduced by the defense. It becomes manifest, then, that, for the whole period of stated time to the death of the intestate, the jury awarded the plaintiff less than $2 per day or $14 per 7 day week for services rendered. If the jury found that the plaintiff worked only one half of the days involved, the payment is $4 per day or $28 per 7 day week. We cannot from the record know the actual calculation by the jury.

It is our judgment that the evidence was sufficient to sustain a verdict for the plaintiff. With that established we cannot say that a verdict for the amount set was excessive to the extent that it becomes "apparent that the jury acted under some bias, prejudice or improper influence, or have made some mistake of fact or law." *Pearson* v. *Hanna,* 145 Me. 379, 381; *Cayford* v. *Wilbur,* 86 Me. 414, 416.

Motion overruled.

PATRICIA ANN BERNIER, PRO AMI
vs.
CHARLES BOURNAKEL

Androscoggin. Opinion, January 24, 1957.

Negligence Per Se. Inferred Negligence. Landlord and Tenant. Licensee. Invitee.

Conjecture and guess cannot be indulged in to fix liability in negligence cases.

The keeping of a rug in the hallway entrance to a landlord's apartment is not *per se* negligence by the landlord; negligence cannot be inferred from the mere slipping thereon by a licensee or guest where it does not appear what caused the slipping.

The only duty owed to a licensee is the negative one of not wantonly injuring him, nor recklessly exposing him to danger.

The duty owed to an invitee is that of reasonable care on the part of the owner to keep the premises under his control reasonably safe.

ON EXCEPTIONS.

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

Frederick Keamy,
Robert F. Powers, for plaintiff.

Frank W. Linnell, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

BELIVEAU, J. On exception to an order directing a verdict for the defendant.

The plaintiff is the daughter of one George F. Bernier and at the time she received the injuries complained of in this

action she was four years and three months old. The family consisted of the father, the mother, the plaintiff and a younger child. The father was a tenant of the defendant and occupied one of the rear apartments in a building owned by the defendant. Two of the apartments were in the front part of the building and two in the rear. Entrance to the front apartments was gained by a door which opened on the street and the entrance to the rear apartments was by another door.

The defendant, with his wife, occupied an apartment in the front and on the ground floor of this building. The plaintiff and her family had occupied their apartment approximately 2½ years prior to the third day of July, 1955. It appears from the evidence that during this time the plaintiff visited the defendant's apartment quite frequently, either socially, or, as has been said, to run errands for the defendant's wife, who was a cripple.

Entrance from the outside to the defendant's apartment opened in a hall about 5 x 8 feet in size. The door leading from the outside to this hall was a large door consisting mostly of glass.

It is admitted by the plaintiff's father that the hall was kept in good repair and well lighted. A scatter rug was kept in front of the outside door in the hall.

The plaintiff's father called on the defendant frequently to pay his rent or for other reasons, and he testified that the premises were always kept in good condition other than the fact that prior to July 3, 1955 he had on occasions found this rug to be sometimes wrinkled.

On the day in question and late in the morning, he called on the defendant to pay his rent and while there the plaintiff came on the premises and left before her father had terminated his business. His first knowledge that the plaintiff had suffered injuries was when he heard a crash and the plaintiff crying.

The father testified that on this morning he took no notice of the condition in the hall and as far as he could observe the situation was the same as he had seen it before.

The child, although of very tender age, was allowed to testify and her testimony, as to liability, is limited to a statement that she slipped on the rug as she was walking through the hall toward the front door.

There is absolutely no other evidence in the case to show that the rug was wrinkled on this morning or that there was anything about the situation in the hall from which negligence could be charged to the defendant.

While there is evidence of the wrinkling of the rug, prior to July 3, 1955, there is nothing whatever to indicate its condition on this day when the plaintiff entered and left the defendant's premises.

The keeping of a rug, as in this case, is not *per se* negligence on the part of the occupant or owner of the premises. It is common practice to keep such a rug close to a door leading immediately from the outside. What caused the plaintiff to slip does not appear in the evidence nor can negligence be inferred for such a situation. Conjecture and guess cannot be indulged in to fix liability in this case or any other case.

The plaintiff frequently visited the defendant's premises and prior to receiving the injuries had experienced no trouble nor difficulty in going to and from the defendant's apartment, through the hall and on the rug in question.

The parties indulge in much discussion as to the status of the plaintiff; one side advancing the theory that the plaintiff was a guest and the other that she was a mere licensee. It is not necessary for us to pass on this question.

If the plaintiff was a licensee as said by our court in *Kidder* v. *Sadler,* 117 Me. 194,

> "..... the defendant owed the plaintiff no duty except the negative one not to wantonly injure him, nor wantonly and recklessly expose him to danger."

In the case of an invitee, the rule is that of reasonable care on the part of the owner. In *Miller* v. *Hooper*, 119 Me., at page 529, the court there said,

> "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."

There is not the least bit of evidence that the defendant violated his duty toward the plaintiff whether her role was that of licensee or guest.

Exception overruled.

EVERETT O. ROWE

vs.

KEYES FIBRE CO.

Kennebec. Opinion, January 28, 1957.

Workmen's Compensation. Appeal and Exceptions. Compensation. Partial Disability. Review.

A decree of the Superior Court upon a decision of the Industrial Accident Commission may be brought before the Law Court upon appeal or exceptions.

The Industrial Accident Commission may, upon original petition and answer, award partial disability payments for a stated period prior to hearing where such decision is properly based upon all the facts then appearing.

The determination of disability and compensation for the period from accident to hearing may be made upon a general denial of liability.

Section 38, which provides for the review of incapacity "from time to time" is limited to situations where "compensation is being paid under any agreement, award or decree."

ON EXCEPTIONS.

This is a decision of the Industrial Accident Commission before the Law Court upon exceptions to be a *pro forma* decree of the Superior Court approving the same. Exceptions overruled. Decree affirmed.

Jerome G. Daviau, for plaintiff.

Sanford L. Fogg, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

WILLIAMSON, C. J. This case is before us on exceptions by the petitioning employee to a *pro forma* decree of a Justice of the Superior Court rendered in accordance with the decision of a member of the Industrial Accident Commission. Such a decree "may like equity decrees . . . be brought before this court for review either by an appeal therefrom or on exceptions thereto." *Girouard's Case,* 145 Me. 62, 67, 71 A. (2nd) 682; R. S., Chap. 31, Sec. 41.

> "Of course, exceptions to any part of a final decree can only present a question of law. No questions of fact are open for consideration upon exceptions."
>
> *Emery* v. *Bradley,* 88 Me. 357, 359, 34 A. 167.

See also Whitehouse Equity Jurisdiction Pleading and Practice in Maine (1900 ed.) Sec. 614. The question of law is whether the commissioner had authority to terminate compensation for partial disability after hearing on the original petition and answer.

In his petition dated March 30, 1956, the petitioner stated, first, that on August 18, 1955 "while working as a tractor operator in the employ of Keyes Fibre Company . . ., I received a personal injury by accident arising out of and in the course of my employment, of which the employer had due

knowledge or notice"; second, how the accident happened, and third, that the accident resulted in a described injury. He also prayed "that he may be awarded such compensation as he may be entitled to." The respondent "for answer denies each and every allegation in the petition."

After hearing, the commissioner entered his decision in August 1956 calling for "compensation for partial incapacity to work, at the rate of $16.54 per week, during the period from October 4, 1955, up to and including March 16, 1956, at which time compensation shall cease, subject to the provisions of the Workmen's Compensation Act."

From the commissioner's findings it appears that the partial disability resulting from compensable injury ceased before the hearing on the petition. It was in light of this fact that the commissioner limited compensation to a given period.

The chief weight of petitioner's complaint in his exceptions is that the commissioner found the right to compensation had been terminated without a special petition for review by the respondent. In other words, on the petitioner's theory upon an original petition to determine liability and compensation and general denial thereof, the commissioner can establish the fact of compensable injury but not the fact that the same injury has ceased to exist. He also urges that the respondent, in the absence of an affirmative pleading to this end, waived any defense of a break in causation arising from an intervening cause, namely, from an injury received in shovelling snow in March 1956.

In our opinion after the hearing on this original petition and the answer, the decision was properly based upon all facts then appearing. The commissioner examined the situation as it existed. In this instance the employee was: (1) under no disability from the August accident to October 4; (2) under partial disability from October 4 to March 16; and (3) under no disability from March 16.

Let us suppose the partial disability had become total in March and continued to the time of hearing. If we understand petitioner's theory correctly, he would be limited in such a case to a decision of partial disability and only on review could he obtain a ruling of total disability. If the partial disability cannot be decreased on such a petition and answer, it cannot well be increased. Common sense leads to the conclusion that the disability and compensation to date of hearing be determined under the procedure adopted in this case.

The Workmen's Compensation Act (R. S., c. 31) does not require a different result. Under Section 35, the answer to the petition "shall state specifically the contentions of the opponents with reference to the claim as disclosed by the petition." The respondent is limited in his defense by his answer. For example, a time limitation for filing a petition and *res adjudicata* must be pleaded. *McCollor's Case,* 122 Me. 136, 119 A. 194; *Ripley's Case,* 126 Me. 173, 137 A. 54. Material facts are admitted when not disputed in the answer. *Demeritt's Case,* 128 Me. 299, 147 A. 210. From such cases, however, we find no compelling reason to say that a general denial of liability is not sufficient to permit the determination of disability and compensation for the entire period from accident to hearing.

Section 38 of the Act provides for petitions for review of incapacity. It is operative "while compensation is being paid under any agreement, award or decree." Only then may the incapacity "from time to time be reviewed." We are not here concerned with further compensation after compensation has ceased.

In our opinion Section 38 has at no time been applicable to the respondent. Until the decision in August last, there was no order to pay compensation. The order then entered called not for payments in the future based on an existing and con-

tinuing disability, but for a determined and settled period of disability ending in the past. The statute does not require that there be two hearings in a situation such as this—the first to start, and the second to end, compensation.

It will serve no useful purpose to discuss the exceptions in detail. Insofar as they concern questions of fact, they are not before us. Our views on the questions of law are covered in the discussion above.

The entry will be

Exceptions overruled.

Decree affirmed.

GERTRUDE L. BLAKE, APPLT.
vs.
ASSESSORS OF TOWN OF YARMOUTH
IN RE ABATEMENT OF TAXES

Cumberland. Opinion, January 29, 1957.

Taxation. Appeal. Motions. Dismissal. Service of Process. Priority.

Where because of improper service of process (1) an appellee's motion to dismiss and (2) an appellant's motion for a new order of service are filed, *justice* requires a hearing on the motion for new service prior to the disposition of the motion to dismiss.

There are no statutory provisions prescribing the order in which motions should be considered in such cases.

ON EXCEPTION.

This is an appeal from the refusal of the Town of Yarmouth to abate a tax. The case is before the Law Court upon exception to an order dismissing the appeal. Exceptions sustained.

Robert A. Wilson, for appellant.

Linnell, Perkins, Thompson,
Hinckley & Thaxter, for appellee.

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

TAPLEY, J. On exceptions. The case comes to this court on exceptions to the action of the presiding Justice of the Superior Court in (1) granting motions to dismiss and (2) a ruling (inferred by the granting of the dismissal motions) that appellant's motion for a new order of service upon the defendants was no longer before him.

The appellant, Gertrude L. Blake, requested the Assessors of the Town of Yarmouth for an abatement of her 1955 real estate taxes. Upon the refusal of the Assessors to abate the tax she entered an appeal at the February Term, 1956 of the Superior Court for the County of Cumberland, which appeal was made returnable at the March Term, 1956. The Inhabitants of the Town of Yarmouth filed a motion to dismiss alleging that they were not proper parties defendant in the action and that no orders of notice were directed against them as defendants.

A motion to dismiss was also filed by B. Frederick Ayer, Willis A. Reed and Richard H. Hodsdon in their official capacity as Assessors of the Town of Yarmouth asking dismissal for the reason that no notice of appeal had ever been served upon them, either individually or collectively.

A hearing was had on the motions to dismiss the appeal, resulting in the granting of the motions. The appeal was dismissed. On the same day the appellant filed a motion for a new order of service. The presiding justice refused to entertain the motion for a new order of service because by granting the motions to dismiss there was no action pending upon which a new service could be ordered.

The order issued on appellant's petition is of the following tenor:

"STATE OF MAINE

(Seal) CUMBERLAND, ss.

At the Superior Court, begun and held at Portland, within and for said County of Cumberland, on the first Tuesday of February Anno Domini, 1956,

UPON THE FOREGOING PETITION, Ordered, That the petitioner give notice to the said respondents Assessors of Town of Yarmouth to appear before the Justice of our Superior Court, to be holden at Portland, within and for the County of Cumberland, on the first Tuesday of March A. D. 1956, at 10:00 o'clock in the forenoon, by serving them said respondents with an attested copy of said Petition and this order of Court thereon, fourteen days at least prior to said first Tuesday of March 1956, that they may then and there in said Court appear and show cause if any they have, why the prayer of said petitioner should not be granted.

HAROLD C. MARDEN
Justice, Superior Court, Presiding."

The officer's return reads:

"STATE OF MAINE

CUMBERLAND, ss.

Yarmouth, February 15 A.D. 1956

I this day made service of the within Petition and Order of Court thereon, upon Hilda R. Thurlow Town Clerk therein named, by giving to him in hand, a true and attested copy thereof. Said copy being duly attested by Leslie E. Norwood, Clerk of the Superior Court.

LESTER E. GRAHAM Deputy Sheriff."

The pertinent portions of the docket entries read as follows:

"Feb T 1956 ld.	Appeal filed and entered.
Mar T 1956 1d.	Motion to dismiss as to Inhabitants of Town of Yarmouth filed.
	Motion to dismiss for want of service filed.
	12d. Motion for new order of service filed. Hearing had on motions to dismiss. Motions to dismiss granted."

The real grievance of the appellant is the refusal of the presiding justice to pass upon her motion for a new order of service upon the Assessors of the Town. The reason assigned for not doing so was the granting of the motions for dismissal of the action. The record discloses the motions to dismiss were filed on the first day of the March Term, 1956; that on the twelfth day of the same term a motion for a new order of service was filed and also hearings were had on the motions to dismiss, resulting in the granting of the dismissal motions; therefore the chronological order of events on the twelfth day of the term was (1) motion for new order of service filed; (2) hearings on motion to dismiss; (3) motions to dismiss granted. It is obvious that upon the granting of the motions to dismiss there remained no appeal pending on the docket of the court upon which an order of service could be predicated. *Reagh, et al.* v. *Schalkenbach, et al.*, 71 P2d., 570 (Wash.). We are confronted with the question as to whether the presiding justice erred in considering the motions to dismiss previous to the one for new service.

There are no statutory provisions prescribing the order in which motions should be considered under circumstances such as obtain in this case.

The merits of this motion for new service do not concern us. This is a matter for determination on the part of the presiding justice. It appears to us where the docket entries show the motion for new service to have been filed on the same day and, according to order of entry, previous to the hearings on the motions to dismiss, that justice requires a hearing on the motion for new service before disposition of the motions to dismiss.

Exceptions were taken to the allowance of the motion to dismiss filed by the Inhabitants of the Town of Yarmouth. These exceptions are overruled because the Inhabitants of the Town of Yarmouth could not possibly be a party to this action.

The appellant should be given an opportunity for a hearing on the merits of her motion for an order of new service.

Exceptions to granting of motion to dismiss as to Inhabitants of the Town of Yarmouth are overruled.

Exceptions to granting of motion to dismiss as to B. Frederick Ayer, Willis A. Reed and Richard H. Hodsdon, Assessors for the Town of Yarmouth, sustained.

Exceptions as to the ruling on appellant's motion for a new order of service upon the Assessors of the Town of Yarmouth sustained.

EDMUND M. SOCEC ET UX.
vs.
MAINE TURNPIKE AUTHORITY, ET AL.

Kennebec. Opinion, January 30, 1957.

Declaratory Judgments. Equity. Law. Demurrer. Exceptions. Easements. Multiplicity of Suits.

The procedure in declaratory judgment cases (whether legal or equitable) is governed by the "nature of the case."

Ordinarily exceptions in equitable causes will not be entertained in the Law Court prior to final hearing.

Exceptions to the overruling of a demurrer to a petition for declaratory judgment even though "equitable in nature," are not prematurely brought before the Law Court when the interests of justice demand that the questions be determined before final hearing.

Implied restrictions upon a grantor's land, whether characterized as "reciprocal negative easements" or "equitable servitudes," have been recognized and enforced in equity by some courts under some circumstances.

Easements by implication, such as a right of way by necessity, are enforceable by an action at law under some circumstances.

Proceedings to quiet title may be at law or in equity. (R. S. 1954, Chap. 172, Secs. 48-51 and Secs. 52-55.)

The "nature of the case" is not always controlled by the interest involved whether legal or equitable; sometimes there are more decisive and less debatable factors such as multiplicity of suits, which may control.

A remedy at law may be doubtful where the rights of mortgagees are involved.

ON EXCEPTION.

This is a petition for declaratory judgment before the Law Court upon exceptions to the overruling of a demurrer. Exceptions overruled.

Sanborn & Sanborn, for plaintiff.

George Varney,
F. Warren Paine,
Drummond & Drummond,
Goodspeed & Goodspeed, for defendant.

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

WEBBER, J. Plaintiffs brought this petition for declaratory judgment naming 48 defendants and seeking a determination as to whether certain building restrictions affect the use of plaintiffs' property or should be removed as a cloud upon their title. Those defendants who resist the action first filed an answer. They then moved to strike their answer and filed a demurrer. The motion and demurrer were overruled. Exceptions were allowed and forthwith prosecuted in the Law Court.

The issues presented here are basically procedural. They furnish a rather lucid illustration of the interesting results which sometimes flow from the formidable complexities and the demanding formalities of common law pleading. The issues are twofold. Are these exceptions prematurely before us? Is the nature of the case presented by this petition such as to dictate procedure as at law or as in equity? The procedure to be followed in a petition for declaratory judgment is governed by the "nature of the case." *Sears, Roebuck & Co.* v. *Portland, et al.,* 144 Me. 250. The plaintiffs contend that the case is equitable in its nature. The defendants insist that law procedure should govern. The defendants have used the demurrer and exceptions, as they frankly admit, as a means of ascertaining at the very outset what their procedural vehicle should be to transport them over the long road of litigation. Their choice of a method of ascertainment appears remarkably efficacious, for the present state

of the pleadings presents an interesting paradox. If this cause is equitable in its nature, "ordinarily exceptions will not be entertained in the Law Court before a case in equity comes up for a final hearing." *Munsey, Exec.* v. *Groves,* 151 Me. 200, 202. If that rule is applicable here, these exceptions to the overruling of the demurrer are prematurely before us and must be dismissed. If we dismiss them for that reason, however, we thereby determine that the cause is equitable, and thus indirectly give the defendants an answer to their question. On the other hand, if we entertain the exceptions as not being prematurely brought, we thereby determine that the proceeding belongs on the law side. In either event the defendants will obtain the answer they seek. We think it preferable and far more realistic to answer directly that which we are compelled in any event to answer indirectly. The limitation upon the right of immediate review of interlocutory orders is, however, subject to certain recognized exceptions which are set forth in *Munsey, Exec.* v. *Groves, supra.* "Where, however, it is deemed to be more in the interest 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." The statute, R. S. 1954, Chap. 107, Sec. 26, governing the equity practice in such cases has long been deemed directory rather than mandatory upon the theory that the Legislature did not intend that a rigid adherence to the rule should defeat the ends of justice. Obviously the case before us falls within the stated exceptions. It is a matter of paramount importance to the parties to know at the outset whether the petition for declaratory judgment is governed by the rules of procedure which obtain at law or in equity. The right to jury determination of facts is involved. The consequences attending an erroneous conclusion can be disastrous. In the *Sears* case *(supra),* the

losing party found himself without a right of review by the Law Court because he had misapprehended the "nature of the case." The "interests of justice" are certainly involved and the matter "hardly permits of postponement." We hold therefore that the exceptions are not prematurely presented for consideration even though equity procedure applies.

The "nature of a case" is not always transparently clear, a fact of which the matter before us furnishes an excellent illustration. The petition, briefly summarized, sets forth that plaintiffs acquired about twenty-seven acres of land; that they laid out a part of the tract in lots and recorded a plan; that they reserved a larger portion on which they operated a farm and a commercial enterprise; that they conveyed certain lots, imposing upon the grantees restrictions against commercial use and the like; that part of their remaining property has now been taken by the defendant, Maine Turnpike Authority, by eminent domain, and the presence of the turnpike and traffic circle have changed the nature of the area so as to impair its residential value. The plaintiffs now desire to sell or use some of their remaining property for commercial purposes, but have been threatened by some of the defendants with legal action if they do so. There is no suggestion in the petition that the plaintiffs as grantors ever expressly covenanted or agreed to impose similar restrictions on the land they retained. If the allegations be taken as true, as is proper on demurrer, the restrictions on the use of plaintiffs' property, if they ever came into existence at all, could only have been created by an implied covenant that the land retained by the grantors would be subjected to the same restrictions which were imposed on the grantees. Such implied restrictions have been recognized and enforced in equity under some circumstances by some courts. Ordinarily, courts which so hold deem it essential that there be proof of a general plan or scheme by which the whole tract would be subjected to like restric-

tions. Some courts have denied relief where the grantors reserved the right to release the grantee from the restrictions. The ground of such a holding is that such action by grantors destroys the concept of a general plan or scheme. Some courts have refused to recognize such implied restrictions, pointing out that they are not favored by the law and that the grantee could, if he saw fit, protect himself by demanding an express covenant by the grantor that the restrictions would be applied to property retained. The very practical problems of the title examiner have been considered. Cases touching the point are assembled in two annotations in 60 A. L. R. 1216 and 144 A. L. R. 916. Courts dealing with the subject have given to such implied restrictions such descriptive names as "reciprocal negative easements," "equitable servitudes," and the like. We know of no case in Maine in which the question has arisen.

In determining the "nature of the case" before us, we are not greatly assisted by opposing views as to the nature of the alleged right or estate claimed, whether equitable or legal. Although the right to burden the property of another without express grant therefor would at first thought seem to be equitable in its nature, we cannot overlook the fact that easements may be raised by implication and are enforceable by action at law under some circumstances. A classic example is the right of way implied from necessity. *Whitehouse* v. *Cummings,* 83 Me. 91; *Doten* v. *Bartlett,* 107 Me. 351. Both counsel vigorously contend that the nature of the interest is determinative. They reach, however, very different conclusions. We think there are other more decisive and perhaps less debatable factors in this case which may properly control our decision.

The plaintiffs have named numerous defendants and alleged their common interest in the subject matter of the petition. In the seventeenth paragraph of the petition they have alleged: "That due to the multiplicity of parties, this

proceeding must be brought in equity." The avoidance of a multiplicity of suits has long been considered a ground for equity jurisdiction, even where it is the sole ground. *Ogunquit Corp.* v. *Inhab. of Wells,* 123 Me. 207. As long as 'the rights of all involved depend upon identically the same question, both of law and fact.' *Farmington Village Corp.* v. *Bank, et al.,* 85 Me. 46, 53; *Lockwood* v. *Lawrence,* 77 Me. 297. And even though each individual plaintiff of a large group may have his remedy at law. *Carlton* v. *Newman,* 77 Me. 408. See *York* v. *McCausland,* 130 Me. 245, 252. We think the allegations of the petition raise the same basic question as to all these defendants, as to whether by implication the plaintiffs have restricted the use of their own property, and if so, whether those restrictions have been destroyed by changed conditions.

The petition seeks first to have declared the respective rights of the parties, and secondly to remove the claimed restrictions as a cloud on plaintiffs' title. Proceedings to quiet title may be brought either at law under the provisions of R. S. 1954, Chap. 172, Secs. 48 to 51 inclusive, or in equity under the provisions of Secs. 52 to 55 inclusive of the same chapter. The remedies are concurrent and the mere fact that an alternative remedy at law is provided does not defeat equity jurisdiction in this instance. *Grant* v. *Kenduskeag Creamery, et al.,* 148 Me. 209. Doubt is cast, however, on the right of the petitioners in such a case as the one before us to employ effectively the remedy at law in view of the fact that mortgagees are involved. *Milliken* v. *Savings Institute,* 142 Me. 387; *Poor* v. *Lord,* 84 Me. 98. In any event, the petitioners here have by their pleadings raised issues which are properly determinative by equity procedure and they have clearly announced in their petition their election to avail themselves of equity. As stated above, the seventeenth paragraph of the petition states the plaintiffs' intention to proceed in equity. The eighteenth para-

graph states: "That there is no plain, adequate and complete remedy at law." The third paragraph of the prayers of the petition request: "That any cloud, if any, on the title of the petitioners as to use of their premises above referred to be removed." We conclude that the "nature of the case" is equitable and the petition is governed by the rules of procedure applicable to matters in equity. Defendants' exceptions being grounded exclusively upon the contention that the "nature of the case" is such as to compel procedure as at law, the mandate must be

Exceptions overruled.

HOWARD O. YOUNG
vs.
EDWARD T. CARIGNAN

Cumberland. Opinion, January 31, 1957.

Trial. Attorneys. Oral Argument. Evidence. Exceptions.

The presiding justice has discretionary authority to control oral argument.

It is an abuse of discretion in the instant case for a presiding justice to prohibit an attorney reading to the jury during oral argument such portions of a transcript of testimony of a previous trial as had been admitted by plaintiff as his previous testimony where such testimony was material to the instant case not unduly long, nor incomplete.

In determining whether the refusal was prejudicial, the value of precedent is limited and the Law Court must make a determination from facts in a given case.

ON EXCEPTIONS.

This is an action of assumpsit before the Law Court, after plaintiff's verdict, on motion for a new trial and exceptions. Exceptions sustained.

Grover G. Alexander, for plaintiff.

Oakes & Oakes, for defendant.

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

WILLIAMSON, C. J. In this action the plaintiff seeks to recover for breach of an oral contract with the defendant wherein the latter promised to make a certain investment in behalf of his son. The case is before us, after verdict for the plaintiff, on motion for a new trial and on exceptions.

In our view the verdict must be set aside for error in a ruling reaching the decisive question of the terms of the contract. The ruling was made in the course of the argument of defendant's counsel to the jury.

On the point in issue the jury found in substance the following:

In May 1951 the plaintiff and the defendant's son purchased a tractor and refrigerator trailer under a conditional sale agreement for $16,500. The plaintiff paid $5,000 in cash to the seller and the plaintiff and defendant's son agreed in writing to pay $5,610.64 in 60 days and to assume a prior claim upon the property held by a Chicago bank in the amount of $5,889.36. The agreement between plaintiff and defendant in substance was that if the plaintiff would enter into business with defendant's son and advance $5,000 toward the cost of the equipment, the defendant within 60 days would invest $5,000 in the business for his son's share by payment on the amount due from the plaintiff and defendant's son to the seller. At the defendant's request, the seller extended the time for payment an additional ten days. The defendant, however, did not make the promised $5,000 payment.

The jury also found: (1) no breach by the plaintiff; (2) a breach by defendant; (3) no waiver by plaintiff of defendant's breach, and (4) damages.

The plaintiff and the defendant differed sharply in their versions of the contract. The defendant testified to the effect that he promised to make the $5,000 payment only in the event he obtained the money from the sale or mortgage of certain houses owned by him, and not otherwise. The plaintiff, on his part, told the jury that the defendant's promise was firm and absolute and the promised payment was in no way conditional upon the defendant's ability to raise the money from particular sources.

If the promise was absolute, as asserted by the plaintiff, then there was a breach by the defendant in his failure to make the payment. On the other hand, if the condition stated by the defendant was not fulfilled, there was no breach by him. The credibility of the plaintiff and the defendant thus became of the utmost significance in the case. What in fact was the agreement turned in large measure upon the evidence of the plaintiff and defendant.

The error complained of arises from the refusal of the presiding justice to permit defendant's counsel to read in argument certain testimony in the case.

The exception reads as follows:

"EXCEPTION 1

Certain testimony of the plaintiff in the previous case (a former trial of the same case) was read to the plaintiff on cross examination in this case and the plaintiff admitted it was his previous testimony. The previous testimony of plaintiff read into this case as it appears and became part of the record in this case is as follows:

Q There was a previous hearing, Mr. Young. In that hearing were you asked this question and

did you give this answer: 'Q and there is no question but that everything was predicated on his selling that house in the first place' 'A. That is right.' Now is that your testimony at the last hearing?

Mr. Alexander: Before the witness answers that question I would like to check and be sure it is identical with the transcript I have.

Mr. Oakes: The question is 'And there is no question but that everything was predicated on his selling that house in the first place.' 'A. That is right.'

Mr. Alexander: Where is that testimony? (Conference between counsel)

Q (By Mr. Oakes) Now is that your testimony in the previous case? A. Yes.

Q Now Mr. Young, did this series of questions and answers occur at the last hearing: 'Q (By Mr. Oakes) One more question, I think. When you first did business with Mr. Carignan, Sr. as you claim was it understood that the money was to come from the sale of the house?' 'A. From the sale of the new house or from the mortgage of the one he was living in that he just built.' 'Q. From the sale of the new house if it could be sold?' 'A. That is right.' 'Q. And otherwise from the mortgage of the house he was living in if he could raise it from that?' 'A. That is right.' 'Q. That is the condition upon which the plan was made up?' 'A. That is what he told me.' 'Is that your testimony at the last hearing? A. It is.'

Robert Oakes arguing the case (for the defendant) led up to this testimony and started to read from the record of the previous case, the words as read into the record in this case as admitted by the plaintiff. The judge presiding refused to allow this testimony to be read. The transcript of the previous hearing was available to both counsel when originally introduced, at which time it was followed in the reading and was likewise available

> when about to be read in argument. The record of the incident is as follows:
>
> (Mr. Alexander then argued for the plaintiff and Mr. Robert Oakes for the Defendant. At the close of the defense argument and before rebuttal Mr. Raymond Oakes (also counsel for the defendant) conferred with the Court at the Bench in the presence of Mr. Alexander).
>
> THE COURT: The defendant takes exceptions to the comment by the Court during argument of defense counsel wherein defense counsel had read and was again about to read from what appeared to be the transcript of the July, 1952 hearing, contending that the portion of the transcript which counsel had read and was about to read again had gone into the record in the instant case and was admitted by the witness of the plaintiff and hence was entirely proper. (Exception allowed)"

In his charge the presiding justice touched upon the problem in these words:

> "Request No. 9 (by the defendant) reads as follows: 'The ruling that attorney could not read from previous testimony does not prevent you from considering such of that testimony so introduced as any other testimony.' I will give you that instruction. Some of the testimony from the previous case was read into the record of this case. That becomes evidence in this case just like the rest and must be considered by you. Any testimony that may have been read from the transcript of the previous case which was not entered on this record, that transcript not being an exhibit, is not properly before you, if there was any, and I do not say that happened, but any testimony from the previous case that was read into the record of this case becomes a part of this case and you must consider it."

The issue is whether there was abuse of discretion by the presiding justice in prohibiting the reading of the testimony

in argument. There is no error in a discretionary ruling "unless indeed (the justice) has plainly and unmistakably done an injustice so apparent as to be instantly visible without argument." *Goodwin* v. *Prime,* 92 Me. 355, 362, 42 A. 785; *Dupont, Petr.* v. *Labbe, et al.,* 148 Me. 102, 89 A. (2nd) 741. "When the determination of any question rests in the judicial discretion of the trial court, the exercise of that discretion can not be reviewed by an appellate court unless it is made to appear that the decision was clearly wrong or that it was based upon some error in law." *Rioux* v. *Water District,* 132 Me. 307, 309, 170 A. 63. "When some palpable error has been committed or an apparent injustice has been done, the ruling is reviewable on exceptions." *Bourisk* v. *Mohican Co.,* 133 Me. 207, 210, 175 A. 345; *American Oil Co.* v. *Carlisle,* 144 Me. 1, 10, 63 A. (2nd) 676. See also *Gregory* v. *Perry,* 126 Me. 99, 136 A. 354; *Charlesworth* v. *American Express Company,* 117 Me. 219, 103 A. 358; *Munsey* v. *Public Loan Corporation,* 151 Me. 17, 116 A. (2nd) 416.

The discretionary authority of the presiding justice to control argument is firmly established. *Crosby* v. *Maine Central Railroad Company,* 69 Me. 418 (not error to refuse permission to read decisions of the court to the jury) ; *Rolfe* v. *Rumford,* 66 Me. 564 (error to permit counsel, after objection to argue upon asserted facts not in evidence) ; *Mizula and Cherepowitch* v. *Sawyer et al.,* 130 Me. 428, and cases cited, 157 A. 239; 53 Am. Jur., Trial § 460; 88 C. J. S., Trial § 175.

The defendant argues that by the ruling the jury gained the impression that counsel was attempting to present the matter without right and that counsel thereby suffered embarrassment. We find no intimation of improper conduct by counsel in the sense of intended wrongdoing. His integrity was unquestioned. The embarrassment of counsel does not

show in the record and does not seem to us of consequence in reaching a decision.

The defendant makes a third point—that the material "included was germane to the vital issue of the case and was the focal point of defendant's argument." There can be no question, as we read the record, of the outstanding importance of the testimony in question. As we have indicated, if the defendant could shatter the plaintiff's evidence upon the terms of the contract, the plaintiff would fail to make out a case.

The defendant sought absolute accuracy in his argument. He could have commented on the testimony and such comment within bounds of fairness could not be denied. Here, in a series of questions and answers *in the testimony in the case,* we may readily believe he centered his argument.

The testimony which he wished to read is not long. It is not, so far as it has been argued to us, incomplete. There is no suggestion that it would have been unfair for this reason.

The defendant wished to do what is common practice in argument, that is, to make certain that he did not misquote or go beyond the evidence in the case. The desirability of accuracy in commenting upon the testimony in question cannot be denied. In light of the situation then existing, the justice erred within the rules above described.

The prejudice to the defendant's case by the ruling is plain. Nor was the prejudice cured by the justice's statement in charging the jury. We are unable to escape the conclusion that the force of the testimony was clearly and seriously weakened in effect through the ruling of the presiding justice.

We are aware that in nearly all of the cases presenting a like problem, the courts have found no prejudicial error in

giving or refusing permission to read testimony in argument. Typical examples are *Podrat* v. *Narragansett Pier R. Co.* (R. I.) 78 A. 1041 and *Wells Fargo & Co. Express* v. *Baker Lumber Co.* (Ark.) 171 S. W. 132.

In *Wells Fargo & Co. Express*, holding no error in refusing permission, the Arkansas Court said, at page 135:

> "The remarks of the court in making its ruling were only tantamount to saying that the court would not permit the time to be consumed in reading the deposition more than once. It was the duty of the trial judge to see that the order of procedure was observed in the manner of introducing testimony and the arguments made before the jury, and this court will not reverse for the ruling of the trial court on these questions of procedure unless it appears that there is an abuse of the court's discretion which results in prejudice to the party making the objection. While the court might very properly have permitted the counsel to read the extracts he desired to read in order to show that he was stating the testimony correctly, the court did not err in refusing this permission and in thus leaving the matter to the recollection of the jury who had heard the reading of the deposition."

In *Podrat*, the Rhode Island Court, in holding no error in permitting the reading, said at page 1044:

> "It appeared in argument before us that the testimony read in argument was no other than that previously read in evidence without objection. Counsel for defendant seems to think it was taking an unfair advantage of his client to read evidence in argument; but such a matter may safely be left to the discretion of the trial judge. Counsel in argument may, and often do, say to the jury that they do not wish to color or distort the meaning of a witness in giving certain testimony, and for the purpose of treating him with the utmost candor and consideration they will give his exact language verbatim et literatim. The counsel may do this

> from his own notes, or from the stenographer's notes, when obtainable, or by reading from a transcript of testimony, or from depositions, and there is no impropriety in so doing, as long as the same is sanctioned by the presiding judge, who would doubtless check any attempt to take an undue advantage of the situation."

In *Gagush* v. *Hoeft* (Mich.) 171 N. W. 437 (affirmed on rehearing 175 N. W. 170), the Michigan Court stated the principle in language applicable in the instant case. The Court said, at page 439:

> "It was error for the court to refuse to counsel for the appellant the right to comment in his argument upon certain alleged contradictions in the testimony given upon the former and upon this trial. Using the testimony given on the former trial, counsel had properly interrogated the witnesses for appellee upon cross-examination, and had secured certain admissions with respect thereto. In argument he sought to return to the matter and to call the attention of the jury to the alleged discrepancies and contradictions of testimony. For this purpose he used, as he had used in interrogating the witness, the record of the testimony given on the first trial. This he was refused permission to do. No one claimed, or now claims, that he made improper use of the testimony or sought to call attention to matter not used in cross-examining the witnesses. What he sought to do was, in substance and effect, this: To say to the jury that the witness admitted having testified on the former trial as follows — reading from the minutes of the testimony given on the former trial matter to which the attention of the witness had been directed — and upon this trial she testified differently. In short, he was directing attention to testimony given at the instant trial. But the court was of opinion that he should either have produced a transcript of the testimony given upon the last trial or have had the reporter read whatever was desired from his notes. The practice pursued by counsel is not an

> uncommon one, and not improper; it being always the duty of the trial court to see that an unfair argument is not indulged in. Whether for this error, this limiting of the privilege of argument, the judgment should be reversed, depends upon whether we can say that prejudice did not result."

The court held the error was not prejudicial and overruled the exception.

The cases, however, are of little help in reaching a conclusion. The value of a case in this field as a precedent in other situations is limited. Compare the rule in interpretation of wills. See *New Eng. Trust Co., et al.* v. *Sanger, et al.*, 151 Me. 295, 303, 118 A. (2nd) 760.

We must take the precise facts in the case at bar and determine whether there has been error of law. In our opinion the denial of permission to read the particular testimony destroyed in large measure its worth. This necessarily must have reacted upon the jury to the prejudice of the defendant. Nor do we find that the error was corrected, or the damage softened or removed by the judge's charge.

We have had the unquestioned advantage, not open to the presiding justice at trial, of studying the entire record with the benefit of briefs and oral arguments of counsel. Our research and consideration have been undertaken without the demands and interruptions of trial.

In view of our decision on the issue discussed, it becomes unnecessary to consider the remaining exceptions and the motion. We do not choose to decide issues which may not arise on a new trial.

The entry will be

Exception sustained.

JOSEPH A. LECLAIR
vs.
JOHN G. WALLINGFORD
AND
EMPLOYERS' LIABILITY ASSURANCE CORP., LTD.

Somerset. Opinion, February 13, 1957.

Workmen's Compensation. Sawmills. Logging and Lumbering. Exclusions. Defenses.

An employee operating a truck and engaged in the hauling of logs from the woods to his employer's saw mill is excluded from workmen's compensation coverage where the Employer's insurance policy assent contains the following exclusion: "Excluding employees engaged in the cutting, hauling, rafting or driving logs."

A qualified employer who fails to become subject to the act loses the defenses of (1) contributory negligence, (2) negligence of a fellow employee, and (3) voluntary assumption of the risk (R. S. 1954, Chapter 31, Sec. 3)

An employee engaged in "cutting, hauling, rafting or driving logs" may at the option of his employer become subject to the act. Failure to do so does not deprive the employer of defenses under R. S. 1954, Chap. 31, Sec. 3.

ON APPEAL.

This is an appeal from a *pro forma* decree of the Industrial Accident Commission denying compensation. Appeal dismissed. Decree affirmed. Allowance of $250 ordered to petitioner for expenses of appeal.

Walter R. Harwood, for claimant.

Mitchell and Ballou,
for Employers Liability Assurance Corp., Ltd.

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

TAPLEY, J. On appeal from a *pro forma* decree of a Justice of the Superior Court confirming a decision by the Industrial Accident Commission that it had no jurisdiction over a petition for an award of compensation.

The appellant was an employee of John J. Wallingford who operated a sawmill in West Forks, Maine. Mr. Wallingford cut and supplied his own logs for the mill. The appellant, Mr. LeClair, had been employed by Mr. Wallingford a year and a half previous to his injury which occasioned these proceedings. During the course of his employment his work varied in that he labored in the mill, outside of the mill and in the woods. At the time of the injury he was driving a truck and had been so employed in this particular capacity for one or two months. He was injured on March 31, 1955. On this day he was operating a truck and engaged in the hauling of logs from the woods to the sawmill. He had no helper on the truck with him. He drove from the sawmill to the cutting area. His truck was loaded with the help of a crew working in the woods and after the loading was completed he drove to the sawmill for the purpose of delivering the load of logs. This was the second load he had delivered that day. He drove into the yard of the mill and found the slip where the logs were to be unloaded full of logs so a discharge of his load at that point was not possible. He was instructed by a superior to unload the logs at a designated place other than the slip and was furnished an employee to assist in the unloading. The appellant drove to the spot as directed for the purpose of unloading the logs, stopped his truck, alighted therefrom and proceeded, with the assistance of the other employee, to unload the logs. In the unloading process he was struck by a swinging log from the truck and sustained the injuries of which he complained. The decree of the Industrial Accident Commission denied compensation to the appellant on the ground that the Industrial Accident Commission had no jurisdiction and, there-

fore, the petition for award of compensation must be dismissed.

> "******we must conclude and find that at the time of this unfortunate accident, the petitioner was engaged in the occupation of logging and lumbering, which was specifically excluded from the Assent and insurance Policy on file with the Commission. Under these circumstances, the Industrial Accident Commission has no jurisdiction over the matter and this Petition must be dismissed."

Appellant takes issue with the finding on the part of the Commission that "the petitioner was engaged in the occupation of logging and lumbering, which was specifically excluded from the Assent and insurance Policy on file with the Commission."

The insurance policy in force at the time of the accident provided coverage in accordance with the Workmen's Compensation Law of the State of Maine. It carries an endorsement entitled "Logging and Lumbering Endorsement (Maine), which in part reads: "It is agreed that such insurance as is afforded by the policy by reason of the designation of Maine in Item 3 of the declarations does not apply with respect to logging and lumbering operations."

John G. Wallingford, the employer, filed with the Industrial Accident Commission an Assent in conformity with the provisions of Chap. 31 of R. S. 1954, known as "The Workmen's Compensation Act" with the following exclusion: "*Excluding* employees engaged in the work of cutting, hauling, rafting, or driving logs." The Assent states that Mr. Wallingford is engaged in the sawmill business. Mr. Wallingford desired to become an assenting employer under the provisions of the Workmen's Compensation Act. (Chap. 31, R. S. 1954) and, in pursuance of this desire, filed his Assent as provided by Sec. 6 of the Act along with a copy of the Industrial Accident Insurance policy. Sec. 4 of the

act provides in part: "Any such logging operations, however, incidental to any business conducted by an assenting employer shall be presumed to be covered by his assent to the act as to such business unless expressly excluded in such assent."

Sec. 3 of the Act provides, in essence, that if an employer is qualified to become subject to the Act and fails to do so, he shall lose his common law defenses in certain actions by his employees against him, in that he shall not be permitted to defend (1) that the employee was negligent; (2) that the injury was caused by the negligence of a fellow employee; (3) that the employee had assumed the risk of the injury.

Sec. 4 affects and relates to provisions of Sec. 3 in that provisions of Sec. 3 shall not apply to employers (1) who employ five or less workmen or operatives in the same business; (2) to actions to recover damages for injuries or from death resulting from injuries sustained by employees engaged in domestic service or in agriculture; or *in the operation of cutting, hauling, rafting or driving logs, including work incidental thereto.*

Any employee engaged in the operation of cutting, hauling, rafting or driving logs, including work incidental thereto, may at the option of his employer be subject to the provisions of the Act. Such employee, as a matter of right, does not come within the provisions of the Act. *Oxford Paper Co.* v. *Thayer*, 122 Me. 201, at page 205:

> "But Section 4 says that the provisions of Section 2, which takes away the three usual defenses, shall not apply to loggers and drivers, any more than it does to domestic servants and farm hands. The result is, although reached in a very cumbersome and awkward manner, that it is optional with employers of loggers and drivers to avail themselves of the Act or not as they see fit. If they do avail themselves of it, then their employees enjoy its benefits. If they do not avail themselves of it and suit

> is brought against them for personal injuries, the ordinary defenses of contributory negligence, negligence of a fellow servant, and assumption of risk are still open to the employer. The employer of loggers and drivers therefore is not forced into accepting the Act, and for this reason he may except this class if he desires to do so when he accepts the Act as to his general manufacturing business. It can make no difference whether the employer of loggers and drivers is carrying on that business alone or in connection with a general lumber or pulp and paper manufacturing business; he is not compelled to accept the Act as to the logging and driving."

See *Cormier's Case,* 124 Me. 237.

The employer, according to the testimony, conducts a sawmill business. He also operates woodlots which furnish the logs used in the mill. The logs are transported from the lots to the mill by truck. There are concerned in the employer's business activities various procedures such as cutting, loading, transporting, sawing and such other work as is customarily performed in a mill yard. Other than the men employed in the sawmill, "there are truck drivers, crane operators, bulldozer operators, cooks, teamsters, and all." This is the type of business enterprise to which the provisions of the Workmen's Compensation Act are to be applied.

We have pointed out that in Sec. 4 of the Act the Legislature has seen fit to exempt from the provisions of the Act such employees as are employed in the operations of cutting, hauling, rafting or driving logs, including work incidental thereto, unless the employer desires to include them under the Act. *Gagnon's Case,* 125 Me. 16; *Oxford Paper Co.* v. *Thayer, supra; Cormier's Case, supra.*

Examining the Assent and the endorsement on the policy of insurance in the light of the factual aspect of this case, we find an intention on the part of the employer to assent as

to his sawmill business but to exclude anything pertaining thereto which concerned those employees who were engaged in the work of cutting, hauling, rafting or driving logs. He, by this exclusion, most carefully and explicitly said he did not desire that this class of employee should come under the jurisdiction of the Workmen's Compensation Act. According to the testimony, the employer operated the woodlot and trucked the logs to the sawmill where they were used in the customary work of the sawmill, so it might properly be argued that under these circumstances the operations of cutting and hauling of the logs were incidental to the employer's sawmill business. In Sec. 4 of the Act is the following provision: "Any such logging operations, however, incidental to any business conducted by an assenting employer shall be presumed to be covered by his assent to the act as to such business unless expressly excluded in such assent." It has been demonstrated that employees doing the work of cutting, hauling - - - including work incidental thereto, are exempt from provisions of the Act unless the employer desires they be included. *Oxford Paper Co.* v. *Thayer, supra.* The statute in this instance puts a burden upon the employer by providing that if the hauling of logs is incidental to his sawmill business he must exclude such operation in his Assent, otherwise it will be presumed to be covered by his Assent. The employer apparently did not want any of his employees to be covered who were engaged in the work of cutting or hauling of logs so in order to make clear his intentions and avoid any statutory presumption that his Assent included these employees, he followed explicitly the statute by including the exclusion in his Assent. *Mary A. White's Case,* 124 Me. 343, at page 344:

> "An employer, circumstanced as was the defendant, may become an assenting employer as to the mill without assenting as to the logging operation. **** Or he may become an assenting employer as to both operations. It is only necessary for him to

make his meaning clear in simple English language."

The appellant at the time of the sustaining of injury, according to the record, was engaged in the hauling of logs, which operation was excluded from the employer's Assent and, therefore, the case is not within the jurisdiction of the Industrial Accident Commission. An examination of the record determines there was competent evidence of probative force to support the findings of fact and that no error of law was committed on the part of the Commission. *Robitaille's Case,* 140 Me. 121.

Appeal dismissed.
Decree affirmed.
Allowance of $250 ordered to petitioner for expenses of appeal.

STATE OF MAINE
vs.
HECTOR R. CHABOT, APLT.

Oxford. Opinion, February 14, 1957.

Criminal Law. Driving Under Influence. Blood Test. Evidence.

A prosecutor in a criminal case is not compelled to introduce all the evidence available.

The failure of the State to offer proof of the results of a blood test does not entitle a respondent to a directed verdict where there is no intimation that the State suppressed evidence or otherwise interfered with its (blood test) availability to respondent. (R. S. 1954, Chapter 22, Section 150)

ON EXCEPTIONS.

This is a criminal action before the Law Court upon exceptions. Exceptions overruled. Judgment for the State.

Henry H. Hastings, for State.

William E. McCarthy, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

BELIVEAU, J. On exceptions. The respondent was charged with violation of Section 150, Chapter 22 of the Revised Statutes, to wit: Operating motor vehicle while under the influence of intoxicating liquor; was tried and convicted.

Immediately after his arrest the respondent requested, as only he could, that a test be taken of his blood to determine its alcoholic contents. Blood was extracted from the body of the respondent by a competent physician and taken immediately by the arresting officer to a Mr. Samuel Rosenthal who made the requested test. This officer was present during the analysis by Mr. Rosenthal. Some time prior to the trial Mr. Rosenthal had moved to New Jersey and was living there.

The three exceptions raise the one issue and for that reason will be considered as one.

Mr. Rosenthal was not a witness at the trial. There is nothing in the record to show the result of the test. The respondent takes the position that absence of evidence of the blood test entitled him to a directed verdict, because it raised a presumption of innocence. No precedent or authority is cited in the respondent's brief to sustain this position.

There is no intimation that the State suppressed this testimony or otherwise interfered with its availability by the respondent. The blood test according to Section 150, Chapter 22 of the Revised Statutes raises at the best a presumption of innocence, no presumption at all or a presumption of guilt. It is not decisive and if the test is such that a presumption of innocence is raised there still may be, and very

often is, more than enough other evidence to overcome such presumptions.

There is here no violation, constitutional or otherwise, of the respondent's rights. The prosecutor is not compelled or called upon to introduce, in a criminal prosecution, all of the evidence available. He is expected to in good conscience and in law to submit to the jury what he believes is sufficient evidence to prove the commission of the alleged crime, just so long as he does nothing to suppress or interfere with any evidence favorable to the respondent.

Exception overruled.
Judgment for the State.

ELWIN C. KNAPP ET AL.
vs.
SWIFT RIVER VALLEY COMMUNITY SCHOOL DISTRICT ET AL.

Oxford. Opinion, February 16, 1957.

Municipal Corporations. Equity. Districts. Dissolution. Withdrawal.

The "ten taxable inhabitants" statute is applicable where a School District and its officers have taken action to pledge their credit for obligations already incurred and will in the ordinary course attempt to pay out moneys for the purposes indicated. (R. S. 1954, Chap. 107, Sec. 4, Subsection XIII)

Where a Town does a complete turnabout on April 6 (voting not to become a member of a school district) from its action of March 19 (voting to become a member of a school district) its April 6th action is a nullity, where during the interim the formation of the District has been completed and credit pledged.

A Member Town of a School District can withdraw only upon compliance with R. S. 1954, Chap. 41, Sec. 121. (Action by the Town and the Legislature is required.)

Brann & Isaacson, for plaintiffs.

Clifford & Clifford, for defendant.

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

WILLIAMSON, C. J. On appeal. This is a bill in equity by ten taxable inhabitants of the Town of Byron and also of the defendant The Swift River Valley Community School District against the District and its trustees to enjoin the defendants from borrowing and expending any funds, from acquiring land, conveying facilities, constructing and equipping a community school building, or entering into any contracts in connection with the proposed operation of the District. The bill is brought under the equity jurisdiction statute, R. S., c. 107, Sec. 4, Subsection XIII. The bill was dismissed without costs by the sitting justice.

The facts are agreed upon and are in substance as follows:

At a town meeting on March 19, 1956, the Town of Byron voted: (1) to join with the Town of Roxbury to form the defendant school district; (2) to authorize the District to acquire and hold property of a value not in excess of $40,000; and (3) to authorize the District to borrow money and issue its bonds and notes in an amount not in excess at any time of $36,000.

On March 5, 1956, like votes were passed at the town meeting of Roxbury. The trustees of the District were subsequently appointed by the municipal officers of each town. On March 21, 1956, the trustees filed their return with the Secretary of State as required by statute. The Secretary of State issued his certificate on March 23rd that the District "has been duly organized as a politic and corporate entity." Under the statute "such certificate shall be conclusive evi-

dence of the lawful organization of the community school district and of the election or appointment of the trustees thereof." It is agreed that "The Swift River Valley Community School District is a legally organized and operating School District, and its Trustees and Officers were legally appointed to their office." See statute relating to the formation of Community School Districts, R. S., c. 41, Secs. 112-121 inclusive.

On March 26 the District borrowed $5,000 from a bank. Prior to the bringing of the bill the District incurred other obligations and made certain payments in connection with the proposed community school.

We come now to the action of the Town of Byron from which the litigation arises. On April 6 at a special town meeting, the Town of Byron voted against the very propositions it had voted for on March 19. That is, Byron voted: (1) against joining with Roxbury to form the defendant school district; (2) against authorizing the District to acquire and hold property not in excess of $40,000 for certain purposes, and (3) against authorizing the District to borrow money and issue its bonds and notes. In brief, the Town of Byron did a complete turnabout on April 6th from its action of March 19th.

The defendants argue that the "10 taxable inhabitants" statute does not apply. With this view we do not agree. From the bill it is apparent that the District and its officers have taken action to pledge their credit for obligations already incurred and will in ordinary course attempt to pay out moneys for the purposes indicated. The equity statute is designed to afford protection against improper expenditures in a case such as this. Subsection XIII reads:

> "When counties, cities, towns, school districts, village or other public corporations, for a purpose not authorized by law, vote to pledge their credit or to raise money by taxation or to exempt prop-

> erty therefrom or to pay money from their treasury, or if any of their officers or agents attempt to pay out such money for such purpose, the court shall have equity jurisdiction on petition or application of not less than 10 taxable inhabitants thereof, briefly setting forth the cause of complaint."

See also *Carlisle et al.* v. *Bangor Rec. Center,* 150 Me. 33, 103 A. (2nd) 339 and *Crommett et al.* v. *Portland,* 150 Me. 217, 107 A. (2nd) 841.

The plaintiffs contend that by the action of Byron in voting *against* the proposals on April 6, the District thereby lost its authority to do business. In other words, their position is that the District as an effective operating business was destroyed, or at least suspended by the action of April 6.

We are not inclined to seek subtle differences in the meaning of words. The plain fact is that if the plaintiffs are correct, Byron has destroyed The Swift River Valley Community School District. Roxbury had no part in the Byron vote whether we call it a vote to dissolve the District or to suspend its activities. If the right of the District to do business depends from day to day upon the votes of town meetings first granting, then taking away, and perhaps again granting rights, it is apparent that a District, duly organized, would not be worthy of the name of a quasi-municipal corporation with rights and powers, duties and obligations of its own.

The control over a district to be exercised by a member town is limited by the terms of the statute. Each town selects trustees and members of a school committee, who then serve the district, not the town. Their authority is determined by the statutes relating to community school districts and not by the will of the town.

The district is a creature of legislative action. Its creation and likewise its dissolution are solely within the power of the Legislature. The Legislature has made full, complete, and readily understandable provisions for withdrawal of a town from a community school district. Withdrawal requires not only action by the town, but action by the Legislature as well. R. S., c. 41, Sec. 121, provides, in part, as follows:

> "When the inhabitants of a participating town have indicated their desire to withdraw from a community school district by a 2/3 vote of the legal voters in said town present and voting at a special meeting, called and held in the manner provided by law for the calling and holding of town meetings, such withdrawal may be authorized by special act of the legislature upon such terms as shall be contained in such special act; provided, however, no such withdrawal shall be permitted while such community school district shall have outstanding indebtedness."

Until a town has so withdrawn in compliance with the statute, it remains a part of the district. In *Parker* v. *Titcomb*, 82 Me. 180, 19 A. 162, it was held on a "10 taxable inhabitants" bill that the division of a school district without the recommendation of municipal and school officers required by statute in the alteration of districts would be *ultra vires*. See also *Regional High School Dist. No. 3* v. *Town of Newtown* (Conn.) 59 A. (2nd) 527, 532.

The Town of Byron by its action of April 6 neither destroyed nor suspended The Swift River Valley Community School District. The plaintiffs have failed to show any illegal action or attempted illegal action calling for the interference of the court in equity under subsection XIII.

The entry will be

Appeal dismissed.

Decree below affirmed without costs.

RALPH B. SANBORN
vs.
ELMORE MILLING COMPANY, INC.

Cumberland. Opinion, February 21, 1957.

Exceptions. Directed Verdict. Evidence. Expert Testimony.

Where the evidence is legally sufficient and the issue is whether the evidence has a tendency to establish the facts, the court has no right to direct a verdict since the judging of testimony and weighing of evidence is the province of the jury.

Expert testimony is to be treated the same as any other testimony and subjected to the same tests as to weight and probative value.

If, on the basis of the evidence, honest and fair minded men might reasonably decide for either party it is error for the court to direct a verdict.

ON EXCEPTIONS.

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

Daniel C. McDonald, for plaintiff.

Barnett I. Shur, for defendant.

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

TAPLEY, J. On exceptions. Plaintiff seeks to recover damages from the defendant for the loss of some turkeys by death and the retarded growth of other turkeys occasioned, as he says, by improper feed furnished by the defendant. It is claimed that the feed purchased from the defendant and fed to the birds contained a sulfa quinoxaline content in an amount over that specified and guaranteed by the defendant, which so adversely affected the birds as to cause death of some and retard the growth of others.

The case was tried before a jury in the Superior Court, within and for the County of Cumberland. After completion and conclusion of the evidence, the court, upon motion of the defendant, directed a verdict in favor of the defendant. To this direction of verdict the plaintiff took exceptions. In addition to the exceptions taken to the directed verdict, the plaintiff preserved and perfected exceptions to the admission and refusal to admit evidence. These exceptions are six in number.

EXCEPTIONS TO DIRECTION OF VERDICT FOR DEFENDANT

The plaintiff, Ralph B. Sanborn, owns and operates a turkey farm and in the Spring of 1954 was in the process of raising approximately ten thousand turkeys. He was under a turkey feed contract with the defendant corporation whereby he agreed to use defendant's feed to the exclusion of all other commercial feeds. The plaintiff testified he followed the recommendations made by the representatives of the feed company and used the type of feed characterized "Elmore Turkey Starting Mash" which contained sulfa quinoxaline in its formula. This is the kind of feed that plaintiff alleges did damage to his flock because of its high content of sulfa quinoxaline. On June 1, 1954 Mr. Sanborn ordered from the Elmore Mills a shipment of this feed consisting of 183 100 lb. bags. The feed was given to the young poults as a starting mash. The birds fed on this mash ranged from three days to six weeks old. Mr. Sanborn said that on the second day after giving the feed to the birds he noticed their reactions were not normal. There followed illness, some of the birds dying and others losing weight. Loss of 1701 turkeys occurred over a period of five days. The plaintiff further claims, according to his testimony, that the surviving birds, approximately eight thousand in number, were retarded in growth. This retardation caused a longer period to elapse before the birds arrived at that state of physical condition which would meet marketing requirements. The birds were not ready for sale for the Thanks-

giving and Christmas business of that year which represented a financial loss to Mr. Sanborn.

Counsel for the defendant argues that the presiding justice was without error in directing a verdict for the defendant. His argument is twofold: (1) that the plaintiff's turkeys could not have died as a result of the feed furnished by defendant because the testimony shows the deaths occurred from June 6th to June 10, 1954, and that the plaintiff was not in the possession of the feed until June 8, 1954; (2) the testimony of defendant's expert in poultry nutrition conclusively proved that if the poults had been fed feed containing an amount of sulfa quinoxaline ninety times greater than the recommended quantity it would not cause the death and retardation of growth of the birds as plaintiff claims.

Defense counsel urges that plaintiff's own testimony, if taken at its face value, shows death of the birds previous to receipt and use of the feed. According to one of defendant's exhibits designated "delivery receipt" and bearing the signature of Ralph Sanborn as consignee, there is documentary evidence that feed was received on June 7, 1954 at Sebago Lake by Mr. Sanborn. Another exhibit dated June 6, 1954 and June 10, 1954 shows a loss of 1701 turkeys varying in age from one to seven weeks.

Concerning the element of time, the record demonstrates some discrepancies between the plaintiff's testimony and some documentary evidence presented by himself and by the defendant.

Counsel argues the inference to be drawn from such discrepancies is that the death of the poultry could not have occurred as a result of the consumption of defendant's product. It must be remembered, however, that all of the feed given to these turkeys was supplied by the defendant under terms of the written contract.

The plaintiff claims, in addition to the death of the birds, some eight thousand of them were retarded in growth because of the high content of sulfa quinoxaline contained in the feed. In this instance the problem of time, between when the feed was received and its alleged ill effects took place, is not so important. There is ample evidence in the record showing receipt of the feed by the plaintiff and that in a week's time after its receipt the plaintiff fed 110 bags of the feed to his birds. There is further evidence that the plaintiff sent samples taken from this questionable shipment to the University of Maine for analysis.

Barrett v. *Greenall,* 139 Me. 75, at page 80:

> "The issue here is not whether the evidence adduced is sufficient to establish the controverted facts, but whether or not it has a tendency to establish those facts, and if this is so, although 'it may not be strong in its support, and the Judge may well apprehend, that the jury will find it insufficient,' the Court has no 'right to weigh it, and determine its insufficiency as matter of law.' **** It is the province of the jury, and not of the justice presiding in the Trial Court, to judge of the testimony of the witnesses appearing in the cause and to weigh their evidence *******. The credit to which the testimony of a witness is entitled is entirely a question of fact for decision by the jury."

A presiding justice may order a directed verdict in a civil case when a contrary verdict could not be sustained on the evidence presented. *Johnson* v. *Portland Terminal Company,* 131 Me. 311; *Coleman* v. *Lord,* et al., 96 Me. 192; *Bennett* v. *Talbot,* 90 Me. 229.

The defendant urges consideration of the testimony of its expert in poultry nutrition, arguing that according to his expert opinion the sulfa quinoxaline content in the defendant's feed in no way caused the death of the turkeys or retarded the growth of the turkey flock. It is suggested

that the testimony of this expert, in giving his opinion that the sulfa quinoxaline content was not the cause of the death or retardation of growth, was sufficient to justify the directing of a verdict favoring the defendant. This position is not legally tenable. The record discloses the fact that the plaintiff in support of his case used the testimony of a witness who was head of the department of animal pathology at the University of Maine. A great percentage of his work at the University was concerned with poultry pathology. There appears to be no overall objection to his testimony. He expresses the opinion that the amount of sulfa quinoxaline contained in the feed given to plaintiff's birds could result in death and retardation of growth. The defendant, on the other hand, presents an expert in poultry food nutrition whose testimony is in direct contradiction to that of plaintiff's expert. The jury were, therefore, presented with a factual question as to which opinion, if either, they would accept. Expert testimony is to be treated in the same manner as any other testimony by the triers of fact. It is subjected to the same tests as to weight and probative value as non-expert testimony.

23 C. J. S., Criminal Law, Sec. 891:

> "Expert testimony is to be weighed and judged like any other, and the same tests are to be applied thereto. It is not necessarily conclusive or controlling, even when uncontradicted by the testimony of other experts, but its weight and value are to be determined by the jury who should consider it in connection with all the other evidence in the case ******."

20 Am. Jur., Evidence, Sec. 1208.

A very careful examination of the record in this case has been made with a view of determining if there is sufficient evidence, if believed by the jury, to warrant a verdict in favor of the plaintiff. *Johnson, et al.* v. *The New York, New*

Haven and Hartford Railroad, et al., 111 Me. 263, at page 265:

> "****** if there was evidence which the jury were warranted in believing, and upon the basis of which honest and fair minded men might reasonably have decided in favor of the plaintiffs, then the exceptions must be sustained. In such a case it is reversible error to take the issue from the jury."

The evidence, as contained in the record, is such as to require jury consideration; consequently, the exceptions to the directed verdict must be sustained.

The sustaining of the exceptions to the directed verdict removes the necessity of considering the other exceptions.

Exceptions to directed verdict sustained.

FIDUCIARY TRUST CO., IN EQUITY
vs.
HOPE WHEELER BROWN, ET AL.

Kennebec. March 9, 1957.

Trusts. Equity. Practice. Issue. Heirs of Body. Adoption. Per Stirpes. Representation.

Where the beneficiary of a trust adopts her son's daughter, such daughter, upon the death of the beneficiary, cannot share in the income of the trust during the life of her natural father since the right to such income is limited to the issue by right of representation.

Whether adopted children are "issue" of their adoptive mothers, depends upon the intention of the testator as expressed in the language used in the trust indenture.

The Supreme Judicial Court has authority to construe and interpret a trust indenture. R. S. 1954, Chapter 107, Section 4.

Although the Supreme Judicial Court has the power to answer questions of construction of wills or trusts before a contingency occurs, it is unwise and not within the intent of the statute, to advise until the time comes when they need instructions.

In determining intent it is the Court's function to find not what the settlor intended to say, but what she intended by what she said.

The word "issue" is ambiguous and interpretation may be due in a large measure to whether the settlor was himself the adopting parent, or whether the word related to adopted children of a beneficiary, since by adoption, adopters can make for themselves an heir, but they cannot thus make one for their kindred.

Technical words are presumed to have been used in their technical legal sense.

"Issue" means prima facie "heirs of the body" or lineal descendants by blood.

ON REPORT AND AGREED STATEMENT.

This is a bill in equity to construe and interpret a trust. The case is before the Law Court upon report and agreed statement. Decree to be made by the sitting justice below in accordance with this opinion.

Fogg & Fogg, for plaintiff.

John Huse,
Philip E. Lamb,
Locke, Campbell, Reid & Hebert, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

DUBORD, J. This is a bill in equity brought by Fiduciary Trust Company of Boston, Massachusetts, sole successor trustee under a declaration of trust executed by Elizabeth S. Haynes and Robert H. Gardiner, on May 16, 1911, and amended on June 12, 1918. The bill is brought against Hope Wheeler Brown of Belfast, Waldo County, Maine, Man-

chester Haynes Wheeler of Augusta, Kennebec County, Maine, Muriel S. Haynes, Letitia Haynes and Honora Haynes all of Weston, Middlesex County, Massachusetts.

The principal of the trust was contributed by Elizabeth S. Haynes and at the time the trust was set up, Elizabeth S. Haynes had two natural daughters, the defendant, Muriel S. Haynes and Hope Manchester Wheeler. Hope Manchester Wheeler had a natural son born to her, the defendant, Manchester Haynes Wheeler. The defendant, Hope Wheeler Brown is the natural daughter of Manchester Haynes Wheeler, and was adopted by her grandmother, Hope Manchester Wheeler. The defendant, Muriel S. Haynes, adopted the defendants, Letitia Haynes and Honora Haynes. The three adoptions took place subsequent to the execution of the trust agreement and the amendment thereto. Two of the adoptions, including that of Hope Wheeler Brown, occurred after the death of Elizabeth S. Haynes and one of them occurred about one year before the death of Elizabeth.

The bill in equity alleges that the plaintiff, in its capacity as trustee, is uncertain as to how to distribute the income formerly payable to Hope Manchester Wheeler, and asks the court to construe and interpret certain provisions of the trust agreement executed by Elizabeth S. Haynes and Robert H. Gardiner.

The pertinent paragraph of the indenture of trust, which gives rise to uncertainty on the part of the trustee is paragraph 1, which reads as follows:

> "1. During the continuance of the trust to pay the net income thereof as often as quarterly to Hope Manchester Wheeler and Muriel Sturgis Haynes in equal shares during their lives, and on the death of either of them who shall leave issue surviving her the share of said income which she would have received shall be paid to such of her issue by right of representation as shall from time to time be liv-

ing at the respective times of payment and on the death of either of them leaving no issue surviving her as well as in the case of the issue of one of them becoming extinct, the whole of said income shall be paid to the other if living, or if she be dead to such of her issue by right of representation as shall from time to time be living at the respective times of payment."

As paragraphs 2 and 7 of the trust indenture, as well as the amendment thereto, may have some bearing upon the determination of the intention of the settlor of the trust, we insert them at this point.

"2. Twenty-one years after the death of the survivor of them and of Manchester Haynes Wheeler the principal of the fund whether said Elizabeth S. Haynes be then living or not shall be paid over to the persons and in the proportions to whom and in which it would then have been distributed under the intestate laws of Maine then in force if it had then been personal property and said Elizabeth S. Haynes had then owned it in her own right and had then died intestate."

"7. If it shall at any time happen after the death of either said Hope or said Muriel that a child of hers shall have attained the age of thirty years the trustees may at any time thereafter, but only if they are satisfied that it will be for the best interest of such child, pay to him or her out of the principal of the fund such sum or sums as they may deem expedient, making in case of such payment such division as they shall deem just thereafter of the income from the remainder of the fund."

Amendment. "If at any time before the termination of the trust as provided in said Declaration there shall be living no issue of mine, then I direct that the trust shall terminate and the property be divided, one-half, or, if there be then living no issue of my niece, Rebecca Russell Dallett, the whole, to go to the issue then living by right of representation of my brother, Horace Russell

> Sturgis, and the other half or, if there be then living no issue of my said brother, the whole, to go to the issue then living by right of representation of my said niece, and, if there be then living no issue of either my said brother or my said niece, the whole principal, whether I be then living or not, shall be paid over to the persons and in the proportions to whom and in which it would have then have been distributed under the laws of Maine then in force if it had then been personal property and I had then owned it in my own right free of trust and had then died intestate."

The bill in equity sets forth the provisions of the trust indenture about which doubt is expressed. The complete trust indenture is annexed to the bill, as an exhibit, and made a part thereof. Subsequently, the original bill in equity was amended by adding the alteration to the trust indenture.

The bill seeks instructions on the following points:

(a) Whether Hope Wheeler Brown, adopted daughter of Hope Manchester Wheeler, is entitled to share in the income as issue by right of representation of Hope Manchester Wheeler, or

(b) Whether Manchester Haynes Wheeler is entitled to the whole of said income formerly payable to his mother, Hope Manchester Wheeler; and

(c) Whether the two adopted daughters of Muriel S. Haynes will be entitled upon the death of their adoptive mother, to the share of the income payable to their adoptive mother, as the issue of said adoptive mother by right of representation.

All of the defendants filed answers joining in the prayer of the plaintiff for interpretation and instructions.

The defendant, Manchester Haynes Wheeler, in his answer, denies that Hope Wheeler Brown is the issue of

Hope Manchester Wheeler, who by right of representation is entitled to share in the income payable under the trust indenture and claims that he is entitled to the entire income formerly payable to his now deceased mother, Hope Manchester Wheeler. In his answer he also advances the contention that in the event of the death of Muriel S. Haynes, her adopted daughters Letitia Haynes and Honora Haynes, will not be entitled to the share of their adoptive mother on his theory that they are not issue by right of representation of Muriel S. Haynes.

The defendant, Muriel S. Haynes filed an answer alleging that Hope Wheeler Brown is entitled, during her lifetime, to one-half of the trust income formerly payable to Hope Manchester Wheeler; that Manchester Haynes Wheeler, during the lifetime of Hope Wheeler Brown, is not entitled to all of the trust income; and she further contends in her answer, that at her death, if either or both are living, her adopted daughters, Letitia and Honora Haynes, will be entitled to share in the trust income as her issue by right of representation.

The other defendants, Honora Haynes, Letitia Haynes, and Hope Wheeler Brown, filed similar answers in which they set up the contention that the adopted children are entitled to share in the trust income as issue by right of representation of their adoptive mothers.

In setting forth, in this opinion, the points upon which instructions are sought, and in briefly digesting the answers of the defendants, we have used the expression used by counsel for the plaintiff in its bill and by counsel for all the defendants in their answers, viz.: "Issue by right of representation." However, we point out that the legal question for our determination is whether or not the adopted children are "issue" of their adoptive mothers, within the intention of the settlor. In other words, taking as an example the case of Hope Wheeler Brown, if she is to share in the

trust income previously payable to Hope Manchester Wheeler, she will share, not by right of representation, but on equal terms with her father, as "issue" of Hope Manchester Wheeler, her grandmother and adoptive mother.

The expression "by right of representation," used by the settlor, of course, has a bearing on her general intention and this point we will discuss later in this opinion.

The case was presented to the court upon an agreed statement of facts, and is to be heard by this court on report under authority of Section 24, Chapter 107, R. S. 1954.

The only evidence for the consideration of this court is the indenture of trust, the amendment thereto and the agreed statement of facts.

The agreed statement of facts reads as follows:

> "Elizabeth S. Haynes and Robert H. Gardiner entered into an executed Declaration of Trust, dated May 16, 1911, a copy of which marked Exhibit A. is annexed to the bill which is a part of this agreed statement of facts. Elizabeth S. Haynes contributed the principal and was the settlor of the trust created by the said Declaration of Trust between herself and Robert H. Gardiner.
>
> "The said Elizabeth S. Haynes and Robert H. Gardiner executed an alteration or amendment to said Declaration of Trust, which alteration or amendment was dated June 12, 1918, a copy of which is included in motion of Fiduciary Trust Company to amend its bill in equity which motion and amendment is a part of this agreed statement of facts.
>
> "The said Elizabeth S. Haynes and Robert H. Gardiner are both deceased and Fiduciary Trust Company is the sole successor trustee of said Declaration of Trust as amended.
>
> "The said Elizabeth S. Haynes had two children born to her, namely, the defendant, Muriel S.

Haynes and Hope Manchester Wheeler, now deceased. Elizabeth S. Haynes died in 1925 and was survived by the said Muriel S. Haynes and Hope Haynes Wheeler.

"The said Muriel S. Haynes, who is still living, never married and has had no children born to her. She does have two adopted children, namely, the defendants, Letitia Haynes, born January 31, 1921 and Honora Haynes, born January 7, 1924. Letitia Haynes was adopted by her by decree of Kennebec Probate Court dated the fourth Monday of February, 1924. Honora Haynes was adopted by her by decree of said court, dated August 8, 1927.

"The said Hope Manchester Wheeler had but one child born to her, namely, the defendant, Manchester Haynes Wheeler, born on April 19, 1906.

"Before her death, however, and since the said Declaration of Trust, to wit, July 28, 1930, she legally adopted as her daughter, her granddaughter, Hope Wheeler Brown, born April 17, 1926. Hope Wheeler Brown is a daughter of the said Manchester Haynes Wheeler."

This court has jurisdiction in equity to determine the issue.

"Under equity practice and the specific provisions of Sec. 36, Subdivision 10, Chap. 91, R. S. 1930, (Now Section 4, Subdivision 10, Chapter 107, R. S. 1954,) the Supreme Judicial Court has authority to pass upon the questions raised by the presentation of a bill in equity seeking the construction and interpretation of the provisions of a trust indenture." *Porter* v. *Porter,* 138 Me. 1.

"Equity as a necessary adjunct to its control over trusts, has assumed jurisdiction to instruct or direct a fiduciary, whether an executor or a trustee, as to his duties in the administration of the estate committed to his care. The directions are given where the fiduciary is in doubt as to the proper performance of his duties because it is recognized that he should not in such cases be required

to act at his peril." *Moore* v. *Emery, et al.*, 137 Me. 259.

In order for this court to determine the issue or issues before it, it will be necessary for us to seek out the intention of Elizabeth S. Haynes concerning the provisions of the indenture of trust, which she executed. As the chronology of events may have an important bearing upon the issues, we reassemble the following history, taken from the agreed statement of facts. On April 19, 1906, Manchester Haynes Wheeler was born. He was the son of Hope Manchester Wheeler and, of course, the grandson of Elizabeth S. Haynes, the settlor. At that time, Elizabeth S. Haynes had another living daughter, Muriel S. Haynes. On May 16, 1911, Elizabeth S. Haynes executed the indenture of trust, and amended it on June 12, 1918. On January 31, 1921, Letitia, later to be adopted by Muriel S. Haynes was born and on January 7, 1924, Honora, later to be adopted by Muriel S. Haynes was born. In February 1924, Letitia was adopted by Muriel S. Haynes. Elizabeth S. Haynes died in 1925. It will be noted that Letitia was born ten years after the execution of the indenture of trust, and approximately two and one half years after the amendment of the trust indenture; that Honora was born thirteen years after the execution of the indenture of trust and approximately five and one-half years after the amendment. It will also be noted that Elizabeth S. Haynes, the settlor, died within approximately one year after the adoption of Letitia by Muriel S. Haynes. Hope Brown, the daughter of Manchester Haynes Wheeler, and the granddaughter of Hope Manchester Wheeler was born on April 17, 1926, or about fifteen years after the execution of the trust indenture, and about eight years after the date of the amendment. On August 8, 1927, Honora was adopted by Muriel S. Haynes, and on July 28, 1930, Hope Brown was adopted by her grandmother, Hope Manchester Wheeler. It will be noted that Hope Brown was born after the death of the settlor, and

that she, as well as Honora were adopted subsequent to the death of the settlor. On November 19, 1955, Hope Manchester Wheeler, the daughter of Elizabeth S. Haynes, and natural mother of Manchester Haynes Wheeler, and adoptive mother of Hope Brown, died.

At the date of the execution of the indenture of trust, the adoption statute then in force was Section 35, Chapter 69, R. S. 1903, and read as follows:

> "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, for the custody of the person and all rights of inheritance, obedience and maintenance, he becomes to all intents and purposes, the child of his adopters, the same as if born to them in lawful wedlock, except that he shall not inherit property expressly limited to the heirs of the body of the adopters, nor property from their lineal or collateral kindred by right of representation."

In 1918 when the trust was amended the adopting statute had been amended to read as follows:

> "By such decree the natural parents are divested of all legal rights in respect to such child, and he is freed from all legal obligations of obedience and maintenance in respect to them; and he is, for the custody of the person and right of obedience and maintenance, to all intents and purposes, the child of his adopters, with right of inheritance when not otherwise expressly provided in the decree of adoption, the same as if born to them in lawful wedlock, except that he shall not inherit property expressly limited to the heirs of the body of the adopters, nor property from their lineal or collateral kindred by right of representation; but he shall not by reason of adoption lose his right to inherit from his natural parents or kindred . . ." R. S., 1916, c. 72 § 38, as amended by P. L., 1917, c. 245.

The immediate problem is created by the fact that Hope Manchester Wheeler, one of the primary beneficiaries of the trust is now deceased. The contingency which gives rise to the uncertainty on the part of the trustee has arisen. Not so in the case of the other primary beneficiary, Muriel S. Haynes, who is still living. No contingency in respect to the adopted children of Muriel S. Haynes having arisen, we give our attention to the situation as it concerns Hope Wheeler Brown.

While this court may have the power to answer questions of construction of a will or trust indenture before a contingency occurs, *Haseltine* v. *Shepherd,* 99 Me. 495, we prefer to abide by the rule set forth in *Huston* v. *Dodge,* 111 Me. 246, 248. In this case, after asserting the right of this court to give instructions as to the proper mode of executing a trust, the court said:

> "And we do not think it wise, nor within the intent of statute, to assume jurisdiction to advise trustees, and to construe wills for their guidance until the time comes when they need instructions. The fact that the question may arise sometime in the future is ordinarily not enough. Such a question should not be decided until the anticipated contingency arises, or at least until it is about to arise, until it is imminent. Then if a trustee needs present advice to know how to meet the contingency, it will be given to him. Then the parties interested in the issue can be heard under the conditions and circumstances as they may exist at that time."

We therefore, propose to confine our instructions to the status of Hope Wheeler Brown.

The issue is to be resolved by this court by determining the intention of the settlor, Elizabeth S. Haynes. Our guiding principle must be to seek her intention and we mean her intention as expressed in the language used in the trust indenture and the amendment thereto. It is our function to

find not what she intended to say, but what she intended by what she did say.

> "It is an elementary, fundamental and prevailing rule, which must govern in the construction of a will, that the entire document should be carefully examined, parts compared with other parts, provisions considered with reference to other provisions, and from the whole instrument, from all that is disclosed . . . as well as from the precise language used to ascertain the intention of the testator." *Bryant, et al.* v. *Plummer,* 111 Me. 511.

> "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." *New England Trust Co.,* v. *Sanger,* 151 Me. 295, 118 Atl. (2nd) 760.

Applying these rules, our conclusions must be reached from the context of the trust indenture itself with particular attention given to the meaning of technical words and to prior decisions of this court and of courts in other jurisdictions upon the status of adopted children.

In this trust indenture, which we are called upon to construe, the settlor, after providing that the income should be paid in equal shares, to her two natural daughters during their lives, said:

> "And on the death of either of them who shall leave issue surviving her the share of said income which she would have received shall be paid to such of her issue by right of representation as shall from time to time be living . ."

The word "issue" as used in wills and in trust indentures is an ambiguous term. It has been given various interpretations by different courts depending upon existing statutes and varying circumstances. At this point, it is well to bear in mind that variations in interpretations may be due, in

large measure, to whether the settlor or testator was, himself, the adopting parent or whether the issue involved adopted children of persons other than the testator or settlor. As was said by this court in *Warren* v. *Prescott,* 84 Me. 483, at 487, "By adoption, the adopters can make for themselves an heir, but they cannot thus make one for their kindred."

> "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; *New England Trust Company* v. *Sanger, supra.*

There is a long line of cases, which defines the word "issue" as prima facie meaning heirs of the body; that the term is synonymous with "descendants"; and that there is a presumption that a limitation in a trust to "issue" of a life beneficiary does not include children adopted by him. *Woodcock's Appeal,* 103 Me. 214; *Union Safe Deposit & Trust Company* v. *Dudley,* 104 Me. 297, at 306.

In *Trust Co.* v. *Dudley, supra,* the court quoted with approval this statement:

> "But the great weight of authority is that the word 'issue' in its general sense, unconfined by any indication or intention to restrict its meaning imports descendants."

In *Woodcock's Appeal, supra,* the court said:

> "Where a testator devises property to his own child by blood and then over to the 'child or children' of that child, if any, otherwise to others of the testator's blood, a child of the latter, by legal adoption only, is not included and takes nothing under the will, even though adopted before the making of the will."

> "The word 'issue' primarily signifies lineal descendants by blood and unless the context of the will indicates otherwise, it does not include adopted children." *In re Baur's Will,* 128 N. Y. S. (2nd) 815, 818.
>
> "Generally where provision is made in will for a child of some person other than testator, an adopted child is not included unless there is language in the will or circumstances surrounding testator which make it clear that adopted child was intended to be included, and fact that adoption was subsequent to testator's death raises presumption against intention to include adopted children. Generally, the term 'heirs' and 'issue' as well as 'children' and words of similar import in a will refer to natural and blood relationships and do not include an adopted child, in absence of circumstances clearly showing that testator so intended." *Copeland et al.* v. *Trust Company,* 188 S. W. (2nd) 1017 (Kentucky).
>
> "In a will or deed of trust, word 'children' does not usually include an adopted child, notwithstanding a statutory provision investing an adopted child with right of inheritance from adopting parent, unless it is manifest from language of document and surrounding circumstances, that testator or settlor intended to include such child. The fact that the adoption is subsequent to death of testator whose will provided for 'children' of adopting parents raises a grave presumption against an intention to include such an adopted child within the class 'children.'" *Rhode Island Hospital Trust Co.* v. *Sack,* 90 Atl. (2nd) 436. (Rhode Island.)

There is an illuminating decision of this court, *Wilder* v. *Butler,* 116 Me. 389, which gives the general rule as to the rights of adopted children. The court said:

> "Where one makes provision for his own 'child or children' by that designation he should be held to have included an adopted child since he is under obligation in morals, if not in law to make provision for such child. When, in a will provision is

> made for 'child or children' of some other person than the testator, an adopted child is not included, unless other language in the will makes it clear that he was intended to be included . . . In making a devise over from his own children to their 'child or children' there is a presumption that the testator intended 'child or children' of his own blood and did not intend his estate to go to a stranger to his blood. Blood relationship has always been recognized by the common law as a potent factor in testacy."

In this case now under our consideration the settlor executed the trust agreement long before the birth of all three adopted children. The adoptions, with one exception, took place after her death. The agreed statement of facts indicates that the settlor lived for approximately one year after the adoption of one of the children. It would seem that she was satisfied with the language she had selected when the trust agreement was entered into as well as when it was amended. Otherwise, if it was her intention to include adopted children, she could have changed the trust and provided for their inclusion. This right she had retained under the provisions of the fourth paragraph of the trust indenture.

The language she used in the first paragraph of the trust indenture "issue by right of representation" used in its technical sense means persons who could inherit her property under the statutes of descent.

To inherit by right of representation is synonymous with inheritance *per stirpes*. That is the expression used by the settlor. She did not change it at any time and it seems to us that she added strength to the legal interpretation of this expression by the second and seventh paragraphs of the trust indenture as well as by the amendment.

Bearing in mind the rule that in the absence of clear evidence to the contrary, there is a presumption that a technical word is to be construed in its technical legal sense, it

is logical to conclude that the settlor did not intend that adopted children should be construed as "issue" of the primary beneficiaries.

Under the provisions of paragraph two, distribution of the trust funds is to be made, twenty-one years after the death of the primary beneficiaries, and her grandson, Manchester Haynes Wheeler, under the intestate laws of Maine, as if such funds had been personal property and had been owned by the settlor in her own right and she had died intestate.

In accordance with paragraph seven, authority was given to the trustees to advance payments from the principal to a "child" of either Hope or Muriel, after the death of either Hope or Muriel. The decision in *Woodcock's Appeal,* 103 Me. 214, which held that an adopted child was not a "child" of the primary beneficiary would not permit these payments to an adopted child.

Moreover, the amendment dated June 12, 1918, emphasizes the intention of the settlor that the assets of the trust should eventually be distributed after the purposes of the trust had been accomplished, to lineal descendants who could inherit by law.

The words in the trust indenture, "by right of representation" help us only in trying to find the general intention of the settlor upon the question of whether or not adopted children should be considered as "issue." They have no other particular bearing on the present status of Hope Wheeler Brown. If she had a present right to any part of the income, she is entitled to it as "issue" of Hope Manchester Wheeler and she would not take "by right of representation." That expression would apply to her in relation to inheriting from her grandmother through her father, and we think that is the type of situation which Mrs. Haynes had in mind when she used the expression "issue by right of representation." For example, let us suppose Manchester Haynes Wheeler's

death preceded that of his mother and that when he died he was survived by brothers and sisters and by his daughter, Hope Wheeler Brown. Upon the death of Hope Manchester Wheeler, Hope Wheeler Brown would inherit her father's share by right of representation. It is our opinion that when the settlor used the words "by right of representation" she was looking into the future and had in mind a situation such as the example we have just set forth, uncomplicated by an adoption of a child by its own grandmother.

In the case of *In re Hoyt's Will,* 117 N. Y. S. (2nd) 167, the court in interpreting a Massachusetts will had this to say:

> "Under Massachusetts law, where testamentary trust, which was established for testator's two daughters provided that if either daughter should die leaving lineal descendants, such daughter's share of trust income should be paid to such descendants 'by right of representation' and testator's daughter died leaving two children and five grandchildren, the quoted phrase meant that descendants of deceased heir would take same share its parent would have taken, if living, and the grandchildren whose parents were living were excluded."

It is evident that at the dates of the execution of the trust indenture and its amendment, an adopted child of someone, other than the person dying intestate, would not take under the then existing adoption statutes.

> "Examination of the statute in question, (adoption statute) discloses that domestic or local adopted children do not take from lineal or collateral kindred of the adoptive parents by right of representation, in fact, adopted children are specifically denied that right." *Wyman, Appellant,* 147 Me. 237, at 244.
>
> "If the will discloses an intention that the testator's property shall pass only to his descendants by blood, as, for example, by the use of the phrase 'issue of the body' or an express direction for a

> taking by representation or a per stirpes distribution, it is clear that adopted children will not be included within the term 'issue'." 57 Am. Jur. § 1383, Page 921.
>
> "But it is equally true that, in using the words 'heirs' and 'issue' with respect to Lemuel, he must be supposed to have used those terms as describing persons who would be heirs or issue according to the law as it would then be, and with such rights as the law as it then existed would or might give them in his estate under the provisions of his will. It is clear that, as the law stood at the time of the adoption and at the time of the death of Lemuel, the respondent Maude would not take under the will of Caleb Stowell as the heir or issue of Lemuel, unless it plainly appeared to have been his intention to include an adopted child of Lemuel. There is nothing to show that it does so appear. The words 'by right of representation' are inconsistent with such a construction, since they apply to lineal descendants only." *Blodgett* v. *Stowell,* 75 N. E. 138, (Mass.)

To determine the intention of the settlor when she executed the trust indenture, it is essential that we endeavor to view the situation in the light of circumstances existing on May 16, 1911. The record does not give us the age of the settlor at that time. Neither are we given the ages of her two daughters. However, we do know that Elizabeth S. Haynes had two natural daughters, Muriel S. Haynes, unmarried, and Hope Manchester Wheeler, married, and the mother of Manchester Haynes Wheeler. When the trust indenture was executed, the settlor's grandson, Manchester Haynes Wheeler was a boy only five years of age. It is comparatively easy to surmise that Elizabeth S. Haynes did not contemplate at that time that her daughter, Hope Manchester Wheeler would adopt a child, much less adopt the child of her own grandson, who was then only five years of age. There is nothing to show any change of mind when she amended the trust indenture in 1918, at which time Manchester Haynes Wheeler was only twelve years of age.

We are convinced by a study of the entire agreement and by applying the interpretation given in a long line of decisions of our court, supported by many similar decisions in other jurisdictions, to the words used by the settlor, that she set up the trust for the benefit of her two daughters and their natural issue. Mrs. Haynes had Manchester in mind as a beneficiary. He was then living and was mentioned by name in the indenture.

If Hope Wheeler Brown is to share at this particular time in the trust income, as issue of Hope Manchester Wheeler, the burden is on her to show that Elizabeth S. Haynes so intended. She has failed to sustain this burden.

True, she is a blood descendant of Elizabeth S. Haynes, the settlor, and, circumstances providing, she might ultimately inherit from her great grandmother, the settlor. Counsel for Hope Wheeler Brown advance the argument that because she is a blood grandchild of her adoptive mother, this fact places her in a stronger position than an adopted child, who is not a blood descendant. We do not subscribe to this contention.

That in this particular case, Hope Wheeler Brown happens to be a blood descendant of the settlor is of no consequence as to the real issue before us for determination. Undoubtedly, Hope Wheeler Brown, as the natural daughter of Manchester Haynes Wheeler, can inherit from her father, and she would also inherit from her adoptive mother, Hope Manchester Wheeler, but she cannot inherit from Elizabeth S. Haynes as adopted child of Hope Manchester Wheeler.

The basic issue is the intention of Elizabeth S. Haynes. She set up a trust for the benefit of her two natural daughters, and their issue. Manchester Haynes Wheeler was then living and was the issue of one of the primary beneficiaries of the trust. The settlor expected and intended that upon the death of Hope Manchester Wheeler, Manchester Haynes Wheeler and any brothers or sisters who might be born

later, and his natural issue, by right of representation, as well as the natural issue, of any brothers or sisters, by right of representation, would become the beneficiaries. If by adopting a grandchild, Hope Manchester Wheeler could create an additional beneficiary, because the adopted child happens to be a blood descendant, then she could adopt any number of lineal blood descendants and thereby reduce to a negligible amount the trust income which Manchester Haynes Wheeler was entitled to receive. We do not believe that such was the intention of the settlor.

We hold that Hope Wheeler Brown, during the lifetime of her father, Manchester Haynes Wheeler, is not entitled to any of the trust income previously payable to Hope Manchester Wheeler, and that Manchester Haynes Wheeler is entitled to the entire amount thereof during his lifetime. This conclusion is limited to a determination that Hope Wheeler Brown is not the "issue" of her adoptive mother, within the meaning and intent of the trust indenture we are asked to construe and interpret, and has no bearing or effect on any of the rights of Hope Wheeler Brown as a lineal descendant by blood of her great grandmother.

The carefully prepared briefs of counsel for all parties have been of great assistance to the court. These proceedings for the construction of the trust indenture being necessary for a proper disposition of the trust income, the expenses should be paid by the trustee from the body of the trust.

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 Trustee.

EASTERN MILLING COMPANY
vs.
JOHN H. FLANAGAN
AND
GREAT EASTERN LUMBER CORPORATION, ET AL.

Kennebec. March 16, 1957.

Torts. Interference. Title. Defects. Deeds. Corporations. Real Estate.

A conveyance to an unincorporated company which takes possession under a deed vests a valid title in the company subsequently incorporated so that a corporate grantee which records its deed at 9:00 A. M. and its incorporation papers at 11:00 A. M. holds a valid title.

The law imposes no duty upon a grantor to inquire into the legal competence of a corporate grantee.

The subsequent refusal of the original grantor to execute a confirmatory deed, so-called, is not an interference with the rights of a subsequent grantee.

Where there is no evidence of any overt or positive act preventing the plaintiff from the enjoyment, possession or use of its property, a charge of interference cannot be sustained.

The delivery and acceptance of a deed is one of the important elements in the sale or transfer of real estate, and until delivered is of no effect.

ON MOTION FOR NEW TRIAL.

This is a tort action for interference with business and contractual rights. The case is before the Law Court upon motion for new trial after verdict for plaintiff. Motion sustained. Verdict set aside. New trial granted.

Sanborn & Sanborn, for plaintiff.

Robert Lewin & Edward J. Ridge,
Philip E. Lamb,
Locke, Campbell, Reid & Hebert, for defendants.

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

BELIVEAU, J. On motions for a new trial by the defendants to set aside a verdict recovered against them, alleging the following reasons, to wit:

"I. Because it is against law and the charge of the Justice.

II. Because it is against evidence.

III. Because it is manifestly against the weight of evidence in the case.

IV. Because the damages are excessive."

The case was submitted to a jury who found for the plaintiff and assessed damages in the amount of $7,000.00.

The writ contained two counts in tort, one for interfering with business and contractual rights of the plaintiff and the second alleging a conspiracy to interfere with the business and contractual rights of the plaintiff.

In January, 1954, the Great Eastern Lumber Corporation was the owner of real estate situated in the Town of Gardiner which, by a written contract of that date, with Brooks Brown, Jr., it agreed to convey to him, or his nominee, for the sum of $16,500.

On the 6th day of February, 1954, the Lumber Corporation in accordance with the terms of this agreement conveyed the property to Brown's nominee, Progressive Iron Works Realty Corporation (described in this conveyance as a "corporation duly organized by law and located at Augusta, Kennebec County, Maine"), upon payment of the agreed sum of $16,500. The deed was delivered to and accepted by the grantee.

This sale was authorized at a special meeting of the Board of Directors of the Lumber Corporation held February 6,

1954. At that meeting John H. Flanagan, in his capacity as president and treasurer, was authorized to execute a proper deed to the Progressive Iron Works Realty Corporation.

It is assumed, because the question has not been raised, that the deed was in proper form and the real estate sufficiently described. It was the plan of the Progressive Iron Works to use the building or buildings, on the property conveyed, to carry on what is referred to in the testimony as an iron business; however, it later found a location in Winthrop, Maine, better suited for carrying on this business, and used it for that purpose.

The property in Gardiner remained idle and unoccupied until the 16th day of August, 1955, when the Iron Works entered into an agreement with the Eastern Milling Company, the plaintiff, to convey to it, the same property, for the sum of $20,000.

The deed to the Iron Works was dated February 6, 1954 and recorded in the Kennebec Registry of Deeds on February 8, of that same year, at 9 o'clock in the morning. The incorporation papers of the Progressive Iron Works were recorded in this Registry on the same morning at about 11 o'clock. An examination of the title during the negotiations between the Iron Works and the plaintiff disclosed this situation and the attorneys involved concluded, wrongly we rule, that this created a flaw or defect in the title.

It is the claim of the plaintiff that at 9 o'clock on the morning of February 8, 1954 the Iron Works was not legally competent or qualified to accept the deed because it did not become a corporation until 11 o'clock on the morning when the incorporation papers were recorded.

While the record is silent as to the steps taken by Progressive to complete its incorporation, the implication is unavoidable that some preliminary work, prior to February

6, 1954, had been done to bring this corporation into existence.

In *Clifton Heights Land Co.* v. *Randell* (82 Iowa 89) 47 N. W. 905, the court there holds that a conveyance to an unincorporated company which takes possession under the deed conveys title which vests in the company subsequently incorporated.

We find that the Iron Works acquired a good title at the time the deed was delivered to and accepted by it.

The law imposed on the Lumber Corporation no duty to inquire into the legal competency of the grantee, nominated by Brown. Under its contract it was obligated to convey the property to him, or his nominee, and it had no choice or discretion to do otherwise. Its title or interest in the real estate ceased as of that moment and its responsibilities under the contract with Brown had been fully and completely fulfilled. From that time on, they were complete strangers to the property.

It is contended by the plaintiff that after the question of defect in the title was raised and the Lumber Corporation had been requested to execute a confirmatory deed it refused so to do and agreed with Brown who was attorney for the Iron Works, and not the plaintiff, to make a "token defense" to the Bill in Equity then pending to correct the alleged flaw.

This court is not called upon to pass upon the legality of such a contract and it is not necessary to do so in this case.

In the first instance there was no consideration for the alleged promise and the court will not undertake to determine what was meant by a "token defense." The Lumber Corporation was within its rights in contesting the Bill in Equity. Furthermore such an agreement, if made, was between the Lumber Corporation and Brooks Brown, Jr. who

represented the Iron Works. The plaintiff was not a party to that agreement nor was there privity of any kind between the Lumber Corporation and the plaintiff. The plaintiff could derive no benefit from such a contract.

The charge that the defendants interfered with the contractual rights of the plaintiff cannot be sustained. The deed from the Iron Works to the plaintiff and the purchase price of $20,000 were deposited in escrow awaiting the disposition of the Bill in Equity. The purpose, it would seem, was to protect the plaintiff until the so-called flaw or defect in the title had been corrected.

It is alleged, though denied by Flanagan, that the defendants did not want the plaintiff to own or occupy these premises. There is no evidence to show any overt or positive action by the defendants to prevent the plaintiff or its grantor from enjoying full possession and use of the property.

It is claimed that an asphalt plant was partly on the premises of the Iron Works and that its location prevented the plaintiff from unloading some heavy machinery, to be used in the plaintiff's business.

It does not appear that either defendant was responsible for this, and, apparently, if such was the case, the Iron Works who had owned the premises for a year and a half, raised no objection.

As a matter of law, this plaintiff never had title to the property nor the right to occupy any part of it. The agreement dated August 16, 1955 made no provisions for occupancy by the plaintiff while the deed was held in escrow and there is no evidence in the case that it was given such permission by the owner. It could not exercise any dominion over the property until the deed now held in escrow had been delivered to it. The delivery and acceptance of the

deed is one of the important elements in the sale or transfer of real estate and until delivered is of no effect.

The interference complained of, as we view the case, was the refusal of the Great Eastern Lumber Corporation to execute a confirmatory deed or to cooperate with the Iron Works in the disposition of the Bill in Equity. This conduct on the part of the defendants, if true, gives the plaintiff no cause of action.

Motions sustained.

Verdict set aside.

New trial granted.

CLEVELAND LOVEJOY, ET AL. IN EQUITY

vs.

RALPH J. COULOMBE, ET AL.

Oxford. March 22, 1957.

Equity. Specific Performance. Real Estate. Demurrer. Answer. Oath. Appeal. Injunction. Amendments. Contracts. Taxes. Equity Rule 15. 22. 5. 20. 4.

A demurrer not certified by counsel to be in good faith should not be filed. (Equity Rule 15).

A motion that an equity cause be heard upon bill and answer in pursuance of Equity Rule 22 and R. S. Chapter 107, Section 17 ("after thirty days from the filing of the replication unless by consent") is properly denied where the parties have previously agreed to hearing upon a prior date.

Better practice under R. S. Chapter 107, Section 21 in perfecting an equity appeal indicates the advisability of filing with the clerk a written statement of appeal even though the law merely requires a docket entry.

In an equity appeal the cause is heard *de novo* upon the record.

An amendment to a bill seeking an injunction must be under oath if new material facts are alleged; (Equity Rule 5, cf. Equity Rule 20.) and an amendment that plaintiff has no plain remedy at law is not new material matter (Equity Rule 4).

An equity answer shall be verified by oath, if plaintiff so requests; otherwise under our practice it is not required.

The responsive portions of an answer under oath are evidence equal to testimony; but affirmative matter set up in the answer by way of avoidance must be proved.

Where a contract to convey land calls for a good marketable title, this can be accomplished by a deed of quitclaim with covenant.

In the absence of agreement to the contrary the entire liability for 1955 taxes is upon the defendants since they had title on April 1, 1955.

ON APPEAL AND EXCEPTIONS.

This is a bill in equity for specific performance of a contract to convey real estate. The case is before the Law Court upon appeal and exceptions after decree favoring plaintiff. Decree affirmed as modified.

Robert T. Smith, for plaintiffs.

Gerry Brooks, for defendants.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

DUBORD, J. This is a bill in equity seeking specific performance of a contract to convey real estate.

The case is before the court on exceptions of the defendants, and on appeal by the defendants after a decision of the presiding justice in favor of the plaintiffs.

The manner in which the exceptions and the appeal are presented to this court leaves must to be desired.

The bill of exceptions sets forth five alleged causes of error. No portion of the record nor the evidence were made a part of the bill of exceptions.

The record indicates that a demurrer to the original bill was sustained for the alleged failure on the part of the plaintiffs to allege a specific date when the contract of purchase was entered into. Plaintiffs then filed a motion to amend their bill. No objection was made by the defendants to the motion, which was allowed by the presiding justice. A new demurrer was filed to the amendment presented by the plaintiffs. The record indicates that the second demurrer was not certified by counsel to be in good faith, and in accordance with Equity Rule 15, the demurrer should not have been filed.

An examination of the amended bill shows sufficiency of allegations. The second demurrer was properly overruled by the presiding justice. The defendants take nothing by this exception.

The record indicates that defendants filed an answer to the amended bill on March 14, 1956, and the plaintiffs' replication was filed on March 19, 1956. Hearing was held on March 23, 1956.

Prior to the hearing, counsel for the defendants presented a motion to the sitting justice that the cause be heard only upon bill and answer, the answer to be taken as true.

> "After answer filed in an equity cause, the orator may elect to set the cause for hearing upon bill and answer, or traverse the truth of the answer by replication, thereby raising an issue of fact to be settled by evidence. If the cause be set for hearing upon bill and answer, the facts stated in the answer are to be taken as true, because the orator elects to so treat them, precisely as a plaintiff in an action of law, by demurrer to a defendant's plea, admits all the facts stated in it that are well pleaded." *Dascomb* v. *Marston,* 80 Me. 230; *Hall*

v. *Hamilton*, 123 Me. 80; Section 389, Whitehouse Equity Pleading & Practice.

The motion of counsel for the defendants was based on Equity Rule 22, and Section 17, Chapter 107, R. S. 1954, both of which provide as follows:

> "When a replication is filed to a plea or answer the court upon motion of either party may set the cause for hearing upon bill, plea or answer, and evidence, but such hearing shall not be held until after thirty days from the filing of the replication unless by consent or special order of Court."

The motion was denied and exceptions taken by the defendants to the ruling.

While it is true that Equity Rule 22, and Section 17, Chapter 107, R. S. 1954 do not specify the nature of the consent required by its provisions, the record clearly shows that counsel for the plaintiffs and the defendants had arrived at a definite oral agreement that the cause would be heard on the date assigned for a hearing. The sitting justice found as a fact that the parties had made a mutual agreement to that effect. Moreover, in defendants' bill of exceptions, counsel sets forth that an oral agreement had been made by counsel, in the presence of the court, that the cause be assigned for a hearing on March 23, 1956. Defendants' exceptions now come with ill grace. The motion was properly denied and defendants take nothing by this exception.

The other three alleged errors are applicable to matters of fact and are not open to consideration upon exceptions. Section 26, Chapter 107, R. S. 1954, *Emery* v. *Bradley*, 88 Me. 357, 34 A. 167; *American Oil Company* v. *Carlisle*, 144 Me. 1, 63 A. (2nd) 676.

The final decree of the sitting justice was filed on June 15, 1956, and notice given on the same date. The docket

indicates that defendants noted an appeal as of June 25, 1956.

Under the provisions of Section 21, Chapter 107, R. S. 1954, an appeal shall be claimed by an entry on the docket of the court from which the appeal is taken, within ten days after such decree is signed, entered and filed, and notice thereof has been given by such clerk to the parties or their counsel.

While it would seem that all an appellant needs to do in order to claim his appeal is to have an entry made on the docket within the specified time, better practice indicates the advisability of filing with the clerk a written statement of appeal.

> "In addition to the entry on the docket, the practice is recommended of filing with the clerk a written statement giving the title of the cause, the nature of the same, the fact that a decree has been rendered therein in favor of plaintiff or defendant and that such plaintiff or defendant appeals therefrom, signed by the counsel for the party appealing as in the case of exceptions. This fully protects the clerk by providing him with conclusive proof of the fact of such appeal by the signature of counsel and should be required by him for that reason as in the case of appearance instead of relying upon an oral request of counsel to make the entry on the docket." Whitehouse Equity Jurisdiction Pleading & Practice, Section 620.

The appeal albeit not perfected in the best approved manner, is properly before us. We, therefore, give it consideration in accordance with the well determined procedure that in an appeal in equity, the cause is heard *de novo* on the entire record.

> "Appeals in Equity matters are heard anew upon the record." *Trask* v. *Chase,* 107 Me. 137, 77 A. 698; *Pride* v. *Pride Lumber Company,* 109 Me. 452; 84 A. 989; *Sears Roebuck & Company* v. *Portland,* 144 Me. 250, 68 A. (2nd) 12.

"Ordinarily, an appeal vacates the judgment below and the case when heard on appeal is heard de novo and judgment is entered upon the new decision." *Sears Roebuck & Co.* v. *Portland, supra.*

"Upon the whole case the court is required to 'affirm, reverse or modify the decree of the court below or remand the cause for further proceedings, as it deems proper.' " *Trask* v. *Chase, supra; Pride* v. *Pride Lumber Company, supra; Sears Roebuck & Co.* v. *Portland, supra.*

"All questions presented by the record are open for consideration on appeal and such decree is to be directed as the whole case requires." *Doyle* v. *Williams,* 137 Me. 53; 15 A. (2nd) 65.

"All issues raised by the record are open for consideration and determination anew by the law court on appeal. Such is the effect of Section 21, Chapter 107, R. S. 1954, which provides in part that in an appeal from a final decree in equity the law court shall 'affirm, reverse, or modify the decree of the court below, or remand the cause for further proceedings, as it deems proper.' " *Woodsum* v. *Portland, R. R.,* 144 Me. 74; 65 A. (2nd) 17.

"The law court is not limited to a consideration of errors in the decree claimed by the parties filing the appeal but may consider issues raised by any party." *Woodsum* v. *Portland R. R., supra.*

"Findings of the sitting justice are to stand unless shown to be clearly erroneous." *Trask* v. *Chase, supra; Wolf* v. *W. S. Jordan, Co.,* 146 Me. 374, 82 A. (2nd) 93.

"It is well settled that the decree of a single justice upon matters of fact in an equity hearing will not be reversed unless it clearly appears that the decree is erroneous." *Eastman* v. *Eastman,* 117 Me. 276; 104 A. 1.

"In case of an appeal in equity proceedings, the burden is upon the appellant. He must show the decree appealed from to be clearly wrong, other-

wise it will be affirmed." *Wilson* v. *Littlefield*, 119 Me. 143, 109 A. 394; *Levesque* v. *Pelletier*, 144 Me. 245, 68 A. (2nd) 9. *Tarbell* v. *Cook*, 145 Me. 339; 75 A. (2nd) 800.

The original bill, sets forth an agreement for the sale by defendants and the purchase thereof by the plaintiffs of certain real estate situated partly in the Town of Bethel and partly in the Township of Mason, in Oxford County, for the agreed price of $3,000.00. The date of the agreement was alleged as "on or about the fifteenth day of April 1955," and the bill further alleges that the defendants executed and signed a memorandum in writing. No copy of the memorandum was included in the bill either by way of allegation or exhibit. Plaintiffs further alleged that pursuant to the agreement, they entered into possession of the premises and made valuable and substantial improvements, in reliance on defendants' agreement. Plaintiffs further alleged that the agreement was understood by all parties to be conditioned upon the negotiation of a loan on the part of the plaintiffs with the Veterans Administration of the United States of America. Plaintiffs alleged ability and readiness to perform the agreement, together with a demand for performance on the part of the defendants, and failure to perform on the part of the defendants. Plaintiffs further alleged that defendants served upon them a notice to quit the premises and further evinced an intention to bring an action of forcible entry and detainer to dispossess the plaintiffs.

Plaintiffs prayed for specific performance of the agreement and for an injunction to restrain the defendants from instituting an action of forcible entry and detainer and from otherwise interfering with plaintiffs' possession.

The bill required an answer under oath.

Plaintiffs' application for a temporary injunction was granted.

Plaintiffs' bill was verified in accordance with the provisions of Equity Rule 5.

To the original bill, defendants filed a special demurrer inserted in an answer.

In their answer defendants admitted plaintiffs' allegations concerning the agreement of purchase and sale, but set up as an affirmative defense a contention that they were prevented from conveying the real estate to the plaintiffs by reason of an attachment, which was placed on their property by one Joseph O'Brien; and that a new agreement was entered into between the defendants and the plaintiffs whereby the plaintiffs were to pay rent at the rate of $25.00 per month until the pending action brought against them by O'Brien had been settled or otherwise disposed of, and the attachment dissolved. Defendants further set up in their answer that the plaintiffs breached the entire agreement by their failure to pay the agreed rent.

The defendants' demurrer was sustained for failure to state a specific date.

Plaintiffs then filed a motion to amend their bill with the allegation of a definite date and by inserting a new paragraph to the effect that plaintiffs did not have a plain, adequate and complete remedy at law; by adding an allegation that the defendants owned the property under contract; by the addition of a complete description of the real estate and by an insertion verbatim of the written memorandum relied upon by the plaintiffs.

No objection was made to this motion by the defendants and the motion was allowed by the presiding justice.

Defendants then filed a new demurrer to the amended bill, which was overruled.

Defendants then filed a new answer to the amended bill substantially the same as the answer to the original bill in

which they admitted a contract for the sale and purchase of the property in question, but set up a new agreement which they say was breached by the plaintiffs.

One of the contentions advanced by the defendants is that, in view of the fact, that the bill seeks an injunction and must be verified under the provisions of Equity Rule 5, that the amendment to the bill should have been under oath.

Section 10, Chapter 107, R. S. 1954, provides that a bill in equity may be amended or reformed at the discretion of the court. See also Equity Rule 20. Amendments to a bill are of two kinds, those which relate to parties and those which affect the substance of the bill. *Hewett* v. *Adams,* 50 Me. 271, at 273.

In *Farnsworth* v. *Whiting,* 104 Me. 488; wherein the case was heard upon report, it was contended that amendments were not allowable because not sworn to, the bill being for an injunction, and required to be on oath. The court said:

> "If the proposed amendments contained any statement of additional facts, or even varied any statement of matters of fact contained in the bill, the objection might be valid."

The court pointed out, however, that in the case under consideration, the proposed amendments were purely in matters of form; that no statement of fact was added and none was varied. The court further said:

> "It is only the manner of stating them that is varied."

The proposed amendments were, therefore, held allowable and the bill taken as amended accordingly.

It is to be noted that in the case of *Farnsworth* v. *Whiting, supra,* no action had been taken upon the allowance of the motion to amend until the cause was heard by the Law Court on Report. In the instant case now under our con-

sideration, the amendment was allowed by the presiding justice without objection on the part of counsel for the defendants.

It would seem to be the rule that an amendment to a bill seeking an injunction must be under oath if new material facts are alleged. *Lakin & Gould* v. *Chartered Company,* 111 Me. 556.

Giving our attention to the amendment now objected to for the first time by the defendants, we are of the opinion that no new material matter was included in the amendment, and thus verification was not essential.

In the amendment, plaintiffs added an allegation to the effect that they did not have a plain, adequate and complete remedy at law. As it is no longer necessary for a plaintiff in equity to allege in his bill that he has not a "plain, adequate and complete remedy at law," Equity Rule 4, *Goodwin* v. *Smith,* 89 Me. 506, such an allegation cannot be construed as being new material matter.

The original bill did not contain a complete description of the property involved, but for a description, referred to the recorded warranty deed by which defendants had secured title. In the amendment, plaintiffs added a complete description. This cannot be construed as an allegation of a new statement, but it is only a varied manner of stating the original allegation. Plaintiffs, in their amendment, also added a clause indicating that the property was owned by the defendants, such a statement having been omitted in the original bill. An allegation of ownership is unnecessary; 49 Am. Jur. 183, Section 160; and, in any event, failure to allege ownership by the defendants was cured by the pleadings of the defendants who admit ownership of the property in question.

The other amendment consisted of including verbatim, the written memorandum relied upon which had not been

incorporated in the original bill. We do not construe this as the addition of new material matter.

Consequently, it is our opinion that defendants' point upon this issue is not well taken particularly when no objection was raised to the motion to amend at the time it was filed.

Plaintiffs having demanded that defendants file an answer under oath, defendants now advance the contention that because of the effect of an answer under oath, plaintiffs have not sustained the burden incumbent upon them.

We turn our attention now to the effect of an answer under oath as bearing upon the question of evidence.

Under the provisions of Section 15, Chapter 107, R. S. 1954, the answer to a bill in equity shall be verified by oath, if the plaintiff in his bill asks for an answer upon oath. Otherwise, under our equity practice, an answer under oath is not required. Section 377, Whitehouse Equity Pleading & Practice.

> "When a cause goes to hearing on bill, answer and replication, it is a rule in general chancery practice, when the answer is under oath, that such parts of the answer as are responsive to the bill are evidence equal to the testimony of one credible witness and are, therefore, to be taken as true unless outweighed by a preponderance of evidence but those parts of an answer which are not responsive, but set up matter by way of avoidance are not evidence and the burden is upon the defendant to prove them. The preponderance of evidence required by the rule is a preponderance of any kind of legal evidence such as two credible witnesses or one witness and corroborating circumstances or even circumstances or documents alone. Any evidence, no matter what it may be, is sufficient if it outweighs the answer and in determining the weight of such evidence any fact may be taken into consideration which has a bearing upon the ques-

tion." Section 390, Whitehouse Equity Pleading & Practice; *Bradley* v. *Chase,* 22 Me. 526-527; *Appleton* v. *Horton,* 25 Me. 23; *Gamage* v. *Harris,* 79 Me. 531.

It is to be noted that while counsel for the defendant has correctly stated the rule as to the weight of an answer under oath when the answer is responsive to the bill, the rule, however, does not apply in this particular case, because the part of the answer upon which the defendants rely is not responsive, but sets up matters by way of avoidance. As previously pointed out, the defendants admit the allegations in the plaintiffs bill insofar as the contract relied on by the plaintiffs is concerned, but they set up affirmatively that a new agreement was entered into which was breached by the plaintiffs. Upon this issue the burden was on the defendants.

The presiding justice found there was no new agreement and the evidence supports this finding. It is unnecessary to cite the long line of decisions to the effect that ordinarily the findings of the sitting justice as to matters of fact are to be sustained unless clearly erroneous; and that the burden is upon the appellant to show that the decision was clearly wrong.

The evidence supports a finding that plaintiffs entered into an oral agreement to purchase the real estate in question from the defendants, the transfer to take place when the plaintiffs had successfully negotiated a loan with the Veterans Administration. The original agreed price was $4,000.00, which was subsequently changed to $3,000.00. The evidence further sustains a finding that the Veterans Administration approved the loan on or about May 6, 1955, at which time the defendants were notified that plaintiffs were ready and willing to perform their part of the agreement.

In their original bill, plaintiffs alleged an agreement of purchase at a price of $3,000.00. The bill alleged that de-

fendants had bound themselves by a memorandum signed and executed by them.

In their amended bill, plaintiffs set forth verbatim a memorandum signed by the defendants which specified a purchase price of $3,000.00.

The evidence disclosed that the original agreement, partly oral and supported by a written memorandum, specified a purchase price of $4,000.00, and this original memorandum was explicit enough in its terms to permit of an action for specific performance. The substituted memorandum changing the purchase price to $3,000.00, might well have been considered inadequate. However, this point is not in issue, as any weakness, if weakness there was, in the form of the substituted written memorandum was not taken advantage of by the defendants in their pleadings. It has been held that a court of equity has jurisdiction to compel specific performance of parol agreements for conveyance of land and that in a bill for specific performance of such parol agreement, if the defendant would rely on the statute of frauds at the hearing, he must raise the question by demurrer, plea or answer. *Douglas* v. *Snow,* 77 Me. 91.

It appears that when the plaintiffs took possession of the premises pursuant to the agreement of sale and purchase, plaintiffs further agreed that they would pay rent to the defendants at the rate of $25.00 per month until the expected loan was approved. Plaintiffs made these payments and made two extra payments totalling $50.00 subsequent to the date of the approval of the loan.

The presiding justice found as a matter of fact, that a contract had been entered into between the parties, whereby the defendants agreed to sell, and the plaintiffs agreed to buy the real estate in question for an agreed amount of $3,000.00, the sale to be completed upon approval by the Veterans Administration of a loan negotiated by the plain-

tiffs. He further found from the evidence that the plaintiffs as of about May 6, 1955, were ready and willing to comply with their part of the agreement and that the defendants breached their contract by refusing to convey. He further found that the plaintiffs were entitled to a credit of $50.00 to be deducted from the purchase price by reason of rent paid after the time of performance had arrived. The presiding justice ordered the defendants to execute and deliver to the plaintiffs, as joint tenants, and not as tenants in common, a deed of warranty in the customary form, warranting against all incumbrances except the taxes assessed or to be assessed for the tax year beginning April 1, 1956, and he further ordered that the taxes for 1955 be pro-rated between the plaintiffs and the defendants on a basis of one-sixth to be paid by the defendants and five-sixths to be paid by the plaintiffs.

The findings and decree of the presiding justice are all supported by the evidence with the exception of that portion of his decree relating to the nature of the conveyance and to the pro-ration of taxes. There is nothing in the case to support the finding of the presiding justice that the defendants should convey the property to the plaintiffs as joint tenants by warranty deed. In that respect the decree is erroneous. All that the defendants are obliged by law to do is to convey to the plaintiffs a good marketable title, and in the absence of specific agreement on the point, this can be accomplished by a deed of quitclaim with special covenants of warranty against incumbrances created by them. *Garcelon* v. *Tibbetts*, 84 Me. 148; *Depositors Trust Company, trustee,* v. *Bruneau, et al.*, 144 Me. 142 at 146. Moreover, as the record is entirely bare of evidence upon the question of payment of taxes, and as the defendants had title to the property on April 1, 1955, the entire liability for taxes for the year 1955 falls upon the defendants.

It is, therefore, our opinion that the decree should provide that the defendants convey to the plaintiffs a good marketable title to the property in question, this to be accomplished by a deed of quitclaim, with special covenants of warranty against incumbrances created by them, including taxes assessed for the year 1955, but excluding all subsequent taxes, for the amount of $2,950.00.

The decree below is affirmed with the exception of the modifications herein suggested. The cause is remanded to the court below for the entry of a decree in the form indicated by this opinion. Appellees to recover additional costs.

So Ordered.

FRED LECLERC
vs.
ROMEO GILBERT AND
THE AETNA CASUALTY & SURETY COMPANY

Kennebec. March 22, 1957.

Workmen's Compensation. Findings.

A finding by the Industrial Accident Commission of permanent impairment and entitlement "to specific compensation for 25 weeks beginning November 3, 1955 . . . compensation already paid . . . to be credited . . ." is a sufficient finding of "permanent impairment commencing on November 3, 1955," even though such finding was not made verbatim or in recessed or isolable words.

A finding of "permanent impairment on November 3" cannot be questioned where no report of any evidence is included in the record before the Law Court.

ON EXCEPTIONS.

This is a petition to determine extent of permanent impairment. The case is before the Law Court upon excep-

tions to a *pro forma* decree sustaining the Commission. Exceptions overruled.

Jerome G. Daviau, for plaintiff.

C. Alvin Jagels,
Locke, Campbell, Reid & Hebert, for defendants.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

SULLIVAN, J. The petitioner-employee, Fred Leclerc, prosecutes exceptions to the *pro forma* decree of a Superior Court Justice sustaining the findings of the Industrial Accident Commission upon a petition to determine the extent of permanent impairment.

On November 3, A. D. 1955 the petitioner sustained a compensable injury to his left ankle. That same month a written memorandum of agreement was made by the petitioner and the respondents for the payment to Leclerc by them of compensation "during present period of temporary total incapacity beginning November 11, 1955." The writing expressly acknowledged that the period of incapacity commenced November 4, 1955. On November 22, 1955 the Commissioner of Labor and Industry approved the transaction.

On September 22, A. D. 1956 the parties agreed by written memorandum for compensation "during the present period of temporary partial incapacity beginning September 17, 1956." October 4, 1956 the Commissioner of Labor and Industry approved.

Each agreement contained this delimitation: "Compensation for permanent impairment not considered in this agreement."

On August 2, A. D. 1956 Leclerc filed with the Industrial Accident Commission his petition, dated July 27, A. D. 1956,

to have determined the extent of his permanent impairment. The respondents answered with a general denial. On November 27, A. D. 1956 the Commission held a hearing and on November 28th, made these findings:

> "Injury November 3, 1955, to left foot
>
> Permanent Impairment found by Commission:
>
> 20%
>
> Employee therefore entitled to specific compensation for 25 weeks beginning November 3, 1955, at $27.00 per week. Any compensation already paid because of said injury for actual incapacity to work during said period or as specific compensation to be credited toward aforesaid amount hereby ordered paid by above-named employer or insurance carrier."

On December 19, A. D. 1956 under the obligatory statute a Justice of the Superior Court formally approved such findings.

On January 3, A. D. 1957 the petitioner filed five exceptions to the decree of the justice. The exceptions are reducible to two specifications of attack:

1. The decree is legally exceptionable in that no finding of fact had been made in the decision of the Industrial Accident Commission asserting positively the specific date on which permanent impairment commenced but payments were scheduled retroactively from the date of the injury in lieu of such a finding and for want of one.

2. The weekly payments decreed should be additional to payments previously accrued and paid under the two, approved agreements for compensation and payments made under those agreements should not have been allowed to the respondents as a credit toward payments to be made in accordance with the decree.

The findings of the Industrial Accident Commission of November 28, 1956 recite that a hearing had been had, that there had been an injury to the petitioner's left foot on November 3, 1955, that permanent impairment of 20% had resulted and that the petitioner was entitled to specific compensation for 25 weeks beginning November 3, 1955. These findings are of fact. *Foley* v. *Dana Warp Mills,* 122 Me. 563, 119 A. 805.

It must be conceded that no finding of fact was made verbatim or in recessed or isolable words saying permanent impairment began on November 3, 1955. The technique employed lacked that direct address to the point and that absolute precision. Yet sufficient detail was recorded to necessitate of the reader only a minimum exertion of his deductive process to perceive a finding by the Commission that permanent impairment commenced on November 3, 1955. The shortcoming under the particular circumstances of this case was trivial and the sacrifice of form is of such fine degree that we may sensibly say it is expendable although not completely desirable.

> "- - - - - The ultimate findings and conclusions of the referee are, in substance, correctly reported by Commissioner Scott, and the mere fact that each finding of the referee is not formally labeled by him as a finding of fact or conclusion of law in no way changes their actual character; again, where a series of facts are found, showing, in themselves, that an employé was injured upon the premises of his employer (as in the present case), the lack of a formally stated conclusion that the injury so occurred is not fatal to the referee's adjudication."

Dainty v. *Jones & Laughlin Steel Co.,* 263 Pa. 109, 106 Atl. 194.

> "In a proceeding under the Oklahoma Compensation Act, the employer contended that the Industrial Commission failed to designate in their order for the payment of certain medical bills, the doc-

> tor entitled thereto, and whether or not the charges thereon were reasonable; and that the award relative to the medical bill should be remanded and the commission directed to correct the order for the medical bill and state therein whether or not the charge made for services rendered, was, in their opinion, reasonable. The court, in denying that contention, said: 'The fact that hearing was had before the commission upon the reasonableness of the medical bill, the order of the commission made thereon 'that all medical bills be paid' was a sufficient finding and order of everything necessary to be found to sustain the same, and was a finding as to the reasonableness of the bill upon which the hearing was had.' Raymond Concrete Pile Co. v. Francis (Okl.), 16 P. (2d) 235 (Nov. 1932)."

Workmen's Compensation Law, Schneider, Vol. 3, Supplement, Page 262.

Determining, as we feel we must, that a finding of permanent impairment commencing on November 3, 1955, was thus unequivocably, howbeit argumentatively, expressed by the Commission in its decision, the finding as an affair of fact cannot be questioned in this case since no report of any evidence is included in the record. *Girouard's Case,* 145 Me. 62, 69; *Bickford* v. *Bragdon,* 149 Me. 324, 332.

In as much as permanent impairment was fixed as of November 3, 1955, double or concurrent compensation was not available to the petitioner upon the facts of this particular case.

In *Phillips' Case,* 123 Me. 501 an injury had occurred, April 5th, 1922. By an open-end agreement of April 28, 1922 compensation was paid from and after April 12, 1922. On August 14th, 1922 there was an amputation. This court held that compensation for the loss by amputation, for 83 weeks began as of August 14th, but that double or concurrent compensation was not allowable under both the agreement of April 28, 1922 and the amputation award, for the

period from the amputation on August 14th, to November 2, 1922, the date of the agreed statement of facts upon which the case was presented to the Law Court.

In *Maxwell's Case,* 119 Me. 504, 508 is this paragraph:

> "The chairman, however, heard the case, but based his decision on an entirely different ground, viz: That the loss, as he puts it, of 'nearly three-fourths of the distal phalange, constitutes the loss of the entire phalange for all practical or useful purposes,' and held that the petitioner had lost the phalange of his finger within the meaning of Section 16 of the Act and was entitled to specific compensation therein provided, *less the sums he had already received.*" (Emphasis, ours.)

The italicized words were not at all essential to the decision rendered by the court. They are quoted here merely for any significance they may negatively afford as manifesting that the court was at no pains to challenge or question them.

In *Martin's Case,* 125 Me. 221, 222 is this passage:

> "The full commission made the finding that usefulness and physical functions of the eye were totally and permanently impaired and ordered compensation appropriate to statutory provision, *toward which the temporary-disability payments* should count. - - - - - - - - - -" (Emphasis, supplied.)

Again, the italicized clause is extraneous to the decision. It is noted here for any importance it may deserve from its having failed to provoke any court comment. There was no perceptible arching of the forensic eyebrows.

In *Estabrook* v. *Steward Read Co.,* 129 Me. 178, the accident had occurred October 14, 1924. On November 4, 1924 a memorandum of agreement was made with requisite approval, for payment of compensation "during present disability," beginning October 21, 1924. Compensation was accordingly paid. On October 14, 1928 the injured employee

died. June 18, 1929 the employee's widow filed a petition to have determined the extent of permanent impairment and for an apt award of compensation. On December 20, 1929 the Commission found the percentage of permanent impairment to have been 95% and that the employer must pay the employee's widow compensation for the specific period of 285 weeks beginning October 21, 1924, *less the number of weeks during which compensation had been paid to the employee before his death and to his widow thereafter.* (Emphasis, supplied.) This court confirmed the Commission's findings crediting payments of compensation made under the agreement of November 4, 1924, against payments ordered to be paid for the specific period of 285 weeks. Concurrent or double compensation was thus denied under circumstances very comparable with those in the instant case.

Exceptions overruled.

KENNETH EVERETT

vs.

LESTER E. RAND

Aroostook. Opinion, April 5, 1957.

Exceptions. Contracts. Parol Evidence. Custom and Usage. Subsequent Acts. Estoppel.

Findings of fact of a single justice are final and binding if supported by any credible evidence; and it must be assumed that the justice found upon all issues of fact necessarily involved in his decision.

An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement.

The parol evidence rule is applicable to an integrated contract which is clear and unambiguous. Parol evidence of custom and usage may be admitted to establish the intention of the parties, although such usage cannot be given legal effect where it is repugnant to the con-

tract itself and would create an ambiguity where none existed. (Defendant sought to prove that by usage "broker" meant "buyer.")

Where a contract is clear and unambiguous, evidence of acts of the parties cannot be permitted to vary their terms.

Where plaintiff, as "seller," and defendant, as "buyer" entered into a contract for the sale and delivery of potatoes, subsequent characterization of the defendant "buyer" as "broker" in an assignment agreement between the parties did not change the original contract; it merely raised the issue of estoppel, and as such had no controlling significance.

ON EXCEPTIONS.

This is an action for breach of contract for the sale of potatoes. The case is before the Law Court upon exceptions to findings by a single justice for plaintiff. Exceptions overruled.

Albert M. Stevens, for plaintiff.

Walter S. Sage,
Gerald E. Rudman, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

WILLIAMSON, C. J. This is an action by the seller against the named buyer for damages from breach of a written contract for sale of potatoes. A justice of the Superior Court hearing the case without a jury and under reservation of the right to except as to matters of law found for the plaintiff in the amount of $4280. Exceptions by the defendant are overruled.

Liability turns on whether the defendant was a buyer or a broker in the transaction with the plaintiff. Exceptions touching damages were not pressed or argued, and are considered waived.

The principles governing our consideration of jury-waived cases are well defined. Only issues of law are reached by the exceptions. "(The presiding justice) 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." *Sanfacon* v. *Gagnon,* 132 Me. 111, 113, 167 A. 695. "The findings of fact of a single justice are final and binding if supported by any credible evidence." *Green Acre Baha'i Institute* v. *Eliot,* 150 Me. 350, 353, 110 A. (2nd) 581.

The justice filed a memorandum setting forth certain findings and rulings. Apart therefrom, to use the words of the *Sanfacon* case, at page 113, *supra,* "It must be assumed that he found for the (plaintiff) upon all issues of fact necessarily involved."

In brief, and without detail, the justice could have found the following:

On August 27, 1952 the plaintiff and the defendant entered into a written contract prepared by the defendant on a printed form supplied by him with provisions of interest stated below:

"L. E. RAND COMPANY
Potato Brokers & Shippers

AROOSTOOK COUNTY
SEED - POTATOES - TABLE
FORT FAIRFIELD, MAINE

STANDARD CONFIRMATION OF SALE

* * * * * * * * *

Sold to L E Rand Co. Fort Fairfield, Maine
(Buyer) (P. O. Address)

Ship to Kroemer Farms, Inc.

Sold for account of Kenneth Everett, Fort Fairfield, Maine
(Seller) (P. O. Address)

Shipment from Maine
(Shipping Station or District)

Time of Shipment March 1953; Buyer's option, subject availability of cars

Sale made (F.O.B. or Delivered) fob net on a del basis we furnish sax pay for cert tags and heat if needed

Terms, How Payable as usual

Special Agreement, if any

(It is understood, unless otherwise stated herein, this sale is made in contemplation of and subject to the Standard Rules and Definitions of Trade Terms printed on the back hereof.)

QUANTITY COMMODITY AND SPECIFICATIONS PRICE

Four (4) cars each containing 450-100# Certified Katahdins nusax tagged at $6.50 bbl.

Note: This is a divisible contract; each car shall be regarded as a distinct and separate transaction.

(Signed) L. E. Rand Co. By L. E. R.
Buyer

(Signed) Kenneth Everett
Seller

By .....
Broker or Salesman

I hereby certify that I am authorized by the seller named above, as his Broker or Salesman, to fill out this Standard Confirmation of Sale and sign and authenticate the same in his behalf."

.....

On August 28, 1952 the defendant as the seller and Kroemer Farms, Inc. as the buyer executed a written contract prepared by the defendant on a printed form like that used in the plaintiff-defendant contract. The contract covered the sale of a like quantity of potatoes at a price per hundredweight reflecting an increase said to be a normal brokerage

commission above the barrel price in the plaintiff-defendant contract.

In March and early April 1953 two of the four cars were "ordered in" by the defendant, delivered to him, and shipped under his instructions to Kroemer Farms, Inc. The defendant made no request or demand for the remaining potatoes under the contract. The plaintiff testified in part on this point as follows:

> "Along the latter part of April I talked with Rand and he explained to me he says 'I can't take those other two cars. The two cars I have shipped I shipped to a fellow by the name of Kroemer down in Milo, Kroemer has gone broke and he can't pay me for two cars so I can't take the other two cars."

At about the same time the plaintiff went to Milo to ascertain the financial condition of Kroemer Farms, Inc. The plaintiff was aware that the payments received by him from the defendant, with the exception of the first payment of $800, or $200 per car, came from payments made by Kroemer Farms, Inc. to the defendant. The plaintiff, in making his contract with defendant, was aware that the defendant would dispose of the potatoes, or, from the plaintiff's point of view, would sell them.

Under date August 11, 1953 in an indenture, so-called, the plaintiff assigned to the defendant for collection all claims against Kroemer Farms, Inc. in receivership.

The assignment reads in part:

> "WHEREAS, the Assignee is a potato broker who, on behalf of the Assignor, contracted with Kroemer Farms, Inc. for the sale of potatoes owned by the Assignor, in accordance with the contract attached hereto; and
>
> "WHEREAS, Kroemer Farms, Inc. is now in the hands of receivers, and there is $6034.54 due said Assignor; and

> WHEREAS, a proof of claim of this contractual debt must be filed with the receivers, the Assignor has agreed to assign this claim to the Assignee upon the trusts hereinafter declared"

Sums paid by the receivers to the defendant were in turn paid to the plaintiff and are credited to the former in this action.

Returning to August 27, 1952, we find a written contract, clear and plain, under which the plaintiff, named as the seller, sold potatoes for future delivery to the defendant, named as the buyer. The instrument signed by these parties unquestionably constituted a complete integration of their agreement, with the exception of the terms of payment "as usual" about which no question has arisen.

> "If, however, the written contract is not 'of a skeleton nature' and is not 'apparently incomplete' but is on its face complete, it presumptively contains the whole agreement and the presumption can be overcome only by clear, strong and convincing evidence."
>
> *Johnson* v. *Burnham,* 120 Me. 491, 493, 115 A. 261.

The agreements and understandings of the parties were thus merged in the writing. *McLeod* v. *Johnson,* 96 Me. 271, 52 A. 760; *Johnson* v. *Burnham, supra.* "An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement. An integration is the writing or writings so adopted." Restatement, Contracts Sec. 228, 232.

The parol evidence rule therefore became applicable. *Card* v. *Nickerson,* 150 Me. 89, 104 A. (2nd) 427; *Bartlett* v. *Newton,* 148 Me. 279, 92 A. (2nd) 611; *Hoyt* v. *Tapley,* 121 Me. 239, 116 A. 559; 32 C. J. S., Evidence Sec. 901, 959, at p. 896; 20 Am. Jur., Evidence Sec. 1091; Restatement, Contracts Sec. 237 *et seq.*

> "It is a rule of substantive law which, when applicable, defines the limits of a contract. It fixes the subject matter for interpretation, though not itself a rule of interpretation."
>
> 3 Williston, Contracts (rev. ed.) Sec. 631. See also Sec. 633.

There is, it may be noted, no claim of fraud, error, or mistake in arriving at the words used in the contract. The defendant does not seek to reform the contract in equity. *Johnson* v. *Burnham, supra.* If plain words are to receive their plain meaning, the defendant was a buyer, not a broker, and the plaintiff without more would prevail.

The defendant attacks the plain meaning of the contract and vigorously endeavors to show that the defendant was a broker, not a buyer, and Kroemer Farms, Inc. was the buyer under the contract with the plaintiff. This interpretation he asserts in substance was established; first, through an operative usage, and second, by a written instrument later discussed referring to the defendant as a broker.

The defendant offered evidence to show a usage in Aroostook County at the time the contract in question was executed for a broker to sign as the buyer, without liability on his part. In brief, the usage, so it was urged, was that the word "buyer" on such a contract did not mean "buyer" at all, but "broker." The evidence on the point was contradictory in several respects, and taken for the defendant did not compel the conclusion that there was in fact such a usage. It is sufficient to say that in large measure the witnesses went no further than to say in effect that knowing the parties they considered the contract was a brokerage and not a sales contract.

The justice, in the memorandum, said:

> "The evidence was admitted 'under offer of proof' to enable the Court to determine the ruling. I find that 1) the parole evidence rule is violated by the

> proffered evidence and that it is therefore not admissible for consideration in the case and 2) even if taken as face value the proffered evidence fails to establish a usage so uniform, general and of such long standing that plaintiff might be presumed to know it (and therefore enter into this contract with the usage in mind) . . . Witnesses presented as experts in the potato industry were not in agreement on the 'usage' and apart from such alleged usage no evidence charged the plaintiff with knowledge of it."

Strictly, the evidence was not inadmissible under the parol evidence rule. Usage may be shown to establish the intention of the parties. The question here was whether the evidence compelled the finding of the usage asserted by the defendant. The justice, as we read the memorandum, in effect ruled that the usage was not established as a matter of law, taking the evidence most favorably for the defendant, and further found that no usage was established as a fact. In terms of a jury trial it seems as a judge he would not have permitted the evidence to go to the jury, or if it had reached the jury, as a fact-finder, he would have found no usage.

The defendant must accept the finding under the *Sanfacon* rule, *supra.* Indeed, as a matter of law the usage urged, assuming it was uniform, and known or presumed to be known to the parties, could not be given effect. Such a usage would be repugnant to the contract and further, to say that by usage "buyer" meant "broker" would create an ambiguity where none existed. A written contract would have little force as an integration of an agreement if plain words could be so twisted in meaning. *Randall* v. *Smith,* 63 Me. 105; *Marshall* v. *Perry,* 67 Me. 78; *Norton* v. *University of Maine,* 106 Me. 436, 76 A. 912; *Gooding* v. *Northwestern Mutual Life Ins. Co.,* 110 Me. 69, 74, 85 A. 391.

The defendant must fail in his second main argument to the effect that the assignment of August 1953 compels the

interpretation of the plaintiff-defendant contract to be between seller and his broker and not between seller and buyer.

First, as we have seen, the written contract was the integration of the agreement between plaintiff and defendant, and so subject to operation of the parol evidence rule. Thus, neither the defendant Kroemer Farms, Inc. contract nor the assignment formed any part of the August 1952 contract between plaintiff and defendant.

For this reason, if for no other, it cannot be said, as does the defendant in his brief, "(The indenture) is singly the most significant item in the entire case. It properly identifies each of the parties and ties in (the contract between plaintiff and defendant and the contract between defendant and Kroemer Farms, Inc.) as part of a single transaction from seller through broker to buyer."

Second, the point is governed by the principle stated in *Gooding* v. *Life Ins. Co., supra,* "But if the acts of the parties in question, are evidence of an interpretation of the contracts by the parties, the evidence cannot be permitted to vary their terms, since they are clear and unambiguous."

Such is the instant case. "Buyer" is a word of plain meaning. See also 3 Williston, Contracts (rev. ed.) Sec. 623; 20 Am. Jur., Evidence Sec. 1144; 32 C. J. S., Evidence Sec. 960.

In our view, the assignment was neither more nor less than a fact for consideration of the justice in determining whether the plaintiff was estopped to charge the defendant as the buyer under their written contract. Plainly the assignment did not modify or change the written contract. It was not, for example, a release of liability thereunder. The purpose for which it was introduced was to serve as an aid in interpreting the meaning of the sales contract at the time it was made and became effective.

In holding an estoppel to assert delay in delivering stock under a contract, we said, in *Gas Co.* v. *Wood,* 90 Me. 516, at p. 523, 38 A. 548:

> "Such an estoppel arises whenever an act is done, or a statement made, by a party, the truth or efficacy of which it would be a fraud on his part to controvert or impair."

The justice was not required to find the existence in the instant case of the elements of estoppel. Obviously Kroemer Farms, Inc. owed someone for potatoes purchased under its contract made with the defendant, whether the latter was seller or broker. Likewise the plaintiff was entitled to be paid under its contract made with the defendant, whether the latter was buyer or broker. If the defendant as a buyer owed the plaintiff, surely there was no loss to the defendant in collecting any sums payable the plaintiff on the books of Kroemer Farms, Inc. In short, whether defendant was buyer or broker with respect to the plaintiff, his entry into the Kroemer Farms, Inc. picture as assignee to collect plaintiff's claims for benefit of the plaintiff, in no way harmed him.

The assignment under the principles of estoppel thus had no controlling significance in determining the defendant's liability to the plaintiff.

To summarize:

(1) The written contract in suit was an integrated agreement, subject to the operation of the parol evidence rule.

(2) The justice was not compelled by usage or acts of the parties to interpret "buyer" to mean "broker" in defiance of the plain and unambiguous terms of the contract;

(3) Nor was he compelled to find the plaintiff was estopped to assert that the defendant was the buyer under the contract.

The entry will be

Exceptions overruled.

EDWARD T. McCAFFERTY
vs.
CHARLES W. GODDARD

Penobscot. Opinion, April 15, 1957.

Procedure. Exceptions. Mistrial.

A plaintiff is not entitled to exceptions to the granting of a mistrial because, after the granting, he is in the same position as he was before the case went to trial; he loses no rights nor is he aggrieved by the ruling and order of the court.

A mistrial, in effect, brings the case to an end without the determination of the issues so that the case stands continued to be tried *de novo* at a later date.

ON EXCEPTIONS.

This is a tort action before the Law Court upon plaintiff's exceptions to the granting of a mistrial. Exceptions dismissed.

Harry Stern, for plaintiff.

John A. Platz, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, JJ. FELLOWS, C. J., sat but retired prior to determination.

TAPLEY, J. On exceptions. The plaintiff, Edward T. McCafferty, brought an action of tort against defendant,

Charles W. Goddard. Trial was commenced before a jury in the Superior Court, within and for the County of Penobscot. The plaintiff had presented two witnesses and then called the defendant to the stand as a witness for the plaintiff. Plaintiff's attorney marked for identification "Plaintiff's Exhibit 2" which was a State Police report signed by the defendant and containing, along with other information, defendant's version of the accident. This report was made out and filed in accordance with Sec. 7, Chap. 15, R. S. 1954, as amended by Chap. 306, Sec. 2, P. L. 1955. The attention of the witness was called to the exhibit and he was then asked to identify the signature on the exhibit. After witness identified the signature as his own, plaintiff's attorney endeavored, through the testimony of the witness, to present the contents of the exhibit in so far as they concerned the statement of how the accident happened as given by the defendant and contained in the State Police report. In other words, plaintiff's counsel was endeavoring to present the contents of the State Police report through the witness without offering the report as an exhibit. This procedure was objected to and then ensued colloquy between the court and the attorneys concerning the admissibility of the proposed testimony. According to the record much of this took place before the jury and later further discussion was had in the chambers of the court. Attorney for the defendant made a motion for a mistrial. The presiding justice granted the motion and declared the case a mistrial. Plaintiff took exception to the ruling and order of a mistrial and also to the exclusion of the evidence sought to be introduced by the plaintiff concerning the statements of the defendant as contained in the State Police report.

First consideration must be given to the action of the court in ordering a mistrial. If the plaintiff was not entitled to exceptions to the order of mistrial, then the case is not properly before us. The granting of a mistrial vitiates the entire procedure. *Ferino, et al.* v. *Palmer, et al.*, **52 A.**

(2nd) 433 (Conn.); 88 C. J. S.—trial—Sec. 36 (b). A mistrial is a nugatory trial. *Stern* v. *Wabash R. Co.*, 101 N. Y. S. 181.

Curley v. *Boston Herald-Traveler Corp.*, 49 N. E. (2nd) 445, at page 446:

> "There is no relation between the declaring of a mistrial and a nonsuit. A mistrial is declared because of some circumstance indicating that justice may not be done if the trial continues, and it results only in the discharge of the jury and the impanelling of another jury to try the case anew."

There are many cases in Maine concerning exceptions to the refusal to grant mistrials but we find none to the granting of them.

The presiding justice when he declared a mistrial, in effect, said that the trial of the case is brought to an end without a determination of the issues and that the case stands continued to be tried *de novo* at some later date. The plaintiff under these conditions finds himself in the same position as he was before the case went to trial, so he loses no legal rights nor is he aggrieved by the ruling and order of the court in declaring a mistrial.

The case is not properly before us for consideration.

Exceptions dismissed.

MAUDE B. BREWSTER, ET AL.
vs.
THE INHABITANTS OF THE TOWN OF DEDHAM, ET AL.

Hancock. Opinion, May 3, 1957.

Equity. Appeal. Jurisdiction. R. S. 1954, Chap. 107, Sec. 31.

The requirements of R. S. 1954, Chapter 107, Section 31 that "all the evidence of the court below, or an abstract thereof approved by the *justice* hearing the case" be reported on appeal is mandatory and jurisdictional. (There was no certificate of approval)

ON APPEAL.

This is an appeal from the dismissal of a bill in equity brought by ten taxable inhabitants of the Town of Dedham. Appeal dismissed, without costs.

Wendell B. Atherton, for plaintiff.

W. E. Silsby, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

WEBBER, J. This was an appeal from the dismissal of a bill in equity brought by more than ten taxable inhabitants of the Town of Dedham seeking to prevent the disbursement of any town funds to the Community Club so-called.

The record before us contains in lieu of evidence an agreed statement of facts signed by counsel but not certified by the sitting justice. R. S. 1954, Chap. 107, Sec. 31 provides in part: "All evidence before the court below, *or an abstract thereof approved by the justice hearing the case,* shall on appeal be reported." (Emphasis supplied) The requirement is both mandatory and jurisdictional and must be strictly complied with. *Girouard's Case,* 145 Me. 62, 67;

Usen v. *Usen,* 136 Me. 480; *Sawyer* v. *White,* 125 Me. 206. Having no jurisdiction over the appeal, we have no choice but to dismiss it.

Whatever reluctance we might otherwise feel in disposing of this case on purely technical grounds is greatly diminished by our awareness that no actual injustice is apt to result therefrom. The litigation arises from the action of the voters of the Town of Dedham in appropriating money for a partial payment upon a loan advanced for school building purposes. The plaintiffs contend that the original total loan partly or wholly exceeded the then constitutional debt limit. We note that since the inception of these proceedings, the constitutional debt limit has been enlarged to permit towns to incur debts or liabilities not exceeding in the aggregate seven and one-half per cent of the last regular valuation of the town. Admittedly, the loan in question, if now made, would not exceed that limit. We also note that by the enactment during the pendency of these proceedings of Chap. 197 of the Private and Special Laws of 1955, the Legislature authorized and enabled the Town of Dedham to repay the loan in question. It is apparent, therefore, that under well established principles of law for which there is ample authority, appropriate action by the voters of the Town pursuant to the enabling act, if not already taken, would render academic and moot all of the issues sought to be raised in this litigation.

Appeal dismissed, without costs.

JOSEPH E. MCCARTHY
vs.
BERNICE E. MCKECHNIE

Androscoggin. Opinion, May 8, 1957.

Negligence. Husband and Wife. Earnings. Demurrer. Damages.

A demurrer reaches only those matters which are apparent on the face of the pleadings demurred to.

R. S. 1954, Chapter 166, Section 37, removes the common law disability of a married woman by giving her a separate property in wages earned, although she may waive her rights to such wages and in such event they become the property of the husband under his common law right.

Where a plaintiff husband seeks as damages his loss of benefit of his wife's earnings, a special demurrer thereto is insufficient which fails to point out wherein plaintiff's allegation of consequential damage is defective, since under certain circumstances the right to a wife's earnings may rest in the husband. (The defendant in demurring failed to allege why the husband is not entitled to the wife's earnings.)

ON EXCEPTIONS.

This is a negligence action before the Law Court upon plaintiff's exceptions to the sustaining of a demurrer. Exceptions sustained.

Berman & Berman, for plaintiff.

Robinson, Richardson & Leddy, for defendant.

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

TAPLEY, J. On exceptions. This is an action of tort. The plaintiff is the husband of one Gloria McCarthy who

was a passenger in a taxicab which was in collision with the defendant's vehicle. The action on the part of the husband is for the purpose of recovering his consequential damages. The writ was returnable to the June Term, 1956 of the Superior Court within and for the County of Androscoggin. The defendant seasonably filed a special demurrer attacking the plaintiff's declaration. The demurrer was joined and, after hearing, the presiding justice sustained it. Plaintiff took exceptions to the ruling of the presiding justice in sustaining the demurrer.

The declaration is set out in the bill of exceptions in its entirety and that part germane to the issue is in the following language: "that he lost the benefit of the services and earnings of his said wife."

The special demurrer as filed by the defendant states in its pertinent portion:

> " 'And now the said defendant comes, etc., and says that the plaintiff's declaration is insufficient in law, and shows to the Court the following causes of demurrer to the said declaration, to wit:
>
> For that in and by said declaration, said plaintiff has declared against the defendant in a plea of the case seeking consequential damages as a result of alleged injuries sustained by his wife, and alleges that he has lost the benefit of the earnings of his said wife.
>
> And also for that the said declaration is in other respects uncertain, informal and insufficient.
>
> WHEREFORE, the defendant prays judgment and for her costs.' "

Defendant's contention, as raised by the demurrer, is that the husband's claim for lost benefits of his wife's earnings is not an element of damage for which he could recover.

It is well settled that a demurrer reaches only those matters which are apparent on the face of the pleading de-

murred to. *State* v. *McNally,* 145 Me. 254. Our area of consideration is confined to the pleadings.

The defendant by her special demurrer raises the basic question of the legal right of a husband to claim and receive as consequential damages the benefit of the wife's earnings.

A part of Chap. 166, R. S. 1954 is devoted to legislation affecting the rights of married persons, and in this chapter will be found statutory provisions enlarging the rights of married women in the ownership and control of their separate property. Sec. 37 of this Chap. 166 uses the following language:

> "LABOR NOT DONE FOR MARRIED WOMAN'S FAMILY. -- A married woman may receive the wages of her personal labor not performed for her own family, maintain an action therefor in her own name and hold them in her own right against her husband or any other person."

The wording of this section contains no ambiguities, is couched in simple language and is easy of interpretation. It very plainly says that for personal labor not performed for her family a wife may receive wages; that if the necessity requires, she may maintain an action for them in her own name and that upon acquiring the wages she may keep them *against her husband* or any other person. There is nowhere to be found in this statute, by exact wording or by implication, that there is any legal right of the husband to share, control or in any other manner participate in the benefit of wages received by the wife for her personal labor. This section of the statute removes a common law disability of a married woman by giving her a separate property in wages earned by her. In the case of *Stratton, et al.* v. *Bailey, et al.,* 80 Me. 345, on page 348, the court said:

> "This as a matter of business, was outside of family duties, the income of which would belong to the

> wife, as much as that from a millinery or grocery store."

See *Haggett* v. *Hurley,* 91 Me. 542.

The case of *Etta M. Marr and Ellsworth C. Marr* v. *John S. Hicks,* 136 Me. 33, is most enlightening. These were tort actions by husband and wife against a common defendant. They grew out of a motor vehicle accident. Mr. Marr was the driver of one car and with him as a passenger was his wife, Etta. Mrs. Marr recovered a verdict for her pain and suffering and for loss of wages for her personal labor as an employee in a shoe shop. The court said on page 34, in speaking of Mrs. Marr's claim for loss of wages for her personal labor:

> "The latter element of damage is alleged in her declaration, and her right to recover therefor, if entitled to damages at all, is not disputed. R. S., Chap. 74, Sec. 3."

The husband, Mr. Marr, alleged as matters of damage the damage to his automobile, the loss of the services and consortium of his wife and her expenses but not his wife's loss of wages. This case, in effect, approves the legal right of a married woman to wages earned by her personal labor when not performed for her own family. In the instant case we have the reverse situation where the present plaintiff is claiming a legal right to his wife's wages.

Counsel for the plaintiff in his brief argues that Sec. 37 of Chap. 166, R. S. 1954 does not establish an absolute bar to a recovery by a husband for his wife's wages. He says in spite of the statute, if a wife works outside of her home under an arrangement with her husband whereby her earnings are to be used by the husband for the family benefit, then he is entitled to the benefit of her wages. There is authority to the effect that while a married woman may claim her wages earned outside of her family relationship (Chap. 166, Sec. 37, R. S. 1954), she may also waive her

right to them and, by virtue of this waiver, they would become the property of the husband under his common law right. *Garland, Applt.,* 126 Me. 84; 41 C. J. S.—Husband and Wife—Sec. 258.

The defendant by her special demurrer contends that the allegation of the wife's wages as an element of damage to the husband is insufficient in law.

The plaintiff argues that defendant's demurrer is technically insufficient in that it fails to point out the specific defect. The special demurrer sets out that the plaintiff's declaration is insufficient in law and states it is insufficient because the plaintiff alleges, in seeking consequential damages, "that he has lost the benefit of the earnings of his wife." We have determined that a wife by statute, under certain prescribed circumstances, may have her earnings as her separate property; that she also may waive this statutory provision so that the right to her earnings will rest in the husband. The defendant in order to present a good and valid special demurrer must specifically point out wherein plaintiff's allegation of consequential damage is defective. This she has failed to do. She has said that the declaration is insufficient in law because plaintiff has pleaded "that he has lost the benefit of the earnings of his wife." Counsel for defendant has argued in his brief that the husband isn't entitled to recover for the wife's earnings and "it is this - - - element that we picked up and set forth in our special demurrer." The defendant fails to allege in detail the reason why the husband is not entitled to the wife's earnings. This becomes most important in view of the fact that under some circumstances the husband does have a right to the wife's earnings. *Ryan* v. *Watson,* 2 Me. 382, at page 385:

> "The special demurrer is also fatally defective in not *pointing out minutely wherein the pleas are double and argumentative,* if they are so."

Neal v. *Hanson,* 60 Me. 84; *Aldrich* v. *Boothby, et al.,* 114 Me. 318; *Boardman* v. *Creighton, et al.,* 93 Me. 17; *Reynolds et al.* v. *Hinman Co.,* 145 Me. 343; *Hughes* v. *Singer Sewing Machine Co.,* 149 Me. 110.

The special demurrer must fail because of its technical insufficiency.

Exceptions sustained.

STATE OF MAINE
vs.
EARLE W. ALBEE

Kennebec. Opinion, May 9, 1957.

Criminal Law. False Pretenses. Res gestae. Evidence. Statements. Verbal Acts. Res inter alios. Directed Verdict.

Assertions by a respondent that he had on several occasions, through political influence, been able to have other "cases disposed of" are admissible not as proof of guilt in other matters but to show the course of conduct and state of mind of a respondent prior to time he allegedly obtained money by alleged false pretenses.

"Sales talk" by respondent with the wife of the alleged defrauded is admissible where such talk was evidently made to convince the defrauded that respondent had the "political influence" which could bring about the desired results.

Declarations having a tendency to explain or give character to acts are sometimes admissible as part of the *res gestae.*

A directed verdict is properly denied where the evidence is strong enough to support a verdict; the case must be considered as a whole and not by reference to isolated bits.

A statement by respondent that "all that remained to be done was the payment of money to certain officials" refers to a present existing fact and not something to be done in the future.

ON EXCEPTIONS.

This is a criminal action for obtaining money by false pretenses. The case is before the Law Court upon exceptions. Exceptions overruled. Judgment for State.

Frank F. Harding,
Robert Marden, for State.

Richard S. Chapman, for defendant.

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

BELIVEAU, J. This case is here on five exceptions. Seven exceptions were taken during the trial but the respondent waives exceptions six and seven.

In the indictment the respondent is charged with obtaining the sum of $878.00 from one Leon E. Gordon under false pretenses. He was tried, convicted and sentenced.

On June 8, 1955, in Waldo County Municipal Court, Gordon was found guilty of operating motor vehicle while under the influence of intoxicating liquor. He appealed and this appeal was pending when, as he testified, he met the respondent in a cocktail bar at Augusta, the latter part of July, 1955. Gordon was drinking heavily and there is testimony that he was very much under the influence of intoxicating liquor when he approached the respondent and discussed his troubles with him.

Prior to this meeting the respondent and Gordon were complete strangers. Gordon had a prior record of other convictions for this same offense. He told the respondent he would willingly pay him $10,000 to have the case disposed of without a record.

According to testimony, evidently believed by the jury, the respondent volunteered to work to the end that the case

would be disposed of advantageously to Gordon. The respondent was not an attorney. He relied on his alleged political influence and prestige to improperly influence law enforcement officers in the performance of their sworn duty.

At the time of this interview Gordon knew the respondent had been a State Senator. According to Gordon the respondent claimed he had been successful in having such a case against himself disposed of and had been instrumental in doing this for others.

They met on several occasions between the first interview and the 28th of August, 1955, when Gordon paid the respondent $878.00, which is admitted by the respondent. According to Gordon's testimony he was told by the respondent he had to "grease a few palms" to the extent of $750.00. Gordon insisted that they interview his attorney in Rockland before he paid him this money. After the interview with the attorney in Rockland, Gordon paid the money to the respondent. There is some controversy as to what transpired in the attorney's office but whatever happened there, it satisfied Gordon that the arrangements had been made by the respondent with some officials to have the case disposed of and all that remained was to "grease a few palms."

There is some contradiction in the testimony on this point, but, there was ample evidence in the case to warrant a finding by the jury that this was the situation.

The respondent testified this was not the agreement and that, at the time of their first interview, he informed Gordon he would work for him and his compensation would be $35 a day, plus actual expenses, and that the money paid by Gordon the latter part of September, 1955, covered 22 days' work by the respondent and some expenses.

The first four exceptions relate to testimony of admissions by the respondent, admitted over objection by the

respondent, that he had, on several occasions, through his political influence, been able to have such cases disposed of —among others, he cited his own case.

This evidence was objected to as immaterial and prejudicial. The evidence was not offered nor admitted as proof of guilt in other matters but to show the course of conduct and state of mind of the respondent up to the time he was paid.

Any talk made by the respondent with Gordon, or his wife, having to do with this situation, was admissible and if damaging, the respondent has no one to blame but himself. This was sales talk, of a kind, and was evidently made to convince Gordon and his wife that the respondent had that kind of political influence which could bring about the desired results.

Statements by the respondent are admissible whether incriminating or beneficial.

Some courts hold that such declarations are part of *res gestae.*

In *Commonwealth* v. *Trefethen,* 157 Mass. at page 188:

> "On principle, therefore, we think it clear that, when evidence of the declarations of a person is introduced solely for the purpose of showing what the state of mind or intention of that person was at the time the declarations were made, the declarations are to be regarded as acts from which the state of mind or intention may be inferred in the same manner as from the appearance of the person or his behavior, or his actions generally. In the present case the declaration, evidence of which was offered, contained nothing in the nature of narrative, and was significant only as showing the state of mind or intention of the deceased."

20 American Jurisprudence, Section 585 at page 491.

> "Competent and material evidence should not be excluded merely because it may have a tendency to cause an influence beyond the strict limits for which it is admissible. State v. Chin Ting, supra; Commonwealth v. Retkovitz, 222 Mass. 245, 110 N.E. 293; Underhill's Criminal Evidence (3d Ed.) § 103, and cases cited."
>
> *State* v. *Miller*, 161 A, page 224.
>
> "It is well established, that where evidence of an act done by a party, is admissible, his declarations, made at the time, having a tendency to elucidate, explain, or give character to the act, are also admissible. They are admissible because they are a part of the transaction, as well in favor of, as against the party making them, and may be given in evidence by the defendant as well as the State."
>
> *State* v. *Daley*, 53 Vt., 442.

The fifth exception was to the refusal of the presiding justice to grant a motion for a directed verdict.

The position of the respondent is well stated in his brief, when he says, "- - - - that regardless how reprehensible the statements of the Respondent might have been, his statements pertained to acts which the Respondent was to do in the future and were not statements of a present existing fact, - - -"

The rule is that a motion for a directed verdict must be granted, when, in the words of Justice Walton, *State* v. *Cady*, 82 Me., page 428, "- - - - - the evidence in support of a criminal prosecution is so defective or so weak that a verdict of guilty based upon it can not be sustained, - - - - -" This rule has been reaffirmed repeatedly by our court and is the law in Maine.

If, as the respondent argues, the evidence is such that the statements made by the respondent, "- - - pertained to acts which the Respondent was to do in the future and were not

statements of present existing fact, - - - - -" no crime has been committed.

To determine that there is sufficient evidence to warrant a verdict, the case must be considered as a whole and not by reference to isolated bits or pieces of evidence. It is evident that the respondent's sole purpose, from the beginning, was an attempt by him, for a financial consideration, to circumvent the law by making improper and illegal arrangements to have Gordon's case disposed of without any record of guilt.

While the respondent was a stranger to Gordon prior to the July meeting, when $10,000 was mentioned he became a friend of Gordon's and tremendously interested in his welfare.

Gordon testified the respondent told him the cost would not be more than two or three thousand dollars to "squash it." If the money had been paid to the respondent on the occasion of their first meeting there could be no charge of obtaining money under false pretenses.

The evidence warrants the conclusion that all that remained to be done, late in August, was the payment by Gordon to certain officials. If that is supported by the evidence, and we think it is, the statements by the respondent referred to a present existing fact. It is significant, in this respect, that Gordon would not pay the respondent the money until they had visited the office of Gordon's attorney in Rockland.

There are two versions of what happened there but apparently the jury believed the testimony offered by the State as to that incident. It certainly convinced Gordon the respondent had done his work well and all that remained for him to do was the payment of money. The jury accepted Gordon's version.

The testimony was highly conflicting. It was essentially a question of fact for the jury and it rejected the respondent's testimony as highly incredible.

No fault is found with the charge of the presiding justice. It was clear, thorough and a detailed discussion of the law involved.

The last chapter was written when Gordon was found guilty of the driving offense and sentenced to pay a fine and serve a term in jail.

Exceptions overruled.
Judgment for the State.

STATE
vs.
ANTHONY CUCCINELLO

Knox. Opinion, June 2, 1957.

Assault. Dangerous Weapon. Intent.
High and Aggravated Nature. Statements.
Constitutional Law.

The bill of exceptions must be strong enough to stand alone.

One does not escape criminal responsibility under R. S. 1954, Chapter 130, Section 21 (assault and battery) because the physical injury may have been accidental or unintentional where the fact remains that the shooting occurred during an intended assault.

Where a witness had previously signed a statement for police officers, there is nothing improper in using the statement on redirect examination to refresh the witness's recollection, concerning matters he was unable to recall on cross examination.

R. S. 1954, Chapter 130, Section 21 is constitutional even though it permits the presiding justice to determine the gravity of the offense.

ON EXCEPTIONS.

This is a criminal action for assault with a dangerous weapon with intent to kill. The jury returned a verdict of

assault and battery. The presiding justice determined that it was of a high and aggravated nature. Respondent alleged exceptions. Exceptions overruled. Judgment for State.

Frank Harding,
Curtis N. Payson, for plaintiff.

Domenic P. Cuccinello,
Harold H. Rubin,
Frederick A. Sherwood, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

WILLIAMSON, C. J. On exceptions. The respondent, tried on an indictment for assault with a dangerous weapon with intent to kill, was convicted by a jury of assault and battery found by the presiding justice to be of a high and aggravated nature. R. S., Chap. 130, Sections 6 and 21.

The bill of exceptions does not meet the minimum requirements of acceptable practice. The bill reads:

> "Exceptions are here now listed;
>
> (1) On page 73 of transcript which is contrary to facts or law."

The remaining seven exceptions are identical, except for a change in the reference to the page of the transcript.

Nothing more is told of the claims of error. The long standing rule was again stated and reaffirmed in *Me. Potato Growers, Inc.* v. *H. Sacks & Sons,* 152 Me. 204, at p. 205, 126 A. (2nd) 919. "The bill must be strong enough to stand alone." See also *Bradford* v. *Davis,* 143 Me. 124, 56 A. (2nd) 68; *Jones V. Jones,* 101 Me. 447, 64 A. 815; "Some Suggestions on Taking a Case to the Law Court" by Justice, later Chief Justice, Merrill, 40 Maine State Bar Association 175, 188. The exceptions are patently insufficient, are not properly before us, and so must be overruled.

We have, however, in this instance gone beyond the bill of exceptions to the record and examined the case fully and completely on the merits as if the points raised by the respondent were plainly stated in the bill. We find no error in the exceptions and accordingly the judgment below must stand.

The facts in brief which the jury could have found are: About 1:30 on a morning in October 1955 the respondent armed with a loaded revolver left his home and spoke with the driver of the Pooler car parked nearby. In the car were two young men, Pooler and Firkins, and two young women. The respondent demanded the keys, license and registration of the car. When asked by what authority he did so, he fired a shot into the ground and stated, "That is my authority." The young men then obeyed his order to leave the car and to hold their hands over their heads. The respondent flashed his light into the car and again made a demand for the keys, which were again refused.

He reached into the car with the revolver in his right hand. When the keys were refused, he fired the revolver seriously wounding Pooler, standing outside the car with his hands over his head as he had been ordered. The respondent then went around the car, took the keys and fled. On reaching home he telephoned the police and informed them of the shooting.

The jury heard the occupants of the car, members of the police force, the respondent, and other witnesses. The contention of the respondent is that the shooting was accidental, and thus an intention to commit a criminal act was totally lacking.

The respondent, as we have noted, was charged with assault with a dangerous weapon with intent to kill. R. S. Chap. 130, Sec. 6. The jury, however, found him guilty of the less serious crime of assault and battery under R. S. Chap. 130, Sec. 21, reading:

> "Whoever unlawfully attempts to strike, hit, touch or do any violence to another however small, in a wanton, willful, angry or insulting manner, having an intention and existing ability to do some violence to such person, is guilty of an assault; and if such attempt is carried into effect, he is guilty of an assault and battery. Any person convicted of either offense, when it is not of a high and aggravated nature, shall be punished by a fine of not more than $100 or by imprisonment for not more than 6 months, or by both such fine and imprisonment; and when the offense is of a high and aggravated nature, the person convicted of either offense shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 5 years, when no other punishment is prescribed."

The exceptions relate in their entirety to rulings upon evidence. There were no exceptions taken to the charge. The respondent's motion for a new trial was denied by the presiding justice, and no appeal was taken therefrom to this court.

The jury did not find the respondent had an intent to kill. They could find, as they did, an assault by the respondent in ordering Pooler at the point of a loaded gun to leave his car and stand with his hands over his head, in the course of which the shooting (or battery) occurred. The physical injury to Pooler may have been unintentional, but the fact remains that the shooting occurred during an intended assault. The respondent does not escape criminal responsibility for the reason that he fired accidentally, or may have so fired, the shot wounding Pooler.

First Exception

On direct examination by the State one of the young women was asked, "Did you . . . lose something when you got . . .?" Objection was taken on the ground it was leading. It developed the witness lost a belt, of which she said, ". . .

when I got out of the car it must have fallen off." No possible harm could have come to the respondent from the question or answer of the witness.

SECOND EXCEPTION

One of the young women, a State's witness, was asked on cross examination:

> "Q Did this man say anything up to this point by way of making or way of threatening you harm, or threatening to harm anybody at that point?
>
> Mr. HARDING: That is just as objectionable.
>
> Q I mean, by his words, to make threats." The cross-examiner requested a "yes" or "no" answer.
>
> * * * * * * * * * *
>
> "THE COURT: I am excluding it because you are asking a question in the form of an opinion and a conclusion on her part. You are not asking her for the words or language that was used that may or may not be threats, which would be for the Jury to decide whether that language as used was of a threatening nature. You are asking the witness to conclude as to whether the language, without describing what was, what that language was, as to whether or not that language was of a threatening nature."

The attorney for the respondent then said, "In view of her testimony, what she has already said, I was doing that in an effort to save time, but I will again try." The record discloses that the witness was given every chance to testify in detail about the entire occurrence.

THIRD EXCEPTION

On cross-examination of Firkins, the young man in the car with Pooler, we find the following question and answer:

"Q And this is the first time that you have made the statement that you heard Cucinnello say: 'Hand over the keys or I will shoot?'

A I don't recall whether I made it or not before."

On redirect examination by the State, the witness could not recall whether in the municipal court hearing anybody asked him anything in regard to the statement, "Hand over the keys or I will shoot." He then admitted signing a statement for the officers.

We come now to the manner in which exception was taken. Counsel for the State said: "Like to use that statement to refresh your recollection as to what you told the officers?" The court permitted the witness to refresh his memory from the paper. We find nothing objectionable in this procedure. The critical question in the fourth exception followed the opportunity given to the witness to refresh his memory.

FOURTH EXCEPTION

The witness Firkins was asked, on direct examination by the State, "Now, I will ask you if you do recall ever making the statement to anyone that Cucinello said: 'Hand over the keys or I will shoot?" An objection to the question was overruled and the witness answered, "Yes, according to my statement I did made that comment." In connection with this exception it should be noted that on cross-examination earlier by respondent's counsel, Firkins was asked:

"Q And at the time you testified in the preliminary hearing, you didn't say then that Cucinello made a statement: 'If you don't hand over the keys I will shoot,' did you?

A I don't recall at this moment whether I made that statement or not.

Q You think you made it?

A I might have made it.

Q And you might not have made it? A Yes."

We find nothing objectionable in the ruling. It was part of a test of witness' recollection, commenced on cross-examination.

FIFTH EXCEPTION

In the absence of the jury the respondent offered to prove certain incidents at his home prior to the present case to establish that he had a sound reason for carrying a gun for purposes of protection. As the respondent's counsel said, "I think there is a big difference with a man who leaves with a gun and had no reason to do it, had no reason to be concerned as opposed to one who did have cause to be concerned with the safety of himself and his family. I offer it for that purpose only . . . MR. RUBIN: The testimony of Chief Thompson was that, that is in this case on this point, that he heard a noise and left the house as a result of hearing that noise, went out as a result of that noise. He testified to that. THE COURT: I will exclude it for the present."

At a later period of the trial the justice pointed out that similar testimony had been admitted and the testimony in question of the witness taken in chambers was read in open court to the jury with no objection whatsoever by the respondent's attorney. It sufficiently appears in the absence of objection that the respondent's attorney agreed to have the evidence read by the reporter and not given in person by the witness. Accordingly nothing remains of the fifth exception.

The sixth, seventh, and eighth exceptions arose on cross-examination of the respondent.

SIXTH EXCEPTION

"Q Just what authority did you (the respondent) have to be there (at the scene of the incident) at the time?

MR. RUBIN: I object. This has been gone over. I believe he asked that question yesterday.

MR. HARDING: I haven't had a satisfactory answer to it.

MR. RUBIN: I think this witness gave the best answer he could.

THE COURT: Other than the fact we have been over it, you have any other objection?

MR. RUBIN: No, Your Honor."

There is no merit in the exception. It involves no more than a repetition of the questioning of a witness.

SEVENTH EXCEPTION

"Q When did you remember you reached in twice instead of once?"

There was no error in permitting the witness to answer.

"A I have always remembered."

EIGHTH EXCEPTION

"Q Since the 9th day of October until the present time you (the respondent) have never tried to talk to the police to tell them it was an accident?

MR. RUBIN: I object.

THE COURT: Reason?

MR. RUBIN: My brother knows this man has been represented by counsel—the matter has been in contest—and there would be no reason or cause. Certainly this man wouldn't talk to the police.

THE COURT: That your only objection?

MR. RUBIN: The question is improper, Your Honor, as putting the man in the posi-

> tion of saying he didn't do something and he knows and we know he wouldn't be expected to do anything of that nature.
>
> THE COURT: I think that is more or less common knowledge and the Jury would know that as well as you and I or anyone else. I will permit the question."

The respondent answered "no."

The State was entitled to inquire what action the respondent had taken consistent or inconsistent with the defense offered by him.

The exceptions, considered on their merits, disclose no error at trial.

The jury, under the instructions of the justice permitting such a verdict among others, found the respondent guilty of assault and battery. The presiding justice, holding the offense was of a "high and aggravated nature," sentenced the respondent accordingly.

The respondent in argument urges the statute is unconstitutional insofar as it permits the presiding justice to determine the gravity of the offense. The validity of the statute and of the procedure here followed has been definitely settled. See *Rell* v. *State,* 136 Me. 322, 9 A. (2nd) 129, and *State* v. *McKrackern,* 141 Me. 194, 41 A. (2nd) 817.

The entry will be

Exceptions overruled.
Judgment for State.

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 APRIL 17, 1957

ANSWERED APRIL 26, 1957

SENATE ORDER PROPOUNDING QUESTION

STATE OF MAINE

In Senate, April 17, 1957

WHEREAS, it appears to the Senate of the 98th 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 98th Legislature a bill (HP 983, LD 1407) entitled, "An Act Relating to Industrial Development in City of Bangor." and

WHEREAS, it is important that the Legislature be informed as to the constitutionality of the proposed bill, be it therefore

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 House Paper 983, Legislative Document 1407, "An Act Relating to Industrial Development in City of Bangor." if enacted by the Legislature, be constitutional?

Name: Martin.

County: Kennebec.

In Senate Chamber April 17, 1957. Read and passed.

CHESTER T. WINSLOW, Secretary

True Copy.
Attest: CHESTER T. WINSLOW,
Secretary of the Senate

Transmitted by Director of Legislative Research pursuant to joint order.

NINETY-EIGHTH LEGISLATURE

Legislative Document **No. 1407**

H. P. 983 House of Representatives, March 26, 1957.

Referred to Committee on Legal Affairs. Sent up for concurrence and ordered printed.

HARVEY R. PEASE, Clerk.

Presented by Mr. Totman of Bangor.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED FIFTY-SEVEN

AN ACT Relating to Industrial Development in City of Bangor.

Emergency preamble. Whereas, industrial development is essential to the preservation and betterment of the economy of the city of Bangor and its inhabitants; and

Whereas, present opportunities for such development are limited under present conditions, and proposed imminent industrial development awaits the availability of an industrial area; and

Whereas, many citizens of said city of Bangor have urged the immediate enactment of a bill to provide for industrial expansion; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

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

Sec. 1. P. & S. L., 1931, c. 54, Art. VIII, additional. Chapter 54 of the private and special laws of 1931, as amended, is hereby further amended by adding thereto a new Article VIII, as follows:

'ARTICLE VIII.

Industrial Development.

Sec. 1. Industrial development. The city of Bangor is hereby empowered to acquire by purchase or lease or purchase and lease, or by the right of eminent domain, lots, sites, improvements and places within the city of Bangor to be used for industrial development. The taking of real estate or any interest therein for the use of the city of Bangor for industrial park purposes by the right of eminent domain shall be effected as provided in sections 2, 3 and 4.

Sec. 2. Manner of taking. Whenever the public exigencies require it, the city council may adopt an order of taking for any land within the following described area, which shall contain a description of the land to be taken sufficiently accurate for its identification and shall state the interest therein taken and the purposes for which such property is taken.

Sec. 3. Area defined. The area in the city of Bangor within which the city of Bangor may take real estate or any

interest therein for the use of the city of Bangor for industrial park purposes by right of eminent domain shall be as follows:

Beginning at a point formed by the intersection of the center line of the Odlin road and the easterly right-of-way line of the Maine Central Railroad; thence southerly along said easterly right-of-way line of the main line of the railroad to the town line between the city of Bangor and the town of Hampden; thence easterly along said town line to an angle point in said town line; thence southeasterly along said town line to a point which is 825.5 feet northerly from the northerly side line of Crosby street; thence northeasterly parallel to and 825.5 feet northerly from said northerly line of Crosby street to Thatcher street; thence crossing Thatcher street and continuing on the same straight line to the center line of the Main Street Industrial Spur; thence northwesterly by and along the center line of said Industrial Spur to the easterly side line of Thatcher street; thence northwesterly along the easterly side line of said Thatcher street to Webster avenue and continuing across said Webster avenue to the northwesterly side line of said Webster avenue; thence southwesterly by and along the northwesterly side line of said Webster avenue to the center line of the Main Street Industrial Spur; thence northwesterly along the center line of said Industrial Spur to the center line of Odlin road; thence southwesterly by and along the center line of said Odlin road to the point of beginning.

Sec. 4. Procedure. All proceedings under the provisions of sections 1, 2 and 3 shall be in accordance with the provisions of sections 12 to 22, inclusive, of chapters 52 of the Revised Statutes of 1954.'

Sec. 2. Referendum; effective date. In view of the emergency cited in the preamble, this act shall take effect when approved, only for the purpose of permitting its submission to the legal voters within the city of Bangor, voting

at a regular or special election called and held for the purpose, by the municipal officers of the city of Bangor, to be held at the regular voting places in said city; the date of holding such election to be determined by said municipal officers. Such election shall be held not later than 8 months after the effective date of this act, and shall be called, advertised, and conducted according to the law relating to municipal elections; provided, however, that the board of registration shall not be required to prepare, nor the city clerk to post, a new list of voters. The city clerk shall reduce the subject matter of this act to the following question: "Shall the Act Relating to Industrial Development in City of Bangor, passed by the 98th Legislature, be accepted?" and the voters shall indicate by a cross or check mark placed against the words "Yes" or "No" their opinion of the same.

This act shall take effect for all the purposes hereof immediately upon its acceptance by a majority of the legal voters voting at said election; provided that the total number of votes cast for and against the acceptance of this act equals or exceeds 20% of the total votes cast for all candidates for Governor in said city of Bangor at the next previous gubernatorial election.

The result of the vote shall be declared by the city council of the city of Bangor and due certificate thereof filed by the city clerk with the Secretary of State. Failure of approval shall not prevent the municipal officers of said city of Bangor from again submitting said question to the voters of said city in the manner aforesaid.

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, we the undersigned Justices of the Supreme Judicial Court, have the honor to sub-

mit the following answer to the question propounded on April 17, 1957.

QUESTION: Would House Paper 983, Legislative Document 1407, "An Act Relating to Industrial Development in City of Bangor." if enacted by the Legislature, be constitutional?

ANSWER: We answer in the negative.

The proposed Act is designed to provide for industrial expansion in Bangor by the acquisition by the city by purchase, lease or by the exercise of the right of eminent domain of "lots, sites, improvements and places within the City of Bangor to be used for industrial development."

The Act, it may be noted, does not set forth standards for action by the city either in the acquisition of property or in its use or disposition, for example, by sale or lease for industrial purposes. These are details, however, which we need not and do not consider. Deficiencies in these respects could be remedied, if the plan broadly speaking were constitutional.

We prefer to place our answer upon consideration of the basic purpose of the Act. This, we are compelled to find, is a private purpose and not a public purpose under our constitution. It follows that the city may neither raise money by taxation nor acquire property by eminent domain for such purpose. There is neither the "public use" of taxation, nor the "public use" of eminent domain. The likelihood that public funds expended in acquisition of property might be repaid in whole or in part, or even with a profit, in its disposal does not alter the situation in its constitutional aspects. The taxpayer in the operation of the plan would be, or might be, called upon to pay therefor; and thus the constitutional bar remains firm.

We are not unmindful that the public exigencies or need for use of public monies for assistance in industrial develop-

ment under the plan here proposed is determined by the Legislature (or under the Act by the city) and not by the Courts. See *Moseley* v. *York Shore Water Co.*, 94 Me. 83 (water supply); *Hayford* v. *Bangor,* 102 Me. 340 (library); *Crommett* v. *City of Portland,* 150 Me. 217, 233 (slum clearance). The value of the plan or its economic or social benefits, however, present no issues for judicial consideration. We mention these factors that it may plainly appear that our opinion does not touch the need or desirability of the plan, but solely the constitutionality thereof.

The pertinent provisions of the Maine Constitution are:

> "He shall not . . . be deprived of his life, liberty, property or privileges, but by judgment of his peers or the law of the land." Art. I, Section 6.
>
> "Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." Art. I, Section 21. "The legislature . . . with the exceptions hereinafter stated, shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this state, not repugnant to this constitution, nor to that of the United States." Art. IV, Part Third, Section 1.

We are unable to escape the conclusion that action under the Act would be for the direct benefit of private industry. An existing shoe factory or paper mill, let us say, within the proposed industrial area or park could not, for reasons clear to all, be authorized under our Constitution to acquire additional facilities by eminent domain. That such a course could well be of great value to the particular enterprise and so to the city or community would not affect the application of the law.

The test of public use is not the advantage or great benefit to the public. "A public use must be for the general public, or some portion of it, who may have occasion to use it, not a use by or for particular individuals. It is not necessary

that all of the public shall have occasion to use. It is necessary that every one, if he has occasion, shall have the right to use." *Paine* v. *Savage,* 126 Me. 121, 126.

The Act in violation of these principles seeks to have the city do for private enterprise what private enterprise cannot be authorized to do for itself.

Our court in 1954, in the *Crommett* case, *supra,* in upholding the constitutionality of slum clearance in Portland, said at page 236, in considering the redevelopment phase of the program:

> "Taken alone, the redevelopment of a city is not, in our view, a 'public use' for which either taxation or taking by eminent domain may properly be utilized."
>
> "However beneficial it might be in a broad sense, it would clearly be unconstitutional for the Legislature to provide for the taking of any area in a city for the purpose of redevelopment by sale or lease for private purposes. Such a proposal would amount to no more than the taking of A's property for sale or lease to B on the ground that B's use would be economically or socially more desirable."

The preamble of the Act before use reads in part:

> "**Emergency preamble.** Whereas, industrial development is essential to the preservation and betterment of the economy of the city of Bangor and its inhabitants; and
>
> "Whereas, present opportunities for such development are limited under present conditions, and proposed imminent industrial development awaits the availability of an industrial area; . . ."

The similarity of the purposes discussed in the extract from the court's opinion and in the preamble to the Act is at once apparent.

Under the Act the city does not seek to regulate the use of land through zoning. The plan calls as we have seen for the acquisition of property against the will of the owner if need be, with its placement in industrial use by private enterprise.

In our opinion the Act attempts what is forbidden by our fundamental law, and is unconstitutional.

Among the cases illustrating the principles on which we base our conclusion are: *Unconstitutional - private use: Allen* v. *Inhabitants of Jay,* 60 Me. 124 (loan by town to manufacturing concern); *Brewer Brick Co.* v. *Brewer,* 62 Me. 62 (exemption of manufacturing plant from taxation); *Opinion of Justices,* 118 Me. 503, 508, 513, 515 (water storage reservoir to increase value and capacity of water powers) "The dominant purpose here (water storage reservoir) is for private benefit and not for the 'benefit of the people,' and therefore the power of taxation to promote it does not exist."; *Bowden* v. *York Shore Water Co.,* 114 Me. 150, where the real purpose of the taking was to serve a private use of protection of timberlands from fire, and not a public use of protection of a public water supply; *Paine* v. *Savage, supra,* (a private logging road); *Haley* v. *Davenport,* 132 Me. 148 (a drain across a neighbor's land); *Perkins* v. *Inhabitants of Guilford,* 59 Me. 315 (town cannot tax for gift to an individual). See also *Opinion of Justices,* 58 Me. 590.

Constitutional - public use: Laughlin v. *City of Portland,* 111 Me. 486 (Portland municipal fuel yard); *State of Maine* v. *Vahlsing, Inc.,* 147 Me. 417 (potato tax).

Dated at Augusta, Maine, this 26th day of April, 1957.

Respectfully submitted:

ROBERT B. WILLIAMSON
DONALD W. WEBBER
ALBERT BELIVEAU
WALTER M. TAPLEY, JR.
FRANCIS W. SULLIVAN

MEMORANDUM:

Mr. Justice Dubord was out of the State when the foregoing question was submitted. Despite his entire willingness to return for the purpose of answering it, it is the unanimous view of his Associates that such action on his part is entirely unnecessary. He has all the material before him, has considered the question and authorizes the statement that he concurs in the answer.

ROBERT B. WILLIAMSON

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 APRIL 24, 1957

ANSWERED MAY 6, 1957

SENATE ORDER PROPOUNDING QUESTION

STATE OF MAINE

In Senate, April 24, 1957

WHEREAS, it appears to the Senate of the 98th 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 98th Legislature, a bill entitled "An Act Relating to Cost of Relocating Facilities in Federal-Aid Interstate Highway Projects," (Senate Paper 385, Legislative Document 1081) as amended by Senate Amendment A (Legislative Document 1510); and

WHEREAS, it is important that the Legislature be informed as to the constitutionality of the proposed bill; be it therefore

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 the bill, "An Act Relating to Cost of Relocating Facilities in Federal-Aid Interstate Highway Projects," (Senate Paper 385, Legislative Document 1081) as amended by Senate Amendment A (Legislative Document 1510), if enacted by the Legislature, be constitutional?

In Senate Chamber, April 24, 1957. Read and passed.

CHESTER T. WINSLOW, Secretary

True Copy.

Attest: CHESTER T. WINSLOW.

Name: Parker

County: Piscataquis

NINETY-EIGHTH LEGISLATURE

Legislative Document **No. 1510**

In Senate, April 19, 1957.

Read and adopted. Sent down for concurrence and ordered printed.

CHESTER T. WINSLOW, Secretary

Presented by Senator Cole of Waldo.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED FIFTY-SEVEN

SENATE AMENDMENT "A" to S. P. 385, L. D. 1081, Bill, "An Act Relating to Cost of Relocating Facilities in Federal-Aid Interstate Highway Projects."

Amend said Bill by striking out everything after the enacting clause and inserting in place thereof the following:

R. S., c. 23, § 23-A, additional. Chapter 23 of the Revised Statutes is hereby amended by adding thereto a new section, to be numbered 23-A, to read as follows:

'Sec. 23-A. Payment for cost of relocating facilities in interstate system. Any utility which is required to move or relocate its facilities under the provisions of this section from or in any way because of construction needs in building the interstate system under the Federal-Aid Highway Act of 1956 on projects for which the contracts are signed after the effective date of this act shall be reimbursed for the cost of relocation of such facilities as said cost is defined in said Federal-Aid Highway Act. The State Highway Commission may make rules and regulations for the determination of such cost in conformity with applicable Federal rules and regulations under said Act. The Commission shall have such rights to inspect the books of account of the utility as may be required in determining the reimbursable costs provided in this section.

Whenever the Commission shall determine that any utility facility which now is, or hereafter may be, located in, over, along or under any way should be moved or relocated because of construction needs in building said interstate system, the utility owning or operating such facility shall relocate or move the same in accordance with an order of the

Commission. If the failure of the utility to move such facility within the time specified in such order should delay the work of the contractor on the project involved, the utility shall be liable to the State for the damages that the State may be required to allow to the contractor under the contract between the State and the contractor for delay in the work caused by the presence of the facility. The utility shall not be liable for such damages if its failure to move shall be for reasons beyond its control. If the Commission and the utility shall not agree as to the liability of the utility for such damages, either party may petition any Justice of the Superior Court for a determination thereof. Such liability shall not exceed such reimbursable costs as may be determined by the provisions of the preceding paragraph.

"Utility" as used in this section shall mean and include any public utility under the jurisdiction of the Public Utilities Commission and also any corporation which owns and operates a telephone or telegraph system or an oil pipe line system and which is subject to the jurisdiction of the Federal Communications Commission or Interstate Commerce Commission.'

Transmitted by Director of Legislative Research pursuant to joint order.

NINETY-EIGHTH LEGISLATURE

Legislative Document **No. 1081**

S. P. 385 In Senate, February 28, 1957

Referred to the Committee on Highways, sent down for concurrence and ordered printed.

CHESTER T. WINSLOW, Secretary

Presented by Senator Parker of Piscataquis.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED FIFTY-SEVEN

AN ACT Relating to Cost of Relocating Facilities in Federal-Aid Interstate Highway Projects.

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

R. S., c. 23, § 19-A, additional. Chapter 23 of the Revised Statutes is hereby amended by adding thereto a new section to be numbered 19-A, to read as follows:

'**Sec. 19-A. Payment for cost of relocating facilities in federal-aid highway projects. Whenever the State Highway Commission shall determine that any public utility facility which now is, or hereafter may be, located in, over, along or under any highway in the interstate system as defined in the Federal-Aid Highway Act of 1956 should be relocated or removed, the public utility owning or operating such facility shall relocate or remove the same in accordance with the order of the Commission; provided that the cost of relocation or removal, including the cost of installing such facilities in a new location, and the costs of the lands, or any rights and interests in land and any other rights required to accomplish such relocation, shall be ascertained and paid by the State as part of the cost of such federally aided project. Cost of relocation shall include the entire amount paid by such utility properly attributable to such relocation after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility.**'

ANSWER OF THE JUSTICES

To the Honorable Senate of the State of Maine:

In our opinion the Act is constitutional. However, the expenditure of the revenues described in Art. IX, Sec. 19 of

our State Constitution for the purposes of the Act would be unconstitutional.

Under the proposed Act, the State will pay the cost of relocation of public utility facilities arising from the construction of an interstate system of highways under the Federal-Aid Highway Act of 1956.

In considering the constitutionality of the Act we must keep in mind both the Federal Act and our State Constitution.

The Federal-Aid Highway Act of 1956 reads, in part:

> "Sec. 111. Relocation of Utility Facilities
>
> (a) Availability of Federal Funds for Reimbursement to States.—Subject to the conditions contained in this section, whenever a State shall pay for the cost of relocation of utility facilities necessitated by the construction of a project on the Federal-aid primary or secondary systems or on the Interstate System, including extensions thereof within urban areas, Federal funds may be used to reimburse the State for such cost in the same proportion as Federal funds are expended on the project: *Provided,* That Federal funds shall not be apportioned to the States under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State.
>
> (b) Utility Defined.—For the purposes of this section, the term 'utility' shall include publicly, privately, and cooperatively owned utilities.
>
> (c) Cost of Relocation Defined.—For the purposes of this section, the term 'cost of relocation' shall include the entire amount paid by such utility properly attributable to such relocation after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility."

Article IX, Section 19 of the Maine Constitution reads:

> "All revenues derived from fees, excises and license taxes relating to registration, operation and use of vehicles on public highways, and to fuels used for the propulsion of such vehicles shall be expended solely for cost of administration, statutory refunds and adjustments, payment of debts and liabilities incurred in construction and reconstruction of highways and bridges, the cost of construction, reconstruction, maintenance and repair of public highways and bridges under the direction and supervision of a state department having jurisdiction over such highways and bridges and expense for state enforcement of traffic laws and shall not be diverted for any purpose, *provided* that these limitations shall not apply to revenue from an excise tax on motor vehicles imposed in lieu of personal property tax."

First: Apart from Art. IX, Sec. 19 of the Constitution, which we later discuss, we find no objection to the Act on constitutional grounds. At common law there is no obligation to pay for the removal or relocation of public utility facilities required by changes in highways. *Belfast Water Co.* v. *Belfast,* 92 Me. 52 (1898); *Rockland Water Co.* v. *Rockland,* 83 Me. 267 (1891); *Telephone* v. *Cyr,* 95 Me. 287 (1901). The State, however, may, in our view, pay for the cost of relocating such facilities, if it chooses to do so. The purpose of such expenditures is public in nature, and the extent and conditions under which the State may meet such costs are for the Legislature to determine.

Second: In our opinion the relocation of a utility facility is not to be construed as construction or reconstruction of a highway within the meaning of Art. IX, Sec. 19 of the Constitution.

We do not commonly consider that a power company in erecting a pole line or a water district in laying a pipe in a highway is constructing a highway. To an even lesser de-

gree would we consider the construction of a pole line or a water pipe across country to be the construction or reconstruction of a highway, although the reason for the relocation was occasioned solely by changes in the highway.

The language of the Constitution should not, in our view, be extended beyond its plain and ordinary meaning.

The expenditure of revenues from sources enumerated in Art. IX, Sec. 19, *supra,* for these purposes would, therefore, violate the Constitution. It will be noted, however, that there is no constitutional prohibition against the expenditure for such purposes of funds derived from other sources.

Dated at Augusta, Maine, this 6th day of May, 1957.

Respectfully submitted:

ROBERT B. WILLIAMSON
ALBERT BELIVEAU
WALTER M. TAPLEY, JR.
FRANCIS W. SULLIVAN
F. HAROLD DUBORD

I concur with the foregoing opinion except as it places an interpretation upon Art. IX, Sec. 19 of the Constitution of Maine which in my view is too narrow. I am satisfied that the limitation placed upon the expenditure of highway funds was designed and intended to prevent raids on those funds for purposes entirely unrelated to the highway program. In my view expenditures which may reasonably be considered as incidental to the construction or reconstruction of highways may properly be met out of highway funds whenever the Legislature elects. Presumably utility facilities present an obstacle to the construction or reconstruction of a highway and so must be removed to permit the work to go forward. Obviously, if the facilities are necessary and serviceable, they must be replaced with facilities which are adequate to perform a like service. The proposed legislative enactment provides that any increased

value of the facility will be provided by the utility and any salvage value of the old facility will be credited to diminish the cost. In short, the utility will be made whole and no more. If the cost of relocation, thus limited, be used as the measure of the damage to the utility, it seems to me that there is involved no expenditure of funds in excess of that reasonably incidental to construction and reconstruction. If the state were merely to pay to the utility the fair replacement value of the facilities which might be encountered, demolished and removed as the construction proceeded, the results would be the same. Art. IX, Sec. 19 does not in express terms permit the expenditure of highway funds for the purchase or taking of land for the construction or reconstruction of highways, yet I suppose that no one would seriously question the right to make such expenditures out of highway funds as reasonably incidental to the construction of the road. If it were found less costly to move a building and establish it in a new location than to purchase the building outright and demolish it, I would not think that the expenditure of highway funds for this purpose would violate the constitutional intent. In the illustrations used, I see only a difference in degree but not in fundamental principle. I would hold the proposed enactment constitutional without regard to the limitations imposed by Art. IX, Sec. 19.

DONALD W. WEBBER

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 16, 1957
ANSWERED MAY 21, 1957

SENATE ORDER PROPOUNDING QUESTION

May 16, 1957

WHEREAS, it appears to the Senate of the 98th 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 98th Legislature a bill entitled, "An Act Relating to the Unfair Sales Act," (Senate Paper 555, Legislative Document 1551); and

WHEREAS, it is important that the Legislature be informed as to the constitutionality of the proposed bill; be it therefore

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 the bill, "An Act Relating to the Unfair Sales Act," (Senate Paper 555, Legislative Document 1551), if enacted by the Legislature, be constitutional?

A true copy.

Attest: WALDO H. CLARK, Asst. Sec.

Charles
Cumberland

In Senate Chamber, May 16, 1957, read and passed.

CHESTER T. WINSLOW, Secretary

(NEW TITLE)
NEW DRAFT OF S. P. 28—L. D. 19

NINETY-EIGHTH LEGISLATURE

Legislative Document **No. 1551**

S. P. 555 In Senate, May 2, 1957.

Reported by Senator Silsby of Hancock from 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-SEVEN

AN ACT Relating to the Unfair Sales Act.

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

Sec. 1. R. S., c. 184, § 2, amended. Section 2 of chapter 184 of the Revised Statutes is hereby amended to read as follows:

'**Sec. 2. Penalty.** ~~Any~~ **It is hereby declared unlawful for any** retailer ~~who, with intent to injure competitors or destroy competition,~~ ~~advertises, offers to sell or sells~~ **to advertise, offer to sell or sell** at retail any item of merchandise at less than cost to the retailer, or **for** any wholesaler ~~who,~~ **to** ~~with intent as aforesaid,~~ ~~advertises, offers to sell or sells~~ **advertise, offer to sell or sell** at wholesale any item of merchandise at less than cost to the wholesaler ~~shall be punished by a fine of not more than $500. In all prosecutions under the provisions of this section, 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.~~'

Sec. 2. R. S., c. 184, § 4, sub-§ I, repealed and replaced. Subsection I of section 4 of chapter 184 of the Revised Statutes is hereby repealed and the following enacted in place thereof:

'I. On complaint of any person the Superior Court shall have jurisdiction in equity to restrain and enjoin any act declared illegal by any provision of this chapter and it shall be the duty of the several county attorneys in their respective counties to prosecute all violations of any provision of this Act.'

Sec. 3. R. S., c. 184, § 4, sub-§ II, repealed and replaced. Subsection II of section 4 of chapter 184 of the Revised Statutes is hereby repealed and the following enacted in place thereof:

'II. Any person, firm or corporation who violates any provision of this Act shall be punished by a fine of not less than $100 nor more than $500 for each offense.'

Sec. 4. R. S., c. 184, § 4, sub-§ III, repealed. Subsection III of section 4 of chapter 184 of the Revised Statutes is hereby repealed as follows:

'~~III. In all proceedings under the provisions of this section, 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.~~'

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, we the undersigned Jus-

tices of the Supreme Judicial Court, have the honor to submit the following answer to the question propounded on May 16, 1957.

QUESTION: Would the bill, "An Act Relating to the Unfair Sales Act," (Senate Paper 555, Legislative Document 1551), if enacted by the Legislature, be constitutional?

ANSWER: We answer in the negative.

In our opinion the Unfair Sales Act (R. S. c. 184) if amended by L. D. 1551 would violate Section I of the 14th Amendment to the Federal Constitution (the due process clause) and Section 1, of the Declaration of Rights in the Maine Constitution.

The primary purpose of L. D. 1551 is plainly to remove the factor of "intent to injure competitors or destroy competition" from the statute. Under the existing Act it is a crime for a retailer or wholesaler *with, and only with such intent,* to advertise, offer to sell or sell merchandise at less than cost, with certain exceptions. L. D. 1551 strikes the intent clause from the Act, thus making it a crime, without reference to intent, for a retailer or wholesaler to advertise, offer to sell, or sell merchandise below cost, with certain exceptions.

The fatal defect from a constitutional point of view lies in the removal of the intent clause. Our opinion is directed solely to this issue. We are not considering in this opinion legislation covering property which may be affected with the public interest and thus subject to special laws, rules and regulations, nor do we touch upon other provisions of the Unfair Sales Act in its present form or as proposed by L. D. 1551.

In *Wiley* v. *Sampson-Ripley Co.*, 151 Me. 400, decided in 1956, the court held that advertising coffee for sale at less than cost could not constitutionally be declared by the Leg-

islature to be prima facie evidence of an intent to injure competitors and destroy competition. The court said, at page 402:

> "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 acts, 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."

and again, at page 404:

> "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."

The Pennsylvania Court, in *Commonwealth* v. *Zasloff,* 13 A. (2nd) 67, held that an Act prohibiting the sale of merchandise at less than cost, except in specified instances, that is, a statute substantially like that proposed in L. D. 1551, was unconstitutional. The court said, at page 70:

> "But the selling of merchandise below cost is, in general, an innocent and legitimate practice, and subject to abuse only in occasional instances. Under such circumstances it has been uniformly held

> to be beyond the power of the legislature to effect an absolute prohibition."

The Connecticut Court, in *Carroll* v. *Schwartz,* 14 A. (2nd) 754, in upholding the constitutionality of their Unfair Sales Practice Law, said at page 756:

> "Laws prohibiting sales at less than cost have been held unconstitutional by some courts. State v. Packard-Bamberger & Co., Inc., 123 N.J.L. 180, 8 A. 2d. 291; Commonwealth v. Zasloff, 338 Pa. 457, 13 A. 2d. 67, 70. The New Jersey and Pennsylvania laws which were held unconstitutional in these cases prohibited such sales and differed in that respect from our law which only operates upon such sales when made with intent to injure a competitor or suppress competition."

L. D. 1551 eliminates the unconstitutional provision relating to prima facie evidence of intent, but this is not its main purpose. The bill goes, as we have seen, to the extent of removing wrongful or criminal intent as a necessary element in establishing a violation of the Unfair Sales Act. Thus the proposed legislation comes within the constitutional ban noted in the *Wiley* and other cases cited above.

With the wisdom of the policy which the Legislature seeks to establish we are not concerned. Our task is to give our opinion upon the constitutionality of L. D. 1551 and no more. It is plain, in our view, that the Legislature in removing the wrongful or criminal intent from the present Act would destroy the constitutional foundation for the Unfair Sales Act which lies within the police power.

Dated at Augusta, Maine, this 21st day of May, 1957.

Respectfully submitted:

ROBERT B. WILLIAMSON
DONALD W. WEBBER
ALBERT BELIVEAU
WALTER M. TAPLEY, JR.
FRANCIS W. SULLIVAN
F. HAROLD DUBORD

COSGROVE*
vs.
FOGG ET AL.

York. Opinion, July 18, 1947.

Trespass. Damages. New Trial.

One may recover whatever damage is suffered by reason of defendant's trespass including out of pocket cost for damages to plaintiff's lawn.

Where a verdict is set aside for inadequate damages and a new trial is ordered, the new trial is limited to assessment of damages.

ON MOTION FOR NEW TRIAL.

This is an action of trespass before the Law Court upon motion for new trial. Motion sustained.

Joseph E. Harvey, for plaintiff.

Wilfred A. Hay,
Titcomb and Siddall, for defendants.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, TOMPKINS, FELLOWS, JJ. MANSER, A. R. J.

MURCHIE, J. The plaintiff brings this case forward on a general motion for new trial wherein the only allegation relied on is that the damages awarded by the jury are inadequate. That this furnishes ground for the relief sought in this jurisdiction is well established when a jury has been influenced by passion, bias or prejudice, or has disregarded evidence. *Leavitt* v. *Dow,* 105 Me. 50, 72 A. 735, 134 Am. St. Rep. 534, 17 Ann. Cas. 1072; *Conroy* v. *Reid,* 132 Me. 162, 168 A. 215. The principle is recognized in other jurisdic-

* The opinion herewith, *Cosgrove* v. *Fogg,* dated July 1947, was inadvertently omitted from a prior publication and is herewith published at the special request of the Chief Justice.

tions. See *Benton* v. *Collins,* 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33; 39 Am. Jur. 153, Par. 147 and the cases cited to that text and in the annotations following the *Leavitt* case as reported in Annotated Cases and the *Benton* case as reported in L. R. A.; also *DeFreitas* v. *Nunes,* 130 Ill. App. 195 and *Harris* v. *Scher,* 63 Misc. 288, 116 N. Y. S. 722, 723. In the latter case language declaring the verdict "inconsistent with any fair deduction from the evidence" seems in accord with the theory that the amount awarded showed a disregard of the testimony presented. In *Sundgren* v. *Stevens,* 86 Kan. 154, 119 P. 322, 39 L. R. A., N. S., 487, there is a considerable review of cases dealing with the subject matter. In that case a new trial was granted (two justices dissenting) on grounds substantially identical with those recognized in this court.

The present action is trespass, *quare clausum.* Plaintiff's ownership and right of possession to the premises in question are undoubted, as is the entry of one of the defendants thereon. The property entered was a lawn in the process of construction. The land was soft and somewhat boggy. The plaintiff had employed a contractor to grade it and on the day of the trespass had expended $644 in preliminary work during which a considerable amount of loam had been accumulated on it in piles or windrows for spreading and grading. Plaintiff's contractor testified that the loam on hand would have been sufficient to bring the lawn to its intended grade if the trespass had not been committed.

The defendants are an employer and his employee. The latter was sent upon plaintiff's property by the former with instructions to spread the assembled loam to some extent with a heavy bulldozer. The defense offered is that the entry was made on the invitation of plaintiff's husband, who was undoubtedly her agent. The testimony shows that the defendant employer had some conversation with a neighbor of plaintiff which led him to believe that she desired to have

the loam spread by his equipment. Conversation between the defendant employee and plaintiff's husband discloses that the authority of the former to go on the property was questioned before the entry was made and that the husband drove away in an automobile to check with the contractor employed by the plaintiff to build the lawn on whether the weight of the machine would damage it in its then condition. In his absence the bulldozer was driven upon the property and the loam spread.

The only question submitted to the jury was the measure of damages. The testimony of plaintiff's neighbor, whom the defendants claim was authorized to invite their entry, was admitted over objection. The justice before whom the case was tried held it insufficient for the purpose for which it was offered and instructed the jury that its verdict must be for the plaintiff and must award at least nominal damages. An exception taken by the defendants to this instruction was not perfected, but it could not have disturbed the verdict on the issue of liability because the evidence viewed most favorably for the defendants would not have justified a finding that their entry on plaintiff's property was by her invitation. The verdict assessed damages at one dollar under instruction that the plaintiff was entitled to recover the reasonable cost of restoring her premises to the condition existing at the time of the trespass.

The plaintiff's claim is that her reasonable cost was $439.50, occasioned by the fact that the weight of the bulldozer compressed the loose soil to an extent that required a great amount of additional material to bring her property to its intended grade. The defendants hauled approximately 36 cubic yards of loam, the quality of which is in dispute, onto the property after the entry without charge. The plaintiff procured more at a cash outlay of upwards of $200. There was an undoubted extra cost in the work of spreading the material. Plaintiff's contractor estimated this at ten days or $160.

On the facts it is impossible to find a sound basis for the jury verdict. The defendants argue that the loam delivered on plaintiff's property after the trespass restored it to the condition prior thereto and that the jury must have so decided. Alternative possibilities are that the jurors considered the contractor's estimate that the loam on hand when the trespass was committed would have raised the grade to the intended level inaccurate, or that a lawn with a hard-packed base was worth the increased cost by comparison with what the plaintiff would have had if the work had been completed according to plan. If the explanation of the verdict lies in the factual decision defendants assume, it is not justified by the evidence; if it lies in the first alternative, there is no evidence to support it; if in the latter, it constitutes no answer in law.

The plaintiff is entitled to recover whatever damage she suffered by reason of the defendants' unlawful entry on her premises. Out-of-pocket cost constitutes damage. The measure should be determined by a jury. There is no warrant in this case, as there was in *Leavitt* v. *Dow, supra,* for believing the jury may have been influenced by prejudice. There is nothing in the record to suggest passion or bias, but it is as apparent on the present facts as it was in the *Leavitt* case and in *Conroy* v. *Reid, supra,* that evidence was disregarded. On the facts the evidence is "essentially equivalent," as was said in the *Leavitt* case, to a finding for the defendants, and must be set aside, so far as it provides a measure of damages.

The liability of the defendants is undoubted. Notwithstanding the admission of the evidence on which the defendants rely to establish the entry as lawful, over objection, the jury was instructed correctly that they must be considered trespassers. A new assessment of damages should be made by a jury having no evidence of justification for the entry to complicate the real issue. *McKay* v. *New England Dredging Co.,* 93 Me. 201, 44 A. 614. The practice of ordering a lim-

ited new trial is well established in the New England states and is recognized in the United States Circuit Court of Appeals for the First Circuit. See *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, 283 U. S. 494, 51 S. Ct. 513, 75 L. Ed. 1188, and cases therein cited. In the *McKay* case the verdict under review was the second awarded against the defendant in the particular process, but the principle is applicable to a first trial of the issue. *Plante* v. *Canadian National Railways et al.*, 138 Me. 215, 23 A. (2nd) 814.

Motion sustained as to damages.

Verdict set aside.

New trial ordered for the assessment of damages only.

IN MEMORIAM

SERVICES AND EXERCISES FOR
FRANK A. TIRRELL, JR.
JUSTICE SUPREME JUDICIAL COURT

BEFORE THE SUPERIOR COURT FOR THE COUNTY OF KNOX AND STATE OF MAINE, MARCH 5, 1956.

BORN MARCH 30, 1893 DIED JUNE 3, 1955

HONORABLE ALAN L. BIRD
President, Knox County Bar Association

May it please the Court:

We are gathered here today in order to pay tribute to the memory of FRANK A. TIRRELL, JR., a former Associate Justice of this Court and later and at the time of his decease, a Justice of our Supreme Judicial Court.

Resolutions have been prepared and will now be presented, with the request that they be entered upon and become a part of the records of this Court.

HONORABLE JEROME C. BURROWS, Esquire

May it please the Court:

It is with a sense of deep sorrow and great personal loss that I formally bring to the attention of this Court the death of Frank A. Tirrell, Jr., an Associate Justice of the Supreme Court of Maine on June 3, 1955. This normally would have been observed at the November Term of this Court, but that term was of such short duration that proper arrangements could not be made at that time.

Judge Tirrell was born in Quincy, Massachusetts, March 30, 1893, the son and grandson of lawyers. He received his early education in the schools there and then attended the

University of Maine Law School from which he was graduated in 1915. He had learned to love the State of Maine and decided to make it his home, coming to Rockland directly after leaving college to start his practice. It was here that he met Beulah Studley, and on January 27, 1917, they were married. All who were privileged to know them soon realized what devotion and love existed in this union.

Frank was early recognized for his keen mind and legal ability, and he became much in demand as a trial lawyer. It was only natural that eventually he was chosen as a Judge of our Superior Court, and his promotion to the Supreme Court was well deserved. In the death of Frank A. Tirrell, Jr., the members of the Knox Bar have lost a friend and the State has lost an able jurist.

It was my privilege to be associated with Frank Tirrell for seventeen years. I prepared for the bar by studying in his office, and it was my good fortune to be with him many times when he was preparing and trying cases. I learned much in this way, and Frank was always patient and helpful to me in my studies. For fourteen years Frank and I shared the same offices. As a struggling young lawyer he was a tremendous help to me; he was always kind, generous, thoughtful, and sympathetic, but he was the same with all people. He was known as a "good fellow" and a friendly Judge. As he went about the State holding Court, the lawyers came to know why we here in Knox County loved him. He was the kind of a Judge whose coming was looked forward to by all attorneys and Court officers. It was a source of genuine pride and satisfaction that evening in 1946 when I presented him the robe which his fellow members of this Bar had so kindly purchased for him when they learned of his appointment.

It was also very gratifying when in the company of Frank Harding and Curtis Payson, both of whom had also

studied under him, I went to Augusta and saw Frank sworn in first as a Judge of the Superior Court by Governor Hildreth and then as Associate Justice of the Supreme Court by Governor Cross. For many years Frank Tirrell was my confidant, my adviser, my friend. I shall miss him greatly.

I have long been an admirer of the late Chief Justice of the United States Supreme Court, Charles Evans Hughes, and so when I recently read some words which he had used with reference to the passing of the late George Wickersham I could not help but think how perfectly they applied to Judge Tirrell and so I am going to quote them.

> "The highest reward that can come to a lawyer is the esteem of his professional brethren. That esteem is won in unique conditions and proceeds from an impartial judgment of professional rivals. It cannot be purchased. It cannot be artificially created. It cannot be gained by artifice or contrivance to attract public attention. It is not measured by pecuniary gains. It is an esteem which is born in sharp contests and thrives despite conflicting interests. It is an esteem commanded solely by integrity of character and by brains and skill in the honorable performance of professional duty. No mere manipulator or negotiator can secure it. It is essentially a tribute to a rugged independence of thought and intellectual honesty which shine forth amid the clouds of controversy. It is a tribute to exceptional power controlled by conscience and a sense of public duty,— to a knightly bearing and valor in the hottest of encounters. In a world of imperfect humans, the faults of human clay are always manifest. The special temptations and tests of lawyers are obvious enough. But, considering trial and error, success and defeat, the bar slowly makes its estimate and the memory of

> the careers which it approves are at once its most precious heritage and an important safeguard of the interests of society so largely in the keeping of the profession of the law in its manifold services."

In behalf of the Knox County Bar Association I desire to present the following resolutions:

RESOLVED:

1. That the members of the Knox County Bar Association desire to express their appreciation of the life, character, and public service of the late Justice Tirrell and to place upon the records of this Court a tribute to the memory of the man they knew so well and loved, honored and respected.

2. That he was a generous and public spirited citizen, having close to his heart the welfare of the State and the communities in which he lived.

3. That we recall with pride the honor and distinction he brought to Knox County, our first judge in fifty years.

4. That the grateful remembrance of the men of his own times will follow him while they live; but the records of the highest court of this State, the Maine Reports, will be permanent and final witness of his work.

I move you, Your Honor, that these resolutions be entered upon the permanent records of this Court.

JEROME C. BURROWS

Rockland, March 5, 1956

HONORABLE FRANK F. HARDING
Attorney General of the State of Maine

May it please the Court:

I am grateful for the privilege of joining with the Court and the members of the Bar in paying tribute to the life and public services of my friend, and our friend, Frank A. Tirrell, Jr., Associate Justice of the Supreme Judicial Court of Maine.

Frank Tirrell was an extraordinary man. I use the word "extraordinary" advisedly. Extraordinary means extra-ordinary. It means beyond, or out of, the common order. It signifies the unusual. Frank Tirrell exceeded the common degree; he did not fit the ordinary measure; he was remarkable; he was rare.

His opinions in our Maine Reports are monuments engraved by himself for all present and future generations of the bench and bar. They will stand by themselves and it is not of them I wish to speak, but of the character and courage of the man himself.

His courage was well known to his adversaries and to his associates while he was practicing law. That courage was perhaps best shown by the way he drove himself physically through the vicissitudes of one illness after another which beset him during the last ten years of his life; never indicating, and always denying, that he felt less than well; driving himself to perform the work he loved until there was literally nothing left to drive.

His courage was of the quiet, rather than the ostentatious type and the full, true measure of it may, therefore, never be known, even by his intimate associates. His character, on the other hand is more visible in his own accomplishments and in his friendship, assistance and inspiration to others.

Frank Tirrell was not content to "live in a house by the side of the road, and be a friend to man." He fared forth upon the road of life and traveled to a high and honorable position by the way of a highly successful and satisfactory practice in his chosen field of law. Because of this, and his active encouragement of others, he was more of a friend to man than if he had sat idly by, offering nothing but good wishes to those who passed.

I recall, vividly, his interest when I entered the office with him and Jerome Burrows to study law; the association with him in his cases during the time I was in the office; and the advice, assistance, encouragement and inspiration he offered during that time and later, after I had been admitted to the bar, both in my practice and in my seeking of public office. I miss, today, the opportunity and privilege of discussing with him the problems which from time to time arise, and for which he always had a clear insight and a helpful suggestion.

His service to the people of Maine cannot be measured by his own life and accomplishments. He was responsible for the legal education of others and was an inspiration and an example for their accomplishments. Some time after he started to practice law in Rockland, Jerome Burrows entered his office to study law. I was next. Curtis Payson followed me and still later, in the same office, Hadley Miller studied. These four people, and Frank Tirrell as the fifth, have provided the following public officials:

One City Solicitor
One Public Administrator
Two Municipal Court Recorders
One Municipal Court Judge
Three County Attorneys
Two Representatives to State Legislature
One State Senator
Two Special Assistant Attorneys General

One Attorney General
One Superior Court Justice
One Supreme Court Justice

The mere recital of the positions held by him, and those he helped and encouraged, serve as a gauge of his service to the State and its people and his character as a man.

The advice and encouragement, the inspiration and incentive he gave of himself to those whom he befriended can only be truly known by those to whom he gave. While his personal accomplishments and his advancement to greater material things were brought to an end by his untimely death, it may in a greater and truer sense be said of Frank Tirrell: "To live in hearts we leave behind, is not to die."

FRANK F. HARDING

Rockland, March 5, 1956

HONORABLE CURTIS M. PAYSON
County Attorney, Knox County, State of Maine

May it please the Court:

I deem it a real privilege to take part in these proceedings honoring the memory of Judge Frank A. Tirrell, Jr. Certainly others more eloquent than I might in these exercises do greater justice to his memory. Yet there is no task which I more willingly undertake than to join in these expressions of affection, which we all here had for him.

It was my good fortune as a young man to have the benefit of his advice, encouragement and help in the study of law.

During those years, in the late thirties, he was a busy man with a varied and extensive practice. At all times,

however, he gave me the benefit of the practical experience of associating and working with him on his cases. He gave me much of his time, a greater gift no man could have. He offered me encouragement, assistance, and a warm human understanding of my problems. For these kindnesses alone I shall always revere his memory.

In the trial of cases he was a man of recognized ability, his perception of sham and pretense in witnesses, his logical arguments and forthrightness with the Court and jurors, won him the respect and confidence of lawyers and laymen alike. He was loved and admired by all members of the bar, but particularly by we here in the Knox County Bar Association. If any brother had a problem or requested advice he was always available for help and guidance. He taught us, the younger members of the bar, to do our work well and in all things to maintain the integrity of the profession. We are a better and wiser bar for his life among us.

A great tribute to the esteem in which he was held by the members of his bar was the unanimous approval with which his elevation to the Superior Court was greeted. He brought to the Court a calm, judicial manner, a wealth of experience as a practicing attorney, and a firm impartiality to all. It was inevitable that his qualifications and his distinguished service as a Justice of the Superior Court would result in his elevation to the Supreme Court of our State. His service on the Supreme Court was a brief one. Yet his expositions of the laws of Maine are a conspicuous contribution to the reports of that Court.

During the last years of his service to our beloved State his health steadily deteriorated. It was then that we, who saw him often, gained a new measure of respect for him. Not once did he complain, but bore his suffering silently. His indomitable courage in his adversity, was a rare and intimate insight into the calibre of this man.

Weary and ill he struggled to carry on his judicial duties, until finally his lonely efforts were too much for his ebbing strength to maintain and he passed on to eternal rest. Ours is a richer, healthier life for having known him. We are glad to have the opportunity to pay homage to his memory, here in this Court which he loved.

CURTIS M. PAYSON

Rockland, March 5, 1956

HONORABLE ABRAHAM M. RUDMAN
Justice Superior Court

This Court gratefully receives the respective tributes of affection and respect in memory of Honorable Frank A. Tirrell, Jr., a former member of this Court and former Associate Justice of the Supreme Judicial Court.

It is most fitting that members of the Knox County Bar Association of which he was a member of long standing should seek to honor his memory by presenting memorial addresses and resolutions of respect, setting forth his virtues and accomplishments, that the same may be included in the permanent records of this Court, of which he was an honorable and honored member.

You have dealt, as you should, with his career, both before and after he was appointed to the bench, with his life and character. It is apparent in all that you have said that a great personal as well as a public loss was suffered in his passing.

He served with distinction, upon the bench of the Superior Court from the date of his appointment on May 15, 1946 to March 18, 1953. He understood human problems, before him all men, high or low, rich or poor were truly equal. His broad knowledge of business affairs, his instinctive sense of justice and his essential humanity made him an ideal presiding Justice.

He qualified as an Associate Justice of the Supreme Judicial Court on March 18, 1953. The first published opinion written by him was in the case of State v. Rogers; reported in 149 Maine, 32, handed down on June 16, 1953, in which he reviewed and reaffirmed the principle, that a conviction for perjury may not be secured and sustained on the uncorroborated testimony of one witness to the falsity of the matter on which the perjury is assigned.

This opinion was written in plain, concise language and in the style which followed in all his subsequent published opinions, which appear in Volumes 149, 150 and 151 of the Maine Reports.

His last published opinion in the case of State v. Goodchild reported in 151 Maine 48 was handed down posthumously on June 6, 1955, three days subsequent to his decease.

His clear and logical opinions stand as everlasting testimonials to his keen mind, his analytical reasoning and sound judgment, and establish fully the competence and ability you have extolled.

He possessed all of the attributes of an ideal jurist. He was dignified, courageous and fearless. He sought only to do justice.

The resolutions and remarks here offered are accepted by the Court as a tribute and memorial to the deceased, Mr. Justice Frank A. Tirrell, Jr., Associate Justice of the Supreme Judicial Court; they are ordered to be recorded upon the permanent records of this Court; and in respect to the memory of Mr. Justice Tirrell, this Court is now adjourned.

ABRAHAM M. RUDMAN
Presiding Justice Superior Court

IN MEMORIAM

Memorial Exercises before the Superior Court at Portland, December A.D. 1953, Conducted by the Cumberland County Bar Association in Commemoration of

HONORABLE WILLIAM B. NULTY
Justice Supreme Judicial Court

Born January 28, 1888 Died September 11, 1953

Justice Arthur E. Sewall, Presiding.

Honorable William S. Linnell of the Cumberland Bar Association

May it Please the Court:

The members of Cumberland Bar today pay their tribute to Mr. Justice William B. Nulty, deceased September 11, 1953, former associate, companion in service to their profession and brother in the law in the truest sense of the word.

Born in Buckfield, Maine, January 28, 1888, educated in the public schools of his native town and at Hebron Academy, William B. Nulty entered Bowdoin College, already having demonstrated in his academic work and his contacts with fellow students and instructors a persistence in application of an unusually well balanced intellect, a soundness of judgment and of human understanding, which had earned for him the respect and commendation of his instructors and bound to him for all time a substantial group of loyal friends. These personal qualities, enduring throughout his college career and later life, as they touched a widening segment of his fellows, ever increased the measure of confidence and affection in which he was held both within and outside the circle of his chosen profession.

Graduating from Bowdoin in 1910 with the earned degree of Bachelor of Arts, he devoted his early post-graduate

years to teaching in the high schools of Portland and South Portland, demonstrating always high qualities of scholarship and an understanding of the youthful mind. He then made a vital decision, and again, with his accustomed determination when seeking a goal, devoted himself to his studies in preparation for his career in the Law, completing them at the University of Maine and at the University of Columbia, earning his degree of Bachelor of Laws.

Mr. Nulty was admitted to the Bar of this state in 1917, and became associated with the firm of Bradley & Linnell. He progressed through all the difficult stages of apprenticeship so familiar to all of us, the doubts as to the adequacy of our preparation and ability, the frustration in our search for authority to support our preconceived ideas, our apprehension of possible mistakes, and our awe and complete wonderment at the seeming confidence in and acceptance of our opinions and advice. He faced up to all these difficulties and emotional disturbances and with characteristic calm mastered them all.

Mr. Nulty became a partner in the firm of Bradley, Linnell, Jones, Nulty & Brown in 1922, assuming a greater and greater portion of its work and responsibilities, and remained with the firm until 1947.

Law partnerships in the area throughout which the members of the Cumberland Bar are accustomed to practice are not, as in the larger centers, too frequently, large aggregations of strangers to whom is permitted an intimacy only among a few of their members. Law partnerships with us are close-knit societies, embracing a complete intimacy between each member and all others—almost a family relationship. It is a rigorous test of a man's character under such circumstances to have inspired and held, for a period of twenty-five years, the trust and confidence and the admiration and loyalty of the entire group. To do so a man must show sincere respect for his seniors, courtesy to his

contemporaries and consideration for his juniors. It can be truthfully said that William B. Nulty observed all these amenities, not just as surface attitudes but as innate qualities of spirit. Yet his was not a negative personality. He was constantly positive. He could be abrupt, yet, as observed by one of his juniors, never unfair. He could be gentle, but never weak.

The ties of such an association can never be broken. They persist beyond promotion to a higher field of activity; they are not dissolved by death.

The confidence in which Mr. Nulty was held by his partners was not exclusively their possession. The members of this Bar held him in the highest esteem. Not alone in character was he praiseworthy, but also in legal learning and interpretive ability. He served as Assistant U. S. District Attorney for 12 years. He could fight a cause vigorously, but he excelled in negotiating adjustments of legal controversies. He could see all sides, and many an over-earnest and emphatic client thanked his good fortune that William B. Nulty had led him to the wise course of adjusting a difficulty. He was an excellent academic lawyer. He was outstanding as a businessman's advisor.

Appointed to the Bench, he became Mr. Justice Nulty in 1947, serving as Superior Court Judge until 1949 when he was appointed to the Supreme Judicial Court. He rendered most distinguished service to the Bar and to the people of Maine in both capacities. His legal learning and sound common sense, combining into a wisdom rarely achieved by one individual, are reflected in his opinions, preserved to the benefit of generations to come in the printed pages of our Maine Reports. In these opinions, no rhetorical phrases will be found, nor any conscious striving for literary excellence; but if truth is beauty, then his direct, forceful, unembellished but understandable expression of the truth is beautiful. Many were his decisions in Equity matters

brought before him, which are recorded, other than in filed formal decrees, only but lastingly in the minds and hearts of his brothers at the Bar and their clients as the determinations of a truly just judge.

In every sense of the word, Mr. Justice Nulty earned the recognition accorded him in the bestowal upon him by Bowdoin College this year, 1953, of the honorary degree of Doctor of Laws. He bore modestly this and other honors bestowed by fraternal, academic and business organizations as, likewise, he endured philosophically the trials and tragedies of his life experience. Student, teacher, lawyer and judge, and withal, respected companion of his fellows, he pursued his career, unaware it would stand as an example to his contemporaries and an encouragement to those who follow after.

IN MEMORIAM

SERVICES AND EXERCISES FOR

HARRY MANSER

Justice Supreme Judicial Court

Before the Superior Court for the County of Androscoggin and State of Maine, April Term A.D. 1957

Born, April 20, 1874 Died, February 20, 1955

HONORABLE FRANK W. LINNELL

for Androscoggin Bar Association

May it please the Court:

I feel greatly honored to have been asked to participate in the memorial services being conducted today in memory of those members of our Androscoggin Bar who have departed this world, and I am particularly honored that I should be asked to speak concerning the life, character and achievements of the late Justice Harry Manser, who was a member of the Court when I came to the Bar in 1931, and to whom I turned enumerable times for counsel and advice in business and personal matters, and from whom I always received kindly and fatherly advice and assistance.

Memorial services, such as these, are the only media through which we, as a Bar association, can express our respect and affection for a man whose qualities of character, and whose keen mind has helped to enrich the lives of all of us who came in contact with him in the practice of law.

In many respects, Judge Manser's life and success can be likened to a character from Horatio Alger. He was born in Hever, Kent County, England, on April 20, 1874, the son of William and Eliza Canham Manser. When he was 13 years old, in April of 1887, he immigrated to America with his

mother and two sisters. He attended and completed his grammar school education in Lewiston, Maine, and attended Lewiston High School for two years. Before he had left England, he had interested himself in the study of Pitman shorthand and continued his study in America and became very proficient. In 1890, two forces combined to direct his steps toward the practice of law. One was the economic pressure being exerted on his family, which made it necessary for him to obtain employment, and the other was a pressing need in the law office of Frye, Cotton & White for a law clerk experienced in the art of shorthand, and he took employment in the office. Within a very short time after his association with the firm, his desire to study law became known to the firm members, and he was given the opportunity to read law in the office, and on September 19, 1896, he was admitted to the Bar in the County of Androscoggin.

It is interesting to note that he was awarded an honorary degree of Master of Arts by Bates College, in 1919. I do think that it is significant that this young man, then 45 years of age, should have so distinguished himself as to be the recipient of an honorary degree from a college having such high standards as Bates.

Judge Manser was married to Gladys M. Stover on June 4, 1898, and the union was blessed by three daughters, Mrs. Doris M. Gould, Mrs. Marjorie S. MacInnes and Mrs. Harriet M. Audet.

After Judge Manser's admission to the Bar, he remained associated with the firm of White & Carter, the successor to the firm of Frye, Cotton & White, until 1903, when he entered practice in Lewiston in his own separate office.

He was corporation counsel for the City of Lewiston in 1897 and 1898. He served as Judge of the Auburn Municipal Court from 1903 to 1911. He acted as City Solicitor for the City of Auburn from 1911 to 1912. He was again Judge of the Auburn Municipal Court from 1918 to 1926. He was

a member of the State Board of Bar Examiners from 1908 to 1914. He was appointed Associate Justice of the Superior Court of the State of Maine in April of 1928, where he remained until July 18, 1935, on which date he was elevated to the Supreme Judicial Court of the State of Maine. He remained an active Associate Justice of the Supreme Judicial Court until April of 1946, when he retired and accepted an appointment as active retired Justice of that Court.

Judge Manser, throughout his life, was a devout christian and for a great many years was associated with the High Street Methodist Church in Auburn, where he was a member and served as one of its trustees. He was also a trustee of the Maine Methodist Congress, and throughout his life contributed generously with time, energy and financial assistance to the welfare of his Church.

He was always interested in good works on behalf of the many charities existing in our community. He was for many years a member of the Executive Committee of the State Y.M.C.A., and a trustee of the Home for Aged Women in Auburn.

His keen mind also lent itself to finance and banking. He was, for many years, a trustee of the Auburn Savings Bank, and also served as its President. He was a member of the New England Order of Protection and of the New England Fraternal Congress, which were fraternal insurance organizations, and served on their governing boards for a great many years. He was a member of the Grange, the Knights of Pythias, and was a 32° Mason.

Judge Manser took to the bench with him, a keen, analytical mind, a kindly disposition, an attitude of fairness, and a keen sense of humor. I am sure that all members of the Bar who are of my age, or younger, who knew Judge Manser at all, remember him as I do, as a kindly, understanding person, with the door to his office always open and

always ready to lend a helping hand to the young lawyer seeking his counsel and advice, and I am sure that we will always remember his quick wit and humor, and his ability to lighten our burdens, real or fancied, by his kindly understanding.

His was a full and useful life in the service of his God, his country, his state and the community in which he lived. He left a mark of achievement which time will never erase.

Now, if it may please the Court, I present the following resolutions:

Resolved: That the members of the Androscoggin Bar Association desire to express their respect and appreciation of the life and character of the late Harry Manser, for nearly sixty years a prominent and respected member of their Association, and to place upon the records of this Court a tribute to the man, the lawyer and the Judge whom they knew and admired.

Resolved: That by his death, the state and community has lost a public spirited and courageous leader in community and state affairs, a man of piety and good will, a firm friend and a devoted husband and father, whose memory will long be cherished, a man, who, as a self-educated lawyer, rose from the Bar to the highest Court of the State, and whose career at the Bar and as a member of the state's courts was characterized by honesty, fairness and justice to all; that we of the Bar, so richer for the experience of having known him, deeply mourn his passing.

Resolved: That these remarks and resolutions be presented to the Court with the request that they be entered upon its permanent records, and that a copy be sent to the late Justice Harry Manser's family, conveying our deepest sympathy.

FRANK W. LINNELL
for the Committee on Resolutions
of the Androscoggin Bar Association

INDEX

CORAM NOBIS

The guilt or innocence of one convicted of forgery is not properly an issue in *coram nobis* proceedings.

One who did not request counsel but contends that he was deprived of his constitutional right thereto must establish that he had not validly waived his rights.

The Sixth Amendment to the Constitution of the United States does not command the State to furnish counsel.

In State criminal prosecutions it is only when the absence of counsel results in a denial of the essentials of justice that the issue of due process under the Fourteenth Amendment to the Constitution of the United States is involved.

Pike v. *State*, 78.

CORPORATIONS

See Equity, *Ingersoll* v. *Gannett Publishing Co., Inc.*, 105.
Torts, *Eastern Milling Co.* v. *Flanagan et al.*, 380.

COURTS

See Appeal, *State* v. *Hoar*, 139.
Equity, *Dumais* v. *Dumais*, 24.

CRIMINAL LAW

The "negligence" referred to in R. S. 1954, Chap. 37, Sec. 146, (which defines as a felony the negligent or careless shooting and wounding of a human being while hunting) is criminal negligence of a degree which may be denominated as gross or culpable and not mere negligence of a degree required for civil liability.

In a criminal prosecution for a felony under a penal statute, the rule of strict construction is applicable and a respondent is entitled to an interpretation most favorable to him.

See dissent. Whether legislative intent requires a literal interpretation of the statute.

State v. *Jones*, 188.

See Appeal, *State* v. *Hoar*, 139.
Assault and Battery, *State* v. *Lumbert et al.*, 131.
Fish and Game, *State* v. *Gaudin*, 13.
State v. *Vicniere*, 293.
Fraud, *State* v. *Albee*, 425.
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Motor Vehicles, *State* v. *Melanson*, 168.
Rape, *State* v. *Dipietrantonio*, 41.

CROSS EXAMINATION

See Rape, *State* v. *Dipietrantonio*, 41.

CUSTODY

See Equity, *Dumais* v. *Dumais*, 24.

DAMAGES

Where a defendant agrees to sell an automobile for the "best price he can obtain" and give plaintiff credit therefor, he cannot charge plaintiff with the loss sustained by him upon a trade-in accepted by him as part of the purchase price of the sale.

Giguere v. *Bisbee Buick Co., Inc.*, 177.

A new trial will not be granted where the verdict is supported by the evidence and the damages are not excessive.

A verdict of $55,000 is not excessive in an assault and battery action where the plaintiff, a young man of 22 years was wrongfully shot in the chest and the bullet became lodged near the liver, where its removal would be dangerous to life, thereby creating a constant source of worry and apprehension; and where it is probable that plaintiff will suffer mental and physical pain for life with a greatly impaired earning capacity.

Pooler v. *Cuccinello*, 253.

A new trial will not be granted where the evidence is sufficient to sustain a verdict and the Law Court cannot say that the amount was excessive to the extent that the jury acted under some bias, prejudice or improper influence, or have made some mistake of law or fact.

Where a topic of damage analysis indicates that the jury computed from $2.00 to $4.00 per day for services rendered, it cannot be said that the jury were manifestly wrong.

Stinson v. *Bridges, Admr.*, 306.

It is now generally held that verdicts may be set aside and new trials granted for inadequate damages as well as excessive damages, where the jury either disregards testimony or acts with passion or prejudice or reaches its verdict by compromise.

Damages of $1,000.00 are inadequate where the evidence shows:

(1) A compressed fracture of seventh dorsal vertebra, a painful injury, which increased to some extent a spinal curvature, affected the tissue, and may have aggravated a previous arthritic condition; use of back brace for six months;
(2) Medical and hospital expenses of $369.00;
(3) Lost Earnings of
5 weeks at $25.00 per week plus room,
Nine months value of room,
Four months further disability, and
10% future disability;
(4) Pain and suffering.

Bergeron v. *Allard*, 297.

One may recover whatever damage is suffered by reason of defendant's trespass including out of pocket cost for damages to plaintiff's lawn.

Where a verdict is set aside for inadequate damages and a new trial is ordered, the new trial is limited to assessment of damages.

Cosgrove v. *Fogg et al.*, 464.

A demurrer reaches only those matters which are apparent on the face of the pleadings demurred to.

R. S. 1954, Chapter 166, Section 37, removes the common law disability of a married woman by giving her a separate property in wages earned, although she may waive her rights to such wages and in such event they become the property of the husband under his common law right.

Where a plaintiff husband seeks as damages his loss of benefit of his wife's earnings, a special demurrer thereto is insufficient which fails to point out wherein plaintiff's allegation of consequential damage is defective, since under certain circumstances the right to a wife's earnings may rest in the husband. (The defendant in demurring

DIRECTED VERDICT

Where the evidence is legally sufficient and the issue is whether the evidence has a tendency to establish the facts, the court has no right to direct a verdict since the judging of testimony and weighing of evidence is the province of the jury.

Expert testimony is to be treated the same as any other testimony and subjected to the same tests as to weight and probative value.

If, on the basis of the evidence, honest and fair minded men might reasonably decide for either party it is error for the court to direct a verdict.

Sanborn v. *Elmore Milling Co., Inc.*, 355.

DISTRICTS

DIVORCE

DOWER

DRUNKEN DRIVING

DUE PROCESS

EASEMENTS

ELECTIONS

EMINENT DOMAIN

EQUITY

For the purposes of testing a demurrer the question is whether the facts justify relief in equity.

Antenuptial religious promises cannot justify the intervention of equity in pending legal divorce proceedings.

The Superior Court has jurisdiction of divorce and custody pending libel under R. S., Chap. 166, Sec. 55. The law of divorce is statutory and given cause therefore, one is entitled thereto as a matter of right not discretion.

Dumais v. *Dumais*, 24.

ERROR

ESTATES

ESTOPPEL

EVIDENCE

EXCEPTIONS

EXECUTORS

EXECUTORS AND ADMINISTRATORS

FIRES

FISH AND GAME

In construing statutes the courts follow the intent of the legislature.

In the criminal law possession usually means care, management, physical control, or the secret hiding or protection of something forbidden or stolen.

State v. *Gaudin*, 13.

Where the State presents evidence, direct and circumstantial, sufficient to prove that the respondent was in the area of the offense charged at night-time, and that there were present and available spot lights, dash board socket, batteries and carrying case, a rifle with ammunition to fit and a mounted scope, that the respondent drove his car slowly whilst a spot light illuminated fields and apple trees where deer were known to resort, the jury were warranted in rendering a verdict of guilty.

Where the case is one of misdemeanor, all participants are principals.

Upon exceptions to the denial of directed verdict the issue is whether there was sufficient evidence to warrant a jury verdict of guilty.

State v. *Vicniere*, 293.

FRAUD

Assertions by a respondent that he had on several occasions, through political influence, been able to have other "cases disposed of" are admissible not as proof of guilt in other matters but to show the course of conduct and state of mind of a respondent prior to time he allegedly obtained money by alleged false pretenses.

"Sales talk" by respondent with the wife of the alleged defrauded is admissible where such talk was evidently made to convince the defrauded that respondent had the "political influence" which could bring about the desired results.

Declarations having a tendency to explain or give character to acts are sometimes admissible as part of the *res gestae.*

A directed verdict is properly denied where the evidence is strong enough to support a verdict; the case must be considered as a whole and not by reference to isolated bits.

A statement by respondent that "all that remained to be done was the payment of money to certain officials" refers to a present existing fact and not something to be done in the future.

State v. *Albee,* 425.

See Statute of Frauds.

HEIRS

See Trusts, *Fiduciary Trust Co.* v. *Brown et al.,* 360.

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See Sureties, *Carpenter, Treas.* v. *Susi et al.,* 1.

HUSBAND AND WIFE

See Damages, *McCarthy* v. *McKechnie,* 420.

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See Equity, *Dumais* v. *Dumais,* 24.
Lovejoy et al. v. *Coulombe et al.,* 385.

INSANITY

See Murder, *State* v. *Arsenault,* 121.
Torts, *Dunbar* v. *Greenlaw,* 270.

INSURANCE

R. S., 1954, Chapter 60, Section 303, is not designed to afford reformation of an insurance policy so as to provide coverage for injuries suffered by an alleged employee (where the policy excepted from coverage injuries to employees, *qua* employees) upon the alleged ground that the company had agreed to issue a policy to cover such individual.

The remedy against an insurer for expenses incurred in the defense of an action covered by an insurance policy is at law and not in equity.

A defendant insurer does not waive his right to contest coverage where he undertakes the defense of an action with reservations of such right.

Jenkins v. *Banks,* 288.

INTEREST

See Paupers, *Norridgewock* v. *Hebron,* 280.

MAINE EMPLOYMENT SECURITY COMMISSION

The legislature in R. S., 1954, Chap. 29, Sec. 3, subsection IX, Paragraph C in using the phrase "acquire the organization, trade or business" contemplated a situation in which there is continuity of the enterprise relatively uninterrupted by the transfer of ownership.

Proof that one has acquired "substantially all of the assets" of a business is not satisfied by mere conjecture or surmise as to what "all of the assets" consisted at the time of acquisition.

In determining legislative intent with reference to the phrase "substantially all of the assets thereof" the court assigns a literal meaning to the words of the Act and tests the facts accordingly.

Statutes such as the Maine Employment Security Law are remedial and must be liberally construed for the purpose of accomplishing their objectives—the stabilization of employment conditions and the amelioration of unemployment.

Stewart v. *M. E. S. C.,* 114

PARTIES

See Equity, *Ingersoll* v. *Gannett Publishing Co., Inc.*, 105.

PAUPERS

Interest is compensation fixed by agreement, or allowed by law, for the use or detention of moneys, and our law imposes it as damages in proper cases, when the debtor is in default, or guilty of fraud.

The date when interest is legally due does not always coincide with the date of demand.

It is error for a referee to award interest from the date of the writ where no claim for interest is set forth in the declaration, and the case is submitted to the referee upon the issue of pauper settlement, so that it cannot be said that there was a default until that issue had been determined.

Where the error of a referee consists merely in the erroneous awarding of interest the award may be accepted in part and rejected in part notwithstanding the rule that in cases heard by referees the authority of the Law Court is limited to remand and no remittitur can be ordered.

Courtenay v. *Gagne*, 141 Me. 302 distinguished.

In the instant case the Law Court ordered that interest be allowed from the date of the referee's award to the date of judgment.

Norridgewock v. *Hebron*, 280.

PERFORMANCE

See Sureties, *Carpenter, Treas.* v. *Susi, et al.*, 1.

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See Torts, *Dunbar* v. *Greenlaw*, 270.

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See Motor Vehicles, *State* v. *Melanson*, 168.
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Waiver, *Seekins* v. *Lougee*, 153.
Writ of Error, *Briggs* v. *State*, 180.
Wrongful Death, *Picard* v. *Libby*, 257.

PRACTICE

The presiding justice has discretionary authority to control oral argument.

It is an abuse of discretion in the instant case for a presiding justice to prohibit an attorney reading to the jury during oral argument such portions of a transcript of testimony of a previous trial as had been admitted by plaintiff as his previous testimony where such testimony was material to the instant case not unduly long, nor incomplete.

In determining whether the refusal was prejudicial, the value of precedent is limited and the Law Court must make a determination from facts in a given case.

Young v. *Carignan*, 332.

The requirements of R. S., 1954, Chapter 107, Section 31 that "all the evidence of the court below, or an abstract thereof approved by the *justice* hearing the case" be reported on appeal is mandatory and jurisdictional. (There was no certificate of approval)

Brewster v. *Dedham*, 418.

PRINCIPALS AND ACCESSORIES

PROBATE

PROCESS

PRO CONFESSO

PUBLIC UTILITIES

There must be a fair compliance with R. S., Chap. 44, Sec. 67 so that if requested by the parties the Commission must set forth in its orders and decrees the facts on which its order is based and what is a "fair compliance" depends upon the issues and the accepted background of each case.

Utilities rates established by contract may be set aside when no longer fair.

The findings by the Commission must stand if supported by any substantial evidence.

If rates must increase the adjustment must be equitable and all should bear the burden.

The judgment of the Commission has a wide area of adjustment of rates in the various classifications within the business of the utility.

Central Maine Power Co. v. *P. U. C.*, 32.

On hearings before the Public Utilities Commission the ordinary rules of evidence apply, yet the mere erroneous admission or exclusion of evidence will not invalidate an order unless substantial prejudice is shown.

If a factual finding is supported by any substantial evidence it is final.

Whether a factual finding is warranted by law on the record is reviewable on exceptions.

A decree of the Public Utilities Commission will be sustained only as to that part supported by substantial evidence.

The "convenience and necessity" referred to in the statutes is that of the public not of individuals or groups.

Ballard v. *P. U. C.*, 158.

PUNISHMENT

QUIET TITLE

QUIT CLAIM

RAPE

The elements of the crime of rape are (1) carnal knowledge of a female (2) by force and (3) against her will.

The words "without her consent" and "against her will" are synonymous.

The uncorroborated testimony of a prosecutrix is sufficient if probable and credible.

The question of previous intercourse or chastity is not material to the question of resisting intercourse.

General reputation for chastity may be admissible.

Questions by the presiding justice as to the location of an alleged offense for the purpose of ascertaining jurisdiction are proper. R. S., 1954, Chap. 145, Sec. 7.

The remarks and conduct of the court in a criminal trial are not contrary to R. S., 1954, Chap. 113, Sec. 104 if they are not prejudicial to the constitutional rights of an accused. The court in its questioning to determine the truth, in its admonition of counsel, or cautioning of witnesses must act in such a manner as not to create a prejudice or indicate an opinion on the facts.

The word "force" is its own best definition, and it is a word understood by everyone.

The degree of resistance is evidence to show consent or the lack of it. Resistance is not necessarily an element of the crime.

State v. *Dipietrantonio*, 41.

RATES

REFEREES

REFORMATION

REMAINDERS

RES JUDICATA

Res judicata means that an issue has been decided by a court of competent jurisdiction. *Res judicata* rests on legal reasons.

Estoppel means preclusion by personal action or by judgment. Estoppel rests on equitable reasons.

Possession is a prerequisite in a trespass action; seisin on title is the issue in a writ of entry.

Where a plaintiff in a trespass action mistakes his remedy *res judicata* will not preclude a proper remedy.

To constitute an estoppel by judgment, it must be proved affirmatively that, in the suit in which the judgment was entered, a right or

STATUTORY CONSTRUCTION

See Fish and Game, *State* v. *Gaudin*, 13.
Maine Employment Security Comm., *Stewart* v. *M. E. S. C.*, 114.
Sureties, *Carpenter, Treas.* v. *Susi, et al.*, 1.

SUMMONS

See Motor Vehicles, *State* v. *Melanson*, 168.

SURETIES

The liability of a bonding company furnishing a statutory bond under R. S., Chap. 23, Sec. 40 for a consideration is a surety, and its guaranty is not to be interpreted under the rule *strictissimi juris;* and the contract will be construed most strongly against the surety and in favor of the indemnity which the obligee has reasonable grounds to expect.

The liability of a bonding company for equipment, appliances, tools, labor and materials furnished to the contractor in the performance of the contract depends upon whether the items are substantially consumed in the performance of the particular contract.

Carpenter, Treas. v. *Susi et al.*, 1.

TAXATION

A Maine customer who leases coin machines from a Massachusetts lessor is not a purchaser at retail sale and hence not liable as such for a sales tax. The lessee in Maine is a *user* but *not* a purchaser.

A foreign lessor is not a user in Maine where he exercises no right or power incident to ownership of machines used by Maine lessees.

At what point an owner or lessor exercises a right or power—not decided.

Trimount Co. v. *Johnson*, 109.

Assessment appeals under the Sales and Use Tax Law are of statutory origin and must be construed strictly according to statute.

Assessment appeals are not a proper subject of reference under statutory provisions where the legislature has seen fit to particularly grant jurisdiction to the Superior Court without right of delegation. R. S., 1954, Chap. 17, Sec. 33.

Morrill v. *Johnson*, 150.

Where because of improper service of process (1) an appellee's motion to dismiss and (2) an appellant's motion for a new order of service are filed, *justice* requires a hearing on the motion for new service prior to the disposition of the motion to dismiss.

There are no statutory provisions prescribing the order in which motions should be considered in such cases.

Blake v. *Yarmouth*, 321.

TITLE

See Equity, *Lovejoy et al.* v. *Coulombe et al.*, 385.
Writ of Entry, *Dudley et al.* v. *Varney et al.*, 164.

TORTS

A physician, who erroneously certifies pursuant to R. S., Chap. 27, Secs. 105, 113 that a person is insane, enjoys an absolute privilege of freedom from tort liability, even though his conduct may amount to gross negligence tantamount to legal malice.

The doctrine of the privilege of protection from tort liability to witnesses for pertinent recitals in judicial proceedings is applicable to physicians who issue certificates of insanity under R. S., Chap. 27, Sec. 105.

Municipal officers of towns are constituted judicial tribunals in insanity commitment cases.

Certifying physicians under R. S., Chap. 27, Secs. 105 and 113 are expert witnesses in emergency restraint and detention proceedings and municipal officers are the judges.

On the occasion of certification under R. S., Chap. 27, Sec. 105, the relation of physician and patient does not obtain.

A witness is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding in which he is testifying, *if it has some relation thereto.* (Emphasis supplied.)

Dunbar v. *Greenlaw*, 270.

A conveyance to an unincorporated company which takes possession under a deed vests a valid title in the company subsequently incorporated so that a corporate grantee which records its deed at 9:00 A. M. and its incorporation papers at 11:00 A. M. holds a valid title.

The law imposes no duty upon a grantor to inquire into the legal competence of a corporate grantee.

The subsequent refusal of the original grantor to execute a confirmatory deed, so-called, is not an interference with the rights of a subsequent grantee.

Where there is no evidence of any overt or positive act preventing the plaintiff from the enjoyment, possession or use of its property, a charge of interference cannot be sustained.

The delivery and acceptance of a deed is one of the important elements in the sale or transfer of real estate, and until delivered is of no effect.

Eastern Milling Co. v. *Flanagan et al.*, 380.

TOWNS

See Municipal Corporations.

TRESPASS

See Damages, *Cosgrove* v. *Fogg et al.*, 464.
Res Judicata, *Bowie et al.* v. *Landry*, 88.

TRIAL JUSTICES

See Appeal, *State* v. *Hoar*, 139.

TRUSTS

A resulting trust arises by implication of law when the purchase money is paid by one person and the land is conveyed to another.

When a trust becomes passive or dry by operation of law the trust becomes executed so that the legal and equitable title rests in the beneficiary.

A decree recorded pursuant to R. S., 1954, Chap. 107, Sec. 29 will effectively remove a cloud upon the title to real estate caused by the title thereto being vested in a dry trust.

Dower rights attach to real estate of an executed dry trust where the rights of innocent purchasers are not involved. Equity will not set aside a voluntary conveyance except in case of fraud, actual or constructive.

Wood, et al. v. *LeGoff*, 19.

Where the beneficiary of a trust adopts her son's daughter, such daughter, upon the death of the beneficiary, cannot share in the income of the trust during the life of her natural father since the right to such income is limited to the issue by right of representation.

Whether adopted children are "issue" of their adoptive mothers, depends upon the intention of the testator as expressed in the language used in the trust indenture.

The Supreme Judicial Court has authority to construe and interpret a trust indenture. R. S., 1954, Chapter 107, Section 4.

Although the Supreme Judicial Court has the power to answer questions of construction of wills or trusts before a contingency occurs, it is unwise and not within the intent of the statute, to advise until the time comes when they need instructions.

In determining intent it is the Court's function to find not what the settlor intended to say, but what she intended by what she said.

The word "issue" is ambiguous and interpretation may be due in a large measure to whether the settlor was himself the adopting parent,

WRIT OF ERROR

A criminal complaint charging in the words of the statute a respondent with attempting to operate a motor vehicle while under the influence of intoxicating liquor is legally sufficient even though the complaint fails to set forth the overt acts which constituted the "attempt." R. S., 1954, Chap. 22, Sec. 150.

A respondent waives objections to matters of form (i. e., a lack of certainty) in a complaint by proceeding to trial without making timely objection by demurrer.

See special concurring opinion. The court has no jurisdiction to consider alleged errors after sentence has been executed by the voluntary payment of fine and costs. The case then becomes moot.

Briggs v. *State*, 180.

WRONGFUL DEATH

Rule 8 does not apply where the Court at the February Term issues an order "Motion granted, Amendment allowed," and there was no continuance of the case with leave to amend. The legal situation is not changed by the plaintiff's filing a paper entitled "Amended Declaration" which included the original declaration plus the two amendments, at the April Term.

The plaintiff in an action of negligence must inform the defendant of the facts sufficient in law to establish a duty of the defendant towards plaintiff and that the act complained of was a violation of that duty.

The allegation in a wrongful death declaration that defendant operated his automobile "so as to drive it off said highway and strike and run into the plaintiff's said intestate" sufficiently apprises the defendant of the particular acts of negligence.

The phrase in the pleadings "for whose exclusive benefit this action is brought" is legally equivalent to the words of the statute, "the amount recovered xxx shall be for the exclusive benefit of xxx (the father and mother)" R. S., 1954, Chap. 165, Sec. 10.

The better practice in pleading is to place the death claim for the statutory beneficiaries and the funeral and other expenses in separate counts although separate counts are not required.

The jury must be directed to find and report the damages found in each type of claim.

Good pleading is designed to make clear and certain the issues.

Picard v. Libby, 257.

See Negligence, *Binette, Admr.* v. *LePage*, 98.