MAINE REPORTS

153

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

JUNE 7, 1957 to APRIL 18, 1958

MILTON A. NIXON

REPORTER

AUGUSTA, MAINE
DAILY KENNEBEC JOURNAL
Printers and Publishers

1958

Entered according to the Act of Congress

BY

HAROLD I. GOSS
SECRETARY OF STATE OF MAINE

COPYRIGHT
BY THE STATE OF MAINE

DAILY KENNEBEC JOURNAL
AUGUSTA, MAINE

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

HON. ROBERT B. WILLIAMSON, *Chief Justice*

HON. DONALD W. WEBBER

[1] HON. ALBERT BELIVEAU

HON. WALTER M. TAPLEY, JR.

HON. PERCY T. CLARKE

HON. FRANCIS W. SULLIVAN

HON. F. HAROLD DUBORD

1 Retired March 26, 1958

---

[1] HON. LESLIE E. NORWOOD, *Clerk*

HON. HAROLD C. FULLER, *Clerk*

[2] HON. FLORENCE C. HOOPER, *Clerk*

1 Died February 27, 1958
2 Appointed Clerk March 1, 1958

ACTIVE RETIRED JUSTICES

OF THE

SUPREME JUDICIAL COURT

HON. EDWARD P. MURRAY

HON. SIDNEY ST. FELIX THAXTER

[1] HON. PERCY T. CLARKE

1 Died August 25, 1957

JUSTICES OF THE SUPERIOR COURT

Hon. HAROLD C. MARDEN
Hon. RANDOLPH WEATHERBEE
Hon. CECIL J. SIDDALL
Hon. LEONARD F. WILLIAMS
Hon. ABRAHAM M. RUDMAN
Hon. CHARLES A. POMEROY
Hon. JAMES P. ARCHIBALD
Hon. ARMAND A. DUFRESNE, Jr.

Attorney General

Hon. Frank F. Harding

Reporter of Decisions

Milton A. Nixon

TABLE OF CASES REPORTED

A

Adams v. Artus 514
Allain, Fillion v. 303
Allen v. Kent 275
Amity v. Orient 29
Artus, Adams v. 514

B

Babine v. Lane Construction Co. et al. 339
Bass, Blanchard v. 354
Baston v. Robbins 128
Bilodeau et al. v. M. E. S. C. et al. 254
Blanchard v. Bass 354
Breton, Ex'x., Kimball et al. v. 476
Brown, Harding v. 331
Brown v. State 512
Brunswick and Topsham Water Dist. v. Hinman Co. 173

C

Cameron v. Stewart 47
Central Maine Power v. P. U. C. 228
Chandler, Stern v. 62
Cianchette, McKinnon et al. 43
Cole's Express, P. U. C. v. 487
Cox et al. v. Sinclair 372
Croteau, State v. 126

D

Daigle v. Yesbec et al. 76
Davis et al., Leavitt et al. v. 279
Day's, Inc., York v. 441
Deschaine v. Deschaine 401
Dumais v. Dumais 24

F

Farmington Dowel Prod. Co. v. Forster Mfg. Co. 265
Farrin Bros. and Smith, Palleria v. 423
Fillion v. Allain 303
First Nat'l Bank of Boston v. Maine Turnpike 131
Forster Mfg. Co., Farmington Dowel Prod. Co. v. 265

G

Getchell, et al. v. Lane Constr. Co. et al. 335
Gregory v. James 453

H

Haines, State v. 465
Harding v. Brown 331
Harmon v. Roessel 296
Henderson, State v. 364
Hinckley v. Johnson 517
Hinman Co., Brunswick and Topsham Water Dist. v. 173
Hornbrook, Inc., Young v. 412
How, Pierce v. 180

J

James, Gregory v. 453
Johnson, Hinckley v. 517
Johnson, Lipman Co. et al. v. 347
Johnson, Morrill v. 460
Johnson v. Parsons, Admr. 103

K

Kent, Allen v. 275
Kimball et al. v. Breton, Ex'x. 476

L

Lane Constr. Co. et al., Babine v. 339
Lane Construction Co. et al., Getchell et al. v. 335
Larou v. Table Talk Distr., Inc. 504

Larsen v. Zimmerman 116
Leavitt et al. v. Davis et al. 279
Libby, State v. 1
Linnell et al. v. Smith et al. 288
Lipman Co. et al. v. Johnson 347
Lyford, Ray v. 408

Mac, Mc

MacNeill v. Madore 46
McKinnon et al. v. Cianchette 43
McKinnon, State v. 15
McMann v. Reliable Furniture Co. 383
McNally v. Patterson 115

M

Madore, MacNeill v. 46
Maine Turnpike, First Nat'l Bank of Boston v. 131
Memoriam, Hon. Raymond Fellows, Chief Justice 522
Memoriam, Hon. William B. Nulty, Associate Justice 549
M. E. S. C. et al., Bilodeau et al. v. 254
Moore, Personal Finance Co. v. 122
Morrill v. Johnson 460

N

Newport Trust Co. v. Susi et al. 51

O

Opinion of Justices (Educational Aid and Reorganization of School Adm. Units) 469
Opinion of Justices (Educational Aid and Reorganization of School Administrative Units) 216
Opinion of Justices (Maine Industrial Building Authority) 202
Orient, Amity v. 29

P

Palleria v. Farrin Bros. and Smith 423
Parsons, Admr., Johnson v. 103
Patterson, McNally v. 115
Personal Finance v. Moore 122

Pierce v. How 180
Poretta v. Superior Dowel Co. 308
P. U. C., Central Maine Power v. 228
P. U. C. v. Cole's Express 487

R

Ray v. Lyford 408
Reliable Furniture Co., McMann v. 383
Robinson, State v. 376
Robbins, Baston v. 128
Roessel, Harmon v. 296
Rule 5 Amended 382
Rule 8, Rules of Court (Indigent Persons) 221
Rule 43, Rules of Court —Equity Rules (Court Records) 224
Rule 44, Rules of Court (Court Records) 224

S

Schofield, White v. 79
Silva, State v. 89
Sinclair, Cox et al. v. 372
Smith et al., Linnell et al. v. 288
State, Brown v. 512
State v. Croteau 126
State v. Haines 465
State v. Henderson 364
State v. Libby 1
State v. McKinnon 15
State v. Robinson 376
State v. Silva 89
Stern v. Chandler 62
Stewart, Cameron v. 47
Superior Dowel Co., Poretta v. 308
Susi et al., Newport Trust Co. v. 51
Sylvester v. Twaddle 40

T

Table Talk Distr., Inc., Larou v. 504
Twaddle, Sylvester v. 40

W

White v. Schofield 79

Y

Yesbec et al., Daigle v. 76
York v. Day's, Inc. 441
Young v. Hornbrook, Inc. 412

Z

Zimmerman, Larsen v. 116

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

STATE
vs.
ALBERT J. LIBBY

Kennebec. Opinion, June 7, 1957.

Exceptions. Particulars. Mistrial. Blood Tests. Witnesses. Experts. Opinions. Evidence. Automobiles. Special Verdicts. Accident Reports. Manslaughter.

Where a bill of exceptions indicates only the question asked of a witness, but fails to indicate the answer to such question or the manner in which the objecting party is aggrieved—such exception is not strong enough to stand alone.

The incorporating by reference into a bill of exceptions of the evidence does not obviate the requirement that the exceptions disclose a succinct and summary statement of the specific grounds relied upon.

A bill of particulars in a criminal case is not allowed as a matter of right, nor may it be employed to compel the State to disclose all its material evidence; it should merely advise respondent of matters to be put in issue concerning which a defense should be prepared.

Mistrial is a matter of discretion to be ordered when the trial cannot proceed with the expectation of a fair result.

Where a respondent requests a blood sample to be taken, the failure of the arresting officers to advise him of his constitutional rights or that he is being charged with a crime does not violate his constitutional rights.

One need not be an expert witness to state an opinion whether another is intoxicated or under the influence. The weight to be given such testimony is for the jury under the proper instructions.

It is within the scope of the testimony of a properly qualified expert to state that any individual with .206% weight of alcohol in his blood is definitely under the influence.

An automobile mechanic may qualify as an expert on the mechanical condition of an auto.

It is not error to strike respondent's answer that he was at all times in control of his car where he has been given full opportunity to relate every essential fact from which the jury might determine the issue.

An instruction need not be given in the form requested.

Written accident reports as well as oral statements made in the course of and as a part of the preparation of such reports are inadmissible under R. S. 1954, Chap. 15, Sec. 7, as amended by P. L. 1955, Chap. 306, although police officers and others may give testimony concerning observations and conversations which are otherwise admissible under well established rules of law.

When an unlawful act is shown beyond a reasonable doubt to be the proximate cause of a homicide, the result is manslaughter.

ON EXCEPTIONS.

This is a criminal action for manslaughter before the Law Court upon exceptions and appeal. Exceptions overruled. Appeal denied. Judgment for the State.

Robert A. Marden, for plaintiff.

Bartolo Siciliano, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

WEBBER, J. On July 24, 1955 an automobile operated by the respondent struck and killed a four year old child. The respondent was subsequently tried by a jury and convicted of the crime of manslaughter. His appeal and exceptions are now before us.

Forty-two separate exceptions were taken in the course of the trial and are recited in the bill of exceptions. Of this

number, twenty-two failed to indicate in what manner the respondent claims to have been aggrieved by the ruling of the court. These exceptions fall into a pattern. A question by the State's attorney was admitted over objection and the witness was permitted to answer. The bill of exceptions furnishes us with the question, the colloquy in some instances, the objection and the exception. In not one of these twenty-two instances are we furnished with the answer given by the witness. For aught that appears in the bill of exceptions the answer may have been innocuous, or favorable to the respondent, or at least harmless. It is true that the bill of exceptions incorporates the report of the evidence by reference, but that does not avoid the necessity of making the bill of exceptions strong enough to stand alone. As was said in *Dennis* v. *Packing Co.*, 113 Me. 159 at 161:

> "It is true in this case, as it was in *McKown* v. *Powers* (86 Me. 291), that the record of the evidence is made a part of the bill of exceptions, but that does not help the matter. It is not a 'summary' bill, as contemplated by statute. It is not an infrequent practice in framing a bill of exceptions to refer to the evidence and make it a part of the bill. This is not improper. The evidence may help to illuminate the exceptions. But neither the statute, nor approved practice, contemplates that a reference in the bill to the body of the evidence, or the incorporation of the evidence as a part of the bill, is to take the place of succinct and summary statement of the specific grounds of exception in the body of the bill itself. In view of the statute and the rule, we do not think it is the duty of the court to hunt through a mass of undigested, and sometimes indigestible, testimony, to find the points of exception, and determine their value."

The practical difficulty is demonstrated by the fact that these twenty-two faulty exceptions are scattered among 579 pages of testimony without any specific suggestion as to where they may be found.

Certain other exceptions are so frivolous or devoid of merit as to require no consideration or comment. We deal only, therefore, with those exceptions which raise alleged errors of law.

Exception No. 1

The indictment for manslaughter was in the usual statutory form. The court, upon motion of the respondent, ordered the State to file a bill of particulars "setting forth the unlawful, illegal, wrongful or negligent act or acts then and there being committed by the said respondent which resulted in the wrongful and unlawful death of the said Philip Picard, for which said death the said respondent stands charged." In compliance with this order, the State seasonably filed such a bill of particulars in which was inserted the essential factual background such as time, place and the like, and in which were specific allegations

> "that said motor vehicle was mechanically and otherwise unfit to be operated upon the public highway; that said motor vehicle was then and there being operated at an excessive and unlawful rate of speed, and otherwise in an unlawful, illegal, wrongful, negligent and careless manner; that said Albert J. Libby while then and there operating said motor vehicle was then and there under the influence of intoxicating liquor; that all of the foregoing acts then and there illegally committed by the said Albert J. Libby were the proximate cause of the death of Philip Picard."

There were inserted other factual allegations not material here. The respondent then filed a motion for further bill of particulars alleging in essence that the State had failed to advise the respondent as to what particular mechanical defect or defects were complained of, as to what specific excessive and unlawful rate of speed was alleged, and in general setting forth that the bill of particulars was "too broad, vague, indefinite and informal to properly and fully apprise

the said defendant of the nature and cause of the accusation with which he stands charged." This motion was denied and exceptions taken.

We said in *State* v. *Hume,* 146 Me. 129 at 138:

> "We see no merit in this exception. The accused, in a criminal case at common law, is not entitled as a matter of right to a bill of particulars. The reason is that in criminal cases there is directness and particularity in the averments of the indictment, and there is no need, generally for a statement of the matters to be given in evidence to be furnished to the respondent. The court may, however, in its discretion require a bill of particulars to be filed. * * * * The effect of a bill of particulars is to reasonably restrict the proofs to matters set forth in it. The construction placed on a bill of particulars, however, should not be 'too narrow.' It should be 'fairly construed.' * * * * The bill of particulars is not a set of interrogatories, *nor is it employed to compel the state to disclose all its material evidence for conviction."* (Emphasis supplied)

So here the court saw fit in its discretion to order a bill of particulars filed. That document sufficiently advised the respondent as to the matters which would be put in issue and as to which a defense should be prepared. The respondent could properly ask no more.

EXCEPTION NO. 2

At the close of the State's case, the respondent offered a motion for a mistrial. The grounds asserted were (a) the denial of the motion for a further bill of particulars; (b) the introduction of testimony that the respondent was intoxicated at the time of the alleged crime; and (c) the introduction of testimony by the investigating officers of alleged admissions and statements made by the respondent at the scene of the accident. The rules governing this exception are too well known to require amplification or citation. Mis-

trial is ordered only in those rare cases where the trial cannot proceed further with the expectation of a fair result. The ordering of a mistrial is within the sound discretion of the presiding justice and exception lies only to an abuse of the discretion. Nothing even remotely resembling such a situation is presented here.

EXCEPTIONS NO. 3, 4, 5, 6, 7, 8, 9

At the close of all the testimony, the respondent addressed to the court several motions for directed verdicts of not guilty, all of which were denied, and exceptions were taken. As all of the same issues are raised on appeal and will be hereinafter discussed in connection therewith, it is unnecessary to consider them here.

EXCEPTION NO. 15

Testimony was introduced that the respondent at his own request permitted a doctor at the scene of the accident to take a blood sample from his arm to be used for analysis. The witness described the taking of the sample. After this testimony had been given without objection, counsel for the respondent moved that the last answer be stricken on the ground that it had not then appeared that the respondent had been advised of his constitutional rights and guarantees or informed that he was charged with any crime. The motion was denied and exception was taken. It is enough to say that the respondent was entitled to a reasonable opportunity to have the blood sample taken if he so desired and if he believed the evidence might be of value to him in event any criminal charge might later be laid against him. There was certainly no error in permitting an eye witness to describe the making of the request by the respondent and the taking of the blood sample pursuant to that request. Neither the right against self-incrimination nor any other constitutional right was involved in the situation there presented. On the contrary, the evidence was a proper pre-

liminary to the subsequent admission of the result of analysis of the blood sample which disclosed a percentage of alcohol substantially higher than that required by statute to constitute prima facie evidence that respondent was then under the influence of intoxicating liquor. R. S. 1954, Chap. 22, Sec. 150.

EXCEPTIONS NO. 18 AND 19

Testimony was admitted which reflected the opinion of the witness as to the condition of the respondent as to sobriety immediately after the fatal accident. Although it is not entirely clear as to how the respondent asserts he was aggrieved by the admission of this testimony in the form in which it was given, we gather that his basic contention is that a non-expert witness may state his opinion that one was intoxicated, but may not state his opinion that one was under the influence of intoxicating liquor. We have not heretofore recognized such a distinction. See *State* v. *Hamilton,* 149 Me. 218. Unfortunately, the results of overindulgence in the use of alcoholic beverages are of such common knowledge, and the manifestations of some degree of excessive drinking so frequent, that we need not be doctors or psychiatrists to form a rational opinion as to whether another is exhibiting the adverse influence of intoxicating liquor or is in fact drunk. Experience shows that juries are aided rather than hindered by hearing the opinions of eye witnesses before reaching a final and decisive conclusion as to whether a respondent was sober or under the influence or drunk. These are the factors which make the evidence admissible. The weight to be given to the opinion of the witness by the jury will depend upon the usual factors such as opportunity of the witness to observe, his demeanor, bias, interest, and the like. A presiding justice commits no error in permitting a police officer who observed the respondent at the scene of the accident to state his opinion that the respondent was then under the influence of intoxicating liquor.

EXCEPTION 26

A witness with special knowledge, training, and experience in the field of blood sample analysis and the effect of alcohol in the body was permitted to testify that a chemical analysis which he performed of the blood sample taken from the body of the respondent disclosed .206% by weight of alcohol in the blood; that any individual with that alcohol level in his blood would be definitely under the influence of intoxicating liquor; and that he considered that at the level .15%, any individual is definitely under the influence of intoxicating liquor regardless of his stature, weight, height, or any other condition. At the close of this testimony, respondent's counsel moved that all of it having "reference to the effect on any given individual of any given amount of alcohol" be stricken on the ground that the witness was not qualified to give that opinion. Motion to strike was denied.

Whether an expert witness is qualified is a preliminary question to be determined by the presiding justice. His decision is conclusive unless it clearly appears that the evidence was not justified, or that it was based upon some error in law. *Hunter* v. *Totman,* 146 Me. 259, 268. The record before us discloses that the expert clearly possessed special skill and experience and a knowledge of the results of technical research in his field. The opinion expressed was within the scope of the stated qualifications.

EXCEPTION NO. 32

Testimony of an automobile mechanic with many years of experience was given with relation to the mechanical condition of the respondent's car. Objection was offered solely on the ground of insufficient qualifications. Under applicable rules already stated, the preliminary question was correctly decided by the presiding justice. Furthermore, the respondent fails to show prejudice where questions and answers related wholly to the mechanical condi-

tion of the automobile in view of the special verdict by the jury which expressly based a finding of guilt on other grounds adequately supported by credible evidence.

EXCEPTIONS NO. 39 AND 40

On direct examination the respondent was asked:

> "Q. Were you in full control of your car at all times up until the moment you made that turn to the left?"
>
> "A. I was."

On motion, this answer was stricken. The witness was declaring his judgment and conclusion on an issue to be decided by the jury, and his answer was given in response to a question which tended to suggest the expected answer. During his examination the witness was afforded an opportunity to relate every essential fact from which the jury might determine for itself whether or not the respondent was in full control of his vehicle. There was no error in preventing the witness from judging that issue. The same rule governs exception 40.

EXCEPTION NO. 42

At the completion of the charge to the jury the presiding justice was requested by the respondent's counsel to give the following instruction:

> "Such negligence (gross and culpable) must be proved as well as the fact that the death was the direct result of such negligence."

It is unnecessary to consider this exception in view of the fact that if any error arose from the refusal to give the instruction in the form requested, such error was effectively cured by the special verdicts which specifically base conviction upon the violation of certain statutes, which violations the jury, guided by proper instructions as to the applicable law, deemed to be the proximate cause of the fatal accident.

OTHER EXCEPTIONS

Certain other exceptions, although not presented in proper form for consideration, appear to rest on erroneous legal theory which may be discussed briefly in general terms.

Respondent's counsel sought repeatedly to exclude testimony of police officers as to facts observed by them at the scene of the accident and their conversations with the respondent which included his account of the accident, and further related to his operation of his motor vehicle and his condition as to sobriety. The theory upon which exclusion apparently was sought rested upon counsel's interpretation of the statute dealing with the reporting of highway accidents. R. S. 1954, Chap. 15, Sec. 7 as amended by P. L. 1955, Chap. 306, makes provision for the preparation and filing of accident reports by the investigating officers and by the operators of the vehicles involved, and contains the following relevant provisions:

> "The driver of any vehicle involved in an accident resulting in injuries to or death of any person or property damage to the estimated amount of $100 or more, or some person acting for him, or the owner of said vehicle having knowledge of the accident should the operator of same be unknown, shall, immediately by the quickest means of communication, give *notice* of the accident either to a state police officer, sheriff or other police official, or to the police department of the municipality wherein the accident occurred. * * * Every such *notice* received by any such official or department shall be promptly investigated.
>
> Every law enforcement officer who investigates a motor vehicle accident of which report is required, shall, either at the time and scene of the accident or elsewhere, interview participants and witnesses and shall, within 48 hours after completing the investigation, transmit his *written report* to the chief of the state police.

> All accident *reports* made by investigating officers shall be for the purpose of a statistical analysis and for accident prevention purposes and shall not be admissible in evidence in any trial, civil or criminal, arising out of such accident, * * * *.
>
> The driver of any vehicle involved in an accident resulting in injury to or death of any person or property damage to the estimated amount of $100 or more, or some person acting for him, shall, within 48 hours after the accident, make a *written report* of it to the chief of the state police. The chief may require drivers of vehicles involved in any such accident to *file* supplemental *reports* whenever the original *report* is insufficient in the opinion of the chief.
>
> Such *report* shall be without prejudice and the fact that it was made shall be admissible in evidence solely to prove a compliance with this section. No *report*, or any part thereof, or statement contained therein, or statement made, or testimony taken at any hearing before the secretary of state or any of his deputies * * * shall be admissible in evidence for any purpose in any trial, civil or criminal, arising out of such accident." (Emphasis supplied)

It will be noted that the first requirement is that of notice of the accident, that is, the imparting of information that such an accident has occurred. Such notice may be, and usually would be, oral. It is contemplated that notification that an accident has occurred will be followed by investigation, the assembling of details, and subsequent written reports. The written reports required by the statute are by its terms rendered inadmissible in any proceeding except to prove compliance with the statute itself. It was never intended that the statute should preclude the giving of testimony by police officers or others covering observations and conversations which would otherwise be admissible under well established rules of law. *Lawyerson* v. *Nadeau,* 136 Me. 361. We can see that the driver of a vehicle involved in an

accident might and doubtless should be protected as to oral statements made in the course of and as a part of the preparation of the written report required of him by statute. One cannot be permitted to do by indirection what he is forbidden to do directly. But the evidence offered and admitted here was not of that nature. Under these circumstances the statute affords him no protection. The theory that the statute precludes officers from giving oral testimony as to facts observed and voluntary statements made by respondent during the ordinary process of investigation would, if adopted, render it nearly impossible to obtain convictions in cases which involved violations of highway safety statutes. The Legislature has merely sought to insure the making of the desired written reports by providing for the exclusion of such reports from evidence.

APPEAL

The jury could find upon the evidence presented that the respondent was operating his car proceeding toward his home. As he came over the crest of a hill he overtook the decedent, a child four years old, and his older brother walking along the roadway. While the respondent's car was still some distance in the rear of the two boys, the decedent left his brother and ran to the right shoulder of the road. The respondent veered to the right and proceeded for approximately seventy-five feet with his two right hand wheels in the grass on the right hand shoulder, after which he veered to the left, crossed to the left hand ditch, traveling in an arc, and came to rest with his car overturned. While his car was proceeding on this course it struck the decedent with such force as to kill him instantly and to throw his body some distance. A short time after the accident occurred a doctor who had been called to the scene of the accident took a blood sample from the respondent's arm at his request which, upon analysis, was shown to contain .206% by weight of alcohol in the blood. Witnesses on the scene immediately after

the accident observed the odor of alcohol on the respondent's breath and observed other symptoms from which they formed and expressed the opinion that he was under the influence of intoxicating liquor. There was evidence that before the blood sample was taken the doctor sponged and cleaned certain cuts and superficial abrasions on the respondent's body with alcohol swabs. There was evidence from expert witnesses as to the amount of alcohol which might reasonably be expected to find its way into the blood stream as a result of this treatment. In addition, there was some testimony by way of conjecture and surmise as to the possibility of the presence of vestigial alcohol moisture in the syringe used to take the blood sample. Expert testimony was given as to the normal rate of absorption of alcohol into the blood stream and the probable rate of evaporation of alcohol in the form of moisture in a syringe. From all of this testimony, the jury could reasonably conclude that the respondent was concealing the truth when he denied that he had had anything to drink in the nature of an alcoholic beverage, and that in fact he had imbibed alcoholic beverages in sufficient quantity to render him well under the influence of intoxicating liquor. On the basis of testimony as to the speed of the respondent's vehicle, the distance it traveled before coming violently to a stop completely overturned, its erratic course, the position of the decedent off the traveled portion of the highway, and the respondent's apparent failure or inability to stop his car or sound his horn or reduce his speed or safely steer the vehicle past the decedent, the jury could justifiably conclude that the death of the decedent resulted directly from the fact that the respondent was then and there operating his vehicle while under the influence of intoxicating liquor. The jury under proper instructions was requested to return special verdicts if they should find the respondent guilty, which verdicts would indicate specifically whether or not they found that death was proximately caused by respondent's operation of a me-

chanically unfit motor vehicle, or by his operation of the vehicle at an excessive and unlawful rate of speed, or by his operation of the vehicle while under the influence of intoxicating liquor. By their special verdicts the jury indicated that they found the respondent guilty on the basis of all three of these charges. It becomes unnecessary to review the evidence with relation to the mechanical condition of the car and especially its brakes, or with relation to the speed at which the vehicle was traveling, in view of the fact that the evidence amply supports the finding of operation under the influence. The operation of a motor vehicle while under the influence of intoxicating liquor is made unlawful by statute and is denominated *malum prohibitum.* When such an unlawful act is shown beyond a reasonable doubt to be the proximate cause of a homicide, the result is manslaughter. *State* v. *Hamilton, supra; State* v. *Budge,* 126 Me. 223. The evidence was in many respects conflicting, but there was credible evidence which, if believed, resolved every reasonable doubt and supported a finding of guilt. We cannot say upon this record that the jury erred in accepting that evidence as representative of the truth. The motion for a new trial must be denied. The entry will be

Exceptions overruled. Appeal denied. Judgment for the State.

STATE OF MAINE
vs.
NORMAN McKINNON

Lincoln. Opinion, June 21, 1957.

Criminal Law. Constitutional Law. Fish and Game. Game Preserves. Hunting.

R. S. 1954, Chapter 37, Sections 148 and 149 as amended, creating a game preserve and prohibiting, except as provided, the carrying of firearms or hunting within the limits of a State game preserve are not unconstitutional as violating Sections 6, 16, 21 of Article I of the Constitution of Maine.

There is no individual ownership in wild animals; they are the property of sovereignty; their conservation, by the creation of a game preserve on an individual's land is not a "taking" of property without just compensation.

Where a respondent whose home is located upon a game preserve is charged with possession of firearms and it does not appear whether the possession was for the purpose of hunting or whether the possession was incidental to his constitutional right to bear arms, the facts are inadequate as a basis of decision.

Williamson, C. J., concurring specially on the ground that consideration of Article I, Section 16, Constitution of Maine, not necessary to a decision of the case.

ON REPORT.

This is a criminal action for hunting and possessing firearms on a state game preserve. The case is before the Law Court upon report and agreed statement. Judgment for the State as to the first count (hunting). Report discharged as to second count.

James Blenn Perkins, for plaintiff.

Niehoff & Niehoff, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ. WILLIAMSON, C. J., concurs specially by separate opinion and is joined by DUBORD, J.

TAPLEY, J. On report. This is a criminal case originating in the Superior Court, within and for the County of Lincoln. The Grand Jury returned an indictment at the May Term, 1956 charging the respondent, Norman McKinnon, in two counts with (1) hunting game on a game preserve, and (2) having in his possession a firearm, to wit, a shotgun, while on the game preserve. By stipulation, the case is reported to the Law Court on an agreed statement of facts.

AGREED STATEMENT OF FACTS

1. The respondent admits the commission of the acts alleged in the indictment, to wit, hunting on a game preserve and having in his possession a firearm in the nature of a shotgun, but denies that such acts violated any law of the State of Maine.

2. That the acts were committed on land owned by the respondent in fee; that he was in possession of the land; that of the 285 acres of land which he owns 205 acres are within the Jefferson and Whitefield Game Preserve; that he has 80 acres under cultivation, 25 acres of which are on the game preserve; that all of his buildings, consisting of dwelling house and barns, are situated within the boundaries of the game preserve.

3. The respondent nor any predecessor in title ever consented or agreed that the land of the respondent should be made a game preserve and that he never received any compensation for such use. He has not voluntarily given up or surrendered his right to hunt or carry arms on his own land.

4. The sole issue in the case is whether the provisions of Chap. 37, Secs. 148 and 149, R. S. 1954, as amended, are valid as to this respondent or whether they are unconstitutional in that they violate the provisions of Secs. 6, 16 and 21 of Art. I of the Constitution of Maine.

Sec. 148 of Chap. 37, R. S. 1954, reads:

> "**Hunting in game preserves; hunting or possession of firearms within limits of game preserves.**—No person shall at any time hunt, trap, chase, catch, kill or destroy any wild birds or wild animals or have in his possession firearms of any description within the limits of any game preserve or closed territory except as provided in this chapter, and except that the commissioner is authorized to regulate the trapping of wild animals thereon and to use such means as may seem necessary to exterminate vermin of any description in all game preserves and sanctuaries and in any other localities where damage is being done."

Sec. 149 of Chap. 37, R. S. 1954, in part reads:

> "**Game preserves and sanctuaries.**—No person shall, except as herein provided, at any time, trap, hunt, pursue, shoot at or kill any wild animal or any game or other wild birds within the following described territories: - - - -."

The amendment to Sec. 149, being Chap. 237, P. L. 1955, creates the game preserve designated as Jefferson and Whitefield. The Legislature has established the Jefferson and Whitefield Game Preserve by legislative enactment and has regulated its use by prohibiting any person to hunt or to have in his possession firearms of any description within its limits.

The respondent, although admitting the acts of hunting and having in his possession a firearm while on the game preserve, proposes that these acts in so far as he is concerned do not violate the law and, for argument, says the

legislative acts creating the game preserve and prohibiting hunting and possession of firearms are unconstitutional. The reasons assigned for his contentions are: (1) that the State by the creation of a game preserve on his land has taken his property without just compensation; (2) that he has been denied the right which the Constitution gives him of bearing arms or keeping arms on his own property, and he further says that he is the object of discrimination in that he is not permitted to have possession of firearms for potential use for protecting crop and orchard damage on his property, as permitted by Chap. 37, Sec. 94, sub-title I, R. S. 1954.

We first consider the subject of taking respondent's land without just compensation. The animals which are objects of the hunt are naturally wild. There is no right of individual ownership as they are property of the sovereignty. There can be no question of the right of the State to conserve, protect and regulate its wild life. In *State* v. *Snowman*, 94 Me. 99, on page 111, the court says:

> "The fish in the waters of the state and the game in its forests belong to the people of the state in their sovereign capacity who, through their representatives, the legislature, have sole control thereof and may permit or prohibit their taking." - - - - -
>
> "When the state permits the taking of fish and game, it has full power and authority to regulate such taking. It may impose such conditions, restrictions and limitations as it deems needful or proper."

The results of proper and efficient wild life conservation in large measure promote the economic welfare and well-being of the citizenry of the State. One of the most important and effective means of wild life conservation is the medium of the game preserve established and regulated by legislative enactment. The Legislature has designated an area named Jefferson and Whitefield Game Preserve to be one where

the laws pertaining to the prohibition of hunting and possession of firearms are applicable. It happens in this case that the respondent owns a part of the land within the preserve, dwells there and cultivates a portion of the soil. His land is being used without his consent and without compensation, and of this he complains.

The establishment of the game preserve by the State does not constitute a "taking" within the meaning of the word as used in its constitutional sense. *Opinion of the Justices,* 103 Me. 506, treats of the right of the State to regulate, without compensation to the owner, and cutting or destruction of trees growing on privately owned, wild or uncultivated land in order to prevent injurious droughts and to preserve and maintain natural water supplies. On page 511, the justices had this to say:

> "Regarding the question submitted in the light of the doctrine above stated (being that of Maine and Massachusetts at least) we do not think the proposed legislation would operate to 'take' private property within the inhibition of the Constitution. While it might restrict the owner of wild and uncultivated lands in his use of them, might delay his taking some of the product, might defer his anticipated profits, and even thereby might cause him some loss of profit, it would nevertheless leave him his lands, their product and increase, untouched, and without diminution of title, estate or quantity. He would still have large measure of control and large opportunity to realize values. He might suffer delay but not deprivation. While the use might be restricted, it would not be appropriated or 'taken.' "

This opinion of the justices sanctions the action of the State in promoting conservation by imposing upon a land owner the necessity of submission to rules and regulations in the use of his land. The reasoning of this opinion is most applicable to the instant case. The law authorizing the State

to establish game preserves on the property of a private owner does not take from him any title, dominion of ownership or essential use. These elements of ownership remain inviolate. The legislative act does nothing more than prohibit hunting and possession of firearms within the preserve without taking any of the essentials of ownership. The State was within its sovereignty powers to establish the game preserve without violating any constitutional rights of the owner by its establishment. See *Cushman* v. *Smith*, 34 Me. 247; *Bauer* v. *Game, Forestation and Parks Commission, et al.*, 293 N. W. 282 (Neb.); *Platt* v. *Philbrick*, 47 P. (2nd) 302 (Cal.).

It is well at this point to consider the legality of the respondent's position from the standpoint of the charges against him. The first count of the indictment alleges that he hunted game on the Jefferson and Whitefield Game Preserve. There is no factual problem as the respondent admits he did hunt game on the preserve but says in doing so he violated no valid law in so far as he was concerned. He argues that as he owns the property he has a legal right to hunt game thereon even though it also is a game preserve. It has been demonstrated that the State has the authority to regulate the wild life of which it is the owner. This right of regulation applies to all land contained within the borders of the State, whether privately or publicly owned. There is nowhere to be found in the Statutes that the State gives the right or privilege of a land owner to hunt game on his own property excepting he may hunt without a license on land where he is actually domiciled and *which is exclusively used for agricultural purposes* (Chap. 37, Sec. 73, sub-title 1, R. S. 1954) or he may kill deer on his own land when crop and orchard damage is done by them (Chap. 37, Sec. 94, subtitle 1, R. S. 1954).

The agreed statement of facts do not state that this respondent's land was used exclusively for agricultural pur-

poses nor that his activities concerned the killing of deer who were causing crop or orchard damage, so the acts of the respondent do not come within the provisions of these sections. The respondent has admitted hunting game on the preserve, as alleged in the first count of the indictment, and has failed to show the statute, upon which the prosecution is based, is unconstitutional or otherwise invalid as to the charge against him of game hunting.

The respondent attacks the second count of the indictment which alleges that he "did then and there have in his possession a firearm, to wit, a shotgun, while on the Jefferson and Whitefield Game Preserve - - - -." He admits the act of possession of a firearm, to wit, a shotgun, as stated in the indictment, but he says in defense that the law upon which the count in the indictment was based is unconstitutional as it violates Art. I, Sec. 16 of the Constitution of Maine: "Every citizen has a right to keep and bear arms for the common defense; and this right shall not be questioned." The respondent contends the law prohibiting persons from possessing firearms on a game preserve is not applicable to him as he, being the owner and domiciled on the land, is entitled under this constitutional provision to have firearms in his possession.

The court is not fully informed as to the detailed facts concerning possession of the shotgun as the agreed statement of facts goes no further than to advise the court, "The Respondent did the Acts alleged in the indictment - - - - and which acts were done on the land owned by the Respondent in fee." The indictment charges, by separate counts, two distinct offenses, one, hunting on a game preserve, and the other, unlawful possession of a firearm on a game preserve. There appears to be no legal reason why the respondent cannot be convicted of both offenses if the facts support the alleged violations. See *State* v. *Beaudette,* 122 Me. 44. The facts submitted bearing on possession are very meager.

The only available facts are (1) an indictment charging hunting and possession and (2) admission on part of respondent that he did hunt and did have in his possession a gun. Does the respondent mean that he had possession of the gun as part of the act of hunting? Does he admit possession of the gun under circumstances which would be naked possession and not connected with hunting activity? Was the respondent charged with possession of the firearm while it was contained within the confines of his own home? The answers to these questions are important to know before a determination can be made as to the respondent's legal and constitutional rights under the second count. The factual aspect of this case in respect to the second count is woefully inadequate. If the possession of this firearm was for the purpose of and used in hunting, then it could not possibly come within the constitutional rights of the respondent in bearing arms for the common defense while, on the other hand, if possession was not a part of the act of hunting, the constitutional rights of the respondent could be involved. The facts presented to us do not permit of a decision as to the second count. In the case of *State* v. *Corriveau,* 131 Me. 79, at page 85, the court said:

> "The Law Court is asked to say whether he is guilty or innocent, and that upon what it holds to be but a partial statement of the facts essential to determination.
>
> This we decline to do."

See also *Carey* v. *Cyr, et al.,* 150 Me. 405.

The order is,

Judgment for the State as to the first count in the indictment. Report discharged as to the second count.

CONCURRING OPINION

WILLIAMSON, C. J. I concur in the result. The defendant has suffered no loss of rights under the Constitution of Maine either in the creation of the game preserve or in the prohibition against hunting. Further, the report is not sufficiently complete for decision on the charge of possession of a shotgun on the preserve.

It is a well settled principle of judicial administration to refrain from passing on the constitutionality of legislation unless compelled to do so by the case. Great rights rest upon Section 16 of our Declaration of Rights, which reads:

> "Every citizen has a right to keep and bear arms for the common defense; and this right shall never be questioned."

I file this concurring opinion only to make it plain beyond any doubt that I have not deemed it necessary to consider the application of Art. I, Sec. 16 of our Constitution to the problem presented by the record in this case.

NATALIE D. DUMAIS, LIBLT.
vs.
ALCID F. DUMAIS

Androscoggin. Opinion, June 26, 1957.

Divorce. Hearings. Judgments. Courts. Vacation. Words and Phrases.

"Vacation" as referred to in R. S., c. 113, Sec. 39 means one, single, non-recurring period of time between the end of the Term (of Court) last adjourned and the beginning of the very next.

Jurisdiction in excess of that vested by statute cannot be conferred by consent.

The Legislature, in P. L. 1949, Chap. 311, Secs. 1 and 2, intended that the vacation jurisdiction of the Superior Court Justice, of any given divorce libel (whether that jurisdiction devolved upon him as presiding justice of the court last adjourned or was assumed by him during vacation) must be culminated by him by a decree rendered in the same vacation or forfeited totally to the next succeeding Term of Court, to be availed of by him entirely *de novo*, if at all, following the latter Term.

ON EXCEPTIONS.

This is an action of divorce. The case was pending and in order at the September Term where an *ex parte* hearing was had by agreement that as to alimony and support a contested hearing would be held later and that a decree might issue in November or vacation following. The contested hearing was had on October 31 in vacation. The November Term adjourned December 13. In vacation December 21, a decree of divorce issued with provisions for alimony and support. Exceptions were filed and allowed. Exceptions sustained.

Frank W. Linnell, for Liblt.

Edward J. Beauchamp,
Berman & Berman, for Libelee

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

SULLIVAN, J. This divorce case was pending and in order for disposition at the September A. D. 1956 term of the Superior Court. An *ex parte* hearing upon the merits of the prayer for divorce was thereupon had before the presiding justice without contest from the libelee. The parties agreed that as to alimony and support of children there would be a contested hearing before such justice at some later date at the convenience of court and counsel, and that the decree might be rendered during the November Term or in vacation following that term.

After adjournment of that September Term and in vacation on October 31, A. D. 1956, there was a full, contested hearing upon the issues of alimony and support of children before the same justice. The next term succeeding the adjourned September Term of court convened in November with another justice presiding and that session adjourned upon December 13, A. D. 1956. On December 21, A. D. 1956, and in court vacation, the justice who heard this case filed a decree of divorce with alimony, custody and support of children awarded. Such judication bore the caption "Superior Court, In Vacation December 21, 1956."

At no time during the proceedings did the libelee protest or challenge the authority of the justice functioning to hold such hearings or to render his decision.

After the decree the libelee seasonably excepted upon several grounds. One grievance was the rendering of the decree by the justice on December 21, 1956, in the second vacation occurring after the September term of court.

The statute providing generally for Superior Court hearings and judgments in vacation reads as follows:

> "Any justice of the superior court, - - - - by agreement of parties - - - may, at any time or place, try

and determine issues of fact and of law submitted to him and render any judgment therein which the court could render if in session. Any such justice may in vacation render judgment in any case heard by him in term time. - - -" R. S. c. 113, § 39.

Our court has interpreted the word "vacation," to mean one, single, non-recurring period of time between the end of the term last adjourned and the beginning of the very next.

Robinson, Appellant, 116 Me. 125, 127. (1917)

Moreland v. *Vomilas,* 127 Me. 493, 502. (1929)

Bolduc et al. v. *Granite State Fire Ins. Co.,* 147 Me. 129. (1951)

See also *Inhabitants of Owls Head* v. *Dodge,* 151 Me. 473, 485. (1956)

In *Bolduc* v. *Ins. Co.* above cited the court also said: "That the exception was waived is immaterial."

In the second decision of *Bolduc et al.* v. *Granite State Fire Ins. Co.,* 147 Me. 246, 248 (1952), it was held:

"Exceptions originally alleged included one challenging the authority of the justice to rule on the motion at the time he did, and that one was sustained, reluctantly in view of the fact that counsel for both parties desired the case considered on its merits, but necessarily because plaintiffs' attempted waiver of it could not confer an authority in excess of that vested by statute."

Moreland v. *Vomilas,* 127 Me. 493 (1929), was a construction of Public Laws of 1923, Chapter 70, 2nd paragraph, which reads as follows:

"A motion to so set aside a verdict must be filed at the same term at which such verdict is rendered and shall be heard by the presiding justice either in term time or in vacation at his discretion; if

such action is heard in term time the presiding justice may render his decision in vacation."

Such a motion was filed and argued at the term at which the trial had been had. Decision was reserved by the presiding justice. The same justice who also presided at the next successive term filed his decision at that later term. This court held that his decision "was of no effect; was null and void" because it was not rendered in the next immediate vacation but at the term following that vacation.

It is pertinent to note that the legislature in 1939, P. L. Chapter 66, amended the statutory paragraph above quoted in its last clause to read:

"- - - - if such motion is heard in term time the presiding justice may render his decision in vacation *or at a later term.*" (words of amendment italicized)

The two divorce statutes anent jurisdiction and hearings in vacation provide:

"- - - - The superior court, *or any justice thereof in vacation,* has jurisdiction of libels for divorce in all counties" R. S. c. 166 § 55.

"- - - - All libels for divorce shall be in order for hearing at the first or return term, provided service of said libel has been made in accordance with the provisions of this chapter not less than 60 days before said return term, *and may be heard by any justice thereof in vacation.*" R. S. c. 166, § 61.

The words in these laws italicized above were added by the legislature in 1949, P. L. c. 311 §§ 1 and 2, several years after *Robinson, Appellant* (1917), and *Moreland* v. *Vomilas* (1929), construed the word "vacation" in statutes recited earlier in this opinion.

The occasion for such 1949 amendments to what are now R. S. c. 166, §§ 55 and 61, was the misgivings of the court to hear divorce cases in vacation under what is now R. S.

c. 113 § 39 and the paucity of court terms in most counties. The legislature intended to remedy those two mischiefs but in granting redress it expressed no purpose to nullify the *raisons d'être* of the word, "vacation." Those objects are of special regard in the instant case and are as compelling as they were in the circumstances of *Robinson, Appellant, Moreland* v. *Vomilas* and *Bolduc et al.* v. *Granite State Fire Ins. Co., supra.* The legislative policy and intent are just as intelligible and manifest in the present case as they were in those decided cases. The jurisdiction of a presiding justice at a court term, in the absence of express legislation to the contrary, should be plenary and exclusive as to all matters pending before court for consideration. Variations of that truism without definitive legislative sanction unnecessarily multiply confusions, delays and dislocation of authority. The legislature in its amendments (P. L. 1949, c. 311, §§ 1 and 2), employed a word of an already established judicial construction, to wit, "vacation." Considering the language used, the subject matter and the object in view we believe the legislature intended without benefit of waiver to the parties that the vacation jurisdiction of a superior court justice, of any given divorce libel whether that jurisdiction devolved upon him as presiding justice of the court term last adjourned or was assumed by him during a vacation must be culminated by him by a decree rendered in the same vacation or forfeited totally to the next succeeding term of court, to be availed of by him entirely *de novo,* if at all, following the latter term. Such a chaste rule imposes sensible, regulatory limits to multiple, divergent jurisdiction and is most conducive to the orderly and efficient administration of the court. The instances of delay or hardship resulting will be more than compensated overall by the constant, definite restoration of pending causes to live, court term dockets.

In view of our conclusion as to the merit of this exception it becomes unnecessary for us to rule upon the others.

Exceptions sustained.

INHABITANTS OF TOWN OF AMITY
vs.
INHABITANTS OF TOWN OF ORIENT

Aroostook. Opinion, July 24, 1957.

Statutory Construction. Pauper Settlement. New Settlement. Notice. Waiver.

The pauper statute is one body of law and all its provisions must be read together in order to give proper consideration to the legislative intent.

The notice required by R. S. 1954, Chap. 94, Sec. 29, to break the continuity of the five year period necessary to acquire a new pauper settlement must be in writing.

Defects in a notice provided for in R. S. 1954, Chap. 94, Sec. 29, may be waived and this rule applies to the requirement of writing.

The written answer to notice as required by R. S. 1954, Chap. 94, Sec. 30, may be waived.

Waiver is question of fact and proof of payment in response an oral notice would carry great weight.

ON EXCEPTIONS.

This is an action for the recovery of pauper supplies. The case is before the Law Court upon exceptions after judgment for the plaintiff. Exceptions overruled.

Walter A. Cowan,
Barnett A. Shur, for plaintiff.

George B. Barnes, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

DUBORD, J. The plaintiff Town of Amity brought suit against the defendant Town of Orient to recover for pauper

supplies furnished to one Dale H. Farrar. The case was heard by the court without a jury, with right of exceptions reserved in matters of law. Judgment was entered for the plaintiff and the case is before us on exceptions taken by the defendant Town of Orient, to the findings of the sitting justice. The evidence is not made a part of the bill of exceptions.

It appears that one Dale H. Farrar, having his pauper settlement in the defendant Town of Orient, moved to the plaintiff Town of Amity, in 1945 and has resided there constantly since 1945. Sometime in 1949, upon application made by Farrar to the overseers of the poor of the Town of Amity for pauper assistance, such assistance was rendered. The overseers of the poor of the Town of Amity notified the overseers of the poor of the Town of Orient by telephone that such assistance had been rendered. The overseers of the Town of Amity were informed that if Farrar had a settlement in Orient, the Town of Orient would reimburse the Town of Amity. The amount expended by the Town of Amity was reimbursed promptly by the Town of Orient. Subsequently, and within five years of the time pauper assistance was rendered Farrar, he again fell into distress and the plaintiff Town of Amity furnished pauper supplies, which form the basis of this suit.

The defendant Town of Orient, by its bill of exceptions, attacks the finding of the court and contends that the oral notice, followed by its payment for assistance rendered by the Town of Amity, is not a sufficient compliance with the applicable statute and did not interrupt the continuity of the five year period required to establish a pauper settlement in the Town of Amity.

Here then, is the issue before us for determination. If the oral notice by telephone given by the Town of Amity to the Town of Orient, followed by payment on the part of the Town of Orient, sufficiently complies with the provisions

of the applicable statute, then Farrar did not establish a pauper settlement in Amity, and as he had a settlement in Orient, at the time of his removal to Amity, then the judgment for the plaintiff was properly entered, and the exceptions of the defendant should be overruled. If, on the other hand the oral notice by telephone, followed by payment on the part of Orient, does not comply with the statute, then Farrar established a pauper settlement in Amity, and the judgment was erroneous, and should be set aside and the exceptions of the defendant sustained.

This case arose while the 1944 statutes were in effect. However, the applicable 1954 statutes are identical in language, and, for convenience we have concluded to refer, in this opinion, to the 1954 statutes.

A decision in this case requires the consideration of the following statutes:

Subsection VI, Section 1, Chap. 94, R. S. 1954.

> "A person of age having his home in a town for 5 successive years without receiving supplies as a pauper, directly or indirectly, has a settlement therein."

Sec. 28, Chap. 94, R. S. 1954.

> "Overseers shall relieve persons destitute, found in their towns and having no settlement therein, and in case of death, decently bury them or dispose of their bodies according to the provisions of section 12 of chapter 66; the expenses whereof and of their removal, incurred within 3 months before notice given to the town chargeable, may be recovered of the town liable by the town incurring them, in an action commenced within 2 years after the cause of action accrued and not otherwise; and may be recovered of their kindred in the manner provided in this chapter.
>
> "When relief is given to a person having a settlement in another municipality and no legal notice

> of such aid has been sent to the municipality of settlement within 6 months from the time that expense has been incurred, the continuity of acquiring a settlement in the municipality furnishing such aid or relief shall not be interrupted thereby.
> "Notice as hereinbefore provided shall be deemed sufficient if the said notice is sent to the municipality of apparent settlement as indicated by written evidence of settlement submitted by the applicant for relief."

Sec. 29, Chap. 94, R. S. 1954.

> "Overseers shall send a written notice, signed by one or more of them, stating the facts respecting a person chargeable in their town, to the overseers of the town where his settlement is alleged to be, requesting them to remove him, which they may do by a written order directed to a person named therein, who is authorized to execute it. If such pauper, so ordered to be removed, shall refuse to obey such order and to return to the town of his settlement, then the overseers of the town wherein said pauper is found may refuse to furnish him relief."

Sec. 30, Chap. 94, R. S. 1954.

> "Overseers receiving such notice referred to in the preceding section shall within 2 months, if the pauper is not removed, return a written answer signed by one or more of them, stating their objections to his removal; and if they fail to do so, the overseers of the town of residence may cause him to be removed to the town of settlement by a written order directed to a person named therein, who is authorized to execute it; and the overseers of the town to which he is sent shall receive him and provide for his support; and their town is estopped to deny his settlement therein, in an action brought to recover for the expenses incurred for his previous support and for his removal."

We are particularly concerned with the second and third paragraphs of Section 28, Chapter 94, *supra*.

It is the contention of the defendant Town of Orient that the words "legal notice" contained in Section 28, Chapter 94, R. S. 1954, contemplate a written notice and that the failure to give such written notice on the part of the Town of Amity caused the five year period provided for in Subsection VI, Section 1, Chapter 94, R. S. 1954 to continue to run so that the pauper acquired a settlement in the Town of Amity, and that consequently the Town of Amity cannot recover in the instant action. The plaintiff Town of Amity contends that the oral notice by telephone followed by payment on the part of Orient was a sufficient and proper compliance with the provisions of the statute. The plaintiff Town of Amity further contends that if a written notice is required under the provisions of Section 28, Chapter 94, then the requirement of such written notice was waived by the Town of Orient by its payment of the amount expended by Amity for the support of the pauper.

The questions before us for answer are as follows:

(1). Do the second and third paragraphs of Section 28, Chapter 94, contemplate notice in writing for the purpose of breaking the continuity of the five year period necessary to acquire a new settlement?, and

(2). If a written notice is required, can such written notice be waived?

It is to be noted that Section 29, Chapter 94, R. S. 1954 specifically provides that a written notice must be sent to the town where a pauper settlement is alleged to be, requesting that the pauper be removed; and Section 30, Chapter 94, R. S. 1954 specifically provides that the overseers receiving the notice provided for by Section 29, Chapter 94, R. S. 1954, must within two months return a written answer stating their objections to the removal of the pauper.

A study of the applicable statutes indicates that if a person is found in distress in a town where that person does not

have a pauper settlement, and if such pauper assistance is rendered, if the town rendering such assistance desires to recover the amounts expended from the town where the pauper has his settlement, a notice in writing must be sent to the town of settlement under the provisions of Section 29, Chapter 94, R. S. 1954, and, presumably, as the first paragraph of Section 28, Chapter 94, R. S. 1954 provides that the expenses incurred within three months before notice is given to the town chargeable may be recovered of the town liable by the town incurring them, such written notice must be given within three months from the time the pauper assistance is rendered. Under provisions of Section 30, Chapter 94, R. S. 1954, it then becomes the duty of the overseers receiving the notice to return a written answer within two months. This written answer is usually described as the denial notice. As the town alleged to be chargeable is allowed a period of two months in which to file a denial notice, manifestly the cause of action does not accrue until the expiration of the two month period, and then the town furnishing the assistance, may within two years, commence an action to recover.

In order to determine the legislative intent insofar as a written notice is concerned, we must give consideration to Sections 28, 29, and 30 of Chapter 94, R. S. 1954, together.

> "The pauper statute is one body of law and all its provisions must be read together. The legislative intent is to be drawn from a consideration of the whole act, and effect must be given, if possible, to every part of it. These are settled rules of statutory construction." *Friendship* v. *Bristol,* 132 Me. 285, 289; 170 A. 496; *Comstock's Case,* 129 Me. 467, 471; 152 A. 618; *State* v. *Frederickson,* 101 Me. 37, 41; 63 A. 535; *Merrill* v. *Crossman,* 68 Me. 414.

> "All statutes on one subject are to be viewed as one and such a construction should be made as will as nearly as possible make all the statutes dealing

> with the one subject consistent and harmonious." *Turner* v. *Lewiston,* 135 Me. 430, 433; 198 A. 734.
>
> "The fundamental rule in the construction of statutes is that they are to be construed according to the intention of the legislature. Another is, that all the statutes on one subject are to be viewed as one. Such a construction must prevail as will form a consistent and harmonious whole, instead of an incongruous, arbitrary and exceptional conglomeration. The context, and the course of legislation, as matter of history often throw light upon the meaning of application of terms used in the statutes." *Guilford* v. *Monson,* 134 Me. 261, 265; 185 A. 517; *Smith* v. *Chase,* 71 Me. 164.

We think a study of the legislative history of these three sections is of importance. Sections 29 and 30, Chapter 94, R. S. 1954, come down to us through all the revisions since 1821 in substantially the same form, and written notice has always been required insofar as these two sections are concerned.

As to Section 28, the 1821 revision does not provide for a written notice. However, the revision of 1841 has a provision for written notice and in all subsequent revisions the word "written" is left out.

It is of great importance to note that the second and third paragraphs of Section 28, Chapter 94, R. S. 1954, which we have before us for primary consideration were first enacted as Chapter 158, Public Laws of 1937. Undoubtedly, this amendment was enacted as a protection to the town of actual settlement against the town in which the time was running towards acquisition of a new settlement.

It is our opinion that the 1937 amendment does not alter the meaning of notice in the remainder of the pauper law.

Giving consideration to the pauper statutes as a whole, in the light of legislative history and prior decisions of this

court, we are of the opinion that the notice required to break the continuity of the five year period necessary to acquire a new pauper settlement must be in writing.

So we pass to a determination of the next issue as to whether or not such notice may be waived.

This court has ruled several times that defects in the notice provided for in Section 29, Chapter 94, R. S. 1954, can be waived. In the case of *York* v. *Penobscot*, 2 Greenleaf 1, this court held that if a notice to a town chargeable with the support of paupers be defective in not being signed by the overseers in their official capacity, or in not describing the paupers with sufficient precision, yet if it be understood and answered without any objections on account of its insufficiency, such objections are thereby waived.

See also *Weymouth* v. *Gorham*, 22 Me. 385, 388, where the court said:

> "The plaintiff can recover only by showing a strict compliance with the statutes applicable to the case, unless there has been a waiver by the defendants of some of their rights."

In the case of *Auburn* v. *Wilton*, 74 Me. 437, a pauper notice described the pauper as Benton L. Blackwell. The pauper's true name was Bennetto L. Blackwell. The court held that the town receiving such notice was under no obligation to answer; but answering, and knowing what person was intended, and not objecting on account of the error of name, they are bound thereby, their conduct constituting a waiver of the defect in the notice.

> "A defect in a notice may be waived by the town upon which the notice is served. The waiver may be implied. And an answer denying liability upon some grounds other than the defect in the notice waives the defect." 48 C. J. 531, *Bath* v. *Bowdoin*, 134 Me. 180, 184; 183 A. 420.

See also, *Wellington* v. *Corinna*, 104 Me. 252; 71 A. 889.

While this court has held in *Turner* v. *Lewiston,* 135 Me. 430, 433; 198 A. 734; that the pauper notice statute is mandatory, we nevertheless see that waiver of defects in such notice is permissible.

Passing now to consideration of Section 30, Chapter 94, R. S. 1954, providing that the overseers of the poor receiving the notice referred to in Section 29, Chapter 94, R. S. 1954, shall within two months return a written answer stating their objections to the removal of the pauper, this court has held that the filing of a written denial may be waived.

The case of *Unity* v. *Thorndike,* 15 Me. 182, was an action in assumpsit to recover supplies furnished to one Sally Severance, alleged to have a settlement in Thorndike. Written notice was given to the Town of Thorndike in compliance with the statute. Within two months from the receipt of the notice from the plaintiffs, two of the overseers of the poor of the Town of Thorndike verbally notified two of the overseers of the poor of Unity, that Sally Severance had not her residence in their town, and they asked the overseers of Unity, if they would receive a verbal answer as a legal one, and the reply was, that they would. The overseers of Thorndike further proved that they stated to the overseers of Unity, that they would give the answer in writing if required, the reply to which was, that they did not require a written answer.

The court ruled that the necessity of a written answer was waived.

The court said:

> "They (overseers of the poor) are in regard to the poor, the authorized agents of their respective towns. And as such, they direct suits to be brought or defended, and negotiate with other towns, in reference to claims of this description. Not indeed with unlimited powers; for they cannot by their acts or admissions, change the settlement of a

> pauper; but their authority extends to the adjustment of all claims of this sort, and to all preliminary proceedings. And in the discharge of these duties, a promise made by them, in behalf of their towns, is binding." *Unity* v. *Thorndike,* 15 Me. 182, 184.
>
> "Overseers of the poor have the care and oversight of the poor, and in the discharge of their duties, they are the authorized agents of the town. Necessarily, they may transact a variety of business, incidental to their general powers." *Palmyra* v. *Nichols,* 91 Me. 17, 21; 39 A. 338.
>
> "Overseers of the poor are the authorized agents of their respective towns. And as such, they direct suits to be brought or defended, and negotiate with other towns in reference to claims of their description (pauper supplies).... Their authority extends to the adjustment of all claims of this sort and to all preliminary proceedings." *Bath* v. *Bowdoin,* 134 Me. 180, 184; 183 A. 420.

It will, therefore, be seen from these foregoing decisions that even though Section 30, Chapter 94, R. S. 1954, specifically provides for a written answer, such a written answer may be waived by the overseers of the poor.

In the instant case, when the officials of the Town of Orient received the oral notice from the officials of the Town of Amity that assistance had been rendered to the pauper, the Town of Orient need not have acted, and could have stood upon its rights in reference to the necessity on the part of the Town of Amity of giving a notice in writing pursuant to the provisions of Section 29, Chapter 94, R. S. 1954. However, the officials of Orient saw fit to reimburse immediately the Town of Amity.

Prior to the enactment of Chapter 158, Public Laws of 1937, requiring that a written notice be given to the town of prior settlement within six months, the matter of proof of a break in the continuity of the five year residence in a

town furnishing pauper assistance was left without record of any kind. To afford protection to a town of prior settlement the amendment was added to Section 28. The statutory requirement of a written notice was undoubtedly for the purpose of establishing a record which would be available in the future in any dispute or litigation concerning the running of the five year period. What better proof could be presented that pauper assistance has been rendered during a given five year period of residence in another town, than payment by the town in which the pauper has a settlement? By such payment, a permanent record, available to all who need it, is definitely established.

In any judicial process involving the issue of a notice pursuant to Section 28, Chapter 94, R. S. 1954, proof of payment by the town alleged to have received the notice would carry great weight.

See *Wellington* v. *Corinna, supra,* where the court held that payment for supplies for the support of a pauper is an important evidential fact bearing upon the question of liability.

In the case of *Weld* v. *Farmington,* 68 Me. 301, the court held that a record of town orders, given by a town for the support of a pauper on the ground that he had a settlement therein, is admissible in evidence on the question of his settlement, not conclusive as an estoppel, but for the jury to weigh.

We rule that under the circumstances existing in this case, the Town of Orient, by the acts of its duly authorized agents, waived the written notice required by the statute.

The presiding justice in ruling for the plaintiff ended his finding with these words:

> "All of the elements of liability being found present, this Court finds for the plaintiff for the amount sued for."

The evidence not being before us, we must conclude that the determinations of fact of the sitting justice, were based on sufficient and compelling evidence. His decision was correct.

Exceptions overruled.

WILLIAM SYLVESTER
vs.
WIDD TWADDLE

Oxford. Opinion, August 6, 1957.

Contracts. Money Counts. Evidence.

The "money count" is a proper vehicle to carry a claim arising from an express contract, fully performed by the plaintiff, on which nothing remains to be done but the payment of money by the defendant.

Where a contract forms an essential part of plaintiff's case, it is properly admissible in evidence.

R. S. 1954, Chap. 113, Sec. 28 (relating to the sufficiency of pleadings based on contracts), was designed to aid, not trap the pleader. A declaration need not set forth the entire contract.

ON EXCEPTIONS.

This is an action of assumpsit before the Law Court upon exceptions. Exceptions overruled.

Gordon M. Stewart,
George Keough, for plaintiff.

Henry H. Hastings, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

WILLIAMSON, C. J. This action is before us on defendant's exceptions to the acceptance of a report of referees who, after hearing the case with right of exceptions in matters of law reserved, found for the plaintiff in the amount of $3400.

The six exceptions relate (1) to pleading and admissibility of evidence, and (2) to the sufficiency of the evidence.

The plaintiff's declaration consists of the common "money counts" with the addition of the following:

> "SPECIFICATION:—Under this count the Plaintiff will prove the aforesaid amount of thirty-four hundred dollars due from the said defendant to the said plaintiff by reason of a written agreement between the said plaintiff and defendant, by each of them signed, dated December 19, 1953."

The referees admitted in evidence, over the defendant's objection, the written contract mentioned in the specification. The contract, which is the basis of plaintiff's claim, was an option to the plaintiff from the defendant owner to purchase before a given date certain described wood lots with a stated price for each, with the further provision that,

> "Any of the above six pieces or parcels of land can be purchased separately, and any trespass after date of this option, or unsettled before date of option, on any of these lots shall become property of owner of option when lot is purchased."

There is evidence in the record apart from the contract in substance as follows:

With the approval of plaintiff's father, the defendant received from the trespassers $3400 in settlement of the trespass stated in the contract. The plaintiff, again through his father, paid the defendant $5200 for certain lots at the stated prices, and received a deed. To obtain the deed the

father was compelled, so he says, to complete the purchase by payment of $5200 without credit for the $3400 received from the trespassers. The defendant refused to pay the $3400 to the plaintiff, and this action followed.

The fourth and fifth exceptions in which the plaintiff charges error by the referees (1) in ruling the declaration "set out a legal cause of action," and (2) "in admitting in evidence the contract or option relied upon by the plaintiff to prove his case," may for convenience be discussed together.

The "money count" is a proper vehicle to carry a claim arising from an express contract, fully performed by the plaintiff, on which nothing remains to be done but the payment of money by the defendant. *Holden Steam Mill* v. *Westervelt,* 67 Me. 446, 450; *Marshall* v. *Jones,* 11 Me. 56; Martin's Notes on Pleading, 6 Me. Law Rev. 139.

Obviously, under such circumstances the contract from which the claim springs forms an essential part of the plaintiff's case, and so is admissible in evidence. Proof must meet allegation; and so it does in this instance. Compare *Bartlett* v. *Chisholm,* 146 Me. 206, 79 A. (2nd) 167.

The defendant argues that under R. S., Chap. 113, Sec. 28, a reference to the contract in distinction from inclusion of the entire contract in the pleading is insufficient. The statute was designed, however, not to trap but to aid the pleader. Certain technical requirements in pleading breach of contract were removed or rendered nonessential thereby and they were not added to pleading under the "money counts." The pleading was sufficient, and the contract properly admitted in evidence.

A question of law is raised by the third exception, that there was "no evidence to support the finding." We have briefly reviewed the record above. The referees chose to believe the testimony offered by the plaintiff, and this they

were entitled to do. The evidence was substantial in character. The decision of the fact finder rested on evidence of probative value. *Staples* v. *Littlefield,* 132 Me. 91, 167 A. 171; *Morneault* v. *B. & M. R. R.,* 144 Me. 300, 68 A. (2nd) 260.

The remaining exceptions present no issues. The defendant says: in the first and second exceptions that the report is against the law and the evidence, and is against the law and the weight of the evidence; and in the sixth exception that the referees failed to consider that the burden was upon the plaintiff to prove his case by a fair preponderance of the evidence.

The distinction between a jury verdict and a referee's findings, and between a motion for new trial and exceptions to acceptance of a referee's report, have been discussed in many cases. Exceptions of the type noted have no value. *Inhabitants of Bethel* v. *Inhabitants of Hanover,* 151 Me. 318, 118 A. (2nd) 787, and case cited.

The entry will be

Exceptions overruled.

DONALD W. MCKINNON ET AL.
vs.
JOSEPH R. CIANCHETTE A/K/A J. R. CIANCHETTE

Penobscot. Opinion, August 7, 1957.

Trespass. Damages. New Trial. Evidence.

Where the evidence on damages is insufficient for a jury verdict so that a jury cannot determine with reasonable certainty the fair market value of the property before and after the alleged trespass, a new trial must be ordered.

ON MOTION FOR NEW TRIAL.

This is an action of trespass before the Law Court upon motion for new trial. Motion sustained. Verdict set aside. New trial granted.

Harry Stern, for plaintiff.

Clair L. Cianchette, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

WILLIAMSON, C. J. This action of trespass *quare clausum fregit* is before us on defendant's motion for a new trial. In 1955 in the course of work on an adjoining lot the defendant's trucks and bulldozer crossed three vacant house lots belonging to the plaintiffs. The defendant admitted the trespass, and the sole issue before us is whether the jury erred in assessing compensatory damages at $550. The defendant contends that the plaintiffs failed to establish any damage and thus could recover nominal damages and no more.

The case was tried on the theory that the plaintiffs' land was permanently damaged, and that the measure of damages was the difference in market value immediately before and after the admitted trespass.

The plaintiffs also sought punitive damages. The ruling of the presiding justice taking this claim from the jury is not, however, before us.

The evidence on damages taken most favorably to the plaintiffs, is, in our opinion, insufficient for a jury verdict. In substance the evidence is this: The three vacant house lots, with a frontage of 120 feet on a city street in Bangor, were purchased by the plaintiffs in 1950 at a cost of "$1,000 plus my services as a carpenter." "I (Mr. McKinnon) re-

alize that land is very scarce and valuable in Bangor." Mr. McKinnon also testified that loam had been scraped from the land and an inferior fill "has been deposited on our land and has been ground in with our loam." Mrs. McKinnon said, "The land was all dug up from the bulldozer, and there were ruts and holes, and the grass was all removed." Photographs were introduced to show the damage caused by the acts of the defendant. From this evidence the jury concluded there was a loss in market value of $550.

We are unable to find evidence from which a jury could determine with reasonable certainty the market value before and after the trespass, and hence the proper damages. What was the market value before, and after, in this instance? The verdict, in our view, was based on guess or conjecture, neither of which is a firm base for a finding.

On a new trial the jury can be supplied with full data on which to place a reasonable verdict. We say no more than that on this record there is not sufficient evidence to find any damages, apart from nominal damages.

Illustrative cases are: *McDougal* v. *Hunt,* 146 Me. 10, 14, 76 A. (2nd) 857; *Susi* v. *Diamond Match Co.,* 131 Me. 487, 158 A. 698; *Bowley* v. *Smith,* 131 Me. 402, 406, 163 A. 539.

Plaintiffs' motion for treble costs on the ground defendant's motion was frivolous or intended for delay is denied. R. S. Chap. 113, Sec. 59.

The entry will be

Motion sustained.
Verdict set aside.
New trial granted.

MARY J. MACNEILL
vs.
PAUL A. MADORE

Cumberland. Opinion, August 15, 1957.

Brokers. Sales.

A commission on a sale of real estate is earned only where the broker is the effective and producing cause of the sale, unless the broker is otherwise protected by the specific terms of his contract with the seller.

ON EXCEPTIONS.

This is an action for the recovery by a broker of a real estate commission. The case is before the Law Court upon exceptions to the direction of a verdict for the defendant. Exceptions overruled.

Udell Bramson, for plaintiff.

William E. Perlin, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

PER CURIAM.

On exceptions to direction of a verdict for defendant. The essential facts are not in dispute. Plaintiff, a real estate broker, was attempting to sell defendant's property. She showed the property to Mr. and Mrs. Worden but failed to induce them to purchase. Later, and quite independently, another agent successfully negotiated a sale by the defendant to Miss Margaret Worden, sister of the plaintiff's prospect. He received his commission. Miss Worden bought the property for herself with her own funds and in good faith. She was not a straw purchaser for her brother and his wife.

Plaintiff seeks commission on the sale. She had no contact with the purchaser and did nothing to interest her in the property or induce her to buy it. A commission on a sale is earned only where the broker is the effective and producing cause of the sale, unless the broker is otherwise protected by the specific terms of his contract with the seller. A broker who has no contact with purchaser and no connection with the sale itself obviously is not entitled to commission.

Exceptions overruled.

JAMES CAMERON
vs.
CECIL R. STEWART

Kennebec. Opinion, August 26, 1957.

Negligence. Pedestrian's. R. S. 1954, Chap. 22, Sec. 147.

A pedestrian who walks along a gravel strip on the side of cement roadway in the same direction of automobile traffic is not guilty of contributory negligence, as a matter of law, not withstanding R. S. 1954, Chap. 22, Sec. 147, where the facts show that snow had fallen during the night and the sidewalks had not been plowed.

R. S. 1954, Chap. 22, Sec. 147 requires that *when practicable,* pedestrians use existing sidewalks and if there are none, walk along the left side of the highway, facing traffic.

Practicability is a question of fact.

ON EXCEPTIONS.

This is a negligence action before the Law Court upon exceptions to the granting of a defendant's nonsuit. Exceptions sustained.

Cratty & Cratty, for plaintiff.

Robinson, Richardson, Leddy, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

BELIVEAU, J. On exception. At the close of the plaintiff's case, the defendant's motion for a nonsuit was granted. Exception was taken.

The plaintiff's action is to recover damages suffered by him when struck by an automobile operated by the defendant.

The uncontradicted evidence shows that on the morning of January 8, 1956, about 6:30, the plaintiff coming from his work at the Maine Central Railroad, was walking southerly on the westerly side of College Avenue in Waterville when he was struck by an automobile operated by the defendant.

The plaintiff was an employee of the Maine Central Railroad and had been for 30 years prior to the accident. His regular hours of employment were from 7:30 in the morning to 4:30 in the afternoon; however, he was frequently called to do extra work and on January 8 he worked from 2:30 to 6 o'clock in the morning, cleaning switches—to remove snow which had fallen during the night. He left the sheds of the Maine Central Railroad shortly after six, that morning, and walked on the easterly side of College Avenue and then across the railroad tracks at a point opposite the Jefferson Hotel and proceeded southerly on the westerly side of College Avenue. He was walking outside of the cement portion of the road, on a gravel strip about 9 feet wide, when he was struck.

While the reason for granting the nonsuit was not given by the presiding justice, it is assumed it was because of the

plaintiff's alleged violation of Section 147, Chapter 22 of the Revised Statutes, which reads as follows:

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

It is admitted by the plaintiff that he was not walking on either of the sidewalks on the easterly or westerly sides of College Avenue, nor walking on the left side of the way, facing traffic.

It has been held by this and other courts that a violation of law is prima facie evidence of negligence. Was this alleged contributory negligence a proximate cause of the accident? In other words, did the plaintiff's alleged violation contribute to the accident? If there is evidence to rebut the presumption, and it is believed by the jury, the defendant takes nothing from that presumption.

It is well-settled law in this state, which needs no citation, that when a motion for nonsuit is under consideration, all the evidence must be viewed most favorably for the plaintiff.

The pavement on College Avenue, at the point where this accident occurred, was 45 feet wide, not including the nine-foot gravel strip on the westerly side. The easterly side was paved to the sidewalk.

The officer who was called to investigate, testified there was a snowbank on the westerly side of the road and one on the easterly side; that the sidewalks on the easterly and westerly sides had not been plowed. This officer further testified that both tires, on the right of the car, were off the pavement, on the gravel portion.

There was also evidence from this officer of an admission by the defendant that his windshield was all frosted, that he had scraped it on the driver's side, did not see the plaintiff until it was too late to stop, and there was no blowing of the horn.

The plaintiff testified that when struck, he was walking on the gravel part of the road, a good 8 feet from the pavement, and that the sidewalks were not plowed on either side of the street. He further testified that, in his opinion, it was safer for him to walk, as he did, on the strip of gravel westerly of the pavement.

The evidence raises clearly important questions of facts to be decided by a jury. The jury must first determine whether the use of sidewalks on College Avenue at 6:30, on the morning of January 8, 1956, in view of all the circumstances disclosed by the evidence, was practicable. If not, the plaintiff was not negligent in using that part of the highway. Admittedly the plaintiff was not facing traffic, as required when practicable.

If these two questions are resolved in favor of the plaintiff he, then, was not guilty of contributory negligence but, if his negligence was established then the last question to determine is his alleged contributory negligence.

The evidence presents facts which were essential for the jury to determine. In *Hamilton* v. *Littlefield,* 149 Me. 48, the court said that it was a question of fact whether the use of a sidewalk was practicable and the same as to walking on the left-hand side of the road or with traffic.

In *Stearns* v. *Smith,* the court ruled that in any case such as this, as to the use of sidewalks by the plaintiff, the jury must consider the time, the place and the surrounding circumstances in reaching their conclusion. Another question for the jury to decide, according to this decision, is whether the violation of the pedestrian statute, if any, was a proximate cause of the accident.

> "One who breaks the statute in question is not necessarily guilty of contributory negligence as a matter of law. He does not thereby become an outlaw to whom no duty is owed by, and with no redress against, the motorist who injuries him. The usual rules of causation remain applicable."
>
> *Stearns* v. *Smith,* 149 Me. 127.

In view of the evidence considered most favorably for the plaintiff, the case shows a number of facts which, if resolved in favor of the plaintiff, would entitle him to a verdict.

The problem here was not one of law but one of fact.

Exception sustained.

NEWPORT TRUST COMPANY

vs.

PAUL E. SUSI, FRANK T. SUSI AND GUY SUSI,
D/B/A P. E. SUSI & CO.,
HARTFORD ACCIDENT & INDEMNITY COMPANY
AND
FRANK S. CARPENTER,
TREASURER OF THE STATE OF MAINE

Penobscot. Opinion, August 30, 1957.

Contracts. Bonds. Sureties. Subrogation.

A surety on a state highway contractor's bond, who binds himself to the performance of a contract, and the satisfaction of all claims and demands incurred for the same and all bills for labor, materials, equipment and other things contracted for or used in connection with the work contemplated, is not liable to a bank which lends money to the contractor for the payment of wages of the contractor's employees where such loan was not within the contem-

plation of the parties at the time of the execution of the bond, and the employees gave no wage assignments to the lending bank.

A bond must be construed in the light of the contract which occasioned its necessity and the statutory requirements.

A lender by lending money to a contractor for use in the payment of contractor's employees' wages does not take part in the performance of the contract or in furnishing labor and materials for use in the work.

A bank does not by the mere act of loaning money to the contractor for the purpose of paying labor become subrogated to the rights of the laborer under R. S. 1954, Chap. 23, Sec. 40.

ON REPORT.

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

Judson A. Jude, for plaintiff.

Richard J. Dubord, for defendant Susi.

Joseph B. Campbell,
for defendant Hartford Accident & Indemnity Co.

James E. Frost, Dep. Atty. Gen., for State.

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

TAPLEY, J. On report. The proceedings are instituted by a petition for declaratory judgment, the plaintiff seeking a determination of the nature and extent of liability, if any, of the defendant, Hartford Accident and Indemnity Company, as surety under a certain contract bond in favor of the Treasurer of the State of Maine. The condition of the bond which is the subject for determination is in the following language:

> "The condition of this obligation is such that if the Principal designated as Contractor in the foregoing contract, 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, then this obligation shall be null and void; otherwise it shall remain in full force and effect."

The parties to the action stipulated certain facts, the material portions of which are substantially these:

P. E. Susi & Co. by contract dated November 5, 1952 agreed with the State of Maine, through its State Highway Commission, to supply all equipment, appliances, tools, labor and materials and to perform all the work required for the construction of a section of bituminous concrete road in Troy, Maine. The contractor, P. E. Susi & Co., furnished a bond in favor of the Treasurer of the State of Maine with itself as principal and Hartford Accident & Indemnity Co. as surety. The contractor entered upon the performance of its contract and obligated itself to pay for labor and materials contracted for in connection with the work. The payrolls for labor were met by checks drawn on the First National Bank of Pittsfield in which bank P. E. Susi & Co. maintained its only bank account. The contractor on May 1, 1953 borrowed from the Newport Trust Company the sum of $3000.00 and as evidence of the indebtedness gave the bank its promissory note. This note, incidentally, was renewed on June 1, 1953. The understanding between P. E. Susi & Co. and the Newport Trust Company was that the money borrowed would be used by P. E. Susi & Co. to meet its payroll. This loan was not within contemplation by the bank nor by the parties to the bond at the time of

the execution of the bond. The Hartford Accident & Indemnity Company was without knowledge of the loan, never consented to it and never gave the bank any assurance that it was protected by the bond. The renewal note remains unpaid and P. E. Susi & Co. is indebted to the Newport Trust Company for the principal sum of $3000.00, with interest. Payment of this note has been demanded of the Hartford Accident & Indemnity Co. and payment has been refused. There have been no assignments to the Newport Trust Company from the laborers employed by P. E. Susi & Co. who have been paid from the proceeds of the money borrowed.

The issue involved, reduced to its simplest terms, is whether, according to the conditions of the bond furnished by the contractor in connection with the construction of the road for the State Highway Commission, the bonding Company is liable to the Newport Trust Company for the repayment of money borrowed from it by the contractor and used to pay workmen for labor performed on the job.

According to the stipulation, it was understood and agreed between the contractor and the Newport Trust Company that the proceeds of the loan would be used by the contractor to meet its payroll and that the money should not be used for any other purpose. The evidence shows that a substantial amount of the $3000.00 was used for construction payroll purposes.

In considering the question of liability on the part of the Hartford Accident & Indemnity Company to pay the money borrowed by the contractor, it is necessary to consider not only the conditions of the obligation of the bond but also they must be construed in light of the statutory requirements and the contract which occasioned the necessity of the bond.

43 Am. Jur., Sec. 149, Page 892:

> "The bond given by a contractor for public work should be construed in connection with, and in the light of, the contract in connection with which it was executed or the performance of which it secures. The bond and contract are to be treated as one instrument."

See 118 A. L. R., Page 62.

The bond was given under authority of R. S. 1954, Chap. 23, Sec. 40, the pertinent portion of which reads as follows:

> "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."

The notice to contractors, being the invitation for bids, issued by the State Highway Commission and by reference made a part of the contract contains this provision respecting the bond:

> "A contract bond will be required for the faithful performance of the contract in such sum as shall be fixed by the Commission; said sum shall be not less than fifty (50) per cent nor more than seventy-five (75) per cent of the amount of the contract. The surety and form of bond must be satisfactory to the Commission."

That portion of the written offer of P. E. Susi & Co. concerning the bond which by reference is part of the contract says:

> "Within ten (10) days from the date of the notice of acceptance of this Proposal, to execute the Contract, and to furnish to the State Highway Commission a satisfactory Contract Bond in the sum specified by Article 4 of Section 3 of the General Requirements and provisions of said Specifica-

tions, guaranteeing the faithful performance of the work and payment of bills."

The general requirements and provisions of the Standard Specifications of the State Highway Commission which are by reference made a part of the contract provide certain conditions relative to the bond and the obligations of the parties thereunder.

We will not attempt to quote verbatim these requirements as set out in the record but only to the extent that they are pertinent to the problem at hand.

"Surety" The corporate body, individual, or body of individuals bound with and for the contractor who engages to be responsible for the payment of all debts pertaining to, and for his acceptable performance of the work for which he has contracted.

"Contract" The agreement covering the performance of the work and the furnishing of materials for the proposed construction also shall include the proposal, plans, specifications, and contract bond also any supplement agreements which reasonably could be required to complete the construction.

"Contract Bond" This is the approved form of security furnished by the contractor and his Surety as a guarantee of good faith on the part of the contractor to execute the work in accordance with the terms of the contract.

"Requirements of Contract Bond" The successful Bidder must furnish a bond payable to the Treasurer of the State of Maine. The form of bond shall be provided by the Commission and the sureties shall be acceptable to the Commission. The bond shall guarantee the execution and faithful performance and completion of the work to be done under the contract, the payment in full of all bills and accounts for material and labor used in the work, and all other things contracted for or used in connection with the contract.

"Responsibility for Damage Claims" The contractor shall 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 contemplated.

We are not unmindful of the rule of liberal interpretation applicable to the type of bond concerned in this case. This rule of construction was reiterated in the case of *Carpenter, Treasurer of State* v. *Susi, et al.*, 152 Me. 1.

The Newport Trust Company takes the position that it is entitled to recover payment from the surety on the bond the amount of a defaulted note, the proceeds of which were used in a substantial amount to satisfy payment of labor employed by the contractor.

The plaintiff in its petition for declaratory judgment has narrowed the issue by alleging:

> "A disagreement has arisen as to the nature of the liability, if any, of the Hartford Accident and Indemnity Company under its bond insofar as it concerns payment of said note, which said disagreement raises a question of law, to wit: the nature and extent of liability of Hartford Accident and Indemnity Company as surety for payment of sums loaned to the contractor for the purpose of meeting current payrolls of the project covered by the bond when said sums were loaned and used for such specific purpose."

We are by this allegation directed to the circumstances of the contractor borrowing money for the specific purpose of paying current payrolls for labor.

One of the main requirements of a contractor's bond dealing with the construction of highways is to guarantee the payment of bills for labor, material and equipment as well as a faithful performance of the contract. 43 Am. Jur., page 885, Sec. 144:

> "* * * * * Ordinarily, such bonds must be conditioned not only for faithful performance of the contract of indemnification of the obligee municipality or public body, but also for the payment of the claims of laborers and materialmen performing services and supplying materials in the prosecution of the work."

Counsel for the plaintiff has laid stress on other phraseology not contained in the bond but proper of consideration, such as under "Proposal," "* * * * * * * guaranteeing the faithful performance of the work and payment of bills," under "Surety," "The corporate body, individual, or body of individuals bound with and for the Contractor, * * * * engages to be responsible for his payment of all debts pertaining to, and for his acceptable performance of the work for which he has contracted," under "Requirements of Contract Bond," "* * * * * 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; * * *."

There is no evidence of claims for wages by those performing labor. There was no knowledge on the part of the laborer that wages paid to him came from the borrowed money.

This court had occasion in the *Carpenter* case *supra* to concern itself with a contractor's bond of the same type as the one now being considered. In speaking of the functions of such a bond in relation to a lien, the court, on page 11 of the *Carpenter* case, had this to say:

> "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."

This statement is strongly indicative of the fact that one of the main purposes of the bond is the protection of the laborer in receipt of his pay and in the event of not being paid, the surety on the bond is unquestionably liable to him but, by the same token, when his pay requirements have been met and satisfied, he no longer has any claim against the bond. The parties to the bond contracted "* * * * shall pay all bills for labor * * * *." Counsel for the petitioner argues liability on the part of the bonding company because of such provisions in the bond and contract as "guaranteeing the faithful performance of the work and payment of bills," "engages to be responsible for his payment of all debts pertaining to and for his acceptable performance of the work for which he has contracted," "and for all other things contracted for or used in connection with the contract," "and for all other things contracted for or used by him on account of the work herein contemplated." The plaintiff has by its pleadings limited itself to a right of recovery based upon the loan for the particular purpose of payment of labor wages. We must confine ourselves to determination of liability under these particular circumstances. The bond and contract specifically provide a guarantee on the part of the surety for payment in full of all bills and accounts for labor and material. In as much as there is present a guarantee to satisfy labor wages, there is no requirement to justify liability on the part of the bonding company by placing wages in the category of "payment of all debts pertaining to * * * the work for which he has contracted * * *," or "and for all other things contracted for or used in connection with the contract." The provision for payment of labor is definite and not in any way qualified by the other provisions.

If the bank acquired assignments from the workmen upon payment to them of wages paid with money borrowed from the bank, then it would stand in the same relationship with the surety as did the workmen. 127 A. L. R. 994.

In the case of *First Nat. Bank of Dothan* v. *American Surety Co. of N. Y.*, 53 F. (2nd) 746, at page 748:

> "By lending money to contractor for use by him in paying for labor and material used in the work contracted for, the lender did not take part in performing the contract or in furnishing labor or material for use in the work."

See *New Amsterdam Casualty Co.* v. *State (Md.)*, 128 A. 641.

Murchison Nat. Bank of Wilmington v. *Clark, et al. (N. C.)*, 135 S. E. 123. In this case money was advanced by a bank for the purpose of paying the claims of laborers and material men. That portion of the bond involved contains conditions similar to the ones now under consideration, and reads in part as follows:

> "******** if the principal *shall faithfully perform the contract on his part, and satisfy all claims and demands incurred for the same* ****** and shall pay all persons who have contracts directly with the principal for labor and materials *******." (Emphasis ours)

On page 24 of the case the court says:

> "It is the general holding that a bank furnishing money to a contractor doing public work, for use in paying the claims of laborers and material men without more, does not come within the protection of a statutory bond conditioned to pay all persons supplying the principal with labor or materials in the prosecution of the work."

See *U. S.* v. *Rundle*, 107 F. 227.

The plaintiff argues through counsel that it is entitled to recover money loaned under the circumstances of the case on the basis of equitable subrogation. There is no merit to this contention. The bank does not by the mere act of loaning money to the contractor for the purpose of paying

labor become subrogated to the rights of the laborer. *First Nat. Bank of Chisholm* v. *O'Neil, et al.,* 223 N. W. 298. See 127 A. L. R. 992, 993; *Carr Hardware Co.* v. *Chicago Bonding & Security Co.,* 181 N. W. 680.

The plaintiff loaned the contractor $3000.00 evidenced by a note in regular form. A substantial portion of the loan was used to pay wages of the contractor's workmen. The bonding company was unaware of the transaction at the time the money was loaned. The workmen had no knowledge that the money which they received was borrowed from the plaintiff and, of course, gave no assignments of any rights they may have had under the bond to the plaintiff. The bond and the contract are silent as to any provisions covering the borrowing of money by the contractor for use in the prosecution of the work. The loan was not contemplated by the parties to the bond or by the bank at the time of the execution of the bond. The money was borrowed and loaned for the specific purpose of satisfying the labor payroll. Consideration is given to the contention of the plaintiff that liability against the bonding company attaches because of other conditions in the bond and contract exclusive of the one applicable to the payment of labor wages but we are of the opinion, after a careful perusal of the record, that other conditions than the payment of bills for labor become immaterial and not pertinent in view of the facts of the case.

It is determined and declared that no liability exists on the part of the Hartford Accident & Indemnity Company as surety for money loaned to the contractor for the purpose of paying labor payrolls of the project covered by the bond.

Case remanded to Superior Court for entry of decree in accordance with this opinion.

HARRY STERN, PETITIONER FOR WRIT OF HABEAS CORPUS
vs.
ARTHUR W. CHANDLER, SHERIFF AND W. IRVING THOMPSON, DEPUTY SHERIFF

Penobscot. Opinion, September 10, 1957.

Attorneys. Contempt.

The Superior Court has power to punish for contempt both under the common law and R. S. 1954, Chap. 106, Sec. 16.

Criminal contempts are those committed in the immediate view or presence of the court which interrupt the regular proceedings in court; such may and should be punished summarily.

Constructive criminal contempts are those which arise from matters not transpiring in open court; but the process and time for hearing are different from the summary process.

Disobedience to a court decree may be either civil or criminal, according to the purpose for which and the manner in which the court may deal with it. Where the power of the court is used *only* to secure an aggrieved party the benefit of the decree, the contempt is civil, otherwise it is deemed criminal.

Misconduct of an attorney which reflects improperly the dignity or authority of the court, or which obstructs or tends to obstruct, prevent or embarrass the due administration of justice, constitutes contempt.

The strict rule of the common law which denied review of contempts committed in the presence of the court has been relaxed so that the acts constituting the alleged contempt may be examined on habeas corpus to ascertain whether in law they constitute contempt, although the truth of the acts recited by the presiding justice may not be controverted; the statement filed by the judge as to matters occurring before him is usually regarded as importing absolute verity.

A mittimus need not specify the nature of the acts of contempt; a mittimus is only evidence of the officer's authority; the judgment is the real thing.

While Maine law is silent on the necessity of a certified statement of fact to support a judgment for contempt, the Law Court is of the opinion that the presiding judge should certify (1) that he saw and heard the conduct constituting the contempt (2) that it was committed in the actual presence of the court (3) and the facts.

Cheney v. *Richards*, 130 Me. 288, 292 statement that finding of contempt is not reviewable is dicta and overruled.

ON EXCEPTIONS.

This is a petition for habeas corpus before the Law Court upon exceptions to a dismissal of the petition. Exceptions overruled. Decree below affirmed.

Harry Stern (Pro Se), for plaintiff.

Orman G. Twitchell, Co. Atty., for defendants.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

DUBORD, J. The petitioner is an attorney at law. During the trial of a criminal case before the Superior Court within and for the County of Penobscot, the petitioner while acting as an attorney for a respondent was adjudged guilty of criminal contempt of court. He was summarily sentenced to pay a fine of $100.00, and in default thereof, to serve fifteen days in jail. The petitioner refused to pay the fine and was delivered into the custody of the Sheriff of Penobscot County and one of his deputies, the respondents in the within cause. Petitioner forthwith addressed a petition for a writ of habeas corpus to a Justice of the Supreme Judicial Court. The writ was issued and after hearing, the writ was dismissed and the petitioner was refused a discharge.

To this ruling dismissing the writ, petitioner took exceptions, and the cause is before us upon these exceptions. The extended bill of exceptions includes a transcript of the testimony taken at the time of the hearing on the petition for

a writ of habeas corpus. There is also included therein so much of the evidence as relates to the finding of the Judge of the Superior Court at the time the petitioner was adjudged guilty of contempt and sentence summarily imposed upon him. The bill of exceptions shows that prior to imposition of sentence, the presiding justice made the following statement:

> "Mr. Stern, throughout this trial I feel you are guilty of contempt of Court, so serious that I cannot disregard it. I feel at this trial your contempt has been so flagrant I have a duty to act upon it. I feel your use of the expression, 'damned fool,' in your argument to the jury illustrates plainly the contempt you have for the Court and the procedure and disregard of the obligations of a member of the Bar."

There is nothing in the bill of exceptions attacking the jurisdiction of the court nor the form of the commitment.

Under the provisions of Section 16, Chapter 106, R. S. 1954, the Superior Court has power to punish for contempt.

However, even in the absence of such a statute, the power of the Superior Court to punish for contempts is unquestionable.

> "The power of courts to punish for contempt has existed from earliest times. It was useless to establish courts unless they had authority to punish acts which might interrupt the orderly course of judicial procedure." *Cushman Co., et al.* v. *Mackesy, et al.*, 135 Me. 490, 494.

> "The power of inflicting punishment upon persons guilty of contempt of court may be regarded as an essential element of judicial authority. It is possessed as a part of the judicial authority granted to courts created by the Constitution of the United States or by the Constitutions of the several states. It is a power said to be inherent in all courts of general jurisdiction, whether they are state or

> Federal; such power exists in courts of general jurisdiction independently of any special or express grant of statute. 12 Am. Jur. 418, § 40.
>
> "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect and decorum in their presence, and submission to their lawful mandates." *Anderson* v. *Dunn,* 6 Wheat. 204, 227, *Ex Parte Terry,* 128 U. S. 289, 303.
>
> "The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice, is inherent in Courts of Chancery and other Superior Courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of Magna Charta and of the twelfth article of our Declaration of Rights." *Cartwright's Case,* 114 Mass. 230, 238, *Ex Parte Terry,* 128 U. S. 289, 303.
>
> "The power to punish for contempt is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity; implied, because it is necessary to the exercise of all other powers." *Cooper's Case,* 32 Vermont 253, 257, *Ex Parte Terry,* 128 U. S. 289, 303.

Recognizing the power of the Superior Court in the instant case, to punish for contempt, we pass now to the question of the types of contempt.

> "There are two kinds of contempt recognized by the authorities and by the practice of the courts. Criminal contempts are those committed in the immediate view and presence of the Court, such as insulting language, or acts of violence, which interrupt the regular proceedings in courts. This class of contempts may and should be punished summarily, and by the order of the presiding Judge, or the Court, after such hearing, at once, as the Court may deem just and necessary."

> "There is another class of contempts, which are in a sense constructive, and arise from matters not transpiring in Court, but in reference to failures to comply with the orders and decrees issued by the Court and to be performed elsewhere. Such refusals or failures are undoubtedly contempts, as actual as those committed in open Court, and liable to be punished under the same law. But the process to bring parties into Court, and the time given for a hearing by our rules, are different from the summary process in case of a criminal contempt before the Court." *Androscoggin & Kennebec R.R. Co.* v. *Androscoggin R.R. Co.,* 49 Me. 392, 400; *Cheney* v. *Richards,* 130 Me. 288, 292; *Gendron* v. *Burnham,* 146 Me. 387, 398; *Cushman Co., et al.* v. *Mackesy, et al., supra.*

> "Contempts have been classified as either criminal or civil. - - - The same act of disobedience to a decree may fall into either class, according to the purpose for which and the manner in which the court may deal with it. If the penalty is not imposed wholly for the benefit of the aggrieved party, but in part at least is punishment for the affront to the law, the contempt is deemed criminal. If, on the other hand, the power of the court is used only to secure to the aggrieved party the benefit of the decree, either by means of a fine payable to the aggrieved party as a recompense for his loss through disobedience to the decree, or by means of imprisonment terminable upon compliance with the decree, then the contempt is deemed civil. *Godard* v. *Babson-Dow Mfg. Co.* (Mass.) 65 N. E. (2nd) 555, 557.

Contempts have been generally defined as:

> "Any act which is calculated to embarrass, hinder or obstruct the court in the administration of justice or to lessen its authority or dignity." *In Re: Holbrook* 133 Me. 276, 280.

> "Misconduct by an attorney which reflects improperly on the dignity or authority of the court, or which obstructs or tends to obstruct, prevent or

> embarrass the due administration of justice, constitutes contempt."
>
> "Thus an attorney's refusal or failure to heed a proper order or admonition of the court constitutes contempt, - - - so also an attorney may be guilty of contempt for addressing insulting language to the court, or to an officer of the court, the jury or a witness, and it is unnecessary that he be warned against the use of such language." 17 C. J. S. 35, § 25 (b).

The petitioner, having been found guilty of criminal contempt committed in the presence of the court, attacks the legality of the action of the court and the sentence imposed upon him, by a means of a petition for a writ of habeas corpus.

It seems clear that at common law a court of competent jurisdiction was held to be the sole judge of contempt against its authority and dignity. Thus, its judgment in such cases was final and conclusive, and in the absence of constitutional or statutory provisions, there was no right of review in contempt proceedings. 17 C. J. S. 150, § 112.

It was universally stated that every Superior Court of record being, at common law, the sole judge of contempts against its authority and dignity, it naturally resulted that the judgment of every such court, in cases of contempt was final and conclusive, and not reviewable by any other tribunal. It was further held that the writ of habeas corpus is a collateral remedy, and under the well established rule that a judgment of a court of competent jurisdiction, upon a matter within its jurisdiction, cannot be collaterally impeached, the result was that, no question of jurisdiction being raised or involved, a conviction or commitment for contempt could not be reviewed by means of a writ of habeas corpus. At common law it was held that on a habeas corpus in a case of commitment for contempt, the court could examine only two questions: first, as to jurisdiction, and

secondly, as to the form of the commitment. When the jurisdiction was undoubted, and the commitment sufficient in form, the writ was discharged.

The common law doctrine was tersely expounded in *Ex Parte Kearney,* 7 Wheat. 38, in these words:

> "Generally speaking, the sole adjudication of contempt belongs exclusively and without interference to each respective court."

In the leading case of *Ex Parte Terry,* 128 U. S. 289, 305, it is indicated that one imprisoned for contempt would be entitled to discharge only when the judgment lies without the jurisdiction of the court, such judgment, under such circumstances, being a nullity.

> " 'The power to commit or fine for contempt is essential to the existence of every court. Business cannot be conducted unless the court can suppress disturbances and the only means of doing that is by immediate punishment. - - - It is a case that does not admit of delay, and the court would be without dignity that did not punish it promptly and without trial. Necessarily there can be no inquiry de novo in another court, as to the truth of the fact. There is no mode provided for conducting such an inquiry. There is no prosecution, no plea, nor issue upon which there can be a trial.' " *Ex Parte Terry,* 128 U. S. 289, 308.

> "In a proper case the writ of habeas corpus may be used to test the validity of an imprisonment for contempt. Its scope of efficacy, however, is narrow since it constitutes a collateral attack on the contempt proceedings - - -. Its sole function is to determine the court's jurisdiction to adjudge the relator guilty of contempt. From this it follows that the writ will not lie or issue where the court in committing the party for contempt acted within its jurisdiction and its orders, including the order of commitment, are not absolutely void. Where the court acted within its jurisdiction, the

> justice or propriety of the commitment is not open to review on habeas corpus. Ordinarily the evidence will not be reviewed except to determine the question of jurisdiction." 39 C. J. S. 539, § 36.

The strictness of the common law rule is demonstrated by the manner in which the court in *Ex Parte Terry, supra,* disposed of the argument that the power to punish instantly, without further proof or examination, contempts committed in the presence of the court, is a power which may be abused and sometimes exercised hastily or arbitrarily. The court said:

> "Wherever power is lodged it may be abused. But this forms no solid objection against its exercise. Confidence must be reposed somewhere; and if there should be an abuse, it will be a public grievance, for which a remedy may be applied by the legislature, and is not to be devised by courts of justice." *Ex Parte Terry,* 128 U. S. 289, 309.

The court further stated that it was competent for a court of general jurisdiction, immediately upon the commission, in its presence of a contempt, to proceed upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form; and to further close the door to appellate redress, the court said:

> "Whether the facts justified such punishment was for that court to determine under its solemn responsibility to do justice, and to maintain its own dignity and authority." *Ex Parte Terry,* 128 U. S. 289, 310.

However, it is clear that the strict rule of the common law has been relaxed and the tendency of judicial decisions has been to extend the right of review on questions of law in contempt proceedings. 17 C. J. S. 150, § 112.

> "A court has power, on habeas corpus to inquire whether the facts confer jurisdiction upon the

court to make the particular order, and it may investigate the question whether the acts for which the petitioner has been committed constitute a contempt within the power of the court to punish contempts." 25 Am. Jur. 212, § 92.

"Where the court is without jurisdiction of the subject matter or of the parties or lacks power to make the order in the particular case, it cannot punish for contempt or disobedience of such order; and habeas corpus may be invoked to avoid such imprisonment and restore the person illegally imprisoned to his liberty. Accordingly, a petitioner will be discharged where he is imprisoned for violation of an order which the court had no authority to make." 25 Am. Jur. 213, § 93.

"The view expressed in some of the earlier decisions that the sufficiency of an act to constitute a contempt cannot be considered in a habeas corpus proceeding brought for the purpose of securing a discharge from the commitment ordered for a contempt has not received support in the later decisions. The rule as stated by many authorities is that the acts constituting the alleged contempt may be examined on habeas corpus to ascertain whether in law they constitute a contempt; and if they do not, the court was without jurisdiction to imprison, and the prisoner is entitled to be released. In other words, if the matters complained of in the contempt proceedings do not in law constitute contempt of court, an adjudication that they do constitute contempt does not make them do so, and relief from imprisonment for matters not amounting to contempt may be had by habeas corpus." 25 Am. Jur. 214, § 94.

"The prevailing view is that the accused may not, upon application for the writ of habeas corpus controvert the truth of the specific facts recited in the order adjudging him to be in contempt. - - - As it has been otherwise stated, the Court may consider whether the facts set out in a record constitutes contempt, but since habeas corpus is a col-

> lateral attack in which the record is conclusively presumed to be correct, the Court cannot question the facts themselves as set out." 25 Am. Jur. 214, § 95.
>
> "A statement filed by the Judge as to matters occurring before him is usually regarded as importing absolute verity." 12 Am. Jur. 444, § 78.

Subject to the limitation that in an action for habeas corpus for release from custody for a criminal contempt, the record is presumed to be correct and that the truth of the specified facts cannot be controverted, it is our opinion that this court has the power to review the facts shown by the record, for the purpose of testing their legal sufficiency. If the facts are not sufficient to constitute a contempt, then it follows that a conviction thereon will be erroneous.

It is our opinion that the common law rule prohibiting any review of a conviction for criminal contempt is too harsh, and some protection should be afforded against the possible arbitrary use of the power of the court to punish summarily for contempt. Because the powers of the judge to punish for contempt are so ample, they must be subject to an eventual scrutiny, so that it may be certain that there existed the substance of an occasion for their exercise.

That this court has already recognized the doctrine set forth in this opinion is indicated by various decisions.

In the case of *Bradley, et al.* v. *Veazie,* 47 Me. 85, a citation was issued to the appellants to appear before the Probate Court, to be examined on oath in relation to an alleged concealment or embezzlement of property of an estate. Pursuant to the statute authorizing the Probate Judge to commit to jail anyone who refused to answer lawful interrogatories, the appellants were committed to jail for failure to answer questions put to them in the Probate Court. The appeal was dismissed and the case remanded to the court below for further proceedings. This court held:

> "Whether the interrogatory be lawful or otherwise, or whether the commitment be justifiable or not, can be determined only by the Supreme Judicial Court on a writ of habeas corpus."

The rule we are enunciating in this decision to the effect that in habeas corpus the record may be examined to determine the legal sufficiency thereof, was applied in two other cases, viz.: *In Re: Holbrook,* 133 Me. 276, and *Gendron* v. *Burnham,* 146 Me. 387.

In the *Holbrook* case, brought to this court on exceptions to a dismissal of a writ of habeas corpus, the petitioner had been adjudged guilty of contempt and committed to jail for perjury alleged to have been committed in the presence of the court. The petitioner was discharged, the court holding that the extent of the court's powers was limited by the statutes applicable to cases of this kind, which statute authorized only that Holbrook be held by the grand jury for subsequent indictment. § 3, Chapter 135, R. S. 1954.

The *Gendron* case involved refusal of a witness to answer questions put to him before a grand jury. The court after citing with approval the statement found in *Bradley* v. *Veazie, supra,* that the question whether the commitment be justifiable or not, can be determined only on a writ of habeas corpus, discharged the petitioner and made the following statement:

> "In the contempt proceeding against the prisoner the court ruled that as he admitted being asked the questions and giving the answers which appeared in the affidavit, that that was sufficient to hold him for contempt, and then proceeded to sentence him to six months in jail therefor. This ruling by the court was erroneous. There being no evidence in the record which would justify a finding that the refusal to answer the questions before the grand jury was contumacious or obstructive, the witness was entitled to have specific rulings as to whether or not he should answer each question which he

> had refused to answer. He was further entitled to an opportunity to answer such questions as the court ruled did not call for self incriminatory disclosures and which the court directed him to answer. This opportunity was not afforded him. The court made no ruling on the several questions as to whether or not the witness should answer the same, nor did it direct him to answer any of them or give him opportunity therefor. There was no contempt, and the sentence for contempt was not justified." *Gendron* v. *Burnham,* 146 Me. 387, 407.

As previously stated, the bill of exceptions does not attack the jurisdiction of the court, either as to the person of the petitioner or as to the subject matter. Nevertheless, we have given careful consideration to these two issues and we rule that the court had jurisdiction over the petitioner and over the subject matter.

In this case the mittimus upon which the petitioner was committed to jail contains no specifications as to the nature of the alleged acts of contempt and includes only a statement that the petitioner had been convicted of the crime of "criminal contempt of court in open court." The bill of exceptions raises no question concerning the sufficiency of this allegation. However, even if the imprisonment had been attacked for any alleged insufficiency in the mittimus, the petitioner would take nothing by such procedure, because as was said in the cases of *Wallace* v. *White,* 115 Me. 513, 521, and *Cote* v. *Cummings,* 126 Me. 330, 332:

> "It is the judgment of the Court which authorizes detention. The mittimus is the evidence of the officer's authority. The judgment is the real thing. The precept is not. The important question on habeas corpus is, is the prisoner in the custody where the judgment commanded him to be put and not how he was taken into custody."

In the bill of exceptions, we find this statement:

> "Your petitioner is a party aggrieved thereby in that no legal cause was shown for his restraint."

While this statement is somewhat ambiguous, we nevertheless consider it as an attack on the legal sufficiency of the facts for which he was sentenced and committed.

Pursuant to the rules laid down in this opinion, we, therefore, proceed to a study of the record with a view of determining whether or not the facts were legally sufficient to form the basis of a conviction for criminal contempt.

It seems that it is the general rule in England, that the facts constituting the contempt need not be set out in the record, and there are authorities in this country holding that a judgment or sentence for contempt is valid without any recital of facts upon which it is based. There is, however, a decided tendency towards adopting a rule which specifically serves the surer end of justice, that a court should make a finding of facts. 12 Am. Jur. 443, § 78.

There is a Federal Court rule which provides that a criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court; and the order of court shall recite the facts and shall be signed by the judge and entered of record. Rule 42 (a) Title 18 U. S. C. A., Federal Rules of Criminal Procedure.

> "In the absence of a statute requiring it, it is not necessary that a judgment in contempt state the facts constituting the contempt." 17 C. J. S. 124.

In this state we have neither a rule of court nor any statute applicable to the situation.

In the case of *Silverton* v. *Commonwealth,* (Mass.) 49 N. E. (2nd) 439, a contempt judgment was attacked by a writ of error, this procedure being authorized by statute in that Commonwealth.

The court after reviewing the common law of England and of various American jurisdictions pointed out the great

diversity in American decisions concerning the necessity of accompanying a sentence of criminal contempt with a detailed statement of its grounds. It concludes by suggesting that while a statement of fact is not necessary to the validity of a judgment for contempt, it is better practice to set forth definitely in the order the acts which are found to constitute contempt.

As good practice, in cases where one is punished summarily for a criminal contempt committed in the presence of the court, we are of the opinion that the judge should certify that he saw and heard the conduct constituting the contempt, and that it was committed in the actual presence of the court, and that the order of contempt should recite the facts. Such procedure, we believe, would better serve the ends of justice.

> "Where the record does not contain a statement of facts, any conceivable state of facts necessary and proper to sustain the orders complained of will be assumed, the findings in the contempt judgment will be taken as true, and the evidence will be presumed to justify the order of contempt." 39 C. J. S. 545, § 36.

In this case, we have a record, albeit a scanty one, in the statement of the judge made at the time of the conviction and found in petitioner's bill of exceptions.

In the case of *Albano* v. *Commonwealth,* (Mass.) 53 N. E. (2nd) 690, it is pointed out that contempt may consist of an objectionable manner, speech, attitude, conduct and tone of voice. In that case the court said:

> "The conduct of the plaintiff in error was consecutive and related. Each part of it might tend to lend flavor to the other parts. The judge could consider the effect of that conduct as a whole. He was not obliged to take action at the first sign of contemptuous conduct or at each separate recurrence of such conduct thereafter, and he did not lose his power to punish by failure to take that course."

In the instant case it would appear that the use of the words "damned fool" by the petitioner in referring to his client was but the culmination of many other acts on the part of the petitioner, throughout the trial, considered contemptuous by the presiding justice.

When the petitioner was found guilty of criminal contempt, and summarily sentenced, the court had jurisdiction over him and over the subject matter. An inspection of the record convinces us that the facts found by the judge were legally sufficient to support a finding of guilt.

In our opinion the statement found in *Cheney* v. *Richards*, 130 Me. 288, 292, to the effect that a finding of contempt by a court of competent jurisdiction cannot be reviewed is dictum, and insofar as such statement may be considered as authoritative, it is overruled by this decision.

Exceptions overruled.
Decree below affirmed.

ARTHUR J. DAIGLE
vs.
MARY ANN YESBEC, IRVING STRUM
AND WILLIAM LANDAU

Aroostook. Opinion, September 10, 1957.

Pleading. Torts. Joinder. Demurrer.

Persons who act separately and independently, each causing a separate and distinct injury, cannot be sued jointly, even though the injuries may have been precisely similar in character and inflicted at the same moment.

A declaration charging one defendant with negligent destruction of a building cannot be joined with a charge against another defendant for fraud.

A misjoinder appearing on the face of the record may be objected to by demurrer.

ON EXCEPTIONS.

This is a tort action before the Law Court upon exceptions by defendants to the overruling of a special demurrer. Exceptions sustained. Demurrer sustained.

Bird & Bird,
Elmer E. Violette, for plaintiff.

Arthur J. Nadeau, for defendant Yesbec.
George B. Barnes & Alfred LaBonty,
for other defendants.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

BELIVEAU, J. On defendants' exception. The defendants filed a special demurrer to the plaintiff's declaration. This was overruled and exception taken.

The declaration alleges an agreement by the plaintiff with one Charles Yesbec on October 1, 1949, for the sale of a strip of land 7½ feet wide, easterly of the land owned by the plaintiff; that this land was conveyed by Yesbec to Mary Ann Yesbec and by her to one of the defendants, Irving Strum, by deed dated November 6, 1954; that the defendant Irving Strum, his servants and agents demolished and destroyed the easterly side of the plaintiff's five-story apartment building, which was erected on the 7½ foot strip. It is alleged that Charles Yesbec "neglected" to give the plaintiff a deed of this strip; that Mary Ann Yesbec had full knowledge of the alleged contract; that on November 6, 1954, Mary Ann Yesbec fraudulently conveyed, by warranty deed, land which included the strip, and that the defendant Strum, wrongfully procured and accepted this deed with full

knowledge of the so-called contract between the plaintiff and Charles Yesbec.

The fraud alleged against Mary Ann Yesbec, Irving Strum and his alleged agent, William Landau, was the fact that they all knew and were aware of the alleged agreement and did nothing to carry out its terms.

There are several causes for the demurrer alleged by the defendants. Passing upon the first cause is sufficient to dispose of this case and for that reason we are giving no consideration to other matters set forth in the demurrer nor to the many apparent defects in the declaration.

The first cause, and the one we are concerned with here, alleges that, ". . . . the plaintiff has declared against the defendants jointly in a plea of the case and in his declaration has set forth and alleged separate and distinct acts of tort by each of the several defendants without alleging consort design or unity on the part of the defendants and further the injuries set forth in said declaration are not one and identical, wherefore the liability, if any, if the defendants is several and they ought not to be joined in the same action."

In *Allison* v. *Hobbs,* 96 Me. at page 29, in discussing misjoinder of defendants, the court said, ". . . . it is true that persons who act separately and independently, each causing a separate and distinct injury, can not be sued jointly, even though the injuries may have been precisely similar in character and inflicted at the same moment," and in *Gordon, Pro Ami* v. *Lee and Scannell,* 133 Me. at page 363, "Persons who do not cooperate, the harm by each being distinct, cannot be sued jointly, even though the harms may have been precisely similar in character, *Allison* v. *Hobbs,* 96 Me. 26, 51 A. 245, 246."

Having in mind the rule so well understood generally, and stated in our court in the above two cases, it is clear that the defendant, Yesbec, cannot be held responsible for

the destruction of that part of the building on the 7½ foot strip, by Strum and his agents. This is separate and distinct from the fraud claimed and alleged against the defendant, Yesbec, in the declaration.

> "At common law misjoinder of parties defendant may be objected to by demurrer where the misjoinder appears from the face of the complaint. A joint demurrer lies at common law in an action ex delicto where several defendants are sued jointly for a tort that cannot, in point of law, be joint, but not where the tort can be joint." 67 C.J.S., Parties Sec. 138b (2). See also 39 Am. Jur., Parties Sec. 121; 1 Chitty on Pleadings 128.

The alleged liability of the defendants is several, and for that reason the defendants cannot be joined in this action.

Exception sustained.
Demurrer sustained.

MICHAEL WHITE, PRO AMI
vs.
STANLEY A. SCHOFIELD

STANTON WHITE
vs.
STANLEY A. SCHOFIELD

Franklin. Opinion, September 16, 1957.

New Trial. Exceptions. Courts. "Law" Jurisdiction. Rule 17. Negligence.

A motion for a new trial addressed to the Superior Court considered in termtime may be decided in termtime, during the ensuing vacation, or at the next term.

Under R. S. 1954, Chap. 113, Sec. 60 and Rule 17, a party has ten days after decision upon the motion for new trial within which

to file a motion for new trial addressed to the Law Court. In such case a transcript of the evidence must be filed within thirty days after adjournment of the term at which the verdict was rendered or within thirty days after the filing of the motion, whichever is later, in any case where no special order for filing is made. During the alternative thirty-day period this time may be enlarged by special order of the justice who presided over the trial as the "presiding justice" within the meaning of Rule 17.

The marking of cases with the entry "Law" upon the docket of the Superior Court (after filing of a motion for new trial and transcript) effectively terminates the authority of the Superior Court and the question of timely filing of the transcript must thereafter be determined by the Law Court.

Rules of court are not to be so interpreted as arbitrarily to destroy rights of appeal and review.

Failure of a motor vehicle operator to give any signal of his intention to make a left turn as required by R. S. 1954, Chap. 22, Secs. 123, 124 and 125 is prima facie negligence.

Uncorroborated oral testimony of an interested witness must yield to undisputed physical facts of universal application.

ON EXCEPTION AND MOTIONS.

This is a negligence case before the Law Court upon defendant's exceptions and motions for a new trial. Exceptions sustained. In the case of *White* v. *Schofield* motion granted, new trial ordered. In *White, Pro Ami* v. *Schofield* motion denied.

Berman & Berman, for plaintiff.

Frank W. Linnell, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

WEBBER, J. These two cases were tried together by a jury below and are before us on exceptions and motions for new trial. Exceptions raise the same issues in both cases

and will be first considered. The bill of exceptions (identical in all material respects in each case) furnishes a sequence of events which effectively raise legal issues and which may be briefly summarized as follows:

1. Jury trial at the May term of the Superior Court, 1956, resulting in plaintiffs' verdicts.
2. During the term, on July 5, 1956, denial by the presiding justice of motions for new trial addressed to him.
3. Final adjournment of the term on the same day, July 5, 1956.
4. In vacation on July 12, 1956 motions for new trial addressed to the Law Court filed by defendant.
5. In vacation on August 10, 1956 ordered by the justice who had presided at the May term that the transcript of evidence be filed on or before September 10, 1956.
6. In vacation on September 4, 1956 the transcript of evidence filed and the cases marked by the clerk "Law." (As shown by docket entries incorporated by reference in the bill of exceptions)
7. At the October term, 1956 motions filed by plaintiffs for judgment on the verdicts. Motions granted and exceptions thereto seasonably prosecuted.

The plaintiffs contend that there was no compliance by the defendant with the provisions of Rule 17 of the Revised Rules of the Supreme Judicial and Superior Courts (147 Me. 464, 470) with respect to the filing of a transcript of the evidence. In essence, the plaintiffs argue that the justice who had presided at the May term was on August 10, 1956 without authority to fix a time for filing the transcript. The defendant insists that a proper interpretation of Rule 17 authorizes the action of the justice who presided at the May

term, and that a transcript filed in pursuance of that order was filed seasonably. We note that another issue is raised, which, although not argued by either party, must be considered here. After filing of the transcript and the marking of the cases "Law," did the Superior Court retain jurisdiction to order judgment upon the verdicts?

In this case, the defendant, after adverse verdicts, filed motions for new trial addressed to the presiding justice in accordance with the provisions of R. S. 1954, Chap. 113, Sec. 60. This he did during the term as required by the statute and by Rule 17. The presiding justice, having considered the matter in termtime, could render his decision during the same term, or during the ensuing vacation, or at the next term. In this instance, his order denying the motions was filed on the last day of the term and just prior to final adjournment. Under the statute and rule *(supra)*, defendant had ten days after the order was filed in which to file new motions addressed to the Law Court. Defendant waited but seven days to avail himself of this right. His motions alone, however, would not be effective without the filing of a transcript of the evidence. Rule 19A provides: "No case at law in which a report of the evidence is required for the Law Court shall be marked 'Law' until such report has been filed." Rule 17 provides the time for such filing.

> "When such motion is addressed to the Law Court, the party making it shall cause a report of the whole evidence in the case to be prepared, signed by the presiding justice or authenticated by the certificate of the official court stenographer, and filed within such time as the presiding justice shall by special order direct, and, if no such order is made, it must be done within thirty days after the adjournment of the term at which the verdict was rendered or within thirty days after the filing of the motion, whichever is later; if not so done, the motion may be regarded as withdrawn, and the clerk, at a subsequent term, may be directed to enter judgment on the verdict."

The first issue before us will be resolved by a determination of the meaning of the words "presiding justice" as used in the quoted paragraph. For it will be noted that the justice here exercised authority and fixed a time for filing the transcript of evidence during the ensuing vacation and not while he was "presiding" over the term.

Rules of Court are designed primarily to implement procedural statutes, discourage procrastination on the part of litigants and their counsel, and provide a smooth and orderly flow of litigation. They are not to be so interpreted as arbitrarily to destroy rights of appeal and review. R. S. 1954, Chap. 103, Sec. 15 provides in part that among the cases which come before the Law Court, sitting as a court of law, are "cases in which there are motions for new trials upon evidence reported by the justice." R. S., Chap. 113, Sec. 190 provides in effect that a transcript of the evidence certified by an official court reporter will suffice without the signature of the presiding justice. R. S., Chap. 113, Sec. 60, already noted, provides for the time of filing motion to the Law Court. These statutes must be read together in order to ascertain what authority the Legislature conferred on the several justices of the Superior Court and what meaning must be given to the quoted words in Rule 17 which implement these statutes. It is obvious that the Legislature intended to provide a litigant, aggrieved by an adverse jury verdict, with an avenue to the Law Court which would remain open to him for ten days after the filing of an adverse decision on a similar motion by the justice who presided over the trial. The Legislature contemplated that the record would be required and might be supplied by an official court stenographer. It is obvious that in many instances it would not and could not be known until long after the adjournment of the term whether the decision of the justice below on the motion addressed to him would be adverse to the movant, whether there would be any resulting necessity of addressing a motion to the Law Court, or what

length of time might be reasonably required by the court reporter for preparing the transcript. For example, a motion addressed to the presiding justice might be taken under advisement and no decision filed thereon until the last day of the *next term* of court. The ten day period then allowed to the movant would carry the filing date for a motion to the Law Court into the *second vacation.* There is surely no occasion for fixing a time for the filing of a transcript until the motion itself has been filed. Rule 17 merely establishes the mechanics of pursuit of the remedy established by the Legislature. Since there must be an end to litigation, Rule 17 provides that the transcript must be filed within thirty days after the adjournment of the term at which the verdict was rendered or within thirty days after the filing of the motion, whichever is later, in any case where no special order for filing is made. We hold, however, that this time may be enlarged by special order of the *justice who presided over the trial.* He is the person designated by the words "presiding justice" to supervise the mechanics of obtaining a "report of the evidence." Such special order may be made at any time during said (alternative) thirty-day period. We think also that it is implicit in Rule 17 that such justice may during the period fixed by his special order further extend the time for filing the record. Only thus can the mechanics be provided to make available the remedy by dual motion for new trial provided by statute. Rule 17 must be so interpreted as to be rescued from absurdity. *Greaves* v. *Houlton Water Co.,* 143 Me. 207, 212.

It appears, therefore, that in the instant case the justice who presided when the verdicts were taken seasonably (within thirty days after the filing of the motion addressed to the Law Court) fixed the time for filing the transcript and that order was complied with.

The cases of *Poland* v. *McDowell,* 114 Me. 511, and *Bradford* v. *Davis,* 143 Me. 124, do not govern this situation.

They deal with exceptions rather than motions. The controlling statute, R. S. 1954, Chap. 106, Sec. 14, specifically provides that exceptions must be filed during the term and not later than thirty days after the event which gives rise to the exceptions. Neither the statute nor the requirement of rigid adherence to it is unreasonable in view of the fact that the aggrieved party knows during the term that the necessity of exceptions has arisen. No undue hardship is imposed by the requirement that he reserve during the term the right to file an extended bill of exceptions and the record in support thereof at some later time to be fixed by the presiding justice. Even in the case of exceptions, however, it has been deemed necessary to resort to legal fiction in order to preserve the remedy from destruction by mechanical breakdown. When the extended bill of exceptions is finally allowed at a time subsequent to that fixed by the justice, there is a "conclusive presumption" that the time was properly extended and all requirements were met. *Bradford* v. *Davis, supra; Poland* v. *McDowell, supra; Carey* v. *Bourque-Lanigan Post No. 5 et al.,* 149 Me. 390, 394. Thus we see that even in the case of exceptions, where the justice has acted to preserve the remedy after his authority has technically ceased, all doubts are resolved by his action in favor of that preservation.

Turning now to the jurisdiction of the Superior Court to order judgment upon the verdicts, we are satisfied that such action could not be taken. Upon the motions for new trial addressed to the Law Court, a transcript having been filed, the cases were marked "Law" upon the docket of the Superior Court. This entry by statute effectively terminated the authority of the Superior Court to do more than continue the cases until their determination by the Law Court. R. S. 1954, Chap. 103, Sec. 15. Nothing remained to be done there except for the clerk of the Superior Court to certify the cases to the clerk of the Law Court at least ten days before its next term, a purely ministerial act. A ques-

tion such as is here raised as to whether the transcript was seasonably filed would thereafter be determined by the Law Court. Only thus is the orderly judicial process of review assured. If certification to the Law Court is premature, no transcript having been filed, the Law Court will take the appropriate action to dismiss the case from its docket. See *Wayne* v. *DeCoster & Stevens,* 140 Me. 192, 196. That a case once transferred to the docket of the Law Court stands automatically continued in the Superior Court was clearly indicated in *Savings Bank* v. *Alden,* 104 Me. 416 and *Stowell* v. *Hooper,* 121 Me. 152. Purported action taken in the Superior Court thereafter and before any determination or order of the Law Court is a nullity. See *Powers* v. *Rosenbloom,* 143 Me. 408. The matter is jurisdictional and we reach the issue upon our own motion.

Having concluded that under the authority inferentially vested by the several pertinent statutes and expressly conferred by Rule 17, the justice who presided when the verdicts were taken properly fixed the time for filing a transcript of the record, and having further concluded that the Superior Court was without authority to order judgment on the verdicts after transfer by docket entry of the cases to the jurisdiction of the Law Court, we are compelled to hold that the exceptions must be sustained. It follows that the motions for new trial are in order for consideration.

These cases arose out of an automobile accident. Plaintiff Stanton White was the operator of a vehicle and his son Michael his passenger. In the process of making a left turn across the highway, the White vehicle was overtaken by and in collision with the defendant's automobile which sought to pass on plaintiff's left. Considering the evidence most favorable to plaintiff, the jury could have found the following facts. The plaintiff driver admittedly failed to give any signal of his intention to turn to the left across the highway as required and prescribed by R. S. 1954, Chap. 22, Secs.

123, 124 and 125. Failure to give the warning signal when required is prima facie negligence. Plaintiff had traversed a long straight stretch of road which gave him visibility to the rear for about a quarter of a mile. He looked back for this distance, about thirteen hundred feet, when he was about one hundred feet from the point where he started his left turn. He saw no vehicle to his rear. He was then proceeding at about thirty-five miles an hour. While traversing the next one hundred feet he gradually reduced speed to about twenty miles an hour. He then looked to his rear again as he started his turn and saw the defendant's car about five hundred feet behind him. It would thus appear that if the defendant had traveled from a point out of sight at the first observation to the point where plaintiff saw him five hundred feet away while the plaintiff was traversing about one hundred feet, the defendant was traveling at least eight times as fast as the plaintiff which on its face is incredible. Plaintiff testified that while making his left turn he traveled from forty to fifty feet at a speed decreasing from twenty to ten miles per hour, and was then struck by the defendant's car. Again affording the plaintiff every possible advantage, it would nevertheless be necessary for the defendant to have traveled the last five hundred and fifty feet at a speed at least eleven times as fast as that of the plaintiff. This result likewise is highly improbable. The only possible inference which can be drawn from the evidence is that the plaintiff either failed to look before starting to turn to the left, or looking, failed to see the defendant where he must certainly have been, much closer behind him than he now admits. The duty owed by one making a left turn to one seeking to overtake and pass from the rear has many times been stated. *Bedell* v. *Railway Co.*, 133 Me. 268, 271, states:

> " 'The law charges the driver of the car making such a crossing with the duty of so watching and timing the movements of the other car as to reasonably insure himself of the safe passage either in front

or rear of such car, even to the extent of stopping and waiting if necessary. *Fernald* v. *French,* 121 Me. 4, 9, 115 A. 420; *Esponette* v. *Wiseman,* 130 Me. 297, 155 A. 650. No less strict rule can be applied to operators attempting to cross the right of way of cars coming from behind. Reasonable care must be exercised in ascertaining their presence in the passing lane. The precautions above stated must then be taken.' *Verrill* v. *Harrington,* 131 Me. 390, 395, 163 A. 266, 268; *Reid et al.* v. *Walton et als.,* 132 Me. 212, 168 A. 876."

It is apparent that the jury could not have given proper consideration to the legal duties which governed the facts here presented. "Uncontroverted and undisputed physical facts may completely override the uncorroborated oral testimony of an interested witness which is completely inconsistent with those physical facts, and natural and physical laws have universal application and may not be disregarded." *Jordan* v. *Portland Coach Co.,* 150 Me. 149, 158. This verdict which exonerates the plaintiff driver from all contributory negligence cannot stand.

The verdict awarded the plaintiff passenger in the amount of $500 is attacked as excessive. Defendant concedes that it is otherwise supported by evidence. As to plaintiff's injuries, there were no objective symptoms, but there was evidence of pain in the chest continuing ten months to the time of trial, coupled with some alleged incapacity for work. The verdict seems high but we cannot say that it is so high as to be manifestly unreasonable or excessive.

The entry will be

In both cases, exceptions sustained. In the case of Stanton White v. Schofield, motion granted, new trial ordered.

In the case of Michael White, pro ami v. Schofield, motion denied.

STATE OF MAINE
vs.
FRANCES SILVA

Cumberland. Opinion, September 18, 1957.

Manslaughter. Circumstantial Evidence. Admissions. Witnesses.

Many crimes are committed in secret. In such case, the state must forge a chain of circumstances, each essential link proven beyond a reasonable doubt, and the whole pointing inexorably to guilt as the only rational hypothesis.

When accident is the alternative to guilt, circumstantial evidence must rule out accident as a rational or reasonable explanation of death.

The history of old injuries has probative value in determining whether or not accidental causation has been eliminated beyond a reasonable doubt.

Where a series of accidental injuries would be regarded abnormal, the likelihood of accidental causation of death diminishes to the vanishing point.

The concealment of past injuries to decedent may add force to the chain of circumstantial evidence which the jury is entitled to consider in determining guilt or innocence.

A statement made by respondent to a criminal investigator for the state that "if anybody would be responsible (for decedent's injuries), it would be me," was admissible to eliminate as suspect other people who had opportunity to injure decedent child.

The jury may consider the unexplained failure of a husband to corroborate his wife's testimony regarding treatment of decedent child.

ON EXCEPTIONS.

This is an action by indictment for manslaughter. The jury returned a verdict of guilty. The case is before the Law Court upon exceptions and appeal. Exceptions overruled. Motion denied. Appeal dismissed. Judgment for the State.

Arthur Chapman, County Attorney, for plaintiff.

Lynn M. Bussey,
Frank O. Dunton,
Basil A. Latty, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

WEBBER, J. John Silva, III was born on October 26, 1954, unwanted and unloved, the child of an unwed mother. On February 1, 1955 he was legally adopted by John and Frances Silva and given the name which he was to bear for the few months of his troubled life. On February 28, 1956, this sixteen months old baby died as a result of injuries incurred under most peculiar circumstances. Autopsy and investigation were followed by indictment charging the respondent, Frances Silva, with manslaughter. A jury heard the evidence and returned a verdict of guilty. Appeal from the denial of a motion for new trial and exception to the admission of a single bit of evidence bring the matter before us.

In the short span of his life, the decedent had acquired a most extraordinary medical history. It is upon this history that the State relies primarily for proof of the guilt of this respondent. At the time of his adoption, there is no doubt but that this baby, then three months old, had suffered from neglect at the hands of his natural mother. The Silva family physician, Dr. Applin, found him to be thin, pale, malnourished and suffering from the early stages of rickets. Symptoms of rickets were at once arrested and had no adverse effect on the bone structure. Dr. Applin found no evidence of fracture. Only two months later, however, he observed the results of the first of a series of unhappy episodes in the baby's life. Asked by the respondent to treat the child for a cold, Dr. Applin perceived a "noticeable"

swelling in the area of the left thigh, and upon x-ray examination discovered a complete fracture of the femur which had started to heal. For this injury the child required hospitalization and traction. The respondent professed ignorance as to the occurrence of any injury to the thigh although the jury could properly infer from the testimony that the swelling would be noticeable to any person attending the baby. Medical testimony makes it clear that the bones of children of this age are more flexible and rubbery than those of adults and are not easily broken. The respondent recalled that a few days before the fracture was detected by the doctor, the baby was riding in an auto chair attached to the back of the divided front seat of her automobile. It becoming necessary to stop the car abruptly, the back of the seat with the auto chair attached tipped forward. The baby was not dislodged from his chair. He cried briefly but was quickly pacified. The child apparently obtained a well healed femur as a result of treatment.

Except for giving some routine immunization shots, Dr. Applin's services were not again required until he received an emergency call from the respondent on February 24, 1956. Upon arrival, the physician discovered the baby in a state of shock and apparently suffering a severe head injury. He was then given by the respondent a history of an accidental fall. The baby is alleged to have climbed to a standing position on the seat of his high chair, and then to have fallen striking his head on the hard kitchen floor. The defense suggests that there was a toy on the floor near the chair on which the child's body may have struck. The respondent states that she was then in the kitchen with the child, but several feet away preparing his food. They were alone in the house at the time. The baby was immediately hospitalized. On February 27th the skull was opened by operative procedure in an effort to relieve pressure from internal bleeding. On the day following, the child died. An autopsy was performed by Dr. Porter, an experienced pa-

thologist. The results of that autopsy together with the history of the fractured femur (not covered by autopsy) reveal that in the space of about a year, this child had an almost unparalleled succession of traumatic experiences. His body showed evidences of the following:

1. Old fracture of the left femur (discussed above).
2. A sub-dural hematoma on the left side of the head which, based on the quantity, quality and color of the fluid and the extent of formed membrane, was about two to four months old.
3. A line fracture of the 3rd to 9th rib inclusive on the right side which, based on the formation and absorption of callus and the formation of new bone, was two to three months old.
4. A sub-dural hematoma on the right side of the head which, based on the same factors, was about four weeks to two months old.
5. A fresh line fracture of the 3rd to 8th ribs inclusive on the left side which, based on the same factors, was only a few days old.
6. A large hematoma in the scalp which was only a few days old.
7. In the same area a fracture of the skull four to four and one-half inches long extending from the midline of the top of the skull to a point back of the right ear, and which was a few days old.

In addition, there were black and blue spots on the left forehead, left lower chest and on the back, with a tiny abrasion on the tip of the nose. It was noted that there were no abnormalties of bone structure and no indication of weakness which might cause the bones of this child to break more readily than those of any normal healthy child.

There was no other pathology which offered any possible explanation of the results noted other than trauma.

The respondent states that she was not aware that the child had ever received a fracture of the ribs or severe internal injuries about the head as he obviously did some time before February 24, 1956. She recalls but one incident in that period when he is alleged to have fallen into the fireplace, but did not appear to be seriously hurt.

As the evidence developed, the issues for the jury were relatively simple. There was no question of suicide by a child of this age. Did this child, then, die as a result of an unfortunate accident or accidents? Or did it die as the result of unlawful and violent force applied by some person? If so, was that person the respondent? This is the type of issue which a jury is well qualified to determine. The jury was fully and properly instructed that the respondent wore the protective mantle of innocence and that the State must strip that mantle from her by proof of guilt beyond a reasonable doubt. The jury has announced by their verdict that they entertained no reasonable doubt that the respondent produced the death of her adopted baby by some unlawful application of external force. The jury has said in effect that an hypothesis that John Silva, III died by accident is not rational or reasonable upon this evidence and the inferences properly to be drawn from it. Many crimes are committed in secret. In such case the State must forge a chain of circumstances, each essential link proven beyond a reasonable doubt, and the whole pointing inexorably to guilt as the only rational hypothesis. When, as here, the alternative is accidental causation, the circumstantial evidence must rule out accident as a rational or reasonable explanation of death. *State* v. *Merry,* 136 Me. 243; *State* v. *O'Donnell,* 131 Me. 294; *State* v. *Terrio,* 98 Me. 17. How, then, does this evidence meet this rigorous test?

As already noted, the first injury in point of time was a fractured femur. The jury might reasonably take into ac-

count the relative infrequency of such fractures in children of this age. In weighing the suggested explanation, the jury could properly consider whether it was probable that the mere tipping forward of the automobile seat, without throwing the child out of the seat and without producing any violent contact between the injured member and any hard object or surface, would cause a fracture in that portion of the body. They might find it difficult to believe that the effects of such a fracture would not have been observed by the respondent as she bathed and attended the baby. Such disbelief might logically raise an inference that the respondent had concealed some guilty knowledge of the true causation of this fracture.

The jury could find on the evidence that at some time two to three months before his death the child fractured seven ribs on the right side and at some time two to four months before his death suffered a severe sub-dural hematoma on the left side. No explanation based on accidental causation is suggested by the defense for these injuries unless it be found in the alleged fall into the fireplace. The incident as related by the respondent indicates that she and the child were alone in the living room about a month or less before the death; that the baby was learning to walk; that the fireplace was equipped with andirons and a metal mesh screen of the curtain type which stood open two or three inches at the center; that the baby took two or three steps toward the fireplace, stumbled and fell into it through the screen; that there was soot on his forehead but no other indication of injury; and that he cried only briefly and showed no later effects from the fall. The jury could properly question whether the force of such a fall would not be partially broken by the resistance of the screen and whether such force would be likely to produce either or both of the severe injuries noted. They might also properly question whether, if such a fall took place, it was related in time to the impact or impacts which produced these particular injuries. They

might properly reject the alleged incident as a rational explanation of these injuries which, on the evidence, they might conclude were incurred some time before the fall is alleged to have occurred.

The evidence would warrant a finding by the jury that at some time between four weeks and two months prior to the death, and in any event at a time more recent than the episode or episodes causing the injuries discussed above, the child suffered a sub-dural hematoma on the right side of the head. They might conclude that no explanation was suggested as to causation of this injury unless it was related to the alleged fall into the fireplace; but in that case, of course, the fireplace incident could not relate to the fractured ribs and the hematoma on the left side above referred to.

The jury could find that on February 24, 1956 the child suffered a severe skull fracture and scalp hematoma on the right side of the head and at or about the same time a fracture of six ribs on the left side. There was evidence to justify a conclusion on their part that an accidental fall from a highchair such as the respondent described would not account for the injuries sustained taking into account their nature and extent, their location on the body, and the degree of force which would ordinarily be required to produce them.

The medical testimony in this case was most revealing. Capable medical witnesses are often reluctant to give categorical denial to the suggestion that, medically speaking, a particular thing is "possible" or "could happen." Their obvious caution is prompted by their recognition of the yet unfilled gaps in medical knowledge. As expert witnesses, testifying with strict regard for truth and accuracy, they frequently speak with great positiveness and certainty only when the question relates to what is probable and likely. Such an answer they can base on their observation and ex-

perience. A jury is entirely justified in giving more weight to the probabilities as to the causation of traumatic injuries than they do to mere possibilities. The instant case furnishes an excellent example of this differentiation.

Dr. Derry, the medical examiner who viewed the autopsy, stated that it was unlikely that the fresh rib fracture in a child of this age was caused by a fall from a highchair as related by the respondent. It was his opinion that such an injury would require some sort of severe crushing causing the soft and flexible baby ribs to bend beyond their limit and snap. He considered it highly improbable that the skull fracture he observed was caused by the fall described, without the application of any additional force. He admitted the possibility of such causation. He denied, however, even the possibility that *all* the fresh injuries sustained could have been caused by such a fall alone. The toy, he felt, might account for some of the bruises, but not for all of the fresh injuries. He further stated that in his opinion neither the old rib fractures, nor the fractured femur, nor any of the hematomas could have been caused by the fall from the child's own height into the fireplace as described. It was his opinion that there would have to be a history of more accidents of greater severity to explain all of the many injuries sustained by this child.

Dr. Applin conceded that this skull fracture "could happen" as the result of a fall from the chair; also that it was "possible" that the fresh rib fracture could have been caused in like manner although he did not think that fracture was consistent with a fall from the chair. He stated unequivocably, however, that the several fresh injuries present on February 24th could not *all* have occurred in one such fall.

Dr. Rand, orthopedic surgeon and consultant in connection with the fracture of the femur, characterized the sustaining of the skull fracture and fresh rib fracture in the

manner alleged as "possible" but "hard to imagine." He noted that fractured ribs in children of this age are very rare. He termed it "highly improbable" that *all* of the fresh injuries were sustained in one such fall. He also was of opinion that the rib injuries were more consistent with severe pressure than with a blow.

Dr. Porter was certain that the fresh injuries were not consistent with a fall from the chair, even onto the toy. He also considered the rib injuries to be consistent with crushing, a "pressure type of injury." It was his opinion that the rib injuries were consistent with a fall from a much greater height or with a very forceful blow with a hand or fist. He established the cause of death as bleeding from the skull fracture into the old sub-dural hematoma on the right side, aided by interference with respiration from the fresh rib injuries. He recognized that if a child's head came forcefully into contact with an andiron, it would be probable that a hematoma could result.

Dr. Bidwell, the neurosurgeon who treated the child for the injuries of February 24th and who subsequently operated, stated that the impact required to produce a sub-dural hematoma such as he observed would be greater than that which would be produced by a fall from the baby's own height into a fireplace. It was his opinion that one would have to assume that the metal screen offered no resistance whatever and the child entered the fireplace at high velocity to account for a sub-dural hematoma as a resulting injury. He pointed out also that a baby's skull is not easily fractured.

The jury could properly weigh the medical testimony in the light of known facts. It could consider that this child was not running and playing outside the home and exposed to the normal accident hazard of an older child. This child was under constant supervision and observation such as to make it highly improbable that it could be involved in a

series of accidents consistent with the severity of the injuries without the knowledge of the respondent. The jury could properly conclude that the incidents related do not adequately explain and are not consistent with the number and extent of injuries. As to the injuries inflicted on February 24th, the jury could reasonably infer that the alleged fall from the highchair was accompanied by some undisclosed force and violence consistent with all the injuries then sustained, or that no such fall took place and the real nature of the episode has not been revealed.

The history of the old injuries has probative value in determining whether or not accidental causation has been eliminated beyond a reasonable doubt. For this child to have received any one of these serious injuries solely as a result of accident in the course of its comparatively sheltered and circumscribed life would be abnormal. As these abnormal results are multiplied, instance upon instance, the likelihood of accidental causation diminishes to the vanishing point. The rule of logic and reason is set forth in Wigmore on Evidence, 3rd Ed., Vol. II, Sec. 302, Page 196. Here the author is discussing proof of intent but the text has logical application to proof negativing accidental causation. He states:

> "The argument here is purely from the point of view of the doctrine of chances,—the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all. Without formulating any accurate test, and without attempting by numerous instances to secure absolute certainty of inference, the mind applies this rough and instinctive process of reasoning, namely, that an unusual and abnormal element might perhaps be present in one instance, but the oftener similar instances occur with similar results, the less likely is the abnormal element to be the true explanation of them. * * * * In short, sim-

> ilar results do not usually occur through abnormal causes; and the recurrence of a similar result * * * tends (increasingly with each instance) to negative accident * * * *."

To the same effect the often cited case of *State* v. *Lapage,* 57 N. H. 245, wherein the court said at page 294:

> "Another class of cases consists of those in which it becomes necessary to show that the act for which the prisoner was indicted was not accidental, - - e.g., where the prisoner had shot the same person twice within a short time, or where the same person had fired a rick of grain twice, or where several deaths by poison had taken place in the same family, or where children of the same mother had mysteriously died. In such cases it might well happen that a man should shoot another accidentally, but that he should do it twice within a short time would be very unlikely. So, it might easily happen that a man using a gun might fire a rick of barley once by accident, but that he should do it several times in succession would be very improbable.
>
> So, a person might die of accidental poisoning, but that several persons should so die in the same family at different times would be very unlikely.
>
> So, that a child should be suffocated in bed by its mother might happen once, but several similar deaths in the same family could not reasonably be accounted for as accidents.
>
> So, in the case of embezzlement effected by means of false entries, a single false entry might be accidentally made; but the probability of accident would diminish at least as fast as the instances increased."

We think the jury could properly conclude on this evidence that the only hypothesis of innocence, accidental causation, was effectively eliminated beyond a reasonable doubt as being irrational and unreasonable. There was left then as the only hypothesis consistent with and explanatory of the

known facts the conclusion that these injuries were caused by the application of unlawful force by some person on several different occasions.

In determining whether or not the respondent was the person whose unlawful acts caused the death of this child, the jury had before it evidence of the relationship between the respondent and her adopted child. Admittedly she assumed all the care of the child and was its constant companion. She was in the best position to know and observe whether it had apparently received severe injury at any time. She was alone with the child much of the time and had the best opportunity to commit the acts which necessarily occurred. During her brief absences from the child, it was cared for by her husband or a baby sitter. There was no suggestion by the respondent or elsewhere in the evidence that the child had ever been injured by either of them or by anyone else. No other person had opportunity to do the several acts involved here. Here again circumstantial evidence points to the respondent and no other. Friends of the respondent testified that on their visits to the home she displayed a high degree of maternal love, care and solicitude. The jury could infer and must have believed that these were but outward manifestations, and that only the respondent could know what her conduct was when she and the decedent were alone. The violence of an ungoverned temper is more often displayed in privacy than under the social restraints engendered by the presence of witnesses. The jury may well have concluded that the respondent concealed knowledge of injuries and of episodes in the life of the child which would have thrown light on what actually transpired. Such conduct is itself a link in and may add force to the chain of circumstantial evidence which the jury is entitled to consider in determining the guilt or innocence of the respondent. See *State* v. *Lambert*, 97 Me. 51 at 56.

At the close of the State's case, Mr. Wheeler, a criminal investigator, was asked to state a particular conversation which he had with the respondent during the course of his investigation. Over objection, he testified that he asked her whether or not anyone else could be responsible for any of the injuries which the child had received and whether or not it could be a baby sitter or her husband, to which she replied that "if anybody would be responsible, it would be me." The exception taken to the admission of this testimony is the only one preserved for our consideration. Objection was on the usual ground that evidence of an admission of guilt by the respondent must await proof of the *corpus delicti* to a probability. It may be noted that the statement attributed to the respondent was not in terms an admission of guilt. Its evidentiary effect was primarily to eliminate as suspect the only other people who had opportunity to injure the child. Obviously the respondent was in the best position to observe and know whether the baby had apparently suffered any injury at the hands of either her husband or a baby sitter. However that may be, on our view of the evidence which had already been presented by the State, the *corpus delicti* (that the death of this child had resulted from the application of unlawful force and violence by some person) had already been shown, not only to a probability, but beyond a reasonable doubt. The admission, therefore, if such it was, was clearly admissible at this stage of the evidence and the respondent takes nothing by the exception.

The husband of the respondent did not testify and the jury was given no indication that he was not available at the time of trial. Next to the respondent herself, her husband was in the best position to know the day to day condition of the child, its treatment at the hands of the respondent in the privacy of the home, and whether or not there were ever manifestations of serious injury. The jury might have considered that his failure to corroborate her

testimony as to these matters casts further doubt upon the value and credibility of the respondent's statements. (See *State* v. *O'Donnell, supra,* at page 303)

In summation, we are satisfied that there was credible evidence for this jury which, if believed, forged an unbroken chain of circumstances, all plotting to the guilt of this respondent. The evidence and proper and reasonable inferences to be drawn from it would in our opinion justify the jury in the elimination of accidental causation as a reasonable and rational hypothesis, and this beyond any reasonable doubt. No other hypothesis consistent with innocence is conceivable under the circumstances which existed here. The jury is not compelled, in its determination as to whether or not a reasonable doubt exists, to disregard all the probabilities and substitute therefor mere unlikely possibilities. These were questions of fact and it is not for us to usurp the place of the jury in deciding them. As was well stated in *State* v. *Lambert, supra,* at page 52:

> "Their conclusions, if warranted by the evidence, are to stand. We have before us only the pages of a printed record, aided somewhat by an inspection of the exhibits which were introduced in evidence at the trial. The jury had before them the living, speaking witnesses. The degree of credence properly to be given to the story of a witness may depend much upon his appearance upon the stand, upon his air of candor and truthfulness, upon his seeming intelligence and honesty, upon his apparent want of bias or interest or prejudice. The want of such characteristics may render testimony of little value. And the appearance of such characteristics, or the want of them, is not always transcribed upon the record of a case. If the story of a witness is seemingly credible and probable, and not inconsistent with other admitted or proven facts, the listener has much better opportunity to judge correctly of its truthfulness than a reader has. From the bare record we might be in grave doubt as to which of two conflicting statements is

true. The jury, seeing the witnesses, might have no reasonable doubt. And it follows that in cases like the one under consideration, as in all others, the jury must be the final arbiters of questions of fact, when the evidence in support of their conclusions, considered in connection with all the other evidence, is of such a character, such a quality and such weight, as to warrant them in believing it."

Exceptions overruled.

Motion denied.

Appeal dismissed.

Judgment for the State.

ETHEL M. JOHNSON
vs.
WILLIS M. PARSONS, ADMR. OF ESTATE OF MALCOLM H. PARSONS

York. Opinion, October 10, 1957.

Contracts. Quantum Meruit. Wills. Decedents. Evidence. Proof. Pleading.

The evidence required to establish an *ante mortem* contract that results in a *post mortem* disposition of an estate must be clear and convincing.

Even though ordinarily the judgment of the court is not to be substituted for the findings of the jury, a verdict should be set aside where it appears that the parties have not had a fair trial.

Where there is manifest error in law in the judge's charge, and injustice results the matter may be examined on motion for a new trial, even though better practice would require that the point be raised in a bill of exceptions.

A pleader may state his case in as many ways as he sees fit in separate counts in order to meet any possible phase of the evidence and ordinarily he will not be required to elect.

Where a declaration contains a count in *quantum meruit,* as well as specific contract, the erroneous elimination of the *quantum meruit* count by the court may result in injustice to a defendant by forcing the jury to consider the case solely upon the specific contract.

ON MOTION FOR NEW TRIAL.

This is an action of assumpsit for services rendered. The case is before the Law Court upon motion for new trial. Motion sustained. Verdict set aside. New trial ordered.

Henry M. Fuller, for plaintiff.

Harvey & Harvey, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

DUBORD, J. This is an action to recover for services alleged to have been performed by the plaintiff for Malcolm H. Parsons during his lifetime. Within twelve months from the date of the appointment of the administrator, the plaintiff filed an affidavit in the Probate Court setting forth a claim totaling $5,400.00. As the basis for her claim, she made three allegations, (1) that she had entered into a specific contract with the intestate whereby she would enter decedent's employment and be paid at the rate of $30.00 per week; (2) that she was entitled to recover for unpaid services on a *quantum meruit* basis; and, (3) that in consideration she should perform the services agreed upon, the intestate would devise to her the farm upon which she was employed.

In her writ there were three counts which followed in substance the claims set forth in her affidavit. The first

count alleged a specific contract of employment at the rate of $30.00 per week. In the second count she set forth a claim based on *quantum meruit.* In her third count she declared upon an oral agreement on the part of the decedent that he would devise the farm to her in payment for services rendered.

To the first count there was attached an account annexed claiming for work and labor from February 5, 1951 to July 9, 1954, the date of decedent's death, at the rate of $30.00 per week for a total of $5,400.00.

Defendant filed a motion for specifications and in compliance with this motion, the plaintiff alleged that the contract upon which the action was based was entered into on an unspecified date in January 1951. It is to be noted that the account annexed which alleged February 5, 1951 as the specific date of the employment, was not corrected in the specifications. No mention was made of the second count in the specifications filed by the plaintiff. While the third count in the writ alleged an agreement in January of 1951 to devise the farm to the plaintiff, the specifications changed this date to April 1954.

Defendant pleaded the general issue and, by brief statement, the statute of frauds was interposed, as a defense to the third count.

During the progress of the trial it was stipulated that the requirements of the statute relating to filing of the claim and to bringing of the suit had been complied with.

The presiding justice instructed the jury that the plaintiff was limited to only those items set forth in the first count in the declaration and that no consideration should be given to the second and third counts.

These instructions were correct insofar as the third count is concerned. Section 1, Art. VII, Chap. 119, R. S. 1954.

The instructions of the presiding justice in reference to the second count, however, were erroneous. To this instruction relative to the second count, the plaintiff seasonably took exceptions. The exceptions were not perfected.

The evidence disclosed that during the last few months of plaintiff's alleged employment, she was paid the sum of $130.00 by the decedent. The jury apparently gave the defendant credit for this payment of $130.00, and returned a verdict for $5,270.00. The case is now before us on defendant's motion for new trial, on the usual grounds that the verdict is against the law and the evidence.

In support of her right to recover, plaintiff introduced in substance the following evidence. A man named Lord and his wife had been employed to work on a certain farm, located in Eliot, Maine, which was then owned by a corporation known as M. H. Parsons & Sons. Title to the farm was conveyed to Malcolm H. Parsons by the corporation on December 31, 1953. An officer of the corporation testified that Malcolm H. Parsons had authority to employ persons to work on the farm even before he acquired title. Malcolm H. Parsons did not live on the farm until March of 1954. His residence was in York Village.

It appears that one Herbert F. Lord and his wife were employed on the farm in question. Lord's duties were those of the ordinary farm hand, and his wife performed the ordinary household chores as well as taking care of some cows and churning butter and doing other odd jobs about the place. For these services, the Lords were paid a total joint weekly wage of $35.00. Sometime, early in the spring of 1951, Mrs. Lord was taken ill, and it became necessary, so the plaintiff claims, to secure a replacement for her. There is evidence on the part of Lord to the effect that Mrs. Johnson came to the farm a short time before his wife was taken ill, and continued her services until the death of M. H. Parsons, on July 9, 1954. The date when Mrs. Johnson came

to the farm is left in a rather indefinite manner. Mrs. Johnson did not stay on the farm at night, but traveled to and from her home in South Berwick every day. There is nothing in the testimony of Lord to support the contract of employment upon which Mrs. Johnson relied, and upon which the verdict of the jury is based. It is rather significant to note that one of the contentions of the plaintiff was that she should be compensated at the rate of $30.00 per week for performing the same services previously performed by Mrs. Lord, and yet Mrs. Lord and her husband, who worked as a farm hand, were paid only $35.00 per week jointly.

The evidence disclosed that the wages of Mr. and Mrs. Lord were paid regularly by the corporation which owned the farm until title to the farm was conveyed to M. H. Parsons on December 31, 1953, after which date the Lords were paid by Parsons.

It is admitted by Lord that subsequent to the death of M. H. Parsons, he was discharged by the sons of Malcolm H. Parsons under a cloud of larceny and embezzlement, facts which leave his testimony subject to an inference of prejudice against the sons, whose interest in their father's estate would naturally be diminished by any amount allowed the plaintiff.

Another witness, who was employed on the farm for some part of the period of alleged employment of Mrs. Johnson, testified that Mrs. Johnson was on the farm and performed services. There was nothing in his testimony, however, to support a specific contract of employment.

Another witness testified that he had knowledge that Mrs. Johnson was working on the farm, and that the decedent told him he was indebted to Mrs. Johnson in a large amount. At one point in the testimony of this witness, he volunteered the information that he was told by M. H. Parsons, that the farm was being fixed up for Mrs. Johnson and that if

anything happened to him, she would receive the farm. There was nothing in his testimony to support a specific contract of employment.

The only witness who testified in any manner in support of a specific contract of employment was one George Boston, a brother of the plaintiff and manifestly a highly interested witness. It is not our intention to analyze in detail the testimony of this witness and point out the ambiguities and those portions of his testimony which cause us to believe that it does not rise to that degree of cogency required in cases of this type.

Subsequent to the time when title of the farm was acquired by Parsons, the plaintiff was paid the sum of $130.00 by Parsons. These payments are supported by checks introduced as exhibits. The jury apparently gave the defendant credit for these payments. The jury award is at the rate of $30.00 per week from February 5, 1951 to July 9, 1954, and this in spite of the fact that there is no definite testimony when her employment began and that while there is some testimony on the part of Lord that she came to the farm prior to March 13, 1951, his testimony is to the effect that she did not work full time; and moreover, the witness Boston testified that there was a period when his sister left the farm for a while during the period for which the jury has awarded her compensation.

A son of the decedent, and an officer of the corporation, which owned the farm in question until December 31, 1953, testified that at no time during the alleged period of employment of the plaintiff did he see her on the farm. It seems strange that she would work for more than three years without receiving compensation; and that she would do this while she found it necessary to borrow from her brother for her support and that of her children. There is also a note of suspicion and misunderstanding when the evidence disclosed that the corporation paid its employees regularly

every week. Moreover, although the plaintiff contends that she worked all of this long period without compensation, the evidence disclosed that towards the end of her employment she was in possession and ownership of an automobile.

There was a conflict of evidence. However, this does not necessarily mean that the plaintiff has sustained the burden of proof.

> "As to the second and third propositions, we are clearly convinced that the finding of the jury should be set aside. While upon these issues there is a conflict of testimony, yet, in view of the nature of the case, the fact of a conflict is not decisive. The phrase 'burden of proof,' like the phrase 'ordinary care,' is a relative term and must be considered, not only in the light of the conflict of the evidence, but also with reference to the subject matter to which the burden of proof relates. With respect to ordinary merchandise accounts and payments thereof, and of cases involving simple issues of fact, the rule is well established that where a substantial conflict of testimony appears, the court will not disturb the verdict of the jury.
>
> "There is another class of cases, however, in which the courts hold that the burden of proof must rise above the mere conflict of testimony and become clear, convincing and conclusive, to sustain a verdict.
>
> "Says Wigmore, Vol. 4, section 2498: 'But a stricter standard in some such phrase as 'clear and convincing proof; is commonly applied to measure the necessary persuasion for a charge of fraud; for the existence and contents of a lost will; for an agreement to bequeath by will; for mutual mistakes sufficient to justify reformation of an instrument; and for a few related cases.' " *Liberty* v. *Haines*, 103 Me. 182, 190; 68 A. 738.
>
> "Therefore in the case before us, typical of a class now becoming somewhat common, the court is of opinion that the evidence required to establish an

ante mortem contract that results in a post mortem disposition of an estate must come within the rule governing the quality of proof required to establish the reformation of an instrument, to prove the contents of a lost will, or a deed, or an agreement to bequeath by will.

"We can conceive of no class of cases in which a higher kind of proof should be demanded than that which seeks to establish oral contracts calculated to subvert the muniments of title and divert descent of intestate property from its legal channel. No class is more susceptible to the temptation of fraud and none in which it can be more easily practiced." *Liberty* v. *Haines,* 103 Me. 182, 193; 68 A. 738.

"One who withholds his demand while an alleged debtor is alive, and in after-time seeks to compel payment by the latter's estate, has no right to expect that such claim will escape close scrutiny or be enforced in the absence of evidence preponderantly amounting to clear and cogent proof." *Weed* v. *Clark,* 118 Me. 466, 469; 109 A. 8; *Colvin* v. *Barrett, Admr.,* 151 Me. 344; 118 A. 2d. 775.

While we are entirely cognizant of the rule that the judgment of this court is not to be substituted ordinarily for the finding of a jury, a verdict should be set aside when it appears that the parties have not had a fair trial. However, bearing in mind the rule relating to burden of proof in cases of this nature, we are of the opinion that the plaintiff's evidence upon the issue of a specific contract of employment is unconvincing and unsatisfactory. The verdict was not a well reasoned one, and was undoubtedly influenced to a large extent by the error of the presiding justice, when he instructed the jury that they were limited to the allegations in the first count.

It has been held many times by this court, that where there is manifest error in law in the judge's charge to the jury, and where as a result thereof, injustice results, the

situation may be examined on a motion for a new trial, as against the law, even though better practice demands that the point be raised in a bill of exceptions.

> "However, this Court has in certain cases reviewed questions of law both on a motion for a new trial and on appeal, even though exceptions were not taken. *State* v. *Wright,* 128 Me., 404, 148 A., 141; *State of Maine* v. *Mosley,* 133 Me., 168, 175 A., 307; *Trenton* v. *Brewer,* 134 Me., 295, 186 A., 612; *Springer* v. *Barnes,* 137 Me., 17, 14 A., 2d. 503; *Megguier* v. *DeWeaver,* 139 Me., 95, 27 A. (2d) 399; and *Cox* v. *Metropolitan Life Ins. Co.,* 139 Me., 167, 28 A. (2d), 143.
>
> "Such review, however, is not compatible with best practice, and although there be error in an instruction, when no exception is taken, a new trial either on appeal or motion should not be granted unless, as stated in the above cited cases, 'error in law . . . was highly prejudicial . . . and well calculated to result in injustice,' or 'injustice would otherwise inevitably result,' or 'the instruction was so plainly wrong and the point involved so vital . . . that the verdict must have been based upon a misconception of the law,' or 'When it is apparent from a review of all the record that a party has not had that impartial trial to which under the law he is entitled . . . .' We consider the foregoing applicable as well to an omission as to an erroneous instruction where no exception is taken." *State of Maine* v. *Smith,* 140 Me. 255, 285, 286; 37 A. 2d. 246.

This rule has been applied in civil as well as criminal cases. *Pierce* v. *Rodliff,* 95 Me. 346; 50 A. 32; *Emery* v. *Fisher,* 128 Me. 453; 148 A. 677; *Adams* v. *Merrill,* 145 Me. 181; 74 A. (2nd) 232; *Fotter* v. *Butler,* 145 Me. 266; 75 A. (2nd) 160; *Davis* v. *Ingerson,* 148 Me. 335; 93 A. (2nd) 129; *Thompson* v. *Franckus,* 150 Me. 196, 201; 107 A. (2nd) 485.

The instructions of the presiding justice that the case should be limited to the first count were erroneous.

> "As a general rule the plaintiff may insert in his petition, declaration, or complaint as many counts as he deems proper, or plead all the causes of action he has, as long as he does not violate the rule against vexatious pleading." 71 C. J. S. § 88, 208.
>
> "It is a familiar rule of pleading that when the plaintiff has two or more distinct reasons for obtaining the relief sought, or when there is more or less uncertainty as to the grounds of recovery or as to the exigencies of proof, the petition may set forth a single claim in more than one count. The pleader may state his case in as many ways as he sees fit in separate counts in order to meet any possible phase of the evidence, and he will not be required to elect on which count he will proceed. Nor do the different theories of recovery constitute admissions within the rule that a party is estopped by the admissions in his own pleading." 41 Am. Jur. § 106, 363.
>
> "As a general rule, a plaintiff, when uncertain as to which of two or more grounds of recovery he will be able to prove, is allowed to present his claim by separate counts so framed as to meet the exigencies of the case as it may develop at the trial, and although he has only a single cause of action arising from a single transaction, he will not be required to elect upon which count he will stand. In such a case, election is frequently impossible until the facts are developed in the trial of the case, and, in the event of possibly conflicting inferences, until the submission of the case to the jury." 41 Am. Jur. § 357, 534.
>
> "Where different causes of action are stated in several counts, ordinarily no election can be required unless the counts are so inconsistent that proof of one necessarily disproves the other or unless there is a misjoinder." 71 C. J. S. § 483, 998.

See also *Dalton* v. *Callahan,* **122 Me. 178; 119 A. 380.**

Moreover, we regard as prejudicial to the plaintiff, the testimony of the witness who volunteered the information that the decedent was fixing up the farm for the purpose of devising it to the plaintiff. As previously pointed out, the plaintiff had filed an affidavit setting forth a contention that the farm was to be devised to her. A copy of her affidavit was introduced as an exhibit and was before the jury for consideration. Moreover, the jury also had in its possession during its deliberations the writ which contained all three counts.

The evidence in this case was undoubtedly sufficient to permit a jury to find that the plaintiff had performed services, for which she had not been paid. Had the jury been instructed that they could give consideration to the second count and award the plaintiff compensation upon an implied contract, it may well be that the verdict returned would have been substantially smaller than the one awarded the plaintiff. The jury might have well believed that the evidence to support a specific contract was inadequate. However, feeling that the plaintiff should receive some compensation, and having heard improper evidence that the farm was to be devised to her, and being limited by the instructions of the presiding justice, which eliminated the theory of an implied contract, they came to the conclusion that the only way to compensate the plaintiff was to find that a specific contract had been entered into.

> "Courts have always endeavored to prevent a prejudicial fact that is not relevant, to 'creep' into testimony, and to correct by the charge, so far as possible, the effect when it is inadvertently or boldly brought out in evidence, and not objected to. If it is prejudicial, and if it probably affected the improper decision of the jury, a new trial may be granted on motion." *Adams* v. *Merrill,* 145 Me. 181, 187; 74 A. 2d. 232.

> "A conclusion reached by triers of fact must rest upon a rational basis and be arrived at by a logical

> process in order to be accepted as final in a court of last resort." *Emery* v. *Fisher,* 128 Me. 453, 457; 148 A. 677; and *Arnst* v. *Estes and Harper,* 136 Me. 272, 281; 8 A. 2d. 201.

The evidence adduced by the plaintiff was not sufficient to support the alleged specific contract upon which the verdict is based. Because of this, and because of the erroneous instructions of the presiding justice and because of the improper evidence relating to the alleged agreement to devise the farm which "crept" into the case, we feel that the defendant did not receive a fair trial and that injustice has resulted.

In arriving at our conclusion we have not overlooked the recent decisions of this court in *Colvin* v. *Barrett, Admr.,* 151 Me. 344; 118 A. (2nd) 775; *Lawson* v. *McLeod, Admr.,* 152 Me. 67; 123 A. (2nd) 199; and *Stinson* v. *Bridges, Admr.,* 152 Me. 306; 129 A. (2nd) 203; which were all cases based on implied contracts and where recovery was sought on a basis of fair value for services rendered.

It is our opinion that the verdict of the jury is an ill considered one.

Motion sustained.
Verdict set aside.
New trial ordered.

SYLVESTER M. McNALLY AND
DOROTHY C. McNALLY
vs.
FRED M. PATTERSON AND
LILLIAN M. PATTERSON

Penobscot. Opinion, October 11, 1957.

New Trial.

Where there is no error of law and the evidence supports the verdict, a new trial will not be granted.

ON MOTION FOR NEW TRIAL.

This is a writ of entry before the Law Court upon motion for new trial. Motion denied.

PER CURIAM.

This is an action upon a writ of entry. The plaintiff received a verdict with a special finding establishing the disputed property line and an award of damages. The case is before us upon the stereotyped motion for a new trial.

There was substantial, credible evidence to support the verdict in all respects. A discussion of the evidence would be futile. The jury entertained and answered authoritatively a typical, jury question with finality. A careful examination of the record discloses no error of law or of fact in the verdict, which requires correction. *McCully* v. *Bessey*, 142 Me. 209, 212.

Motion denied.

John H. Needham, for the plaintiff.

Oscar Walker, for the defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

OSKAR LARSEN
vs.
HERMAN ZIMMERMAN AND
BERTHA ZIMMERMAN

Aroostook. Opinion, October 11, 1957.

Assumpsit. Account. Accord and Satisfaction. Checks. Conditions.

The offer of money in settlement of a claim, whether liquidated or unliquidated, and the acceptance thereof in accord and satisfaction are ordinarily questions of fact. (See R. S. Chap. 113, Sec. 64)

The tender and acceptance of a check bearing the words, "By endorsement this check is accepted in full payment of the following account," and "final" may be in itself sufficient to establish the intent requisite for a complete accord and satisfaction.

One may not accept a check with conditions attached and then seek to deny the force and effect of the condition.

ON EXCEPTIONS.

This is an action upon an account annexed. The case is before the Law Court upon exceptions to the acceptance of a referee's report finding for plaintiff. Exception sustained.

Phillips & Olore, for the plaintiff.

James A. Bishop, for the defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

WILLIAMSON, C. J. This action upon an account annexed for materials furnished and labor performed in the construction of a dwelling house is before us on exceptions to the acceptance of a referee's report. The referee found for the plaintiff in the amount of the claim, or $776.11. The sole issue is whether the referee erred as a matter of law in find-

ing that the defendants had not established the defense of accord and satisfaction.

The bill of exceptions reads in part as follows:

> "At the hearing before the referee defendants introduced in evidence, a photostatic copy of a bank check of Herman Zimmerman signed by Bertha Zimmerman, dated November 7, 1953 payable to the order of Oskar Larsen in the amount of $1000.00 drawn on the Northern National Bank of Presque Isle. In the upper left hand corner are the printed words 'By endorsement this check is accepted in full payment of the following account.' Underneath this is written the word 'Final.' Below this is printed, 'If incorrect Please return. No other receipt necessary.' The check bears endorsement on the back 'Oskar Larsen', and the check is perforated to form the following: 'Paid, 11-9-53, 52-123.' "
>
> * * * * * * * * * *
>
> "In his findings the referee found as follows: '. . . There is no doubt that the check of Herman Zimmerman dated November 7, 1953 for $1000.00 bearing in the upper left hand corner the word 'final' was intended by the Zimmermans to be a final settlement of the account. It does not appear however, that such intent was made clear to the plaintiff prior to his receipt of the check.' "
>
> * * * * * * * * * *
>
> "In his findings the referee also found as follows: 'There is no evidence that the parties discussed the offer of $1,000.00 in final settlement, and the use of the word 'final' on the check does not appear sufficient to prove agreement on the part of the Plaintiff.' "

The defendants contended that the plaintiff had agreed to build the house for $17,000, provided no changes were made. The referee in his report found that the defendants had paid $18,500, that there was no contract for a specific sum, and he declined to consider a claim of damages from

inferior workmanship. No objections were taken to these findings and rulings and they are not before us.

Under R. S. Chap. 113, Sec. 64, there may be an accord and satisfaction of a liquidated or undisputed claim, as distinguished from an unliquidated or disputed claim, by payment of less than the amount due. Thus, the common law is modified by the statute, which reads:

> "No action shall be maintained on a demand settled by a creditor or his attorney entrusted to collect it, in full discharge thereof, by the receipt of money or other valuable consideration, however small."

It appears clearly from the report of the referee that before the check was delivered to the plaintiff there was a disputed claim arising from the construction of the house. We are not, however, concerned with whether the claim was disputed or undisputed, for in either event the statute is applicable. *Mayo* v. *Stevens,* 61 Me. 562; *Fuller* v. *Smith,* 107 Me. 161, 165, 77 A. 706; *Bell* v. *Doyle,* 119 Me. 383, 111 A. 513; *Fogg* v. *Hall,* 133 Me. 322, 178 A. 56.

In passing upon the exceptions, we accept the facts as found by the referee, and we assume there is supporting evidence therefor. The record before us does not include a transcript of the oral testimony. From the report of the referee and the bill of exceptions it plainly appears that no evidence entered the case relating to the sufficiency of the asserted accord and satisfaction apart from the findings stated above from the bill of exceptions. To these facts—and in particular to the check with its terms and conditions—the referee erroneously applied the pertinent rules of law.

We are mindful of the established rule that a referee's findings of fact stand when based upon any credible evidence. When, however, the referee fails to draw the only reasonable inference from unquestioned facts, there is error of law. So here, in our view the only reasonable inference to

be drawn from facts found by the referee leads directly to the conclusion that the intent of the defendants to make a final settlement was made known to the plaintiff from the check itself, and that the plaintiff accepted the check on the condition therein stated.

The findings "It does not appear, however, that such intent was made clear to the plaintiff prior to his receipt of the check," and "There is no evidence that the parties discussed the offer of $1000.00 in final settlement," are facts accepted by us at their full value. The error of law lies in the conclusion of the referee that to complete an accord and satisfaction the check was not evidence in itself sufficient without more to establish the intention of the defendants and the plaintiff in giving and receiving the check.

The word "final" on the check could have only one meaning to a person in the situation of the plaintiff; namely, that it was the intention of the defendants thereby to settle the claim. What else could "final" mean to the plaintiff contractor? What need was there for the parties to discuss the offer of $1000.00 in final settlement? The plaintiff chose to accept the check with the condition attached. He now seeks to deny the force and effect of the condition, and this he may not do.

Price v. *McEachern,* 111 Me. 573, 90 A. 486 and *Bell* v. *Doyle, supra,* cited by the referee in his report, do not require the result reached by him. In *Price, supra,* a jury case, the issue was whether a check for a workman's wages was accepted in full settlement under an oral agreement. There was no writing upon the check, as here. The wide difference from the instant case is shown in the opinion on page 578:

> "The cases cited by the defendants contain written proof that the check or money, if accepted, was in full payment. The contract of acceptance was made clear. But in the case at bar no such evi-

dence appears. The testimony does not show that the defendants presented any new contract or prescribed any conditions, upon the offer of the check to the plaintiff."

In *Bell, supra,* on motion for new trial by the defendant, it was held a question of fact for the jury whether defendant's letter enclosing a statement of accounts and "herewith check to balance" with his check was an accord and satisfaction. The plaintiff at once wrote the defendant that he received the check on account and requested payment of the balance. Not hearing from the defendant, the plaintiff cashed the check. The court said, at p. 387:

> "This brings us back to the proposition that accord and satisfaction is a question of fact to be submitted to the jury, . . unless the testimony is such that only one inference or finding can be made."

The governing principles were well stated in *Viles* v. *Realty Company,* 124 Me. 149, 153, 126 A. 818, a case closely analogous to the instant case in that it involved a voucher check in full settlement.

> "The court is of the opinion that this defense is sustained by the record before us. The rule of law is familiar and has been so recently stated by this court that an extended restatement here is not necessary. *Fuller* v. *Smith,* 107 Maine, 161, 165; *Chapin* v. *Little Blue School,* 110 Maine, 415, 420; *Bell* v. *Doyle,* 119 Maine, 383. Briefly, 'it must be shown that the debtor tendered the amount in satisfaction of the particular demand, and that it was accepted by the creditor as such.' *Fuller* v. *Smith, supra.* 'If an offer of money is made to one, upon certain terms and conditions, and the party to whom it is offered takes the money, though without words of assent, the acceptance is an assent de facto and he is bound by it. The acceptance of the money involves the acceptance of the condition. Under such circumstances, the assent of the creditor to the terms proposed by the debtor will be implied.' *Anderson* v. *Standard Granite Co.,* 92

> Maine, 429, 432; 69 Am. St. Rep., 522. *Price* v. *McEachern,* 111 Maine, 573. *Richardson* v. *Taylor, Admr.,* 100 Maine, 175. The offer and its terms, by the one party, and the acceptance by the other party are ordinarily questions of fact for the jury, unless upon the evidence only one inference can be drawn. *Bell* v. *Doyle,* supra. *Horigan* v. *Chalmers Motor Co.,* 111 Maine, 111, 114. In the instant case submitted on report, the court exercises the functions of a jury."
>
> * * * * * * * * * *
>
> "This check was received and used by Mr. Viles without question or objection. It is difficult to perceive how in ordinary business dealings the offer of this check in settlement of the unsettled account for wood, and that it was offered upon the terms and conditions, could have been made plainer. It was stated to be in full settlement, and the request was made that it be returned, if not correct."

See also *Crockett, Appellant,* 130 Me. 135, 154 A. 180; *Fogg* v. *Hall,* 133 Me. 322, 178 A. 56; 1 Am. Jur., Accord and Satisfaction Sec. 22 et seq.; 1 C. J. S., Accord and Satisfaction Sec. 33 et seq.; 34 A. L. R. 1034, Annot.; 75 A. L. R. 905, Annot.; 1 Williston, Contracts, Sec. 128 (rev. ed.); 6 Williston, Contracts, Sec. 1854 et seq. (rev. ed.).

The cases cited treat the question of accord and satisfaction as an issue of fact. We reaffirm the rule. Our opinion comes to this: That on the facts here disclosed as a matter of law the fact finder had no choice other than to find the ultimate or decisive fact of an accord and satisfaction. Whether on a new trial before referee or court, the evidence will cast a different light on the issue of accord and satisfaction is of course not known to us.

The entry will be

Exceptions sustained.

PERSONAL FINANCE CO.
vs.
ATWOOD MOORE
Kennebec. Opinion, October 15, 1957.

Fraud. Bankruptcy. Damages.

Bankruptcy is not a bar to action against the maker of a promissory note where at the time of the delivery of the note the defendant intentionally and falsely misrepresented his financial status for the purpose of deceiving and inducing the plaintiff payee to consummate the transaction. (11 U.S.C.A., Sec. 35, Bankruptcy Act, Sec. 17(a) (2))

Where a note sued upon is given to a payee in part for the payment of a prior obligation and in part for "new money" so-called, the loss sustained by the fraud within the meaning of the Bankruptcy Act is limited to the "new money" where the facts indicate that the prior obligation was not in default and the evidence fails to indicate any extension of time on the prior obligation.

ON EXCEPTIONS.

This is an action upon a promissory note before the Law Court upon exceptions to rulings by the presiding judge who heard the case without a jury.

Charles A. Peirce, for the plaintiff.

Defendant, Pro Se.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

SULLIVAN, J. This case is before this court upon the exceptions by the prevailing plaintiff to the ruling as to the measure of damages awarded. The cause was heard by a judge without a jury.

The action was upon the promissory note of the defendant-maker to the plaintiff-payee made and delivered

for value prior to the defendant's bankruptcy. The note was given partly in renewal of an existing but unmatured note upon which a balance of $512.90 was outstanding but not yet due and partly for a new and additional advance of $500.89 in cash. The trial judge found that at the time of the delivery of the note sued upon, the defendant gave to the plaintiff in writing an intentionally and materially false statement of his financial status with the successful purpose of deceiving the plaintiff and of inducing it, thereby, to consummate the transaction. The judge found that the defendant's plea of bankruptcy was not a bar to the plaintiff's action. 11 U. S. C. A. § 35; Bankruptcy Act § 17 (a) (2)

The plaintiff's exceptions are to the following ruling of the judge:

> "The 'money or property' so obtained by the defendant is confined to the so-called 'new money' which he obtained on October 22, 1952, viz: the $500.89 then advanced him - - - The extension or renewal of the previous note or its surrender is neither 'money' nor 'property' within the meaning of Section 17-A (2) of the Bankruptcy Act."

The Bankruptcy Act, as it pertains to the present controversy, reads thus:

> "(a) A discharge in bankrutpcy shall release a bankrupt from all of his provable debts, - - - - except such as - - - (2) are liabilities for obtaining *money or property* by false pretenses or false representations, - - -." 11 U. S. C. A. § 35; Bankruptcy Act § 17 (a) (2). (Emphasis supplied.)

The trial judge ruled:

> "It is held that this false representation by defendant excepts from the defense of discharge in bankruptcy that liability of the defendant for the 'money or property' so obtained."

In deciding what "money or property" the defendant in fact obtained through his misstatements, the judge stated:

> "As against the face amount of the Oct. 22, 1952 note ($1013.79) credits totaling $501.11 were applied, which credits, for the purpose of this case, must be apportioned between that part of the note representing the balance of the previous note ($512.90) and that part of the note representing the "new money" ($500.89). So apportioned arithmetically, of the total credits of $501.11, an amount of $253.52 is to be applied as credit on that part of the note representing the balance of the previous note and $247.59 is to be applied as credit on that part of the note representing the 'new money'. The defendant's liability not affected by his discharge in bankruptcy is expressed by the balance on that part of the note representing the 'new money' and so determined such unpaid balance is $253.30 plus interest from Sept. 16, 1953 to this date in the amount of $93.72, a total of $347.02."

Personal Finance Co. of Shreveport, Inc. v. *Murphy,* 53 So. (2nd) 421 (La.) (1951) presented facts indistinguishable in kind from those of the instant case. In that case, on January 24, 1949, the defendant was indebted to the plaintiff for $214.92 upon a prior, unmatured note payable in installments. The defendant on that day induced the plaintiff by a false, financial statement to take from him a new note for $300 and to pay him in cash the sum of $76.38 as the balance between the old and new notes. On August 22, 1949 the defendant became a bankrupt. Plaintiff thereafter sued the defendant for the unpaid balance of $253.18, of the note of January 24, 1949. The court said:

> P. 422. "Plaintiff contends, on the basis of these facts, that it is entitled to judgment for the full amount of the obligation, inasmuch as the alleged renewal of the old note must be considered as an extension of credit which, under the provisions of the bankruptcy statute, is not affected nor released by the discharge - - -
>
> -

> The point of distinction between the instant case and those cited, together with others, would seem to be the fact that the testimony does not establish the past due nature of the balance of $214.92 which remained upon the old note at the time of the negotiation of the note sued upon. The note was due in monthly installments and we fail to find any claim on the part of plaintiff that the installments were in default. As a consequence, we cannot subscribe to the contention that plaintiff obtained the entire principal sum and, accordingly, we think, as did the District Judge, that the actual amount of cash received is the measure of plaintiff's recovery. While unreservedly condemning defendant's action in the execution of a false financial statement, we cannot conclude, from an equitable standpoint, that this has actually resulted in any loss to plaintiff."

There is contradictory authority, e. g.,

Personal Finance Co., of New Jersey v. *Bruns,* 84 A. (2nd) 32 (1951) and authorities cited.

The sole loss in "money or property" actually sustained by the plaintiff and "obtained" by the defendant, as a causative result of the latter's misrepresentations was the fresh cash paid to the defendant by the plaintiff. The transaction of October 22, 1952 was an integral contract, to be sure, but the prior note had not matured and was not in default and there is no evidence that the new note in reality extended the time for payment of the installments fixed under the former note. Upon the facts and circumstances of this case with reference to the application of Section 17 (a) (2) of the Bankruptcy Act we are in accord with the reasoning and result of *Personal Finance Co. of Shreveport, Inc.* v. *Murphy, supra,* and with the ruling of the trial judge.

Exceptions overruled.

STATE OF MAINE
vs.
ALBERT LEO CROTEAU

Androscoggin. Opinion, October 15, 1957.

Driving Under the Influence. Drugs.

A charge that one operated a motor vehicle while under the influence of "drugs" is not demurrable on the ground of vagueness. (R. S. 1954, Chap. 22, Sec. 150)

ON EXCEPTIONS.

This is a criminal action for violation of R. S. 1954, Chap. 22, Sec. 150 before the Law Court upon exceptions to the overruling of a demurrer. Exceptions overruled. Judgment for the State.

Gaston M. Dumais, Co. Atty.,
William D. Hathaway, Co. Atty., for the State.

Robert F. Powers, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

BELIVEAU, J. On exception. The respondent, in a complaint issued against him by the Lewiston Municipal Court, was charged with operating a motor vehicle while under the influence of drugs. This is made a criminal offense by Chap. 22, Sec. 150, R. S. The respondent demurred to this complaint in the Superior Court. The demurrer was overruled and exception taken.

The respondent's position, as stated in his brief, is ". . . . that the term *Drugs* is vague and should be modified as set forth in the aforesaid statute by the word *Intoxicating* or specified with other appropriate description."

In *State* v. *Munsey,* 114 Me. 408, our court said, ". . . that the indictment or complaint is sufficient if it follows the statute so closely that the offense charged and the statute under which the indictment is found may be clearly identified."

This is a statement of the law universally recognized by the courts.

This court takes judicial notice of the well recognized fact that overindulgence or consumption of drugs of any kind causes the user to be under the influence of drugs and if he operates a motor vehicle while in that condition, is guilty of a violation of Sec. 150, Chap. 22, R. S. This statute does not specify or mention the use of *intoxicating* drugs.

Generally "intoxication" refers to the excessive use of alcoholic liquors. The addition of the word "intoxicating" or some "other appropriate description" would not add to, or better describe, the statutory violation.

The allegation is in accordance with the offense set forth in the statute; gives the respondent ample information, and meets all the requirements of good pleading.

Exception overruled.
Judgment for the State.

EDWIN BASTON, PETITIONER FOR WRIT OF HABEAS CORPUS
vs.
ALLAN L. ROBBINS, WARDEN MAINE STATE PRISON

Knox. Opinion, October 15, 1957.

Habeas Corpus. Sentence. Governor and Council. Commutation. Constitutional Law.

Article V, Part First, Section 11 of the Constitution of Maine authorizes the Governor and Council to commute a sentence with such restrictions as may be deemed proper provided such restrictions are not illegal, immoral or impossible to perform.

A commutation is not affected because the Statutes do not permit courts in the first instance to fix such punishments. (An eight year sentence for rape was commuted to "not less than four nor more than eight.") R. S. 1954, Chap. 149, Sec. 12.

ON REPORT.

This is a writ of habeas corpus before the Law Court upon report. Writ discharged. Petitioner remanded to the custody of the warden of the Maine State Prison in execution of sentence.

C. S. Roberts, for the plaintiff.

Roger A. Putnam, Asst. Atty. Gen., for the defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

BELIVEAU, J. This is a petition for a Writ of Habeas Corpus brought by the petitioner in which he questions the validity of a commutation of sentence, dated May 12, 1955, granted to him by the Governor and Council. The writ was granted and the case reported to this court for disposition.

At the November 1952 Term of Superior Court, County of Aroostook, the petitioner was convicted of the crime of

rape and was sentenced to 8 years imprisonment in the Maine State Prison. This sentence was commuted to a term of not less than four nor more than eight years.

The commutation, in fact, was a reduction of the original sentence and brought it within the category of indeterminate sentences. By implication, at least, the Parole Board acquired authority to parole the petitioner at the expiration of the minimum term of his imprisonment. He was released by the Board on January 14, 1956. On October 18, of the same year, a parole violator's warrant was issued for the petitioner and he was returned to the Maine State Prison to complete the commuted sentence.

The power or authority of the Governor and Council to act in this case, is found in Article V, Part First, Section 11 of our Constitution.

> "He shall have power, with the advice and consent of the council, to remit, after conviction, all forfeitures and penalties, and to grant reprieves, commutations and pardons, except in cases of impeachment, upon such conditions, and with such restrictions and limitations as may be deemed proper, subject to such regulations as may be provided by law, relative to the manner of applying for pardons."

It is readily seen from a reading of this part of Article V, that the power to act is one granted to the Governor and Council by the Constitution and legislative action is limited to the adoption of regulations "relative to the manner of applying for pardons." Other than this, the Legislature is without authority to control in any way, regulate or interfere with the powers of the Governor and Council, under this constitutional provision.

The petitioner's position is that the commutation, was in fact the imposition of an indeterminate sentence and a violation of Section 12, Chapter 149 of the Revised Statutes of Maine.

As before noted the authority of the Governor and Council is derived from the Constitution and it may commute the sentence with such restrictions as may be deemed proper. If the restrictions and limitations imposed are in conflict with the provisions of any statute, then such statute does not control and it may be ignored as it was in this case, provided such restrictions or limitations are not illegal, immoral, or impossible to perform.

It is the consensus of judicial opinion that a commutation is not affected because the statutes do not permit courts in the first instance to fix such punishment. C. J. S. Vol. 67, page 585. *Ex parte re Wells,* S. C. 18 Howard, 307-331. *Stroud* v. *Johnston,* 139 F. R. (2nd) 171.

The Parole Board saw fit to release the petitioner on parole after he had served the minimum sentence and the responsibility was placed on his shoulders, and his alone, as to the remainder of the sentence. If he conducted himself properly and complied with the rules and regulations of his parole, he would then be free forever from further execution of the sentence. It rested wholly on his conduct and he now cannot be heard to complain because his conduct, after he was placed on parole, was such that the parole was revoked and he was compelled to serve the full term of his imprisonment.

Writ discharged. Petitioner remanded to the custody of the Warden of Maine State Prison in execution of sentence.

THE FIRST NATIONAL BANK OF BOSTON AND NATIONAL BANK OF COMMERCE OF PORTLAND, IN EQUITY

vs.

MAINE TURNPIKE AUTHORITY ET AL.

Kennebec. Opinion, October 15, 1957.

Turnpike. Utilities. Relocation. Police Power. Constitutional Law. Damnum Absque Injuria. Easements. Obligations of Contract. Bondholders.

Whatever hierarchy of privileges in utility installation there may be, the exigencies of public travel and the police power are unremittingly paramount.

Charters, franchises, statutory grants and permits affording the use of public ways to utility locations are subservient, expressly or by implication, in the exercise of governmental functions, to public travel and to the paramount police power and relocation of utility facilities in public streets or ways are at utility expense, a common law liability unless abrogated by the clear import of the language used in a particular instance.

Without express authority from the legislature, the state or municipality cannot pay to a utility its expense for relocating an installation in a public street or way.

There is no taking of private property but *damnum absque injuria* when the state invokes the police power obliging utilities to relocate, without compensation, by reasonable and not arbitrary regulation not violative of any constitutional limitation.

The police power cannot be surrendered or contracted away by the state.

The Maine Turnpike Authority is a creation of the legislature. The turnpike was manifestly to be a type of public highway and the Authority was, in legal conception, a governmental agency with police power plainly conferred.

Where the legislature by the Turnpike Enabling Act granted to the Authority leave to covenant as to bonds to be issued, it could not subsequently through its power to alter, amend, or repeal said Act,

impair the obligations of contract and the covenants thus made. Article I, Sec. 10, Constitution of the United States. Constitution of Maine, Article I, Sec. 11.

The laws in force at the time of the making of the contract enter into its obligations with the same force as if expressly incorporated in its terms.

ON REPORT.

This is a petition for declaratory judgment by certain banks as trustees under a trust indenture. The case is before the Law Court upon report and agreed statement. Case remanded for decree in accordance with the opinion.

Hutchinson, Pierce, Atwood & Allen, for the plaintiff.

H. E. Foster,
Verrill, Dana, Walker, Philbrick & Whitehouse,
Joseph Gorham & Everett Maxcy,
Locke, Campbell, Reid & Hebert,
Skelton & Taintor,
Linnell, Perkins, Thompson, Hinckley & Thaxter,
Sanborn & Sanborn,
George Varney,
Warren Paine,
Bingham, Dana & Gould, for defendants.

Frank Harding, Atty. General,
James Frost, Asst. Atty. Gen.,
Roger A. Putnam, Asst. Atty Gen., for State of Maine.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

SULLIVAN, J. The Maine Turnpike Authority extended its toll road from Portland to Augusta and thus obliged the defendant utilities to relocate or replace some of their pipes, wire lines and other facilities which had been installed in

many portions of extant public ways traversed en route. The Authority has negated all liability for payment of the expense and losses entailed in such transposition or abandonment and the utilities have submitted to the cost under steadfast protest. The resultant outlay and deprivations have been of serious financial magnitude for the utilities.

Pursuant to the Uniform Declaratory Judgments Act, R. S., c. 107, §§ 38 through 50, and on behalf of the bondholders, the plaintiff banks as trustees under the indenture of trust of the Authority have instituted this bill in equity against the Authority, the utilities and the Attorney General to have resolved the controversy as to who must sustain the expense of relocation and the cost of replacement. By agreement amongst all parties the issue is restricted to liability without fixation of the amount of any damages.

Before construction of the turnpike extension the legislature had accorded to the utilities by charter, statute or statutory validation, and without charge, the permit to maintain in the public ways their facilities and the utilities had made the installations. The purport of such legislative privilege is of prime concern in this case and is discovered by court precedents and statutes.

A review of the decided cases of this court is informative.

In *Rockland Water Company* v. *Rockland,* 83 Me. 267 (1891) it was decided that a right by charter to lay pipes in city streets "in such manner as not to obstruct or impede travel thereon" does not afford a right of action against the city which in repairing a street uncovers one of the submerged pipes and exposes it to frost, "in the absence of any improper method in so doing."

Inhabitants of Paris v. *Norway Water Company,* 85 Me. 330 (1893) concerns itself primarily with the cataloguing of utility facilities for taxation purposes. P. 332. The decision says, in part:

> P. 334. "- - - - Such companies, therefore, by the public license accorded them, take no title in the land - - - -"

> P. 335. "- - - - water-mains, pipes, etc., may be considered real estate and taxable where they are located - - - -"

This case of *Paris* v. *Norway* holding that water pipes, hydrants and conduits of a water company, laid in public streets are real estate for the purposes of taxation in the instance of a private corporation chartered by special act of the legislature (P. & S. 1885, c. 369; 1887, c. 46) to lay its installations in public ways "under such reasonable restrictions as may be imposed by the selectmen of said towns," has been excessively interpreted and enlarged in the quest to justify an implication that such a chartered utility is not subject to relocation of its facilities installed in public streets or ways without compensation. Language used in *Readfield Telephone and Telegraph Company* v. *Cyr,* 95 Me. 287 @ 293 and in *Portland* v. *New England Telephone and Telegraph Company,* 103 Me. 240 @ 246, attempts to distinguish those opinions from that of *Paris* v. *Norway,* has been the occasion of misapprehension as to the primary and permanence of the police power.

Belfast Water Company v. *City of Belfast,* 92 Me. 52 (1898) arose from a contract between the utility and the city, permitting the utility to lay its pipes in the city street. The utility laid its pipes. The city in altering its sidewalk required the utility to relocate its pipes. The utility brought the action to recover from the city the expense of such relocation and was denied relief. The court said:

> P. 58. "- - - - When the company placed its gates in the street of the city under the contract referred to, it did so subject to the right of the city to make such change in the surface of the street and the alignment of the sidewalk as might be necessary to render the street safe and convenient for public

> travel. *In making needed repairs and changes in the streets, the city is but an instrument of the state, an agent of the public, and it cannot barter away its rights or fetter its duty to make such repairs and changes.* To subject itself to the expense of changing the appliances of the water company in the streets whenever it became necessary to change them, by reason of repairs, would be a serious impairment of its rights, and an onerous addition to its duties." (Emphasis supplied)

Brunswick Gas Light Company v. *Brunswick Village Corporation,* 92 Me. 493 (1899) was an action by a utility which by charter had "the right to lay gas pipes in any of the public streets and highways of the town of Brunswick, the consent of the selectmen of said town having first therefor been obtained." The utility claimed "that its pipes, lawfully in the Brunswick streets, were broken by the defendant in the course of the construction of sewers in said Streets." The court opinion contains the following tenets:

> P. 497. "- - - - This is the whole of it. It is not claimed that the acts of the defendant were negligent, unreasonable, unnecessary, or in excess of its statutory rights, and of course we cannot assume them to have been so. The question is fairly presented, whether the defendant, having constructed its sewers in a reasonable and proper manner, can be held responsible for damages which were the natural or necessary result of the exercise of its lawful powers. We think the question must be answered in the negative."

> P. 496. "- - - - But this was not an absolute right. It was only a qualified right. It was not paramount, but subordinate. The placing of its pipes in the streets, with the consent of the selectmen, did not give the plaintiff the vested right to have them remain as placed undisturbed. *Its right was subordinate to the rights of the public in the use of the streets; and it was subject to the power of the legislature to authorize additional public uses of*

> *the streets, and that, without providing for the payment of compensation for incidental and consequential damages occasioned by such uses. Notwithstanding the provisions in the plaintiff's charter,* we think it cannot be successfully claimed that the legislature did not still possess the power to authorize the construction of sewers in the streets, although by such construction, the plaintiff might be put to inconvenience, damage and loss." (Emphasis supplied)

> P. 497. "- - - - The legislature exercised its power by granting the defendant's charter. The defendant, then, clearly had the right to construct sewers in its streets. If it did so reasonably and properly, it was only in the lawful exercise of its right. It is well settled that when a public corporation does only what by its charter it is authorized to do, and is free from fault or negligence, it is not liable for consequential damages - - - We think this rule is applicable here."

In *Readfield Telephone and Telegraph Company* v. *Cyr,* **95** Me. 287 (1901), a case concerning a permit by general statute to a class of utilities, is found:

> @ 290. "The beneficial use of the soil in our highways had been appropriated by the public for public purposes, but the property in the soil still remains in the owner of the adjoining land, who may use it for any purpose, above or below the surface, which does not injuriously interfere with public uses. A telephone is a public use, and the legislature, by virtue of its power of control over the public roads and highways of the State, may grant to a telephone company the authority to erect its lines along or upon such roads and highways, or it may delegate that power to the municipal officers of the several municipalities, as has been done in this State by statute of 1885, c. 378. A telephone company, however, cannot construct its line along the highway at its own pleasure. It is forbidden to do so without first obtaining a written permit from the municipal officers. - - - Nor is this permission,

when once obtained, final and irrevocable and *the use so granted subject to be determined only by the will of the company or the discontinuance of the highway.* The same section further provides that 'after the erection of the lines, having first given such company, persons, associations, or their agents, opportunity to be heard, the municipal officers may direct any alteration in the location or erection of said posts.' These are comprehensive terms. Telephone lines, though affected with a public use, are operated for private gain. Nothing is paid for the valuable privilege of occupying and using the soil of the public roads and highways. The authority to fix the location of the posts, in the first instance, has been wisely given to the municipal officers, and if wisely exercised, the location will be made with a view to existing and probable future conditions. *Yet conditions are constantly changing and, in the growth and improvement of our municipalities, the time may come when it may be desirable to alter the location of one or all of the posts of the line from one side of the street to the other, or from one street to another* - - - The telephone company then has no interest in the soil which supports its posts and lines except a right to occupy it by the permission of the municipal officers, a mere license revocable at will.

P. 291. - - - - "No legal right to the continued use of the enjoyment of the privilege can be acquired by prescription in the face of this statute. No right to such continued use is granted, for the only privilege granted in any particular spot, parcel or portion of land is temporary and not permanent, a mere license revocable at the will of the municipal officers so far as any particular portion of the highway *or any particular highway is concerned,* and not a permanent vested interest in the land itself." (Emphasis supplied)

The court was troubled about reconciling this case with *Paris* v. *Norway, supra.*

City of Portland v. *New England Telephone and Telegraph Company,* 103 Me. 240 (1907) was an action for the recovery of taxes upon conduits laid under the surface of the streets by the defendant, a foreign corporation, authorized by special act of the legislature to place its installations under the streets "with the permission and under the supervision of the municipal officers and subject to such rules and regulations as they may from time to time impose." The municipal officers by authorized rules and regulations had reserved full prerogative to revoke or change the location of the facilities of the defendant in city streets whenever such might be deemed necessary or proper. The defendant was obligated to relocate such facilities "whenever ordered to do so by the board of mayor and aldermen." The court ruled that the conduits were not taxable by the city under the prevailing tax statutes. The court said that under the circumstances the permit of the utility to maintain its facilities in the public streets was a mere license revocable at will. The court was at some pains to distinguish the case from *Paris* v. *Norway* but at Page 247 quoted with approval from *Telephone Co.* v. *Terminal Co.,* 182 Mass. 397, a case concerning the assessment of land damages by reason of street discontinuance, as follows:

> '- - - - All the statutes and ordinances upon which the petitioners rely as a justification for their action in constructing conduits in the public streets and as giving them rights of property there, are merely provisions for the regulation of the different public rights in the streets. None of them purports to convey private rights of property. Most of them expressly state the limitations upon the authority given, and make the petitioners subject to possible future proceedings terminating or modifying their rights.
>
> *'But where there is no such express provision the result is the same. Their rights in connection with the rights of others of the public are subject to reasonable regulation, or even to termination at any*

> *time, if the supreme authority acting in the public interest shall so determine.* It follows that they have no rights of property in the street, and their structures that were built therein were personal property which they had a right to remove, and *which could not be subjects for the assessment of damages under statutes of this kind.'* (Emphasis supplied)

The Augusta Turnpike Extension was projected early in 1953 and completed in 1955. Many statutes concerning utility facilities in public ways were in force. R. S. 1944, c. 46, § 11 (P. L. 1951, c. 142, § 2) ; c. 46, § 12, § 13, § 14; c. 46, § 16 (P. L. 1945, c. 293, § 5) ; c. 46, § 17 (P. L. 1951, c. 267, § 1) ; P. L. 1951, c. 267, § 2; R. S. 1944, c. 46, § 19 (P. L. 1945, c. 293, § 7) ; c. 46, § 21, § 22, § 30; c. 46, § 31 (P. L. 1945, c. 293, § 8; P. L. 1951, c. 304, P. L. 1953, c. 224) ; c. 46, § 38, § 40; R. S. 1944, c. 47, § 4, VIII; P. L. 1949, c. 400; P. L. 1951, c. 321, § 6; P. L. 1953, c. 308, § 20.

Permits by statute were available for telephone, telegraph, gas, water, pipe line, heat, power and electric utilities to maintain facilities in public ways. These permits were obtainable from public officers and were "subject also to such rules and regulations as to location and construction as such - - - - officers may designate in their permit." R. S. 1944, c. 46, § 17; P. L. 1951, c. 267, § 1. All facilities entitled to be located and located *"are hereby valid and declared legal and the same shall henceforth be legal structures in said streets and highways until the location thereof shall have been changed in any manner required or authorized by law."* P. L. 1951, c. 267, § 2. (Emphasis supplied) The facilities were to be constructed and maintained so "as not to incommode the use of such roads and streets for public travel." R. S. 1944, c. 46, § 19; P. L. 1945, c. 293, § 7. Telegraph or telephone companies were authorized to sell, lease or buy existing, located facilities. R. S. 1944, c. 46 § 21. Utilities for the transmission of intelligence, heat, light or

power by electricity were eligible for permits from public officers for locating their facilities but the permits were subject to alteration. The located facilities were "deemed legal structures." R. S. 1944, c. 46, § 31; P. L. 1945, c. 293, § 8; P. L. 1951, c. 304; P. L. 1953, c. 224. In municipalities of more than 40,000 inhabitants, the municipal officers, after notice and hearing, might determine that public safety and the public welfare required the revocation of any location of facilities of certain utilities in the public ways but were obliged to supply other suitable locations. R. S. 1944, c. 46, § 38.

There are 7 defendant utilities in the instant case. 4 of them enjoy their rights in public ways from special legislative charters. 3 of them, by general, state, legislative grants to a class of utilities. The water districts only are quasi municipal corporations. The other utilities are private corporations with stockholders. Since the Public Laws of 1895, c. 102, § 5, § 8, c. 103, § 4 (now, substantially, R. S. c. 1954, c. 50, § 11, § 14, § 37) the source of installation rights of utilities in public ways without special charters is legislative by general grant with permits subject to the proper discretion of public officers. One of the telephone companies by special legislation may install facilities in public ways in such manner as not to incommode or endanger the customary public use and with consent of the municipal officers. The gas company by special legislation may install with the consent of the municipal officers and under their prescribed regulations. The water districts by special legislation "may lay pipes in and through streets" and highways. The water districts, therefore, contend that their installations in public ways are more immanent because they derive from special, plenary franchise without any requirement of municipal permits and without reservation as to revocation or alteration. The merits of the present controversy, however, concern themselves primarily with the requirements of public travel and with the police power. The

authorities which follow as well as the Maine decisions which precede establish that, whatever hierarchy of privileges in utility installations there may be, the exigencies of public travel and the police power are unremittingly paramount.

Lynn and Boston Railroad Company v. *Boston and Lowell Railroad Corporation,* 114 Mass. 88 (1873) is a case that was litigated between "a horse railroad company" and a steam railroad and affords the following law of public street usage:

> P. 91. "The enactment of a statute authorizing a railroad corporation to construct a road over a given route, necessarily involves a determination by the Legislature that the public exigency requires such road. It may, by a direct provision, authorize the corporation to build its road on a level with any highway which it crosses. In the absence of any express provision, the power of deciding whether public necessity requires that the railroad should be built on a level, is delegated to the county commissioners. - - - - -
>
> "If they so decide, it is an appropriation of the highway to a public use by the authority of the Legislature. It necessarily modifies, to some extent, the general use of the highway, but neither those who have occasion to travel over it, nor a street railway corporation which has a right to use it in common, can object. *They hold their rights to use it in subordination to the power of the public authorities to determine what other use of it is demanded by public necessity.*" (Emphasis supplied)

Boston Electric Light Company v. *Boston Terminal Company,* 184 Mass. 566, 69 N. E. 346 (1904)

> P. 567. - - -" 'All the statutes and ordinances upon which the petitioners rely as a justification for their action in constructing conduits in the public streets and as giving them rights of property

there, are merely provisions for the regulation of the different public rights in the streets. None of them purports to convey private rights of property. Most of them expressly state the limitations upon the authority given, and make the petitioners subject to possible future proceedings terminating or modifying their rights.' "

Anderson v. *Fuller et al.*, 51 Fla. 380 (1906)

P. 392. "- - - And while municipalities may by ordinance grant to individuals and corporations the privilege of occupying the streets and public ways for lawful purposes, such as railroad tracks, poles, wires, gas and water pipes, such rights are at all times held in subordination to the superior rights of the public and all necessary and desirable police ordinances, that are reasonable, may be enacted and enforced to protect the public health, safety and convenience, notwithstanding the same may interfere with legal franchise rights. A water company placing its pipes in the streets under a franchise contract with the city, does so in subordination to the superior rights of the public, through its duly constituted municipal authorities, to construct sewers in the same streets, whenever and wherever the public interest demands; and if in consequence of the exercise of this right, the water company is compelled to relay its pipes, *in the absence of unreasonable or malicious conduct,* it has no cause of action against the corporation for reimbursements on account thereof. - - - - - *The city of Tampa was therefore, not authorized directly or indirectly to burden itself or its citizens with the cost of removing and replacing of the water pipes, gas pipes, telegraph, telephone and electric light poles, drains or conduits or railway tracks that might necessarily have been interfered with in laying its sewers* in the streets. - - - - -" (Emphasis supplied)

New Orleans Gas Light Company v. *Drainage Commission of New Orleans,* 197 U. S. 453, 1905.

P. 458. "In the case of the New Orleans Gas Company, 115 U. S. 650, it was held that the complaint, by reason of the franchises granted and agreements made, as fully set forth in that case, had acquired the exclusive right to supply gas to the city of New Orleans and its inhabitants through pipes and mains laid in the streets.

"It is the contention of the plaintiff in error that, having acquired the franchise and availed itself of the right to locate its pipes under the streets of the city, it has thereby acquired a property right which cannot be taken from it by a shifting of some of its mains and pipes from their location to accommodate the drainage system, without compensation for the cost of such changes. It is not contended that the gas company has acquired such a property right as will prevent the Drainage Commission, in the exercise of the police power granted to it by the State, from removing the pipes so as to make room for its work, but it is insisted that this can only be done upon terms of compensation for the cost of removal. This contention requires an examination of the extent and nature of the rights conferred in the grant to the gas company. The exclusive privilege which was sustained by this court in the case of the New Orleans Gas Co. v. Louisiana Light Co., supra, was the right to supply the city and its inhabitants with gas for the term granted. There was nothing in the grant of the privilege which gave the company the right to any particular location in the streets; it had the right to use the streets, or such of them as it might require in the prosecution of its business, but in the original grant to the New Orleans Gas Light and Banking Company the pipes were to be laid in the public ways and streets 'having due regard to the public convenience.' And in the grant to the Crescent City Gas Light Company the pipes were to be 'laid in such manner as to produce the least inconvenience to the city or its inhabitants.' In the very terms of the grant there is a recognition that the use of the streets by the gas company was to be in such manner as to least inconvenience the city in

such use thereof. Except that the privilege was conferred to use the streets in laying the pipes in some places thereunder, there was nothing in the terms of the grant to indicate the intention of the State to give up its control of the public streets, certainly not so far as such power might be required by proper regulations to control their use for legitimate purposes connected with the public health and safety. In the case above cited, in which the exclusive right to supply gas was sustained, there was a distinct recognition that the privilege granted was subject to proper regulations in the interest of the public health, morals and safety.
- - - - -

P. 461. - - - "There is nothing in the grant to the gas company, *even if it could legally be done,* undertaking to limit the right of the State to establish a system of drainage in the streets. We think whatever right the gas company acquired was subject in so far as the location of its pipes was concerned, to such future regulations as might be required in the interest of the public health and welfare. Those views are amply sustained by the authorities. Natural Water Works Co. v. City of Kansas, 28 Fed. Rep. 921, in which the opinion was delivered by Mr. Justice Brewer, then Circuit Judge; Gas Light & Coke Co. v. Columbus, 50 Ohio St. 65; Jamaica Pond Aqueduct Co. v. Brookline, 121 Massachusetts, 5; In re Deering, 93 N. Y. 361; Chicago, Burlington etc. R. R. Co. v. Chicago, 166 U. S. 226, 254. In the latter case it was held that uncompensated obedience to a regulation enacted for the public safety under the police power of the State was not taking property without due compensation." (Emphasis supplied)

Southern Bell Telephone and Telegraph Company v. *State of Florida, ex rel. Ervin,* 75 So. (2nd) 796 (1954)

P. 799. "The statute authorizes the Telegraph Company to use the roads or highways for its facilities so long as such facilities shall not obstruct or interfere with the common uses of said streets.

> Even if the proviso in the act had been omitted, it would not have conferred upon the company any absolute or indefeasible right to have such facilities remain in the same place forever. In the only instance, cited supra, where this statute has been before this Court, we held that streets are primarily for the benefit of the traveling public, and that the use of such streets by Telephone Companies was secondary and restricted to the extent that such facilities should not interfere with the common uses thereof. The streets were built first and when the Telephone Company installed its facilities in the streets it did so knowing that if it became necessary in the future to improve such streets in the interest of the general welfare, its facilities would have to be removed, relocated or rearranged. In other words, it knew then that its facilities and business was then and always would be subservient to the rights of the public."

Scranton Gas and Water Company, Appellant v. *Scranton City,* 214 Pa. 586, 64 Atl. 84 (1906)

The City of Scranton and a railroad constructed a viaduct from one street to another over the railroad tracks to eliminate a dangerous grade crossing.

The water company had *a legislative grant* to occupy the streets. It had laid its pipes beneath the street where the viaduct was constructed and had long maintained them there. It became necessary to relocate the pipes and conduct them along several other streets because of the viaduct. The water company claimed the cost of relocation, to be paid by the city under its eminent domain process. Recovery was denied by the court.

> P. 590. - - - "So far as property rights are concerned there is but slight correspondence between the easement enjoyed by appellant company in the streets of the city, and the rights of the abutting owners in their several properties. The distinctions between the two are too obvious for discus-

> sion. It is enough to say with respect to the former, that it is held and enjoyed subject always to the earlier and superior rights of the public in the streets of the municipality. Among these is the power to regulate and control the streets in the interest of public health and safety. When these demand a change in the mode and manner of the enjoyment of the easement or privilege, and that demand is expressed through the municipal authority, in the exercise of reasonable discretion, that change must be made. *Calling the legislative grant of privilege to use the streets a contract does not avoid the conditions on which the privilege is to be exercised. Whether such limitation or conditions be expressed in the grant or not is immaterial,* for, as said in Butchers' Union Slaughter House Co. v. Crescent City Live Stock Landing Co., 111 U. S. 746, the power to control and regulate the streets so as to protect the public health, is one that cannot be bargained away by legislative or municipal grant. The power to control them for the protection of public safety, if not the same, stands on equally high ground. All authorities agree that such right is both paramount and inalienable. - - - -" (Emphasis supplied)

City of Louisville, Kentucky v. *Cumberland Telephone and Telegraph Company,* 224 U. S. 649 (1912). The legislature had given to the utility a charter to maintain its telephone system, erect poles and string wires over the streets and highways of the city, with and by the consent of the city. The court said:

> P. 658. "- - - For, while the city was given the authority to consent, the statute did not confer upon it the power to withdraw that consent, and no attempt was made to reserve such a right in the collateral contract contained in those provisions of the ordinance relating to the company's giving a bond and carrying the police and fire wires free of charge - - - -. But the municipality could not by an ordinance impair that contract nor revoke the rights conferred. Those charter franchises

had become fully operative when the city's consent was given, and thereafter the company occupied the streets and conducted its business, not under a license from the city of Louisville, but by virtue of a grant from the State of Kentucky. Such franchises granted by the legislature could not, of course, be repealed, nullified or forfeited by any ordinance of a General Council."

P. 661. "- - - Such a street franchise has been called by various names — an incorporeal hereditament, an interest in land, an easement, a right of way - - - but, howsoever designated, it is property. Detroit v. Detroit Street Ry. 184 U. S. 368, 394; Louisville City Ry. v. Louisville, 71 Kentucky, (8 Bush), 534; West River Bridge v. Dix, 6 How. 507, 534; Board of Morristown v. East Tenn. Tel. Co., 115 Fed. Rep. 304, 307. Being property, it was taxable, alienable and transferable, - - - - -."

P. 663. "- - - - To say that the right to maintain these appliances was only a license, which could be revoked at will, would operate to nullify the charter itself, and thus defeat the State's purpose to secure a telephone system for the public use." (The Court had no occasion to discuss the subject of police power.)

Old Colony Trust Company v. *City of Omaha,* 230 U. S. 100 (1913). In 1884 the defendant city gave to a utility permission to maintain its facilities upon and over the public streets. There were conditions exacted. The utility was obliged to allow the police and fire department wires the use of its poles, was not to interfere with public travel and was to remove its facilities from the public streets in 60 days whenever the city by ordinance declared removal to be a necessity. In 1908 the city "elected to terminate" and passed such an ordinance. This was a suit by the trustee for the utility bondholders to enjoin such city action. The injunction was granted. The court said, in part:

P. 117. - - - - "In this aspect, the case is like that in Plattsmouth v. Nebraska Telephone Co., supra,

> where the Supreme Court of the State said (p. 466); '*That the rights of the defendant in the streets of the city must yield to public necessity - - - is beyond question or dispute;* but, having acquired a right in the streets, and having made expenditures on the strength of the grant extended by the city, the authorities are quite uniform that *this right cannot be taken away in an arbitrary manner and without reasonable cause.*' " (Emphasis supplied)

Owensboro v. *Cumberland Telephone Co.,* 230 U. S. 58 (1913). A municipal ordinance granted to the utility telephone system the right to use the city streets for its poles and wires. By a later ordinance the city required the utility to remove its facilities from the streets or else pay a rental which had not been prescribed in the original ordinance. The court held that the later ordinance was unconstitutional under the contract clause of the Federal Constitution.

> P. 72. "The power to be a corporation and to conduct a telephone business did not come from the city, nor could it. The only thing which the ordinance pretends to do is to grant an easement in the streets which, as we have already shown, was an unlimited right to place and maintain poles and wires upon the streets, *subject, however, to the police power of the city.* This repealing ordinance, though it purports to be an exercise of the police power in the 'whereas' clause, proceeds immediately to contradict the assertion that the poles and wires are a 'nuisance' by the proviso giving the company an opportunity to purchase the right to continue the use of the streets under conditions 'to be prescribed by ordinance,' upon request of said company. It is a plain attempt to destroy the vested property right under which a great plant had been installed and operated for more than twenty-five years. When that grant was accepted and acted upon by the grantee it became a contract between the city and the telephone company, which could not be revoked or repealed, unless the

power to repeal was clearly and unmistakably reserved. (Emphasis supplied)

> The sixth section of the granting ordinance provides that, 'This ordinance may be altered or amended as the necessities of the city may demand.' This is no more than a reservation of the police control of the streets and of the mode and manner of placing and maintaining the poles and wires incident to the unabridgeable police power of the city. See Grand Trunk Railway v. South Bend, 227 U. S. 544. It does not reserve any right to revoke or repeal the ordinance, or to affect the rights therein granted - - - - -"

New Orleans Public Service, Incorporated v. *City of New Orleans,* 281 U. S. 682 (1930). The city brought suit to require the street railway corporation without compensation to remove a viaduct and to construct double tracks at street level across railroad tracks. The city asserted that because of an increase in population the single track over the viaduct was indaquate and that the viaduct had not been properly maintained and was dangerous. The defense *inter alia* was that the city ordinance demanding the changes was arbitrary and in violation of the contract and due process clauses of the Federal Constitution. The trial court and supreme court of Louisiana upheld the city's contentions. The United States Supreme Court affirmed the state court decision and in so doing held that the case was distinguishable from the *Owensboro* case, *supra,* which the street railway corporation had cited.

> P. 686. "- - - The ordinance now under consideration does not aim to destroy or to exact payment for the right of appellant to use the street for the operation of its street railway. *It purports merely to regulate the use of the streets for the convenience and safety of the public. It does not impair appellant's franchise.*"

> P. 687. "- - - *It is elementary that enforcement of uncompensated obedience to a regulation passed*

in the legitimate exertion of the police power is not a taking of property without due process of law. - - - - -" (Emphasis supplied)

New York City Tunnel Authority, Appellant v. *Consolidated Edison Company of New York, Inc., et al., Respondents, et al., Defendants,* 295 N. Y. 467, 68 N. E. (2nd) 445. (1946)

P. 474. "The 'fundamental common-law right applicable to franchises in streets' is that a utility company must relocate its facilities in the public streets when changes are required by public necessities. (Transit Comm. v. Long Island R. R. Co. Bell Ave. case), 253 N. Y. 345, 353.) The rule finds succinct statement in that case (253 N. Y. at p. 351) : '*Although authorized to lay its pipes in the public streets, the company takes the risk of their location and is bound to make such changes as the public convenience and security require, at its own cost and charge.* (Chicago, Burlington & Quincy R. R. Co. v. Chicago, 166 U. S. 226; New Orleans Gas Light Co. v. Drainage Commission, 197 U. S. 453; Chicago, Burlington & Quincy R. R. Co. v. Drainage Commrs., 200 U. S. 561; Lake Shore & Michigan Southern R. Co. v. Clough, 242 U. S. 375; Chicago, Milwaukee & St. Paul Ry. Co. v. City of Minneapolis, 232 U. S. 430; National Water Works Co. v. City of Kansas, 28 Fed. Rep. 921; Matter of Petition of Deering, 93 N. Y. 361; Chace Trucking Co. v. Richmond, Light & R. R. Co., 225 N. Y. 435). *All these cases are to the point, that these public service corporations maintain their rights in the streets, subject to reasonable regulation and control, and are bound to relocate their structures at their own expense whenever the public health, safety or convenience requires the change to be made.*'" (Emphasis supplied)

P. 475. "If this rule is not to apply here, the distinction must lie in the nature of the project, the character of the authority, or the intent of the Legislature as shown by the enabling statute."

Cases sustaining the foregoing pronouncements are numerous. Charters, franchises, statutory grants and permits affording the use of public ways to utility locations are subservient, expressly or by implication, in the exercise of governmental functions, to public travel and to the paramount police power and relocation of utility facilities in public streets or ways are at utility expense, a common law liability unless abrogated by the clear import of the language used in a particular instance. Some of the authorities are: *Southern Bell Tel.*, etc. v. *State* (Fla.), 75 So. (2nd) 796 (1954); *Southern Bell Tel.*, etc. v. *Commonwealth* (Ky.), 266 S. W. (2nd) 308 (1954); *Natick Gaslight Co.* v. *Natick,* 175 Mass. 246, 56 N. E. 292 (1900); *Hammond W. & E. C. Ry.* v. *Zeigler,* 198 Ind. 456, 152 N. E. 806 (1926); *Stillwater Water Co.* v. *Stillwater,* 50 Minn. 498, 52 N. W. 893 (1892); *Erie Railroad Company* v. *Board of Public Utility Commissioners,* 254 U. S. 394 (1921); *New Jersey Bell Telephone Co.* v. *Delaware River Joint Commission,* 125 N. J. L. 235, 15 A. (2nd) 221 (1940); *Consolidated Edison Co. of New York* v. *State of New York,* 276 App. Div. 677, 97, N. Y. S. (2nd) 431, 302 N. Y. 711, 98 N. E. (2nd) 587 (1950-1); *Raleigh* v. *Carolina Power & Light Co.,* 180 N. C. 234, 104 S. E. 462 (1920); *Ganz* v. *Ohio Postal Telegraph Cable Co.,* 140 Fed. 692 (6th Cir., 1905); *County Court* v. *White,* 79 W. Va., 475, 91 S. E. 350 (1917); *State ex rel., City of Benwood* v. *Benwood & McMechen Water Co.,* 94 W. Va. 724, 120 S. E. 918 (1923); *Macon* v. *Southern Bell Tel. & Tel.,* 89 Ga. App. 252, 79 S. E. (2nd) 265 (1953); *Peoples Gas Light & Coke Co.* v. *Chicago,* 413 Ill. 457, 109 N. E. (2nd) 777 (1953); *Louisville Gas & Electric Co.* v. *Commissioners of Sewerage of Louisville,* 236 Ky. 376, 33 S. W. (2nd) 344 (1930).

Southern Bell Tel. & Tel. Co. v. *Commonwealth, supra,* concerned a limited-access highway which not only followed existing highways in part but crossed some.

The decisions cited just above regard the considerations of travel and transportation of first concern in the ranking of rights in public ways.

Without express authority from the legislature the state or municipality cannot pay to a utility its expense for relocating an installation in a public street or way. *Anderson* v. *Fuller et al.*, 51 Fla. 380 (1906); *Boston, Worcester & N. Y. Street Ry. Co.* v. *Commonwealth,* 301 Mass. 283 (1938); *Transit Commission* v. *Long Island R. R.,* 253 N. Y. 345, 171 N. E. 565 (1930).

When to accomplish a legitimate, public, protective purpose by a reasonable and not arbitrary regulation, not violative of any constitutional limitation the state invokes the police power obliging utilities to relocate their facilities installed in a public street or way, without compensation, there is no taking of private property but *damnum absque injuria,* damage without the invasion of legal right.

New Orleans Gas Light Company v. *Drainage Commission of New Orleans,* 197 U. S. 453 (1905).

> P. 462. "- - - - Chicago, Burlington etc. R. R. Co. v. Chicago, 166 U. S. 226, 254. In the latter case it was held that uncompensated obedience to a regulation enacted for the public safety under the police power of the State was not taking property without due compensation. In our view, that is all there is to the case. The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the State, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement

> at its own expense none of the property of the gas company has been taken, and the injury sustained is damnum absque injuria."

See, also, *Chicago, Burlington and Quincy Railway Company* v. *People of the State of Illinois ex rel. Drainage Commissioners,* 200 U. S. 561 (1906) ; *Dakota Central Telephone Co.* v. *Shipman Construction Co.,* 49 S. D. 251, 207 N. W. 72 (1926) ; *Western Gas Co. of Washington* v. *City of Bremerton,* 153 P. (2nd) 846 (1944).

> P. 847. "The principle of damnum absque injuria is an ancient one. It is applicable here. The city is not guilty of any tort, no wrongful act is being done. The necessity and convenience of the public is being served. No property is taken, no title is disturbed. The authorities are well nigh unanimous that in such a case the city has a paramount right to serve the public necessity and convenience without payment for individual losses resulting therefrom. Many roadside businesses have been destroyed by the rerouting of traffic or changes in the location of streets and highways."

Boston Electric Light Company v. *Boston Terminal Company,* 184 Mass. 566, 69 N. E. 346, 348 (1904).

> P. 570. "- - - The Legislature is the supreme authority in regard to public rights in the streets and highways - - - -"

New Eng. Tel. & Tel. Co. v. *Boston Terminal Co.,* 182 Mass. 397 (1903) is a case cited with approval in *Portland V. N. E. T. & T. Co.,* 103 Me. 240 *(supra).* A street was discontinued. Action for damages. Recovery denied.

> P. 399. "These public rights are primarily subject to the regulation and control of the Legislature which represents the public. This regulation and control is usually delegated to the local authorities by general laws, and sometimes by special laws. But the Legislature remains all the time the supreme authority in regard to all public rights

> and interests. The authority which it delegates, it may at any time resume, and then it may exercise it as it deems best - - - - -"
>
> *N. B.* P. 398. "- - - - The wires were removed, but *the conduits and manholes were so constructed that they could not be taken up without such destruction as would render them worthless.* - - - - -" (Emphasis supplied)

See, also, *City of Macon* v. *Southern Bell Tel. & Tel. Co.,* 89 Ga. App. 252, 79 S. E. (2nd) 265 (1953).

The police power cannot be surrendered or contracted away by the state.

Baxter v. *Waterville Sewerage District,* 146 Me. 211 (1951).

New Orleans Gas Light Company v. *Drainage Commission of New Orleans,* 197 U. S. 453 (1905).

Northern Pacific Railway Company v. *State of Minnesota ex rel. The City of Duluth,* 208 U. S. 583 (1908).

City of Macon v. *Southern Bell Tel. & Tel. Co.,* 89 Ga. App. 252, 79 S. E. (2nd) 265 (1953).

> P. 276. "So it follows that whatever construction could be placed on any contractual franchise right granted by the city to the telephone company, the city could not by contract or otherwise override the police power imposed in it. Neither could the State through Code, § 104-205 do away with its constitutional power to require the plaintiff telephone company to remove its underground conduit from a specific locality to another locality at its own expense, where such removal is necessitated for the safety, protection, welfare, and health of the citizens. Under no construction of the provisions of the Code or of the contract with the city or of any municipal ordinance, can the telephone company acquire a right to use the public highways of the State or the streets which would not

> be subordinate to the 'public use and private rights, and subject to any lawful exercise of the police power belonging to the State or to its municipalities or counties.' "

Boston and Maine Railroad v. *County Commissioners,* 79 Me. 386 (1887).

> P. 393. "This power of the legislature to impose uncompensated duties and even burdens, upon individuals and corporations for the general safety, is fundamental. It is the 'police power.' Its proper exercise is the highest duty of government. The state may in some cases forego the right to taxation, but it can never relieve itself of the duty of providing for the safety of its citizens. This duty, and consequent power, override all statute or contract exemptions. The state cannot free any person or corporation from subjection to this power. All personal as well as property rights must be held subject to the police power of the state. Beer Co. v. Massachusetts, 97 U. S. 25; Stone v. Mississippi, 101 U. S. 814; Butchers' Union Co. v. Crescent City Co., 111 U. S. 746."

The Maine Turnpike Authority is a creation of the legislature.

P. & S. 1941, c. 69; P. & S. 1947, c. 69; P. & S. 1949, c. 41; P. & S. 1951, c. 152; P. & S. 1953, c. 68, c. 91; P. & S. 1955, c. 201.

It is "a body both corporate and politic" and "shall be regarded as performing a governmental function."

The Authority "in order to facilitate vehicular traffic between the southwestern and northeastern section of the state of Maine" "for the benefit of the people of the state of Maine and for the improvement of their commerce and prosperity in which accomplishment the authority will be performing essential governmental functions" was authorized to construct, operate and maintain a turnpike, with the approval of the State Highway Commission, from Kit-

tery to Fort Kent. Such authorization by the legislature was tantamount to "a determination that the public exigency requires such road." *Lynn & Boston Railroad Company* v. *Boston & Lowell Railroad Corporation,* 114 Mass. 88, 91. It had to be a limited access road from its very design and purpose. Revenue bonds payable solely from tolls were sanctioned, for the cost of construction. Such bonds were not to be a debt of the state of Maine, nor could the faith or credit of the State be at all pledged in their behalf. The turnpike when paid for was to become the property of the State, to be operated thereafter by the State Highway Commission. The Authority was granted power to acquire, hold and dispose of personal property and to acquire "by purchase, continuation, lease or otherwise, real property and rights or easements therein deemed by it necessary or desirable for its purposes and to use such property." Right of eminent domain was accorded as to real property. The Authority was afforded immunity from levy, sale and lien except for the lien granted its bondholders upon its net receipts. Its property, income and the securities it might issue were exempted from all Maine taxes. The turnpike was made available at all times, without charge, to the armed services.

The turnpike was manifestly to be a type of public highway and the Authority was, in its legislative conception, a governmental agency with police power plainly conferred.

> P. L. 1941, c. 69, Sec. 4. Powers. (a)
>
> (4) to construct, maintain, reconstruct and operate a toll turnpike - - - - -
>
> (14) to do all other lawful things necessary and incidental to the foregoing powers.

It is not conceivable that the Authority which was given the responsibility for an expressway essentially direct and straight from Kittery to Fort Kent was subordinated by the legislature to the discretion and action of municipal

officers in the many municipalities to be traversed. Even the State Highway Commission was denied the power or right to be consulted as to the course of the turnpike.

P. L. 1941, c. 69, Sec. 4. Powers. (c)

> - - - the turnpike and connecting tunnels and bridges, overpasses and underpasses shall be constructed under the supervision of the state highway commission, provided, however, that such supervision of the state highway commission shall not extend to the control of the location or course of the turnpike.

The Authority was empowered to "permit the erection, or installation of electric power, telegraph, telephone, water or pipe line facilities." P. S. 1953, c. 91.

Its real or personal property was not to be devoted to commercial purposes except for gasoline and repair stations and restaurants, for the need of travelers. P. S. 1953, c. 91.

New York City Tunnel Authority, Appellant v. *Consolidated Edison Company of New York, Inc. et al., Respondents, et al., Defendants,* 295 N. Y. 467, 68 N. E. (2nd) 445 (1946), is a case with issues very similar to those present here. The Tunnel Authority sought successfully to recover from the utility the cost of relocating utility facilities in the approaches to the tunnel. The court said:

> P. 476. "Nor does the circumstances that tolls are charged in order to finance the improvement change either the character of that improvement or the character of the authority. We may take judicial notice of the fact that, when the authority was created, many municipalities of the State were struggling to finance public improvements which could not be undertaken upon their own direct credit, either because of constitutional debt limitations or because of the disinclination or inability to burden further the traditional taxpayer.

The imposition of a toll or charge for the use of the new improvement does not make the operation a business enterprise carried on for profit, as the Appellate Division suggested. Rather, it creates a new class of taxpayers thought to be more justly charged with the cost of the new improvement. The Legislature's choice of the incidence of this taxation should not, and does not, change applicable principles. Imposing no new burdens on respondents, it was certainly not intended to relieve them of obligations to which they were subject by well-established rules. - - - -"

"The legislature might, of course, have required the authority to pay the expenses of the character here involved — or to reimburse those who laid them out — and respondents contend that the statute so provides. This argument is two-pronged. Respondents argue, first, that the Legislature failed to delegate to the authority expressly its own police power and that in the absence of such a delegation the authority was not intended to be vested with it; and, second, that the power of condemnation given to plaintiff (§ 629) with respect to 'easements,' 'structures,' 'franchises' as well as the power to pay for damages to real estate—carries a fair intendment that the authority was to pay for the charges here in question. It seems to us that neither contention has merit."

P. 477. "The enabling act, it is true, does not contain any delegation of police power in haec verba, but such language is at best rare; it is not contained in any of the statutes governing similar projects, to which our attention has been called. The legislation does, however, contain the language—to which we have already referred—clothing this authority with the attributes of delegated sovereignty as a State agency. Such language would be fully adequate for the purpose even apart from the well settled rule of construction—announced in the *Bell Avenue* case—that the power is to be implied unless expressly negatived." (253 N. Y., at pp. 354-355)

Public ways, as we have noted, *supra,* have, as their proper objects, travel and transportation. Public safety is a prime requisite and transcendentally so in a turnpike. The latter must be of limited access with a minimum of curves and approaches. There can be no intersections. Sufficient overpasses and underpasses must be available. Divided lanes are necessary. Road digging and alteration must be precluded irreducibly. The stream of commerce must flow with all reasonable speed. Millions of automobiles are being made, distributed and placed upon public ways. Old town and shire roads are no longer safe or adequate. Turnpikes or expressways are vital for fast, direct movement of the armed forces and their impedimenta. These are all responsibilities of the police power.

Highway Research Board, Special Report 21

> P. 38. "Furthermore, it would be manifestly dangerous to the traveling public to permit telephone or telegraph poles or drains or sewers, even though they were originally constructed in compliance with regulations of the highway authorities or municipalities as to their placement and construction, to remain in those original locations when the highway is widened and those facilities would be situated in the traveled portions of the new mutilated, divided, high speed throughway. Likewise, it would be inconvenient, if not dangerous, to the public for utilities to be permitted to excavate upon the traveled portion of an expressway or throughway when its underground facilities need repairs."

The Authority takes its powers immediately from the legislature and the enabling act delegates police power of considered precedence as to utility facilities located in public streets or ways in its route.

Because of the state of the law authoritatively expressed, without an affirmative grant from the legislature, the defendant utilities when submitting to the police power had no right to reimbursement for relocation of their facilities

installed in the public ways or for abandonment of them. Conversely the Authority had no right to reimburse the utilities without such legislative sanction.

Until the amendment that is P. & S. 1955, c. 201, legislative intendment as to reimbursement is perceived chiefly from the topics, "Definitions" and "Eminent Domain." P. & S. 1941, c. 69.

"Sec. 3. Definitions.

> (b) The word 'owner' shall include all individuals, copartnerships, associations or corporations having *any title or interest in any property rights, easements, or franchises authorized to be acquired by the act.*
>
> (c) The words 'the turnpike' shall mean the turnpike to be constructed as hereinafter provided - - - - - and shall be deemed to include not only the turnpike and all tunnels and bridges connected therewith, overpasses and underpasses *but also all property rights, easements and franchises relating thereto and deemed necessary or convenient for the construction or the operation thereof.*
>
> (d) The term 'cost of the turnpike' shall embrace the cost of constructing the turnpike and all connecting tunnels and bridges, overpasses and underpasses; *the cost of all lands, property rights, easements and franchises* acquired which are deemed necessary for such construction;
>
> - - - - - - - - - -
>
> the construction of the turnpike and connecting tunnels and bridges, overpasses and underpasses;

Sec. 5. Eminent domain.

> (a) - - - the authority is hereby authorized and empowered to acquire by condemnation any such *real property* whether wholly or partly constructed or *interest or interests therein* and any *lands, rights, easements, franchises* and other property

> deemed necessary or convenient for the construction or the efficient operation of the turnpike, its connecting tunnels, or bridges, overpasses or underpasses in the manner hereinafter provided.
>
> (f) Whenever the authority decides to acquire any *lands, rights, easements* and *franchises* or *interests therein* by condemnation as hereinbefore provided - - - - - the authority shall have the right to immediate possession of the property which is the subject of the condemnation proceedings - - -" (Emphasis supplied)

The enabling act does not in the very words state that the Authority may or must pay the relocation costs in dispute here. Nor does the act imply that those costs may or must be so paid. The description and enumeration of costs and properties fall short of containment of payments for expense arising from damages without the invasion of legal right. The rights of utilities to enjoy installations in public streets or ways are positive and very respectable in the status of the law but they are subordinate to public travel and to the valid exercise of the police power. They have, as we have seen, *supra,* their delimitations. The terms, "real property" "interest or interests therein," "lands," "rights," "easements" and "franchises" as used in the enabling act prior to its last amendment are not sufficiently apt to support the claim of the defendant utilities.

In *New York City Tunnel Authority, Appellant* v. *Consolidated Edison Company of New York, Inc., et al., Respondents, et al., Defendants, supra,* it was held: "that the power of condemnation given - - - with respect to 'easements,' 'structures,' 'franchises'—as well as the power to pay for damages to real estate" did not carry "a fair intendment" that the Authority was to pay for the charges for utility relocations in question.

The defendant utilities still have their franchises which they continue to enjoy although in some instances in new

locations. *New Jersey Bell Telephone Co.* v. *Delaware River Joint Commission,* 125 N. J. L. 235, 15 A. (2nd) 221 (1940); *Baltimore Gas and Electric Co.* v. *State Roads Commission of Maryland,* 134 Atl. (2nd) 312, 319 (1957).

We quote from the stipulation of the parties:

> Record of case. "- - - - Wherever the plans called for alteration of a public highway the new highway has been constructed in accordance with such plans and has since been operated and maintained by the respective towns or cities or State Highway Commission."

It is true that some facilities were relocated from public ways to private property. Record of case.

The crossing of public roads by the turnpike in respect to the utilities here has some resemblance to a partial street closing. See *New England Tel. & Tel. Co.* v. *Boston Terminal Co.,* 182 Mass. 397, 400 (1903); *City of Macon* v. *Southern Bell Tel. & Tel. Co.,* 89 Ga. App. 252, 79 S. E. (2nd) 265 (1953). Or to the elimination of a grade crossing. See *Transit Commission* v. *Long Island R. R.,* 253 N. Y. 345, 171 N. E. 565 (1930). *Philadelphia Suburban Water Co.* v. *Pennsylvania P. U. C.,* 168 Pa. Super. 360, 78 A. (2nd) 46 (1951).

> P. 51. "Whether regarded as an exercise of the police power or of the power of eminent domain, the vacation of a highway is not a taking of private property for public use, requiring payment of compensation conformably to the Constitution, Art. 1, Sec. 10. Paul v. Carver, 24 Pa. 207. Unless a statute expressly imposes liability for compensation upon the commonwealth for the vacation of a highway, neither damages nor compensation are recoverable."

By P. & S. 1955, c. 201, the legislature amended § 5, sub-§ (d) and sub-§ (e), "Eminent Domain," of the enabling act to permit the Authority to acquire real or personal property

or rights therein, of a utility for the authorized purposes of the Authority and to condemn utility facilities legally located in a public street or way by franchise, permit or legislative authority, by paying value or relocating costs of facilities, whichever is the lesser.

The amendment became effective August 20, 1955 and yet contained this language:

> "- - - - - Said payment shall include payment of such cost for any such property or facilities acquired or the cost of any such relocations made at the request of and for the benefit of said authority in any section of the turnpike under construction and not open to public use prior to May 1, 1955, except where said authority has obtained title thereto by purchase or specific conveyance."

The amendment thus purported to be partially retroactive.

The Augusta extension of the turnpike was not open to public use before May 1, 1955 but was under construction and "largely completed."

The authority had not been obligated to pay the relocation costs of the defendant utilities prior to the enactment of the 1955 amendment to the enabling act. It remains to be determined if that amendment could be retroactive, to affect the trustees or bondholders of the Authority or the turnpike funds.

We quote from the stipulation of the parties in this case:

> "19—To finance the construction, maintenance and operation of the aforesaid Augusta Extension, the Maine Turnpike Authority pursuant to its Resolution dated April 23, 1953, executed and delivered to the Trustees a Trust Indenture dated as of January 1, 1953, but actually executed and delivered on or about May 15, 1953, a copy of which marked 'Exhibit A' is annexed to the plaintiffs' bill of complaint. The provisions thereof were for-

mally approved by the Maine State Highway Commission by vote dated April 23, 1953. In addition to the initial issue of $75,000,000 Refunding and Revenue Bonds, the Authority in May 1956 issued under and pursuant to the provisions of said Trust Indenture Refunding and Revenue Bonds in the amount of $3,600,000 to meet costs incurred in connection with the construction of the Augusta Extension.

20—To promote the sale of the aforesaid first issue of $75,000,000 of Refunding and Extension Bonds and as an inducement thereto there was issued and circulated to the public a Prospectus, a copy of which marked 'Exhibit B' is annexed to the plaintiffs' bill of complaint. The said Prospectus was approved by a Resolution of the Authority dated April 23, 1953. All of said first issue of bonds in the form set forth in the said Trust Indenture was duly issued and sold prior to August 20, 1955.

21—The complainants herein and those who purchased and now hold the first issue of Refunding and Extension Bonds acted in reliance upon the estimates and representations contained in the Prospectus and the Trust Indenture.

24—After the issue and sale of the $75,000,000 of Refunding and Extension Bonds aforesaid, and after a large part of the work of relocating the facilities above referred to had been performed, there was enacted and became effective August 20, 1955, an amendment to Section 5 sub-section (d) and (e) of the aforesaid Chapter 69 of the Private and Special Acts of Maine of 1941; the amendment being Chapter 201 of the Private and Special Acts of Maine of 1955."

The authority did not invoke condemnation at any time as to the utility facilities or purchase them. It has no obligations based upon actual condemnation.

New Jersey Bell Tel. Co. v. *Delaware River Joint Commission,* 125 N. J. L. 235, 15 A. (2nd) 221 (1940).

In re *Delaware River Joint Commission,* 342 Pa. 119, 19 A. (2nd) 278 (1941).

The legislature possessed the power and authority to alter, amend or repeal the enabling act at any time following the enactment thereof. R. S. 1930, c. 56, § 2; R. S. 1944, c. 49, § 2; R. S. 1954, c. 53, § 2. But in the exercise of that prerogative the legislature had no right to impair the obligation of a contract amongst the Authority and others.

> "No state shall - - - - pass any - - - - law impairing the obligation of contracts - - - -." *Constitution of the United States,* Article I, § 10.

> "The legislature shall pass no bill of attainder, ex post facto law, nor law impairing the obligation of contracts, - - - - -" *Constitution of Maine,* Article I, § 11.

The enabling act, prior to 1953, granted to the Authority leave to provide from time to time for the issuance of bonds to pay the "cost" of the turnpike, to pledge all or any of the turnpike revenue to secure payment of the bonds, to set aside reserve and sinking funds and to regulate and dispose thereof, to covenant against pledging any turnpike revenue and to covenant as to the bonds to be issued, as to their issue in escrow or otherwise and as to the use and disposition of the proceeds. P. & S. 1941, c. 69, § 6.

The enabling act, prior to 1953, required the Authority to apply the proceeds of all bonds solely to payment of the "cost" of the turnpike and to the appurtenant fund and created and granted a lien on such moneys until so applied, to the bondholders and the trustees. P. & S. 1941, c. 69, § 7. The Authority was permitted to execute an indenture with a trustee, to thus pledge or assign tolls or revenues and to define and protect the rights and remedies of bondholders and trustees. P. & S. 1941, c. 69, § 8.

The Bond Indenture made in 1953 pursuant to the enabling act restricted the funds of the Authority to be used only for the "cost" of the Augusta Extension of the turnpike, the cost of maintenance, repair and operation of the turnpike and for interest and redemption to the bondholders. No provision was made for paying any relocation expenses to utilities.

The legislature in the enabling act had been at considerable pains to immunize the State of Maine from liability for the turnpike and to make it unmistakably clear that the State's credit was in no way pledged therefor. To compensate for those negations the State afforded considerable security to bondholders to assure a favorable marketability for the bonds. Hence the provisions as to exemption from taxation, attachment, execution and the imposition of the lien upon the proceeds of the bonds and turnpike revenue, etc. The indenture, in 1953, was adapted to the act. The enabling act and indenture were the basis of the bondholders' and trustees' contract with the Authority, a governmental agency.

The Bond Indenture of 1953 contained the following:

> P. 2. "Whereas, for the purpose of providing funds for paying the cost of the Initial Unit, the Authority duly issued its turnpike revenue bonds in the aggregate principal amount of Twenty Million Six Hundred Thousand Dollars ($20,600,000), - - - -
>
> P. 3. "Whereas, by virtue (of the enabling act), the Authority is authorized and empowered to provide for the issuance of turnpike revenue bonds of the Authority for the purpose of refunding the outstanding bonds and paying the *cost* of any additional integral operating unit or units and the cost of improvements, extensions and enlargements; and

P. 3. "Whereas, the Authority had determined to proceed at this time with the construction of the second integral operating unit of the turnpike - - - -

P. 4. "Whereas, the Authority has caused an estimate to be made by its Consulting Engineers of the *cost* of constructing the Augusta Extension at such location and, according to such estimate, the proceeds of the bonds to be issued initially under the provisions of this Indenture will be required and will be sufficient for paying the *cost* of the Augusta Extension and for refunding the outstanding bonds, other funds being available in the Interest and Sinking Fund (a special fund created under the provisions of the trust indenture securing the outstanding bonds), including the Reserve Interest Account therein, in an amount sufficient to provide for paying the interest which will accrue on the outstanding bonds to the date of their redemption and the redemption premium thereon; and

P. 4. "Whereas, the Authority has determined to provide for the issuance at this time of turnpike revenue bonds of the Authority for the purpose of refunding the outstanding bonds and paying the *cost* of the Augusta Extension, as above set forth, and to provide for the issuance at a later date under the provisions of this Indenture of turnpike revenue bonds of the Authority for the purpose of paying the cost of additional integral operating units - - - -

P. 4. "Whereas, for the purpose of refunding the outstanding bonds and paying the *cost* of the Augusta Extension, as above set forth, the Authority has by resolution duly authorized the issuance of turnpike revenue bonds of the Authority in the aggregate principal amount of Seventy-five Million Dollars ($75,000,000), designated 'Turnpike Revenue Refunding and Extension Bonds,' - - - -

P. 26. "Section 208. There shall be initially issued under and secured by this Indenture turnpike revenue bonds of the Authority in the principal

amount of Seventy-five Million Dollars ($75,000,-000) for the purpose of refunding the outstanding bonds and paying the *cost* of the Augusta Extension - - - -

P. 29. "Section 209. If and to the extent necessary (as shown by the documents mentioned in clauses (a) and (c) of this Section) to provide additional funds for completing payment of the *cost* of the Augusta Extension, turnpike revenue bonds may be issued under and secured by this Indenture, at one time or from time to time, in addition to the bonds issued under the provisions of Section 208 of this Article - - - -

(a) a copy, certified by the Secretary and Treasurer of the Authority, of the resolution adopted by the Authority authorizing the issuance of such additional bonds in the amount specified therein;

- - - - - - - - - - - - - - -

(c) a statement, signed by the Consulting Engineers, giving their estimate of the date on which the Augusta Extension will be opened for traffic and the date on which the construction of the Augusta Extension will be completed and certifying that, according to their estimate of the total amount required for paying *the balance of the cost* of the Augusta Extension, the proceeds of such bonds will be required for paying such *balance*;" (Emphasis supplied)

The Bond Indenture of 1953, Section 403, in defining the "cost" of the Augusta Extension, stated:

"- - - - without intending thereby to limit or restrict or to extend any proper definition of such *cost* under the provisions of the Enabling Act, - - - -" (Emphasis supplied)

The bonds issued and sold prior to August 20, 1955, under the indenture contained this paragraph:

"This bond is issued and the Indenture was made and entered into under and pursuant to the Constitution and laws of the State of Maine, including

> the Enabling Act, and under and pursuant to resolutions duly adopted by the Authority. The Indenture, in accordance with and as required by the Enabling Act, provides for the fixing and charging by the Authority of tolls for the use of the Turnpike and the different parts or sections thereof and for adjusting such tolls from time to time in order that such tolls and other revenues of the Turnpike will be sufficient to provide funds to pay the cost of maintaining, repairing and operating the Turnpike and to pay the principal of and the interest on all bonds issued under the Indenture as the same become due and payable, and to create reserves for such purposes. The Indenture also provides for the deposit of all such tolls and other revenues, over and above such cost of maintenance, repair and operation and reserves for such purposes, to the credit of a special fund, designated the 'Maine Turnpike Interest and Sinking Fund,' which fund is pledged to and charged with the payment of the principal of and the interest on all bonds issued under the Indenture."

The 1955 amendment to the enabling act was intended to ordain the payment by the Authority of the utilities' relocation costs. Such payment could be made only by diversion from moneys which pursuant to the enabling act and the indenture thereunder had been in 1953 pledged with the plaintiff trustees for the turnpike bondholders. The 1955 amendment in so far as it pretended to prescribe such a payment was unconstitutional. It sought to impair a contract made for a valuable consideration by a State agency upon "the deliberate action and solemnly pledged faith of the Commonwealth."

Opinion of the Justices, 190 Mass. 605 (1906).

Rorick v. *Board of Com'rs of Everglades Drainage Dist.*, 57 F. (2nd) 1048 (Fla.) (1932).

> P. 1055. "Legislation by authority of which bonds are issued, and their payment provided for

> becomes a constituent part of the contract with the bondholders. Such a contract is within the protection of the Constitution, Art. I, § 10 - - - -"

Beaver County Building and Loan Association, Appellant, v. *Winowich et ux.,* 323 Pa. 483 (1936).

> P. 489. "In determining what constitutes the obligation of a contract, no principle is more firmly established than that the laws which were in force at the time and place of the making of the contract enter into its obligation with the same effect as if expressly incorporated in its terms."
> - - - -
>
> P. 492. "Any law which enlarges, abridges, or in any manner changes the intention of the parties as evidenced by their contract, imposing conditions not expressed therein or dispensing with the performance of those which are a part of it, impairs its obligation, whether the law affects the validity, construction, duration, or enforcement of the contract; Story's Commentaries on the Constitution, Book 3, ch. 34, sec. 1379."

Martin et al. v. *Saye et al.,* 147 S. C. 433, 145 S. E. 186 (1928).

City of Little Rock et al. v. *Community Chest of Greater Little Rock,* 163 S. W. (2nd) 522 (1942).

Forbes Pioneer Boat Line v. *Board of Commissioners of Everglades Drainage District,* 258 U. S. 338 (1922).

Pennsylvania Coal Company v. *Mahon et al.,* 260 U. S. 393 (1922).

Coombs v. *Getz,* 285 U. S. 434 (1932).

Woodward v. *Central Vermont Railway Company,* 180 Mass. 599 (1902).

Fletcher v. *Peck,* 6 Cranch, 87 (1810).

St. Louis Union Trust Co., et al. v. *Franklin American Trust Co.,* 52 F. (2nd) 431 (1931).

Hawthorne v. *Calef,* 2 Wallace 10 (1864).

Woodruff v. *Trapnall,* 10 Howard 190 (1850).

Curran v. *State of Arkansas,* 15 Howard 304 (1853).

Von Hoffman v. *City of Quincy,* 4 Wallace 535 (1866).

> "The amount of impairment of the substantive obligation of a contract is immaterial. Any deviation from its terms, however slight, falls within the meaning of the constitution: Greene v. Biddle, 8 Wheat. 1, 84; Ogden v. Saunders, 12 Wheat. 213, 256; Walker v. Whitehead, 16 Wall. 314, 318."

Beaver County Building and Loan Association, Appellant v. *Winowich et ux., supra,* P. 493; see, also, *Martin et al.* v. *Saye et al., supra,* at Page 447.

In the instant case the cost of relocating the utility facilities is not computed but the stipulation of the parties that the total amount "does not and shall not exceed $300,000" is some basis of inference that the amount is very ponderable and quite conclusive.

We are not unaware that all acts of the legislature are presumed to be constitutional and will not be adjudged to be otherwise unless the conclusion is free from all doubt.

State v. *Pooler,* 105 Me. 224, 228 (1909).

In re John M. Stanley, Exceptant, 133 Me. 91 (1934).

Baxter v. *Waterville Sewerage District,* 146 Me. 211 (1951).

Laughlin v. *City of Portland,* 111 Me. 486 (1914).

Village Corporation v. *Libby,* 126 Me. 537 (1928).

Warren v. *Norwood,* 138 Me. 180 (1941).

Kelley v. *School District et al.,* 134 Me. 414 (1936).

Hamilton v. *District,* 120 Me. 15 (1921).

We are convinced that we have resolved "every reasonable doubt in favor of the proposition that" the 1955 amendment to the enabling act "is within and under the terms of the constitution." (*Baxter* v. *Waterville Sewerage District, supra.*)

In our deliberated judgment the amendment of 1955 in so far as it purports retroactively or prospectively to affect the bonds issued pursuant to the Indenture for the "cost" of the Augusta Extension, by providing payment from the funds of the turnpike for utility relocation in the Augusta Extension is a nullity.

As to the trustees, bondholders and turnpike funds the 1955 amendment to the enabling act is unconstitutional, as well, in its professed effect retroactively and prospectively, of providing payment for utility relocation costs of the Augusta Extension since it is thus violative of the Fourteenth Amendment to the United States Constitution.

> "- - - - - It would transfer a vested property right from one person to another by the pure fiat of the Legislature. - - - - -"

Hanscom v. *Malden & Melrose Gas Light Co.,* 220 Mass. 1, 7 (1914).

See, also, *Opinion of the Justices,* 134 N. E. (2nd) 923, 926 (Mass.) (1956) and authorities cited.

Ettor v. *City of Tacoma,* 228 U. S. 148 (1913).

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

BRUNSWICK & TOPSHAM WATER DISTRICT
vs.
W. H. HINMAN CO., INC.

BRUNSWICK & TOPSHAM WATER DISTRICT
vs.
W. H. HINMAN CO., INC.

Kennebec. Opinion, October 15, 1957.

Districts. Police Power. Utilities. Highway Commission. Relocations of Utilities.

The Brunswick and Topsham Water District is a body politic and corporate and a quasi municipal corporation created by a special, state, legislative act. (P. and S. L. 1903, Chap. 158.)

The State Highway Commission in the making and maintenance of roads is acting within the scope of the police power and as such may compel a quasi municipal utility to relocate its facilities without compensation. (R. S. 1954, Chap. 23, Secs. 19, 27, 38.)

A validly exercised police power can never be relinquished by the legislature.

ON REPORT.

These are actions by the plaintiff for reimbursement of expenses incurred in the relocating of utility facilities occasioned by street construction. Judgment to be entered for defendant in each case.

Verrill, Dana, Walker,
Philbrick & Whitehouse, for the plaintiff.

L. Smith Dunnack, for the defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

SULLIVAN, J. These two cases identical in controlling facts and in issues of law have been certified to this court upon an agreed statement of facts for decision.

The plaintiff is a body politic and corporate and a quasi municipal corporation created by a special, state, legislative act, to supply the inhabitants of two towns with water and, apropos of that, "to lay in and through the streets and highways thereof, and to take up, repair and replace all such pipes, aqueducts and fixtures as may be necessary for the objects above set forth, and whenever said district shall lay any pipes or aqueducts in any street or highway it shall cause the same to be done with as little obstruction as possible to the public travel, - - - -" P. & S. 1903, c. 158.

Prior to March A. D. 1955 and since then the plaintiff has had utility installations in Pleasant and Mill Streets, public highways in Brunswick, Maine and a part of State Highway 1.

The defendant is a resident corporation organized under general laws and for years has engaged in road construction. In December A. D. 1955 and in January A. D. 1956 it undertook, for the State Highway Commission, a state department, to reconstruct a portion of Pleasant and Mill Streets aforementioned. R. S. c. 23, § 40. The State Highway Commission advised the plaintiff of the contract with the defendant before any work was commenced thereon. The defendant, before beginning the street reconstruction, directed the plaintiff to relocate its installed facilities so far as necessary for the work projected.

The plaintiff, as required by the defendant, relocated its facility installations in the altered ways and institutes these actions for reimbursement for that, considerable expense.

The plaintiff contends that its charter excludes control by the municipal officers, that the State Highway Commis-

sion had no right to compel the plaintiff to relocate its facilities without compensation, that the plaintiff's facilities installed in the public ways were real estate for the taking of which reimbursement would lie and that equity and good conscience dictate reparation to the plaintiff from the defendant for the costs of relocation.

The defendant is not charged with negligence.

The State Highway Commission was acting in these matters within the scope of its functions on behalf of the State and obviously was possessed of police power. R. S. 1954, c. 23, § 19, § 27, § 38, etc. In road making and maintenance the Commission was vested with full authority and the complementary discretion and responsibility. The welfare and safety of the public are the very causes for the existence of the Commission.

In a decision lately rendered in the suit of *The First National Bank of Boston et al.* v. *Maine Turnpike Authority et al.*, this court stated, with supporting precedents, the law determinative of the issue produced in these cases. It is not deemed necessary to repeat at length here our full commentaries there. We said, in part:

> "- - - - The water districts, therefore, contend that their installations in public ways are more immanent because they derive from special, plenary franchise without any requirement of municipal permits and without reservation as to revocation or alteration. The merits of the present controversy, however, concern themselves primarily with the requirements of public travel and with the police power. The authorities which follow as well as the Maine decisions which precede establish that, whatever hierarchy of privileges in utility installations there may be, the exigencies of public travel and the police power are unremittingly paramount."

Scranton Gas and Water Company, Appellant v. *Scranton City,* 214 Pa. 586, 64 Atl. 84 (1906) is a case of a water company with a legislative grant to occupy the streets. The utility was denied recovery for the expense of relocating its installations from locations beneath a public street, to other streets when required to remove them because the city and a railroad were building a viaduct to eliminate a dangerous street crossing at grade.

A validly exercised police power can never be relinquished by the legislature.

> "- - - - The state may in some cases forego the right to taxation, but it can never relieve itself of the duty of providing for the safety of its citizens. *This duty, and consequent power, override all statute or contract exemption* - - - - -" (Emphasis supplied)
>
> *Boston and Maine Railroad Company* v. *County Commissioners,* 79 Me. 386, 393 (1887).

County Court v. *White,* 79 W. Va. 475, 91 S. E. 350 (1917).

> P. 479. "- - - - The right of the public in the highway, for the purpose of travel in the ordinary modes, is a primary and fundamental right and is not limited to that portion only of the right of way heretofore traveled. Respondents have a permissive and subordinate right only, which exists only so long as it does not interfere with the primary and superior rights of the traveling public. Such primary right to occupy any and all parts of the right of way for the purpose of a roadway, necessarily implies the right to widen and improve the traveled portion of the road, whenever it becomes necessary for the better accommodation of the public. This principle was not controverted in the argument. But it was contended that the poles did not interfere with travel in the roadway, and that, being in the way only of the work of improving the highway, it was, therefore, the duty,

> either of the County Court or their contractors, to remove them in a careful manner, at their own expense. This is certainly not the law. - - - - -"

Inhabitants of Paris v. *Norway Water Company,* 85 Me. 330 (1893). The defendant, a private corporation, was a utility with a legislative charter. It had been authorized to lay its installations in public ways "under such reasonable restrictions as may be imposed by the selectmen of said towns" P. & S. 1885 c. 369, 1887 c. 46. The case decided that for tax purposes the utility installations were to be classified as real estate.

The plaintiff in the instant cases attributes great significance to this decision of *Paris* v. *Norway Water Co.* as authority for the proposition that the plaintiff's installed facilities in public ways are real estate and that it has been endowed by the legislature with contractual rights to have its facilities in public ways undisturbed even by a valid exercise of the police power unless there is made to it financial compensation or reimbursement. The court in *Paris* v. *Norway Water Co.* said:

> P. 334. "The public has an easement in land, over which streets and roads are laid, co-extensive with the necessities of public use. No title in the soil is acquired thereby, and when the ways are discontinued the easement is extinguished. Private corporations, like gas companies, water companies and street railway companies, by legislative authority, are sometimes allowed the use of the public easement to serve the necessary demands of society, and without any additional compensation to the owner of the soil. Such companies, therefore, by the public license accorded them, take no title in the land. They are simply allowed to use it for the public convenience as a counter-balancing consideration for their expenditures, giving opportunities to gather tolls from its use. In using the street or road, they place their pipes or rails in or upon the ground there permanently to remain.

> They occupy land with appliances that become valuable for the revenue they yield. These appliances are fixed, permanent, used in connection with the soil that supports and sustains them. When considered as the property of their respective companies, they are not land within the common law rule - - -"

The case of *Paris* v. *Norway Water Co.* lends no support to the plaintiff's position and that becomes more uncontrovertibly true when it is recalled that the safety of the traveling public and the police power were not components in *Paris* v. *Norway Water Co.*

The plaintiff which is a public utility of a special denomination (*Eaton* v. *Thayer,* 124 Me. 311, 313) has rights of usage in the public ways which were of a very respectable and respected order. Such rights

> "- - - - cannot be taken away in an arbitrary manner and without reasonable cause."

Old Colony Trust Company v. *City of Omaha,* 230 U. S. 100, 117 (1913).

But those rights are subservient to validly exercised police power.

Owensboro v. *Cumberland Telephone Co.,* 230 U. S. 58, 72 (1913).

The loss to the utility in these cases was *damnum absque injuria,* damage without invasion of right.

> "- - - - It purports merely to regulate the use of the streets for the convenience and safety of the public. It does not impair appellant's franchise.
> "- - - - It is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a

taking of property without due process of law.
- - - -"

New Orleans Public Service, Incorporated, v. *City of New Orleans,* 281 U. S. 682, 686, 687 (1930).

Without express authority from the legislature the State can not pay to a utility the costs or damage for relocating installations in public ways.

Anderson v. *Fuller, et al.,* 51 Fla. 380 (1906); *Boston, Worcester & N. Y. Street Ry. Co.* v. *Commonwealth,* 301 Mass. 283 (1938); *Transit Commission* v. *Long Island R. R.,* 253 N. Y. 345, 171 N. E. 565 (1930).

The State would not be liable as defendant in these cases. This defendant is not liable.

Dakota Central Telephone Company v. *Shipman Construction Company,* 49 South Dakota 251, 255, 207 N. W. 72 (1926).

Judgment to be entered for the defendant in each case.

LEWIS PIERCE, ADM. D.B.N.C.T.A.
ESTATE JOSEPH HOW, PETITIONER IN EQUITY

Cumberland. Opinion, October 17, 1957.

Trusts. Cy Pres. Public. Private. Charitable Intent. Change of Circumstances. Resulting Trusts.

One of the essential elements of the doctrine of *res judicata* is the identity of the issue.

The doctrine of cy pres is the principle that equity will, when a charity is originally or later becomes impossible or impractical of fulfillment, substitute another charitable object which is believed to approach the original purpose as closely as possible.

The doctrine of cy pres does not apply to private trusts.

Private trusts are for the benefit of certain and designated individuals in which the cestui que trust is a known person or class of persons.

Public or charitable trusts are those created for the benefit of an unascertained, uncertain and sometimes fluctuating body of individuals in which the cestuis may be a portion or class of a public community.

Private trusts are subject to the limitations of a perpetuity while public trusts may continue for a permanent or indefinite time.

There are three prerequisites to the application of the cy pres doctrine (1) the court must find that the gift creates a valid charitable trust; (2) it must be established that it is to some degree impossible or impractical to carry out the specific purpose and (3) a general charitable intent.

Where the specific purpose of a public trust is to render assistance to "indigent seamen" of the class to which the testator belonged and it has become clear that the fund has become too large to permit its application to such class, the cy pres doctrine may be applied if otherwise appropriate.

A general charitable intention is a desire to give to charity generally, rather than to any one party, object or institution.

The purpose of a gift can not be changed by the cy pres doctrine. For example, a gift for "education" can not be changed to "religion," etc.

It is easier to find a more general charitable intent where the impossibility or impracticality of a particular purpose is due to a change of circumstances occurring subsequent to the giving of the trust property.

Where the purpose of a particular charitable trust is fully accomplished without exhausting the trust property and a general charitable intent is manifest, there will not be a resulting trust of the surplus but the court will direct the application of the surplus to some charitable purpose within the general charitable intent of the settlor.

ON REPORT.

This is a petition for construction of a will before the Law Court upon report. Case remanded to the sitting justice for a decree in accordance with this opinion. Costs and reasonable counsel fees to be filed by the sitting justice, paid by the trustee and in her probate account.

Nathan W. Thompson, for Portland Marine Society.

Devine & Devine and
John Bates, for Geo. How, Lena How and Edna Pettengill.

Daniel C. McDonald, for Seaman's Friend Society.

LeBlanc & Bullerwell, for Sailors Bethel Society.

Verrill, Dana, Walker,
Philbrick & Whitehouse, for Maine Medical Center.

Barnett I. Shur, for City of Portland.

John Sturgis, for Lillian Sturgis, Trustee.

Ralph W. Farris, for State of Maine.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

DUBORD, J. This case is before us upon petition of Lillian S. Sturgis, trustee under the will of Joseph How, ask-

ing for a new construction of the will and for instructions concerning the administering of the trust fund under the cy pres doctrine.

The administration of an estate is usually a prosaic procedure. However, the history of this case, throughout the eighty-seven years which have elapsed since the death of Joseph How, is most interesting and presents a set of facts, which one might expect to find in a romantic novel, rather than in the true story of an estate, the assets of which, at the outset and for more than forty years, were considered too small to be worth-while, and which have now grown to a value too large to permit of the administration of the trust in accordance with the seeming directions of the testator.

The testator, Joseph How, was a man of the sea. He was master of the bark known as the *Ellen Stevens*. Records indicate that he was commissioned master in 1862 and his name appears as captain of this bark in 1869. For the benefit of the uninitiated, a bark is described in Webster's unabridged dictionary as a three-masted vessel having her foremast and mainmast, square-rigged, and her mizzenmast fore-and-aft rigged. Joseph How was born on July 22, 1820 and died on October 26, 1870. His home was in Portland and he is buried there.

On October 25, 1870, just the day before his death, he executed his last will and testament.

Under the first paragraph of this will he bequeathed the possession and use of all his personal property, including money, bonds, vessels, choses in action and furniture to his wife, Alice W. How. By the second paragraph he bequeathed to his wife the income from all of any real estate of which he may have been seized. Under the provisions of the third paragraph he directed that his real estate, as well as his interest in the bark, *Eben Stevens* be sold and that

the proceeds of said sale be invested and the income from said investment paid to his wife, for and during her natural life.

At this point it may be well to point out, that the record copy of the will as we have it, describes his ship as the *Eben Stevens*. This may be a typographical error. The correct name of the ship was the *Ellen Stevens* as indicated by records of the American Ship Masters' Association. However, this discrepancy is of no moment at this particular time.

Under the provisions of the fourth paragraph of his will, he directed that at the decease of his wife, his executor should pay the entire income to his mother, Eliza How, if she should then be living, for and during her life, and in case his mother should not be living, then the income was to be paid to his brother, James L. How, for and during his natural life.

The record in the case does not give us the information, but it is assumed that these directions on the part of the testator were carried out.

The controversy now before us, arises under the fifth paragraph of the will which reads as follows:

> "I request and direct that after the decease of my said wife, mother and brother, my said estate, real and personal shall be appropriated to the founding of a home for indigent seamen, and I authorize and empower my executor to invest the said property and the income thereof and to use and employ the same in such manner as will do the most good to the class of indigent seamen."

The will was filed in the Probate Court within and for the County of Cumberland and on the third Tuesday of November 1870 duly allowed. The executor named in the will, James P. Baxter, was appointed. He later resigned, and on June 15, 1875, Lewis Pierce was appointed administrator *de bonis non* with the will annexed.

The inventory shows that the entire value of the estate was only about $1500.00. There is nothing in the record to indicate how long the widow lived, nor when the mother or the brother named in the will, as contingent beneficiaries, died. All we know is that the matter remained in abeyance until at the April Term 1912 of the Supreme Judicial Court for Cumberland County, a bill in equity was filed by Lewis Pierce, the administrator, asking the court to construe the fifth paragraph of the will and to determine the ownership of the assets in the estate. This bill was reported to the Law Court for determination upon bill and answer.

It was contended by the heirs at law, that the attempted trust under consideration had failed, both for indefiniteness and because the amount available was so small as to render it impossible to carry out the provisions of the trust even if one were created.

In an opinion dated November 15, 1912, written by then Associate Justice Cornish, later to become Chief Justice, this court held that the bequest constituted a good public charitable trust. The opinion provided that a trustee appointed to administer this trust was to invest the residuum of the estate and employ the income for the benefit of indigent seamen. It was stated that the trustee could do this directly, or he could turn over the income to some worthy society or association organized for that purpose. The manner in which the money was to be expended was left to the sitting justice who was to determine to whom the income should be paid and through what channel this kindly gift could be made most effective. This case is reported in 109 Me. 509.

Although the mandate of the Law Court directed that a decree should be entered in accordance with its opinion, no such decree was written and again the matter remained in abeyance for a long period of years. Eventually this case was dismissed from the docket. For twenty-five years the

estate was apparently forgotten, probably because the available amount was too small to really be worth-while.

Now we come to a very interesting part of the story. It appears that a short time before his death, Captain How had invested the reported amount of three thousand dollars in a new corporation, which was then being organized by a friend of his in Chicago. Subsequent developments indicate that the captain probably did not place much value upon this investment, and if the certificate representing his stock ownership in this corporation ever came into the possession of the executor, administrator or trustee, they too probably felt there was little value attached to this item, as such poor care was given to the certificate that it became lost, misplaced or destroyed. However, the corporation which was engaged in the leather business prospered to an extent never dreamed of by its founder, and through a series of stock dividends and accretions in value, the estate of Captain How now amounts to more than three hundred thousand dollars, with more than one hundred thousand dollars of income ready to be expended for the purposes provided for in his will.

When the court was apprised as to the situation, the case was restored to the docket and a decree, pursuant to the opinion of the Law Court in the *Pierce* case, to be found in 109 Me. 509, was entered *nunc pro tunc* on December 12, 1938, and this decree holds that the bequest contained in the fifth paragraph of the last will and testament of Joseph How is in its terms a good public charitable trust; that the purpose of this public charitable trust is definite in its objects, is lawful and is to be regulated by the trustee of the estate of Joseph How, who has been or may be appointed and qualified in the Probate Court within and for the County of Cumberland. The trustee was ordered to invest the residuum of the trust fund and employ the income thereof for the benefit of indigent seamen, doing this directly or turning

over the income to some worthy society or association organized for that purpose, but before so doing, the trustee was ordered to apply to a Justice of the Supreme Judicial Court for determination to whom and in what amounts the income should be paid. On April 8, 1937, a trustee was appointed. He subsequently resigned, and on March 8, 1944, Lillian S. Sturgis, the petitioner herein was appointed as successor trustee.

On December 29, 1954, Lillian S. Sturgis filed a petition in the Supreme Judicial Court in Equity in Cumberland County in the name of Lewis Pierce, Administrator, asking the court to determine to whom and in what amounts the income of the trust estate should be paid.

On July 16, 1956, the sitting justice of the Supreme Judicial Court in Equity instructed the trustee to pay to the Portland Seamen's Friend Society the amount of ten thousand dollars, to be used exclusively by it for assistance for the indigent, needy and destitute seamen, and for no other purpose, this money to be expended under the supervision of the Attorney General under the provisions of Section 4, Chapter 20, R. S. 1954, which provides that the Attorney General shall enforce due application of funds given or appropriated to public charities within the state and to prevent breaches of trust in the administration thereof.

On August 13, 1956, the trustee filed another petition in the Supreme Judicial Court in Equity for a new construction of the will and for instructions concerning the administering of the fund under the cy pres doctrine. It seems to have been assumed by all parties that the beneficiaries of the trust were supposed to be seamen of the class to which Captain How belonged. Based upon this assumption, in her petition, she alleged that after paying the amount of ten thousand dollars to the Portland Seamen's Friend Society, in accordance with decree of court, she still has income of over one hundred thousand dollars in her possession, which

she is unable to expend for the benefit of indigent seamen, for the reason that there are not a sufficient number of this class to allow for the expenditure of the money available, and she further asked for instructions as to whether or not she may be permitted to expend the funds under the cy pres doctrine for the benefit of seamen of other classes such as fishermen, lobstermen, and others.

Various organizations claiming to have been organized for the purpose of rendering assistance to indigent seamen, or who throughout the years have been rendering such assistance, filed appearances and were heard by the sitting justice at the time of the hearing. The heirs-at-law of Captain How who comprise grandnephews, grandnieces, great-grandnephews, and great-grandnieces also appeared.

The State of Maine because of the provisions of Section 4, Chapter 20, R. S. 1954, previously referred to, was represented by the Attorney General. The trustee, and those who appeared, with the exception of the heirs-at-law, take the position that the fund now available should be administered under the cy pres doctrine, and the class of beneficiaries extended to include seamen of types other than that to which Captain How belonged.

The heirs-at-law argue, first that the trust has failed; second, that there was no general charitable intent on the part of Captain How; and third, that the matter has been judically settled and is res judicata by reason of the decree of the Supreme Judicial Court in Equity dated July 16, 1956, at which time the trustee was instructed to pay the sum of ten thousand dollars to the Portland Seamen's Friend Society. The heirs-at-law, therefore, contend that a resulting trust has arisen in the entire fund for their benefit.

Before passing to a discussion of the cy pres doctrine, and its applicability to the instant case, we can readily dispose of the third argument advanced in behalf of the heirs-at-

law, to the effect that the matter has been judicially settled by the decree of the Supreme Judicial Court previously referred to. One of the essential elements of the doctrine of res judicata is identity of issue. It is clear that the issue for our determination at this time is not at all the issue which was concluded in the hearing which culminated in the decree of July 16, 1956. Consequently, it is our opinion that there is no strength to this argument in behalf of the heirs-at-law.

The words "cy pres" are Norman French for "as near." The phrase when expressed to its full implication was "cy pres comme possible" which means "as near as possible."

The doctrine of cy pres is the principle that equity will, when a charity is originally or later becomes impossible or impractical of fulfillment, substitute another charitable object which is believed to approach the original purpose as closely as possible. It is the theory that equity has the power to mould the charitable trust to meet emergencies.

> "Admittedly cy pres is an unusual doctrine. Generally, if a court cannot enforce or discover the intent of a donor or grantor, - - - it gives no relief. It does not ordinarily substitute for the dubious intention of the party or parties some scheme which the court thinks ought to have been their intent. If the original intent is clear, but cannot be carried out, the court does not usually substitute a second best intent and give a judgment or decree carrying it into effect." *Bogert, Trusts & Trustees,* Vol. 2A § 431, Chap. 22, Page 316.

> "If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor." *Restatement of the Law, Trusts,* § 399, Page 1208.

> "Where property is given in trust for a particular charitable purpose, the trust will not ordinarily fail even though it is impossible to carry out the particular purpose. In such a case the court will ordinarily direct that the property be applied to a similar charitable purpose. The theory is that the testator would have desired that the property be so applied if he had realized that it would be impossible to carry out the particular purpose. The theory is that although the testator intended that the property should be applied to the particular charitable purpose named by him, yet he had a more general intention to devote the property to charitable purposes. The settlor would presumably have desired that the property should be applied to purposes as nearly as may be like the purposes stated by him rather than that the trust should fail altogether. The principle under which the courts thus attempt to save a charitable trust from failure by carrying out the more general purpose of the testator and carrying out approximately though not exactly his more specific intent is called the doctrine of cy pres." *Scott on Trusts,* Vol. 3, § 399.

> "Cy pres means 'as near to,' and the doctrine is one of construction, the reason or basis thereof being to permit the main purpose of the donor of a charitable trust to be carried out as nearly as may be where it cannot be done to the letter." 14 C. J. S., *Charities,* § 52 a, Page 512.

> "The cy pres doctrine is properly applied where there is a general charitable purpose, but a literal compliance with the terms of the trust becomes impossible or impracticable, in which case the court directs the administration of the trust as nearly as possible in conformity with the intention of the donor or testator." 14 C. J. S., *Charities,* § 52 c., Page 514.

Our own court has in many instances expounded the doctrine.

> "In the administration of trusts under the general equity jurisdiction of the court, it is an old and

familiar principle that if the original purpose of a public charity fail and there are no objects to which, under the specific terms of the trust the funds can be applied, the court may determine whether, in the event that has happened it was not the probable intention of the donor that his gift should be applied to some kindred charity as nearly like the original purpose as possible. This is commonly known as the doctrine of cy pres, which, in its last analysis is found to be a simple rule of judicial construction designed to aid the court to ascertain and carry out, as nearly as may be, the true intention of the donor. *Jackson* v. *Phillips*, 14 Allen, 539; 2 Perry on Tr. §§ 717-729, and cases cited. But if it appears that the gift was for a particular purpose only, and that there was no general charitable intention, the court cannot by construction apply the gift cy pres the original purpose. 'There is a class of cases,' says Mr. Perry, 'where the gift is distinctly limited to particular persons or establishments, and upon a change of circumstances the doctrine of cy pres does not apply.'" *Doyle* v. *Whalen*, 87 Me. 414, at 426; 32 A. 1022.

The doctrine of cy pres does not apply to private trusts.

"Private trusts are for the benefit of certain and designated individuals in which the *cestui que trust* is a known person or class of persons. Public, or, as they are frequently termed, charitable trusts, are those created for the benefit of an unascertained, uncertain and sometimes fluctuating body of individuals, in which the *cestuis que trustent,* may be a portion or class of a public community, as for example, the poor or the children of a particular town or parish. 2 Pom. Eq. § 987. 'In private trusts,' says Mr. Perry, 'the beneficial interest is vested absolutely in some individual or individuals who are, or within a certain time may be, definitely ascertained; and to whom, therefore, collectively, unless under some disability, it is, or within the allowed limit, will be competent to control, modify, or end the trust. Private trusts of this kind cannot be extended beyond the legal limi-

> tations of a perpetuity . . . But a trust created for charitable or public purposes, is not subject to similar limitations, but it may continue for a permanent or indefinite time.' " *Doyle* v. *Whalen, supra,* at 425.

A very fine exposition of the prerequisites to the application of the doctrine of cy pres can be found in Chapter 5, of the book entitled The Cy Pres Doctrine in the United States by Edith L. Fisch.

The author points out that before the cy pres doctrine will be applied three prerequisites must be met. First, the court must find that the gift creates a valid charitable trust. Second, it must be established that it is to some degree impossible, or impractical to carry out the specific purpose of the trust, for the cy pres doctrine is inapplicable when the particular purpose of the settlor can be effectively carried out. The third prerequisite, is the requirement of a general charitable intention, and it is this prerequisite which has given rise to most of the litigation in cy pres cases. This requirement of general charitable intent grew up as a result of the theory that the cy pres doctrine is a device to carry out the intent of the settlor of the trust.

The first prerequisite, viz.:—That the gift creates a valid charitable trust, has been taken care of by the decision of this court in *Pierce, Petitioner,* 109 Me. 509; 84 A. 1070, in which the court held that the bequest in the How will is in terms a good public charitable bequest.

Passing now to the second prerequisite, that it must be established that it is to some degree impossible or impractical to carry out the specific purpose of the trust, we find a situation where all the interested parties are agreed, and this statement applies to the heirs-at-law as well, that while the number of indigent seamen of the class seemingly intended by the testator, has become substantially reduced, it has not entirely disappeared. Moreover, the record clearly indicates that there are still indigent seamen in existence,

even of the class to which the testator belonged. Consequently, the trust has not entirely failed. However, it is also clear that the trust fund now available is in an amount too large to permit its application for the relief of indigent seamen of the class to which the testator belonged. It has, therefore, become impossible to carry out the specific purpose of the trust, if the specific purpose was to render assistance only to indigent seamen of the class to which the testator belonged.

The important issue, therefore, for determination is whether or not the testator expressed in his will a general charitable intent. If so, then the application of the cy pres doctrine would be in order and the scope of the beneficiaries seemingly covered in the trust can be broadened and enlarged. In other words, seamen of a type different from that to which the testator belonged can be included as beneficiaries.

We give our attention, therefore, to the issue of determining whether or not Captain How manifested a general charitable intention when he created the trust which is now before us for construction.

Legal authors all describe this general charitable intention as a desire to give to charity generally, rather than to any one party, object or institution.

> "Whether or not the testator evinced a general charitable intent or, as otherwise said, evinced an intent to devote the subject matter of the gift to charitable purposes generally, is a question of interpreting the will of the testator. Being a question of interpretation of a will the intent must be discovered within the four corners of the instrument being construed, read in the light of the surrounding applicable circumstances." *First Universalist Soc., Bath* vs: *Swett, et al.*, 148 Me. 142, 149; 90 A. 2d. 812; or as said in *Lynch* v. *South Congregational Parish of Augusta, et al.*, 109 Me. 32; 82 A. 432, 'In the light of existing conditions.' "

"The question of whether or not a testator is making a charitable bequest has evinced a general charitable intent or is making a specific bequest to a specific beneficiary for a specific charitable purpose is a question of interpretation of the particular will under consideration. To attempt to formulate a general rule which would solve all such cases would be an attempt to achieve the impossible. Nor do the cases from our own or other jurisdictions materially aid in deciding the particular question of interpretation with which we are here concerned, as distinguished from a decision of the fundamental principles of law from which the authority of the Court to apply the cy pres doctrine arises." *First Universalist Soc., Bath* v. *Swett, et al.,* 148 Me. 142, 150; 90 A. 2d. 812.

"The courts are more ready to apply the doctrine of cy pres where the particular trust fails at a time after its creation than where the particular purpose fails at the outset. Thus, where the particular object of the charitable bequest is in existence at the testator's death, but ceases to exist at a subsequent time, the legacy does not lapse, and the fund, having once vested in charity, may be applied cy pres by the court." 14 C. J. S., *Charities,* § 52, Page 516.

"No general rule can be enunciated as to the manner in which the cy pres doctrine will be applied, but each case must necessarily depend on its own peculiar circumstances. One limitation of the rule is that the purpose of the gift cannot be changed. For example, if property is devised to education, it cannot be judicially diverted to religion, or the relief of the poor or the sick, or to general charity, or vice versa. However, this limitation does not prevent the substitution by the court of another object of the same general charitable nature where the original object fails." 14 C. J. S., *Charities,* § 52, Page 517.

"Whether the cy pres rule attaches depends upon whether or not the will itself discloses a general charitable intention or a gift for a particular

> charitable purpose without that intention. The rule under each state of facts has been clearly stated as follows: 'If it appears from the will that the intention of the testatrix was that her property should be applied to a charitable purpose whose general nature is described so that a general charitable intent can be inferred, then if by a change of circumstances or in the law it becomes impractical to administer the trust in the precise manner provided by the testatrix, the doctrine of cy pres will be applied in order that the general charitable intent which the court regards as the dominant one may not be altogether defeated. . . . . But if the charitable purpose is limited to a particular object or to a particular institution and there is no general charitable intent, then if it becomes impossible to carry out the object or the institution ceases to exist before the gift has taken effect, and possibly in some cases after it has taken effect, the doctrine of cy pres does not apply, and in the absence of any limitation over, or other provision, the legacy lapses.' " *Gilman* v. *Burnett,* 116 Me. 382, 386; 102 A. 108.

Authors on the subject of trusts are all in accord that if property is given in trust to be applied to a particular charitable purpose, and at the time when the property is given it is possible and practical and legal to carry out the particular purpose, but subsequently owing to a change of circumstances it becomes impossible or impractical or illegal to carry out the particular purpose, it is easier to find a more general charitable intention of the settlor than it is where the particular purpose fails at the outset.

> "The court can fairly infer an expectation on the part of the settlor that in course of time circumstances might so change that the particular purpose could no longer be carried out, and that in such a case the settlor would prefer a modification of his scheme rather than that the charitable trusts should fail and the property be distributed among his heirs who might be very numerous and only re-

motely related to him." Restatement of the Law, *Trusts,* § 399.f.

"There is stronger reason, therefore, to apply the cy pres doctrine where the particular purpose of the testator fails at a subsequent time than there is where the purpose fails at the outset." *Scott on Trusts,* Vol. 3, § 399.3, Page 2110.

"In the absence of a provision providing that a charitable trust shall terminate if the specific purpose can no longer be accomplished, it is rarely held that the trust fails altogether because of the impossibility of carrying out the specific directions of the testator, where the trust was a permanent trust and the impossibility was due to circumstances happening after the trust had been created." *Scott on Trusts,* Vol. 3, § 399.3, Page 2110.

"When the gift cannot be carried out in the precise mode prescribed by the donor, effect has been given to his general purpose by adopting a method which seemed to be as near his intention as existing conditions would permit. Such a construction is not the result of an arbitrary power exercised in disregard of the donor's wishes for the public benefit, but is as truly based upon a judicial finding of his intention as applied to new conditions, as is the construction of a will, deed, or other written contract. The mere making of a gift for charitable purposes, which is unlimited as to the length of time it may continue, presupposes a knowledge on the part of the donor that material change in the surrounding circumstances will occur which may render a literal compliance with the terms of the gift impractical, if not impossible, and it is not unreasonable to infer that under such circumstances the nearest practicable approximation to his expressed wish in the management and development of the trust will promote his intention to make his charitable purpose reasonably effective, for it would be rash to infer that he intended that the trust fund should be used only in such a way that it would not result in a public benefit: in other words, that he wished his general benevolent pur-

pose to be defeated, if his method of administering the trust should become impracticable." *City of Keene* v. *Eastman,* 75 N. H. 191; 72 A. 213, 214.

"In construing charitable trusts, the absence of a provision for forfeiture will be considered as evidence that the donor did not intend the estate to revert while the carrying out of his general purpose is practicable." *City of Keene* v. *Eastman, supra.*

"The absence of a gift over or a provision for reversion in case of failure of the particular charitable purpose is some evidence of a general charitable intent." *Fisch on The Cy Pres Doctrine in the United States,* § 5.03 (a) Page 152, and cases cited.

"A general charitable intention has also been implied where the bulk of the donor's fortune is given to charity." *Fisch on The Cy Pres Doctrine in the United States,* § 5.03 (a) Page 152, and cases cited.

"Where the charitable gift has once taken effect and the particular object subsequently fails, the courts have less difficulty in finding a general charitable intent than when the particular object has ceased to exist before the gift takes effect. In such a case, the courts infer an expectation on the part of the settlor that with the passage of time changing conditions might make the effectuation of the particular purpose impossible or impractical, and in that event the donor would prefer a modification of the trust rather than a reversion of the property to his heirs or next of kin." *Fisch on The Cy Pres Doctrine in the United States,* § 5.03 (a) Pages 153, 154, and cases cited.

"If property is given upon trust to be applied to a particular charitable purpose, and the purpose is fully accomplished without exhausting the trust property, and if the settlor manifested a more general intention to devote the whole of the trust property to charitable purposes, there will not be a resulting trust of the surplus, but the court will direct the application of the surplus to some char-

> itable purpose which falls within the general charitable intention of the settlor." *Restatement of the Law, Trusts,* § 400, Page 1220.

A review of the cases decided by this court in which the principle of the cy pres doctrine was involved may be of interest. The doctrine was discussed in *Allen* v. *Trustees of Nasson Institute,* 107 Me. 120; 77 A. 638. In this case, the court pointed out that the doctrine applies only when two prerequisites exist, viz., when the court may see in the instrument a general charitable purpose as well as a specific gift, which has failed. In deciding that the cy pres doctrine did not apply, the court found that neither of these prerequisites existed. The trust had not failed and there was no evidence of a general charitable intent.

In *Brooks* v. *Belfast,* 90 Me. 318; 38 A. 222; the court found that there was a gift for a specific purpose with no general charitable intent and so the doctrine was not applied. Again in *Doyle* v. *Whalen,* 87 Me. 414; 32 A. 1022; it was held that the trust created in this instance was for the benefit of definite persons who could be identified, and so the doctrine was not applied.

The doctrine was applied in *Manufacturers National Bank* v. *Woodward,* 141 Me. 28; 38 A. (2nd) 657; in *Stevens* v. *Smith,* 134 Me. 175; 183 A. 344; in *Snow & Clifford* v. *The President and Trustees of Bowdoin College, et al.,* 133 Me. 195; 175 A. 268; and in *Lynch, Trustee* v. *South Congregational Parish of Augusta, et al.,* 109 Me. 32; 82 A. 432.

The doctrine was not applied in *Dupont* v. *Pelletier, et al.,* 120 Me. 114; 113 A. 11; *Bancroft, et al.* v. *Maine State Sanatorium Association, et al.,* 119 Me. 56; 109 A. 585; *Gilman, Trustee* v. *Burnett, et al.,* 116 Me. 382; 102 A. 108; in *Merrill, Executor* v. *Hayden, et al.,* 86 Me. 133; 29 A. 949.

In the case of *Merrill* v. *Hayden, supra,* a testator had left all of his property to one of his two daughters, to hold dur-

ing her lifetime, and at her death the residue was to go to the Maine Free Baptist Home Missionary Society. During the lifetime of the testator this society was dissolved by act of the Legislature and all its property transferred to another Association created for a different purpose. It was held that the legacy lapsed and the cy pres doctrine not applicable.

In *Gilman, Trustee* v. *Burnett, supra,* and *Bancroft* v. *Maine State Sanatorium Association, supra,* the cy pres doctrine was not applied because the court found no evidence of general charitable intent.

In the case of *Lynch* v. *South Congregational Parish of Augusta, supra,* the court found that after reading the will in the light of existing conditions, the testator had evinced a general charitable intention and the doctrine of cy pres was applied.

In the cases of *Snow & Clifford* v. *The President and Trustees of Bowdoin College, supra,* and *Stevens* v. *Smith, supra,* the court reached the conclusion that the testators had evinced a general charitable intention and upon inability to comply with the original purpose of the trust, the doctrine of cy pres became applicable.

Two cases from other jurisdictions where the doctrine was applied are of interest. In the case of *Society for Promoting Theological Education* v. *Attorney General, et al.,* 135 Mass. 285, a trust was set up providing that indigent students in theology who should be deemed worthy of assistance would be paid sums not exceeding one hundred or one hundred fifty dollars a year for three years. The trust income increased substantially and there was not a sufficient number of indigent students to exhaust the income. The court ruled that under the cy pres doctrine the payments could be increased.

In the case of *White* v. *Bliss,* a Connecticut case, 105 A. 699, a trust was set up providing for the support of one stu-

dent. A surplus of money developed and the court ruled that the trustee could use the money to support additional students.

While, as previously stated, it seems to have been assumed by all interested parties that the beneficiaries of the trust created by Captain How were indigent seamen of the class to which he belonged, we are not thoroughly convinced that this is so. At times much earlier than the year when Captain How's will was executed, our court had described crewmen of other types of vessels as seamen.

It seems apparent that even in 1870, the term "seamen" was not limited to mariners of the type who manned vessels such as the *Ellen Stevens*.

That this is so, is shown by a decision of this court in *Lewis* v. *Chadbourne,* 54 Me. 484; a case decided prior to 1868, in which fishermen in the mackerel industry were described as seamen. Another is *Holden* v. *French,* 68 Me. 241, decided in 1878, in which this court described the crewmen of a fishing vessel as seamen.

If we endeavor to project ourselves into the past and contemplate upon the intention of Captain How, we may well suppose that while he was perhaps primarily interested in crewmen of ships such as he was master of, he nevertheless had in mind that wider group of men whose major means of livelihood was gained from the sea. He used the expression, in his will "the class of indigent seamen." Webster describes the word "class" as "a group of individuals ranked together as possessing common characteristics or as having the same status;" and also "a group of persons, having common characteristics or attributes."

Webster defines the word "indigent" as follows:

> "Destitute of property or means of comfortable subsistence; needy; poor; in want; necessitous,"; and Joseph Addison the English poet and essayist said: "Charity consists in relieving the indigent."

After making provision for those most dear and close to him, his wife, mother and brother, Captain How gave all of his estate for a public charity. The will neither provides for forfeiture or limitation over. We are convinced that when he executed his will on the day before he died, he was imbued with a deep charitable intent, and that he intended all of his worldly goods and effects to be devoted forever to the relief of indigent seamen, not only of the class to which he belonged, but to all classes of indigent seamen.

It is, therefore, our opinion that the scope of the beneficiaries of this kindly gift should be widened and enlarged. We reach this conclusion not necessarily through the application of the cy pres doctrine, but rather through an interpretation of the intention of the testator at the time he executed his will. See *Guilford Trust Company, Trustee, et al.* v. *Inhabitants of Guilford, et al.*, 148 Me. 162; 91 A. (2nd) 17.

The trustee is, therefore, authorized to use and employ the income for the benefit of indigent seamen not only of the class to which Captain How belonged, but to other classes, by way of illustration and not of limitation, such as crewmen of merchant vessels, oil tankers and fishing vessels.

In the determination of who shall be classed as indigent seamen, the trustee may give consideration to the modern laws and latter day adjudications as to the interpretation of what a "seamen" is.

A good definition is to be found in 79 C. J. S., Seamen, § 1, (a.) Page 490.

> "While the word 'seamen' is a flexible word, the meaning of which ordinarily depends on the circumstances in which it is used, in the broad sense of the word a seamen is a mariner of any degree, including one who does any sort of work aboard a ship in navigation."

In her petition, the trustee requested instructions as to whether or not lobster fishermen may be included among

the beneficiaries. We are of the opinion that lobster fishermen are not seamen within the meaning of the foregoing definition, nor within the intention of the testator.

The trustee is given the right to employ agents for the purpose of investigating cases, and to pay such agents reasonable compensation for their services and charge the same to the trust fund. The trustee in using and employing the income for the benefit of indigent seamen of the classes above described, may do this directly or she may turn over the income to some worthy association or associations organized for that purpose; the exact details to be left to a Justice of the Supreme Judicial Court who is to determine to whom the income shall be paid and through what channel the gift can be made most effective.

Associations to whom any portion of the income is paid may charge a reasonable commission for expenses of administration, the amount of such commission to be determined by the trustee, subject to the approval of a Justice of the Supreme Judicial Court. Any association to whom any of the income is paid shall file at least annually an account of its disbursements with the trustee. The Portland Seamen's Friend Society to whom the sum of ten thousand dollars has already been paid shall forthwith file an account of its disbursements with the trustee. Copies of all accounts of the trustee which are filed in the Probate Court, as well as copies filed by associations to whom any portion of the income has been paid are to be filed with the Attorney General of the State of Maine.

Case remanded to the sitting Justice for a Decree in accordance with this opinion. Costs and reasonable counsel fees to be fixed by the sitting Justice, paid by the Trustee and charged in her Probate account.

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

* * * * * *

QUESTIONS PROPOUNDED BY THE SENATE IN AN ORDER
DATED OCTOBER 28, 1957
ANSWERED OCTOBER 29, 1957

SENATE ORDER PROPOUNDING QUESTION

STATE OF MAINE

In Senate
October 28, 1957

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

WHEREAS, the Ninety-Eighth Legislature proposed an amendment to the Constitution of Maine by the provisions of Chapter 159 of the Resolves of the Ninety-Eighth Legislature which act was favorably voted on by the people at a special election held on September 9, 1957, and by proclamation of the Governor became Section 14-A of Article IX of the Constitution of Maine on September 19, 1957; and

WHEREAS, under the authority of the amendment aforesaid there has been introduced and there is now pending before the Legislature Senate Paper 620, Legislative Document Number 1614, "An Act to Create the Maine Industrial Building Authority"; and

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

ORDERED, that in accordance with Section 3 of Article VI of the Constitution of Maine the Justices of the Supreme

Judicial Court are hereby respectfully requested to give the Senate their opinion on the following question:

QUESTION

Would Senate Paper 620, Legislative Document Number 1614, "An Act to Create the Maine Industrial Building Authority," if enacted by the Legislature in its present form, be constitutional?

Name: Low

County: Knox

In Senate Chamber
Oct. 28, 1957
READ AND PASSED
Chester T. Winslow
Secretary

A true copy.
Attest:
Chester T. Winslow
Secretary of the Senate

FIRST SPECIAL SESSION

NINETY-EIGHTH LEGISLATURE

Legislative Document **No. 1614**

S. P. 620 In Senate, October 28, 1957.

Presented by Senator Low of Knox. Committee on State Government suggested. 2,000 printed.

CHESTER T. WINSLOW, Secretary

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED FIFTY-SEVEN

AN ACT to Create the Maine Industrial Building Authority.

Emergency preamble. Whereas, the inhabitants of the State of Maine on September 9, 1957 approved an amend-

ment to the Constitution of Maine pledging the credit of the State and providing for a bond issue for guaranteed loans for industrial purposes; and

Whereas, acts of the Legislature do not become effective until 90 days after adjournment, the following legislation is urgently necessary to foster, encourage and assist the physical location, settlement and resettlement of industrial and manufacturing enterprises within the State; and

Whereas, in order to carry out the will of the people of Maine as expressed in their approval of the Constitutional Amendment, the following legislation is vitally necessary to provide opportunities for gainful employment by the people of Maine and to insure the preservation and betterment of the economy of the State and its inhabitants; 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. R. S., c. 38-B, additional. The Revised Statutes are hereby amended by adding thereto a new chapter to be numbered 38-B, to read as follows:

'CHAPTER 38-B.

Maine Industrial Building Authority Act.

Sec. 1. Title. This chapter shall be known and may be cited as the "Maine Industrial Building Authority Act."

Sec. 2. Purpose. It is declared that there is a state-wide need for new industrial buildings to provide enlarged opportunities for gainful employment by the people of Maine and to this insure the preservation and betterment of the economy of the State and its inhabitants. It is further declared

that there is a need to stimulate a larger flow of private investment funds from banks, investment houses, insurance companies and other financial institutions including pension and retirement funds, to help satisfy the need for housing industrial expansion. Therefore, the Maine Industrial Building Authority is created to encourage the making of mortgage loans for the purpose of furthering industrial expansion in the State.

Sec. 3. Credit of State pledged. The Maine Industrial Building Authority is authorized to insure the payment of mortgage loans, secured by industrial projects, and to this end the faith and credit of the State is hereby pledged, consistent with the terms and limitations of section 14-A of Article IX of the Constitution of the State of Maine.

Sec. 4. Organization of authority. The Maine Industrial Building Authority hereinafter in this chapter called the authority, hereby created and established a body corporate and politic, is constituted a public instrumentality of the State, and the exercise by the authority of the powers conferred by the provisions of this chapter shall be deemed and held to be the performance of essential governmental functions. The authority shall consist of 9 members, including the Commissioner of Economic Development, and 8 members at large appointed by the Governor with the advice and consent of the Council for a period of 4 years, provided that, of the members first appointed, 2 shall be appointed for a term of one year, 2 for a term of 2 years, 2 for a term of 3 years and 2 for a term of 4 years. A vacancy in the office of an appointive member, other than by expiration, shall be filled in like manner as an original appointment, but only for the remainder of the term of the retiring member. Appointive members may be removed by the Governor with the advice and consent of the Council for cause. The authority shall elect one of its members as chairman, one as vice-chairman, one as treasurer, and shall employ a manager, who shall be

secretary. The secretary and treasurer shall be bonded as the authority shall direct. Five members of the authority shall constitute a quorum and the affirmative vote of a majority of members, present and voting, shall be necessary for any action taken by the authority. No vacancy in the membership of the authority shall impair the right of the quorum to exercise all rights and perform all the duties of the authority.

All the members of the authority shall be reimbursed for their actual expenses necessarily incurred in the performance of their duties.

The manager shall be appointed by the authority and his tenure of office shall be at the pleasure of the authority. He shall receive such compensation as shall be fixed by the authority with the approval of the Governor and Council.

The manager shall be the chief administrative officer for the authority and as such shall direct and supervise the administrative affairs and technical activities of the authority in accordance with rules, regulations and policies as set forth by the authority. It shall be the duty of the manager among other things to:

I. To attend all meetings of the authority, and to act as its secretary and keep minutes of all its proceedings.

II. To approve all accounts for salaries, per diems, allowable expenses of the authority or of any employee or consultant thereof, and expenses incidental to the operation of the authority.

III. To appoint, under the provisions of the Personnel Law, such employees as the authority may require, and such assistants, agents or consultants as may be necessary for carrying out the purposes of this chapter.

IV. To make to the authority an annual report documenting the actions of the authority, and such other reports as the authority may request.

V. To maintain a close liaison with the Department of Economic Development and provide assistance to the various divisions of that Department to facilitate the planning and financing of industrial projects.

VI. To make recommendations and reports in cooperation with the Department of Economic Development to the authority on the merits of any proposed industrial project, on the status of local industrial development corporations, and on meritorious industrial locations.

VII. To perform such other duties as may be directed by the authority in the carrying out of the purposes of this chapter.

Sec. 5. Definitions. As used in this chapter, the following words and terms shall have the following meanings unless the context shall indicate another or different meaning or intent:

I. "Cost of project" shall mean the cost or fair market value of construction, lands, property rights, easement, franchises, financing charges, interest, engineering and legal services, plans, specifications, surveys, cost estimates, studies and other expenses as may be necessary or incident to the development, construction, financing and placing in operation of an industrial project.

II. "Federal Agency" shall mean and include the United States of America, the President of the United States of America, and any department of, or corporation, agency or instrumentality heretofore or hereafter created, designated or established by the United States of America.

III. "Industrial project" shall mean any building or other real estate improvement and, if a part thereof, the land upon which they may be located, and all real properties deemed necessary to their use by any industry for the manufacturing, processing or assembling of raw materials or manufactured products.

IV. "Local development corporation" shall mean any organization, incorporated under the provisions of chapter 54, sections 1 to 16, for the purposes of fostering, encouraging and assisting the physical location, settlement and resettlement of industrial and manufacturing enterprises within the State, and to whose members no profit shall enure.

V. "Maturity date" shall mean the date on which the mortgage indebtedness would be extinguished if paid in accordance with periodic payments provided for in the mortgage.

VI. "Mortgage" shall mean a mortgage on an industrial project and the term "first mortgage" means such classes of first liens as are commonly given to secure advances on, or the unpaid purchase price of, real estate under the laws of the State of Maine, together with the credit instruments if any, secured thereby.

VII. "Mortgagee" shall mean the original lender under a mortgage, and his successors and assigns approved by the authority and may include all insurance companies, trust companies and their commercial departments, banking associations, investment companies, savings banks, executors, trustees and other fiduciaries, including pension and retirement funds.

VIII. "Mortgagor" shall mean the original borrower under a mortgage and his successors and assigns, and shall be limited to local development corporations.

IX. "Mortgage payments" shall mean periodic payments called for by the mortgage, covering interest, installments of principal, taxes and assessments, mortgage insurance premiums and hazard insurance premiums.

Sec. 6. Powers. The authority is authorized and empowered:

I. To adopt by-laws for the regulation of its affairs and the conduct of its business;

II. To adopt an official seal and alter the same at pleasure;

III. To maintain an office at such place or places within the State as it may designate;

IV. To sue and be sued in its own name, plead and be impleaded;

Any and all actions at law or in equity against the authority shall be brought only in the county of Kennebec and service of process in any action shall be made by service upon the manager of said authority either in hand or by leaving a copy of the process at the office of the manager;

V. To employ such assistant, agents, consultants and other employees as may be necessary or desirable for its purposes and to fix their compensation; and to utilize the services of other governmental agencies; such employment shall be consistent with the Personnel Law;

VI. To enter into agreements with prospective mortgagees and mortgagors, for the purpose of planning, designing, constructing, acquiring, altering and financing industrial projects;

VII. To acquire, hold and dispose of real and personal property and make and enter into all contracts, leases, agreements and arrangements necessary or incidental to the performance of its duties and the execution of its powers under the provisions of this chapter;

VIII. To accept from a federal agency, loans or grants for the planning or financing of any industrial project, and to enter into agreements with such agency respecting any such loans or grants;

IX. In connection with the insuring of payments of any mortgage, to require for its guidance a finding of the planning board of the municipality in which the industrial project is proposed to be located, or of the regional planning board of which such municipality is a member, as to the expediency and advisability of such project;

X. To do all acts and things necessary or convenient to carry out the powers expressly granted in this chapter.

Sec. 7. Local development corporations. When a local development corporation does not meet mortgage payments insured by the authority by reason of vacancy of its industrial project, the authority, for the purpose of maintaining income from industrial projects on which mortgage loans have been insured by the authority and for the purpose of safeguarding the mortgage insurance fund, may grant the local development corporation permission to lease or rent the property to a responsible tenant for a use other than that specified in section 5, subsection III, such lease or rental to be temporary in nature and subject to such conditions as the authority may prescribe.

Sec. 8. Mortgage insurance fund.

I. There is hereby created an industrial building mortgage insurance fund, hereinafter in this chapter referred to as the "fund," which shall be used by the authority as a non-lapsing, revolving fund for carrying out the provisions of this chapter. This fund shall initially be the sum of $500,000. To this sum shall be charged any and all expenses of the authority, including interest and principal payments required by loan defaults and to the sum shall be credited all income of the authority, including mortgage insurance premiums and from the sale, disposal, lease or rental.

II. Moneys in the fund not needed currently to meet the obligations of the authority in the exercise of its responsibilities as insurer as provided for in this chapter, shall be deposited with the Treasurer of State to the credit of the fund, or may be invested in such manner as is provided for by statute.

Sec. 9. Insurance of mortgages. The authority is authorized upon application of the mortgagee to insure mortgage payments required by a first mortgage on any industrial project, upon such terms and conditions as the authority may prescribe, provided the aggregate amount of principal obligations of all mortgages so insured outstanding at any one time shall not exceed $20,000,000. To be eligible for insurance under the provisions of this chapter a mortgage shall:

I. Be one which is to be made and held by a mortgagee approved by the authority as responsible and able to service the mortgage properly;

II. Involve a principal obligation, including initial service charges and appraisal, inspection and other fees approved by the authority, not to exceed $1,000,000 for any one project and not to exceed 90% of the cost of project;

III. Have a maturity satisfactory to the authority but in no case later than 25 years from the date of the insurance;

IV. Contain complete amortization provisions satisfactory to the authority requiring periodic payments by the mortgagor which shall include principal and interest payments, cost of local property taxes and assessments, land lease rentals if any, and hazard insurance on the property and such mortgage insurance premiums as are required under section 10;

V. Contain such terms and provisions with respect to property insurance, repairs, alterations, payment of taxes and assessments, default reserves, delinquency charges, default remedies, anticipation of maturity, additional and secondary liens, and other matters as the authority may prescribe.

Sec. 10. Mortgage insurance premiums. The authority is authorized to fix mortgage insurance premiums for the insurance of mortgage payments under the provisions of this chapter, such premiums to be computed as a percentage of the principal obligation of the mortgage outstanding at the beginning of each year. *Such premiums shall be payable by the mortgagees in such manner as shall be prescribed by the authority.

Sec. 11. Acquisition and disposal of property. The authority may take assignments of insured mortgages and other forms of security and may take title by foreclosures or conveyance to any industrial project when an insured mortgage loan thereon is clearly in default and when in the opinion of the authority such acquisition is necessary to safeguard the mortgage insurance fund, and may sell, or on a temporary basis lease or rent, such industrial project for a use other than that specified in section 5, subsection III.

Sec. 12. Authority expenses. The authority may in its discretion expend out of the fund such moneys as may be necessary for any expenses of the authority, including administrative, legal, actuarial and other services. All such expenses incurred by the authority shall be paid by the authority and when pertaining thereto shall be charged to the fund or to the appropriate industrial project or projects. Upon the issuance of mortgage insurance for any such project or projects, any expenses by the authority charged

* Such insurance premiums shall not be less than one-half of 1% per year nor more than 2% per year of said outstanding principal obligation.

thereto shall be reimbursed to the authority by the mortgagee from the proceeds of the mortgage. All proceeds received by the authority from the disposal by sale or in some other manner of property it may have acquired in accordance with section 11 shall be credited to the fund.

Sec. 13. Mortgages eligible for investment. Mortgages insured by the authority of this chapter are made legal investments for all insurance companies, trust companies and their commercial departments, banking associations, investment companies, savings banks, executors, trustees and other fiduciaries, pension or retirement funds.

Sec. 14. Records of account. The authority shall keep proper records of accounts and shall make an annual report of its condition to the State Banking Commissioner.

Sec. 15. Authority to provide funds. If from time to time in the opinion of the authority the addition of moneys to the mortgage insurance fund may be required to meet obligations, the authority shall in writing request the Governor and Council to provide moneys in such amounts as may be necessary for the purpose. The Governor and Council shall transfer to said fund sufficient moneys for said purpose from the State contingent account or from the proceeds of bonds to be issued as provided in this section. If bonds are to be issued, the Governor and Council shall order the Treasurer of State to issue bonds in the amount requested, but not exceeding in the aggregate $20,000,000 at any one time, to mature serially or made to run for such periods as the Governor and Council may determine, but none of them shall run for a longer period than 20 years, and at such rates of interest and on such terms and conditions as the Governor and Council shall determine. The bonds so issued shall be deemed a pledge of the faith and credit of the State.'

Sec. 2. Appropriation. For the establishment of the mortgage insurance fund, there is hereby appropriated $500,000 from the unappropriated surplus of the general fund.

Sec. 3. R. S., c. 54, § 5, amended. Section 5 of chapter 54 of the Revised Statutes is hereby amended by adding at the end thereof a new paragraph to read as follows:

'The limitations of this section as to the holding of real and personal property shall not apply to a corporation formed under the provisions of this chapter for the purpose of fostering, encouraging and assisting the physical location, settlement and resettlement of industrial and manufacturing enterprises within the State.'

Emergency clause. In view of the emergency cited in the preamble, this act shall take effect when approved.

The foregoing is a true copy of the original document presented by the sponsor and marked Senate Paper 620, Legislative Document 1614.

CHESTER T. WINSLOW
Secretary of the Senate

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 submit the following answer to the question propounded on October 28, 1957.

QUESTION: Would Senate Paper 620, Legislative Document Number 1614, "An Act to Create the Maine Industrial Building Authority," if enacted by the Legislature in its present form, be constitutional?

ANSWER: We answer in the affirmative.

Our Constitution reads in Section 14-A as follows:

> " 'SECTION 14-A. For the purposes of fostering, encouraging and assisting the physical location, settlement and resettlement of industrial and manufacturing enterprises within the state, the legislature by proper enactment may insure the payment of mortgage loans on the real estate within the state of such industrial and manufacturing enterprises not exceeding in the aggregate $20,000,000 in amount at any one time and may also appropriate moneys and authorize the issuance of bonds on behalf of the state at such times and in such amounts as it may determine to make payments insured as aforesaid.' "

On examination of Senate Paper 620, Legislative Document Number 1614, we are of the view that the means chosen are reasonably adapted to carry out the purposes of Section 14-A of the Constitution and are otherwise constitutional.

Dated at Augusta, Maine, this 29th day of October, 1957.

Respectfully submitted:

ROBERT B. WILLIAMSON
DONALD W. WEBBER
ALBERT BELIVEAU
WALTER M. TAPLEY, JR.
FRANCIS W. SULLIVAN
F. HAROLD DUBORD

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
ON OCTOBER 21, 1957
ANSWERED OCTOBER 22, 1957

LETTER PROPOUNDING QUESTIONS
State of Maine
Office of the Governor
Augusta

October 21, 1957

To the Honorable Justices of the
Supreme Judicial Court:

Under and by virtue of the authority conferred upon the Governor by the Constitution of Maine, Article VI, Section 3, and being advised and believing that the questions are important and that it is upon a solemn occasion,

I, Edmund S. Muskie, Governor of Maine, respectfully submit the following Statement of Facts and the questions and respectfully ask the Opinion of the Justices of the Supreme Judicial Court thereon:

STATEMENT

WHEREAS, the Governor has in the exercise of his constitutional prerogative issued his proclamation for a Special Session of the Legislature to convene at four o'clock in the afternoon on the twenty-eighth day of October 1957; and

WHEREAS, the Governor by Section 9 of Part First of Article V of the Constitution of Maine is required to recommend to the Legislature such measures as may in his judgment be expedient; and

WHEREAS, in the preparation by the Governor of a measure to amend Chapter 364 of the Public Laws of 1957 entitled "An Act Relating to Educational Aid and Reorganization of School Administrative Units" certain constitutional questions have arisen; and

WHEREAS, an answer to these grave problems would greatly assist the Governor in the exercise of his duty in recommending this measure to the Legislature at said Special Session.

NOW, THEREFORE, I, Edmund S. Muskie, Governor of Maine, respectfully request an answer to the following questions:

I.

Do the following provisions of Chapter 364 of the Public Laws of 1957, namely:

the last paragraph of Section 237-A relative to the power to adjust the State subsidy to an administrative unit,

subparagraph V of Section 111-D and paragraph (2) following Table I in Section 237-D relative to the power to classify schools as unnecessary,

the third paragraph following Table II in Section 237-E relative to the power to approve an administrative unit as necessary and efficient,

Section 237-H relative to the power to determine whether the formation of a school administrative district by consolidation is not geographically or educationally practical, subparagraph VI of Section 111-D relative to the power to approve or disapprove applications for the establishment of school administrative districts and the creation of districts composed only of those municipalities voting on the formation of a district which vote in favor thereof, Section 111-E relative to the power to determine whether

smaller districts would be for the best educational interest of the pupils involved, and

the second paragraph of Section 111-H relative to the power to make changes in the number of school directors,

delegate legislative power to the State Board of Education and the School District Commission in violation of Section I of Part First of Article IV of the Constitution of Maine?

II.

Must every city or town that is a participating municipality in a school administrative district, consisting of two or more municipalities and created under the provisions of Chapter 364 of the Public Laws of 1957, take into account its proportionate part of the indebtedness incurred by such district in computing the extent of its ability to create debt or liability under the provisions of Section 15 of Article IX of the Constitution of Maine?

III.

Is a school administrative district, consisting of two or more municipalities and created under the provisions of Chapter 364 of the Public Laws of 1957, subject in any manner to the provisions of Section 15 of Article IX of the Constitution of Maine limiting the amount of debt or liability that may be incurred by cities and towns?

Respectfully submitted,

Edmund S. Muskie
EDMUND S. MUSKIE

ESM/eb

ANSWER OF THE JUSTICES

To the Honorable Edmund S. Muskie, Governor of Maine:

The undersigned Justices of the Supreme Judicial Court individually acknowledge receipt of your communication of

October 21, 1957, requesting our advice concerning certain provisions of Chapter 364 of the Public Laws of 1957 entitled "An Act Relating to Educational Aid and Reorganization of School Administrative Units," by giving our opinion on the specific questions submitted to us therein.

We feel constrained to say, in reply thereto, that the occasion of the inquiry of your Excellency is not a solemn one within the meaning of Section 3 of Article VI of the Constitution which reads as follows:

> "Section 3. They shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the governor, council, senate or house of representatives."

Our opinions are sought on the ground that thereby your Excellency will be assisted in presenting measures to the special session of the Legislature convening on October 28th next, pursuant to the Constitution.

> "**Giving information and recommending measures to legislature.**—He shall from time to time give the legislature information of the condition of the state, and recommend to their consideration such measures, as he may judge expedient."
> Art. V, Part First, Sec. 9.

The Act in question was duly enacted by the Legislature, approved by the Governor, and is presently in full force and effect as a law of our State.

In the situation here presented we find no action required by your Excellency that would permit us within the duties and functions of our office to give an advisory opinion upon existing legislation. There is, in our view, no action required by law of your Excellency analogous to your duties with respect to pending legislation.

In 1935, in declining to answer a question relative to the Brunswick School District, the justices unanimously said, in language here applicable:

> "The Act has been approved, and signed, by the Executive. It follows that no 'solemn occasion,' wherein the Governor may require the Justices of the Supreme Judicial Court to give their opinion, that is, express their individual views, without a hearing, or the benefit of argument, as to the constitutionality of the particular enactment, exists.
>
> "Should parties in interest institute a proceeding for the purpose, the Court, as such, might, after hearing, and mature consideration, determine if the legislation be valid and constitutional."

Opinion of the Justices, 134 Me. 508.
See also *Opinion of the Justices,* 147 Me. 414, in which the limitations imposed upon the Justices by the Constitution relating to advisory opinions are discussed.

Dated at Augusta, Maine, this 22nd day of October, 1957.

Respectfully submitted:

ROBERT B. WILLIAMSON
DONALD W. WEBBER
ALBERT BELIVEAU
WALTER M. TAPLEY, JR.
FRANCIS W. SULLIVAN
F. HAROLD DUBORD

RULES OF SUPREME JUDICIAL COURT
STATE OF MAINE

SUPREME JUDICIAL COURT October 8, 1957

All of the Justices of the Supreme Judicial Court concurring, the Revised Rules of the Supreme Judicial Court as established May 16, 1952, effective August 1, 1952, are hereby amended by adding thereto another rule, the same to be numbered 8. Said Rule 8 is as follows:

8

APPELLATE PROCEDURE FOR INDIGENT DEFENDANTS IN CRIMINAL CASES

Any person convicted of a felony, who has filed a motion for a new trial and has appealed from the denial of his motion, or who has noted his exceptions, who claims to be without financial means to employ counsel to prosecute his appeal or exceptions, or to obtain a stenographic transcript of the proceedings at his trial, for the purpose of securing an appellate review of his conviction, may file, during the term of court at which he is convicted, a petition requesting that counsel be assigned to represent him on appeal or exceptions, and that he be furnished with a stenographic transcript of the proceedings at his trial. The petition shall be verified by the petitioner and shall specify the grounds for the appeal or the exceptions, and shall allege facts showing that he was, at the time of his conviction, and is at the time of filing the petition without financial means to employ counsel or to pay for the transcript.

The matter shall be heard forthwith by the presiding justice upon the issue of the indigency of the petitioner, and upon the question of whether or not the appeal is frivolous or without merit or filed in bad faith.

If, after hearing, the presiding justice finds that the petitioner is without financial means with which to prosecute his appeal or exceptions, or with which to obtain a transcript of the proceedings at his trial, and that the petition has merit and is filed in good faith, he shall appoint competent counsel to represent the defendant on appeal or exceptions. Counsel for the petitioner and for the state may then designate by a written stipulation the parts of the record, proceedings, and evidence to be included in the record on appeal. By agreement of counsel for the petitioner and for the state, all or part of the testimony may be furnished in narrative form, rather than by question and answer. The presiding justice shall then order the court reporter to transcribe an original and two copies of such of the record as has been designated by counsel for the petitioner and for the state. The original transcript shall be filed with the clerk; a copy thereof shall be delivered to the petitioner without charge; and a copy thereof shall be delivered to the county attorney.

If the presiding justice finds that the petitioner has financial means with which to employ counsel or with which to pay for the transcript, or if he finds that the appeal or exceptions are frivolous or without merit or filed in bad faith, the petition shall be denied and the presiding justice shall file a decree setting forth his findings. From these findings, the petitioner may, within ten days after the filing thereof, appeal in writing to any Justice of the Supreme Judicial Court, who, after notice to counsel for the State shall hear the matter *de novo*, and may affirm, modify, or reverse the findings of the justice below. If the findings of the presiding justice are modified or reversed, the matter shall be remanded to the court below for appropriate action by the justice who presided at the term of court before which the petitioner was convicted. The decision of the reviewing justice shall be final.

In the hearings before the presiding justice, or, upon appeal, before a Justice of the Supreme Judicial Court, the testimony of the witnesses shall be taken subject to the penalties of perjury.

In cases where the appellate review is based on exceptions, the presiding justice, shall, during the term, fix a time for the filing of the extended bill of exceptions, and in all cases, whether on exceptions or appeal, the presiding justice, shall, during the term, fix a time for the filing of the evidence, which times, for good cause shown, may be enlarged by the justice who presided at the term of Court before which the petitioner was convicted.

The court reporter who prepares a transcript of the trial proceedings pursuant to an order of court shall be paid the same fee for preparing the transcript and copies as in other cases. The court reporter, and counsel appointed to represent the petitioner, shall be paid out of moneys appropriated for this purpose, on certification of the presiding justice, and approval and order by the Chief Justice of the Supreme Judicial Court.

Whenever the petition for the appointment of counsel and for the furnishing of a transcript is allowed, the presiding justice, notwithstanding the provisions of Rule 5, may, by order, specify the manner by which the record on appeal may be prepared and settled to the end that the petitioner may be able to present his case to the Law Court in the most economical manner. The presiding justice may provide in his order that the record shall consist of the original documents in the case, together with the original transcript or bill of exceptions. If the Law Court deems it necessary or advisable to have an enlargement of the record, it may order such enlargement, or the matter may be remanded to the court below for appropriate action by the

justice who presided at the term of court before which the petitioner was convicted.

Rule 8 shall take effect immediately and shall be recorded in Volume 153 of the Maine Reports.

ROBERT B. WILLIAMSON,
Chief Justice
DONALD W. WEBBER
ALBERT BELIVEAU
WALTER M. TAPLEY, JR.
FRANCIS W. SULLIVAN
F. HAROLD DUBORD

RULES OF SUPREME JUDICIAL COURT AND SUPERIOR COURT

STATE OF MAINE

SUPREME JUDICIAL COURT

October 28, 1957

SUPERIOR COURT

All of the Justices of the Supreme Judicial Court and Superior Court concurring, the Revised Rules of the Supreme Judicial Court and Superior Court as established May 16, 1952, effective August 1, 1952, as amended, are amended so that Rule 44 of the Supreme Judicial and Superior Courts entitled "Court Records" and Rule 43 of the Equity Rules entitled "Court Records" shall read as follows:

RULE 44

COURT RECORDS

Clerks shall, without unreasonable delay, after the rendition of final judgment in civil actions, make extended rec-

ords of proceedings in court in real actions, including actions for foreclosure of mortgage, in complaints for flowage, and petitions for partition.

In libels for divorce and annulments of marriage it shall be sufficient to record the names of the parties, the residence of each, the date of the libel, the term of the court at which it was entered, the date of service or notice to the libelee, the date of marriage, the alleged grounds of divorce or annulment, the names of the children, the prayer, if any, for change of name, and further, an extended record of the decree of the court.

In all other civil cases at law, it shall be sufficient to record the names of the parties, date of the writ, petition or complaint, the term of the court at which it was entered, date of service or notice to defendant, verdict of jury, if any, the date of rendition of judgment, its nature and amount, and the number of the case upon the docket at the judgment term.

Upon application of any party in any civil cause, either at law or in equity, the court or a justice thereof in vacation, may upon or within ninety days after judgment or final decree order a full record in any case, or such additional record as to him may seem proper, upon payment of fees as may be ordered.

No extension of records is required in petitions and decrees for changes in custody, support, reciprocal support, alimony, restraint and contempt.

Rule 43

Court Records

In equity cases it shall be sufficient, except in cases for dissolution of corporations, cases or proceedings involving title to real estate, and bills for the construction of wills, to record the names of the parties, date of filing bill and issue of subpoena or order of notice and return day thereof, dates of filing answer and replication, if any, date of filing decree that bill be taken *pro confesso*, date of final decree, and number of the case upon the docket; in addition to the foregoing particulars, in proceedings for the dissolution of corporations, the decree of dissolution shall be recorded in full; in bills for the construction of wills, the decree construing the will in question shall be recorded in full; in bills to quiet title to real estate the final decrees shall be recorded in full; in interlocutory proceedings by receivers, trustees and masters in selling real estate, the decrees authorizing sales shall be recorded in full, with date of decrees confirming the sales; and in cases in equity to enforce liens on real estate only final decrees authorizing sale of real estate shall be recorded in full, with date of decree confirming sale; provided that the justice signing the final decree in any case may by special order direct that such additional record be made as to him seems proper.

Upon application of any party in any civil cause, either at law or in equity, the court or a justice thereof in vacation, may upon or within ninety days after judgment or final decree order a full record in any case, or such additional record as to him may seem proper, upon payment of fees as may be ordered.

The above Rules shall take effect immediately and shall be recorded in Volume 153 of the Maine Reports.

SUPREME JUDICIAL COURT JUSTICES

ROBERT B. WILLIAMSON
DONALD W. WEBBER
ALBERT BELIVEAU
WALTER M. TAPLEY, JR.
FRANCIS W. SULLIVAN
F. HAROLD DUBORD

SUPERIOR COURT JUSTICES

HAROLD C. MARDEN
RANDOLPH A. WEATHERBEE
CECIL J. SIDDALL
LEONARD F. WILLIAMS
ABRAHAM M. RUDMAN
CHARLES A. POMEROY
JAMES P. ARCHIBALD
ARMAND A. DUFRESNE, JR.

A True Copy.

Attest:

LESLIE E. NORWOOD
Clerk of the Law Court

CENTRAL MAINE POWER COMPANY

vs.

PUBLIC UTILITIES COMMISSION

RE: INCREASE IN RATES

Kennebec. Opinion, November 7, 1957.

Public Utilities. Rates. Operating Expenses. Rate Base. Income Taxes. Wages. Fuel. Promotional Expenses. Deferred Reserves. The Rate.

The *income tax* chargeable to the utility business for rate making purposes should be no more than the total tax on the corporation so that the ratepayers (not the stockholders) should have the benefit of the reduction of income taxes obviously arising from the impact of a merchandizing loss and contributions.

Additional *wage costs* resulting from a wage increase to employees after the effective date of the test period should be treated as an operating expense for rate making purposes, since such wage increase results from a firm contract with its employees known in the test year and effective thereafter.

Additional fuel costs above the costs of the test year were properly excluded by the Commission as an operating expense since no one can with certainty determine the fuel prices in the future and the Commission did no more than tie its estimates of income and expense to the test year.

Promotional expenses actually incurred during the test year should be treated as an expense for rate making purposes where such expenses are not excessive or unwarranted.

The creation of an income tax *deferred reserve* is properly disallowed by the Commission where under the circumstances it does not represent a tax saving in fact from offset of loss against income or an actual incurred expense but is, as the name indicates, an expense to be incurred in later years.

A utility company is entitled to a *fair return* and entitled to such rates as will permit it to earn a return on the value of the property

which it employs for the convenience of the public equal to that generally being made. At the same time, in the same general locality, on investments in other business undertakings attended by corresponding risks and uncertainties.

ON EXCEPTIONS.

This is a petition for a rate increase by the Central Maine Power Company before the Law Court upon exceptions to rulings by the Public Utilities Commission. Exceptions overruled on issues relating to income tax saved or deferred, additional fuel costs, and rate of return. Exceptions sustained on issues relating to additional wage costs and promotional expenses.

Everett Maxcy,
William H. Dunham,
Leonard A. Pierce,
Vincent McKusick, for plaintiff.

Richard B. Sanborn, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

WILLIAMSON, C. J. This rate case is before us on exceptions by the Central Maine Power Company to the denial by the Public Utilities Commission of its request for an increase in electrical rates. Rates under the statute must be just and reasonable. R. S. Chap. 44, Sec. 17. Questions of law may be raised by exceptions to the ruling of the Commission on an agreed statement of facts or, as here, on facts found by the Commission. R. S. Chap. 44, Sec. 67.

The basic issue before the Commission was well stated in the Company's brief, "What were just and reasonable rates required by the Company in order to provide a fair return on the reasonable value of all of the Company's property used or required to be used in its service to the public?"

Two of the major points necessary to a solution of the issue were disposed of by the Commission without complaint of the Company. First, the rate base was established at $179,250,000, and second, the gross revenues produced by the existing rate schedules were not in dispute. Thus the issues were narrowed to the determination of expenses to be charged against revenues, and of the amount required to constitute a fair return on the rate base.

There are certain fundamental principles to be kept in mind in passing upon exceptions to a decree of the Public Utilities Commission. (1) Questions of law, and only questions of law, are presented by exceptions. R. S. Chap. 44, Sec. 67. (2) The facts are found by the Commission and not by the Court. (3) The burden is upon the complaining party, here the Company, to establish the error of law. (4) Errors of law are committed if the Commission: (a) erroneously interprets and applies by its ultimate ruling the law applicable to the facts found by it, or, (b) in its findings of fact, which form the basis of such ultimate ruling, misinterprets the evidence, or, (c) makes such findings of fact unsupported by substantial evidence. (5) Further, the rates must not be confiscatory in violation of the due process clauses of the State and Federal Constitutions. State, Art. I, Sec. 19; Federal, 14th Amendment.

> "The Commission is the judge of the facts in rate cases such as this. This court under the statute which created it is only a court to decide questions of law. It must be so, for it has not at its disposal the engineering and the technical skill to decide questions of fact which were wisely left within the province of the Commission. Only when the Commission abuses the discretion entrusted to it, or fails to follow the mandate of the legislature, or to be bound by the prohibitions of the constitution, can this court intervene. Then the question becomes one of law. We cannot review the Commission's findings of fact and seek to determine

> what rates are reasonable and just. When the Commission decides a case before it without evidence, or on inadmissible evidence, or improperly interprets the evidence before it, then the question becomes one of law."
>
> *N. E. Tel. & Tel. Co.* v. *Public Utilities Comm.,* 148 Me. 374, 377, 94 A. (2nd) 801.

The above statement was quoted with approval in *Central Maine Power Co.* v. *P. U. C.,* 150 Me. 257, 261, 109 A. (2nd) 512. Among other cases illustrating the "substantial evidence" rule are: *Hamilton* v. *Power Co.,* 121 Me. 422, 117 A. 582; *Public Utilities Commission* v. *Utterstrom,* 136 Me. 263, 8 A. (2nd) 207; *Public Utilities Commission* v. *Gallop,* 143 Me. 290, 62 A. (2nd) 166; *Public Utilities Commission* v. *Johnson Motor Transport,* 147 Me. 138, 84 A. (2nd) 142; *Chapman, Re: Petition to Amend,* 151 Me. 68, 116 A. (2nd) 130; *State of Maine* v. *Ballard,* 152 Me. 158, 125 A. (2nd) 861.

In an earlier statement of the rule Chief Justice Cornish, speaking for the court, said in *Public Utilities Commission* v. *Lewiston Water Comm.,* 123 Me. 389, 390, 123 A. 177:

> "This Court is not an Appellate Court from the Public Utilities Commission, to retry questions of fact already tried and decided by that tribunal. The only power of review relates to questions of law. 'Questions of law may be raised by alleging exceptions to the rulings of the Commission on an agreed statement of facts, or on facts found by the Commission.' (Now R. S. Chap. 44, Sec. 67). 'Facts found by the Commission are not open to question in this Court unless the Commission should find facts to exist without any substantial evidence to support them, when such finding would be open to exceptions as being unwarranted in law.' *Hamilton* v. *Caribou Water, Light and Power Company,* 121 Maine, 422, a case which determines the power of this court on review in this class of cases and establishes the practice in such proceedings."

We are not here concerned with the provisions for additional court review enacted in 1953 under which no case has yet been brought to the Law Court. R. S. Chap. 44, Sec. 69. The present case is governed by Section 67, unchanged in the pertinent language since first enacted in Laws of 1913, Chap. 129, Sec. 53.

The problem before us, as is so often the case, lies not chiefly in the ascertainment of the applicable rules of law, but in their application to the facts.

The contentions of the Company are conveniently summarized in the following table from its brief:

TABLE

"Return found by Commission	$10,064,075
(Percent of $179,250,000 rate base—5.61%).	
Overstatement of above return through erroneous rulings of the Commission as to operating expenses properly includable on a test year basis:	
Additional Federal income tax	$ 118,000
Additional wage costs	105,000
Additional fuel costs	191,000
Promotional expenses disallowed	80,000
Federal income taxes deferred because of accelerated depreciation	353,000
Total	$ 847,000
A. Return which can be earned under present rates	$ 9,217,075
B. Additional amount required to produce a return equal to 5.8% on the rate base	1,179,425*
5.8% return on the $179,250,000 rate base found by the Commission	$10,396,500

*At the current 52% Federal income tax rate, a rate increase of over $2,450,000 would be required to produce this return."

We here note that for the purposes of this case an income tax rate of 52% is applicable to all of the charges in operating expenses and to any additional amount necessary to produce a given return on the rate base. To bring 48 cents additional into the return upon the rate base requires $1.00 in revenue from the customer.

For the Company, the Commission, and the Court, the income tax is neither more nor less than an inescapable fact. Without question, the income tax is properly charged against utility operating revenues for rate making purposes. In other words, the return on the rate base must be computed after deduction of the income tax.

Additional Federal Income tax—$118,000.

The Company urges that the reduction in income tax arising from losses and expenses chargeable against *taxable income,* but not against *public utility operating revenue,* should be a charge against such operating revenue, or, in other words, taken as an operating expense for rate making purposes. The argument is this: The Company lost $209,000 on merchandising operations and made charitable contributions of $17,000 in the test year of 1956. Applying the items against income from utility operations resulted in reducing the corporate federal income tax otherwise payable on the utility taxable income by 52% (the tax rate) x $226,000 (total of the item) or about $118,000.

It is agreed that merchandising losses and gains are neither to be subtracted from nor to be added to utility operating income for rate making purposes. Gains and losses of this type are taken and borne by the stockholders and not the ratepayers. In like manner, contributions to charity come from the stockholders.

The reduction in income tax obviously arises from the impact of the merchandising loss and contributions upon the utility income. Without the latter there would be no income tax to be saved. The Company would have it that the ratepayers should make good to the stockholders such tax reduction. The net amount which the Company seeks from increased rates to cover these items is $118,000. By operation of the 52% income tax an increase of $246,000 would be necessary to yield the desired amount.

The Company is not compelled to remain in the merchandising business, nor need it give its money to charities, no matter how deserving. If it chooses to run two distinct types of business—the one a public utility and regulated, and the other private and unregulated—in one corporate organization, it seems to us entirely reasonable that the income tax chargeable to the utility business for rate making purposes should be no more than the total tax on the corporation. The stockholder has an equity in both the utility and non-utility properties. He is interested in the profits and losses from both types of operations. The surplus exists as a source of strength for the utility as well as the private business. Any significant reduction therein harms the Company, hence the utility operation, and in the long run the ratepayers.

We are not here concerned with the treatment of so-called income taxes deferred. There was no error by the Commission in refusing to charge this item against operating revenue.

Additional Wage Costs—$105,000.

We have held under "additional federal income tax" that the tax savings in question were properly disallowed as an operating expense for rate making purposes. "Additional Wage Costs" present a different problem. Here the inclusion of wages generally in expense is obvious. The issue

is whether a wage increase effective after the test period is to be treated as such an expense.

The Commission refused to include a net item of $105,000 for additional wage costs in its forecast of expenses. By net item we mean the wage increase urged less the income tax reduction therefrom. In brief, $220,000 (wage increase) less $115,000 (52% income tax on $220,000) equals $105,000.

As we read the record, the Commission agrees that under the Company's contract with its employees, in force in 1956, there will be a wage increase in 1957 after the close of hearings in the instant case. There is the finding in the decree that "Wages will increase in 1957." The refusal to include this item in operating expenses is based on two grounds: (1) the increase was not effective in whole or in part in the test year of 1956, and (2) the estimates of cost of operation should be unchanged from the costs in fact of the test year, at least without opening the record to every type of change that might occur in the future.

The Commission in its decree said:

> "We cannot agree that the 1956 expenses should be adjusted upward to include oil and other costs which may be incurred in the year 1957, unless all other figures are varied to take into consideration the effects which might be expected in 1957. It would be impossible from the Record to establish a satisfactory 1957 rate base. It also would be impossible without a great deal of mere conjecture to arrive at fair 1957 revenues and expense items. We believe it to be fairer and more reasonable both to the Company and to the public, and in keeping with the usual practice, where we are so close to the end of the recent year, to use actual figures, rather than speculating as to 1957 possibilities."

A further reason advanced for tying closely to the actual experience of the test year in projecting revenue and ex-

pense in the future, is that the estimated increase in utility revenues will take care of the estimated increase in expense.

In the case of the wages, we know with the maximum degree of certainty attainable in a forecast that in the period for which rates are to be set there will be an increase in net expense. To ignore this probability is to defeat the very idea of fixing rates for the future upon intelligent and informed estimates. Why should a probability such as this be set aside in favor of the experience of the test year, which we know with certainty will not be repeated in the future? The experience of the test year is at best a "guess" for the future. If we can make the "guess" more in line with the probability, in the long run we will have benefited both public and Company. Much obviously must be left to the sound judgment and experience of the Commission. When, however, the Commission refuses to include in its estimates expenses so plainly observable, we must conclude that it has improperly interpreted the evidence.

The governing principle was set forth by the Vermont Court, in approving the test year method, in adopting these words from a Commission report:

> ". . . the propriety of the petitioner's proposed rate in relation to the present time and the immediate future can most reasonably be ascertained from a study of its operations during the most recent time for which data is available, with proper adjustments to show what results such operations would produce in the light of presently known factors relating to operating cost and revenues."
>
> *Petition of Central Vermont Pub. Serv. Corp.*, 116 Vt. 206, 71 A. (2nd) 576.

In the instant case an operating expense to complete the funding of certain pension liabilities in 1956 was properly eliminated by both Company and Commission in the use of the 1956 test year. In like manner, the wage increase must be included.

The Nevada Court, in *Bell Telephone Company of Nevada* v. *Public Service Commission,* 70 Nev. 25, 253 P. (2nd) 602, 608 (decided in 1953), said:

> "Any order as to rates must perforce operate for the future. It cannot act retroactively. A failure to take into consideration the very material increase in operating expenses resulting from these two items again presents a false picture with reference to the future earnings the company may expect. . . . . Without an honest and intelligent forecast as to probable tax, price, and wage levels in the immediate future, the fixing of rates would be a futility."

See also *McArdle* v. *Ind. Water Co.,* 272 U. S. 400, 408, in which we read:

> "But in determining present value, consideration must be given to prices and wages prevailing at the time of the investigation; and, in the light of all the circumstances, there must be an honest and intelligent forecast as to probable price and wage levels during a reasonable period in the immediate future. In every confiscation case, the future as well as the present must be regarded. It must be determined whether the rates complained of are yielding and will yield, over and above the amounts required to pay taxes and proper operating charges, a sum sufficient to constitute just compensation for the use of the property employed to furnish the service; that is, a reasonable rate of return on the value of the property at the time of the investigation and for a reasonable time in the immediate future. *S. W. Tel. Co.* v. *Pub. Serv. Comm.,* 262 U. S. 276, 287, 288; *Bluefield Co.* v. *Pub. Serv. Comm.,* 262 U. S. 679, 692. *Cf. Board of Utility Commissioners* v. *New York Telephone Co.,* 271 U. S. 23, 31."

The Commission argues in its brief:

> "The use of actual figures is the best method to use when fairly possible and is well substantiated

> by the practice of the Commission and this Court . . . This was done in this case, so that the Decree rendered on March 15, 1957 spoke of actual figures in the year 1956. It was not necessary to estimate what repairs might be carried on in a future month, nor how much oil might be burned, nor how many men might be employed, and so on."

In *Gay* v. *Water Co.,* 131 Me. 304, 162 A. 264, cited by the Commission, the precise question here raised does not appear to have been in issue. The point is that the actual figures of the test year on wages plainly do not provide a reasonable basis for judgment on future expense.

We conclude, therefore, that the Commission erred in not including an amount for additional wages in operating revenues, and hence the exceptions covering this issue must be sustained. It is for the Commission, not for us, to determine on the present record before it the amount of such additional wages and to make the proper adjustments arising therefrom in establishing rates for the Company.

Additional fuel costs—$191,000.

During the test year 1956 it appears from the record that the price of oil per barrel rose from $2.55 to $2.95. In its brief, the Company seeks to include in the record an increase of 25 cents in January 1957 on the strength of the Commission's statement:

> "We can take judicial notice of the fact that oil prices have increased and may further rise or may sharply drop."

With this view of judicial notice we cannot agree. The statement is general in nature and does not serve to bring a particular price rise into the record. The Company contends that the estimates of expense should include the cost of oil at the January 1957 price of $3.20, or, in any event at the price at the end of the test year of $2.95. The Com-

mission, however, adopted the total cost of oil in 1956, thus bringing the average cost per barrel below the year end price.

There is a surface resemblance, but no more, between "additional wage costs" and "additional fuel costs." In each instance the Company seeks to adjust the costs in fact of the test year 1956 to make a fair estimate for the future. The difference between the items, however, is wide and basic. On the one hand, the wage adjustment is founded upon a firm contract known in the test year and effective thereafter. On the other hand, the fuel or oil adjustment rests solely on estimates of the future market price of oil beyond the experience of the test year.

There are solid grounds, in our opinion, for sustaining the action of the Commission. First, the experience of the test year should not be cast aside except upon a strong showing of its weakness as a measure for the future. Important as it is to the Company, oil is only one item in the cost of operation. Oil prices may strengthen or soften. No one can with certainty determine the price in the future. Of one fact, all can be certain; namely, that oil cost the Company a stated number of dollars in 1956, the test year adopted by both Company and Commission. Second, the substitution of fact for prophecy at any point in the process of rate making is an advance on the road to certainty. There is, of course, in the acceptance of the 1956 costs no implication of a finding or of an opinion that the price of oil will stay at a fixed level. It yet remains that with the use of test year costs of items fluctuating in price, the projection of costs into the future is based upon the facts of the recorded past. The Commission did no more than tie its estimates of income and expense to the test year.

It is urged by the Company that the Commission is inconsistent in its treatment of oil cost in light of its decree in *Re Lewiston Gas Light Co.*, F. C. #1516, entered on the

same date as the decree in the instant case. In the *Lewiston Gas Light* case the Commission in using 1957 as the test year (including actual experience for a brief period and several months based on estimates only) took oil at the market price in the period of actual operations in 1957. We touch upon the *Lewiston Gas Light* case only for purposes of illustration. In March 1957 the Commission on a record with a test year of 1957 properly could take oil costs experienced in the test year 1957, and on a record with a test year of 1956, in like manner the costs experienced in the test year 1956.

Further, the Commission, charged as we have often said with the finding of the facts, was justified in our view in considering that the growth in gross revenues would care for any increase in the cost of oil. The Company on its part pointed out that in 1956 operating income increased $1,994,000 and operating expense $2,231,000, or, in other words, that increased expense more than offset increased income. It may be noted, however, that $353,000 for income tax deferred, disallowed by the Commission, was included in the expense. If we deduct this item, we find in 1956 the increase in income exceeded and was not offset in full by the increase in expense. We cannot say that the Commission erred as a matter of law on this point. The issue does not lend itself to absolute certainty.

In whatever manner we approach the problem of rate making, we cannot escape prophecy. What will the Company earn in the future? What does the Company require in rates to produce that which it is entitled to earn? The efforts of regulatory commissions, and courts as well in their field, should be directed to a reduction and not to an increase in the weight of prophecy.

In reaching our conclusion on this issue we do not depart from the principles so well stated by Justice Cardozo who, in speaking for the Supreme Court of the United States, in

West Ohio Gas Company v. *Public Utilities Commission of Ohio*, 294 U. S. 79, 79 L. ed. 773, said, at p. 81:

> "We think the adoption of a single year as an exclusive test or standard imposed upon the company an arbitrary restriction in contravention of the Fourteenth Amendment and of 'the rudiments of fair play' made necessary thereby . . . The earnings of the later years were exhibited in the record and told their own tale as to the possibilities of profit. To shut one's eyes to them altogether, to exclude them from the reckoning, is as much arbitrary action as to build a schedule upon guesswork with evidence available. There are times, to be sure, when resort to prophecy becomes inevitable in default of methods more precise. At such times, 'an honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances' . . . is the only organon at hand, and hence the only one to be employed in order to make the hearing fair. But prophecy, however honest, is generally a poor substitute for experience. 'Estimates for tomorrow cannot ignore prices of today.' . . . We have said of an attempt by a utility to give prophecy the first place and experience the second that 'elaborate calculations which are at war with realities are of no avail.' . . . We say the same of a like attempt by officers of government prescribing rates to be effective in years when experience has spoken. A forecast gives us one rate. A survey gives another. To prefer the forecast to the survey is an arbitrary judgment."

In stating the facts Justice Cardozo also said:

> "To ascertain the gross income and the operating expenses the commission confined itself to the business in 1929, predicting on that basis the income and expenses to be looked for in the years to follow. Besides the figures for 1929, there was evidence, full and unchallenged, as to the actual revenue and outlay for 1930 and 1931. The commis-

sion refused to give any heed to that evidence in fixing the new rates."

The difference between *West Ohio* and the instant case is at once apparent. In our case the estimates are based on the experience of the immediate, not the distant, past. In short, 1956 is the test for 1957.

To summarize:

We start here with a test year—1956. The past has been recorded and the record is open to provide the facts of the immediate past as the basis for estimating operations in the immediate future. Plainly, facts which no longer have life in the future must be discarded, e.g., payments for pension amortization. So also facts which with certainty will gain life in the future, but do not affect the operations of the test year, must be weighed by the fact finder, e.g., the wage increase under the firm contract.

We come then to the great mass of items, both of income and of expense, in the operation of the Company. An increase in gross income may be anticipated from the record of a growing and expanding company. Increased use will produce increased revenue, at least to meet costs on the basis of the test year. Further, it seems to us that the Commission, here charged with the duties of regulation, properly concluded that estimated increase in revenue would absorb increases in costs. That this conclusion could not be reached with the precision and exactness of the answer to a problem in mathematics, does not deprive it of validity as an estimate in rate making.

The test year in the instant case is the very period within which the case was heard by the Commission. It is the annual period immediately preceding the decision. If the Commission adjusts the results of the test year to meet facts, i.e., the wage increase, and the pension amortization, it is on firm ground. To do more, with reference of course

to admittedly proper items of expense, would destroy or seriously weaken the effectiveness of the test year, a valued and respected tool in rate making.

We find no error on the part of the Commission in refusing to allow additional fuel costs above the costs of the test year. The exceptions with reference thereto are overruled.

Promotional expenses disallowed—$80,000.

The Commission made the following findings and rulings:

> "The Company spent for the year 1956 the sum of $297,649 for sales promotion and all of this has been claimed as an electric operating expense according to the various exhibits offered by the petitioner . . . We exclude a gross amount of $166,-700, or a net of $80,000 of this expense for rate purposes. We do not mean to infer in any way that the management may not continue to carry on such costs, so long as the cost falls on the shoulders of the stockholders, who will be the ones to benefit from the effectiveness of such programs."

This item differs among other respects from the items previously discussed in that here we have an actual expense of the test year 1956 disallowed in forecast of future expenses. Additional income taxes, wage costs and fuel costs were expenses which the Company sought to add to the expenses in fact of the test year.

The Company's objections to the findings and rulings are twofold; first, they constitute an invasion of management, and second, they lack any supporting evidence.

The applicable rules are well understood. The following are illustrative statements:

> "Good faith is to be presumed on the part of the managers of a business. . . In the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay. . . The suggestion is made that there is no evidence of competition.

We take judicial notice of the fact that gas is in competition with other forms of fuel, such as oil and electricity. A business never stands still. It either grows or decays. Within the limits of reason, advertising or development expenses to foster normal growth are legitimate charges upon income for rate purposes as for others . . . When a business disintegrates, there is damage to the stockholders, but damage also to the customers in the cost or quality of service."

West Ohio Gas Co. v. *Public Utilities Commission,* 294 U. S. 63, 72.

"The function of a public service commission is that of control and not of management, and regulation should not obtrude itself into the place of management. . . This rule is recognized in all of the cases. This matter of salaries and advertising expense calls for the exercise of judgment on the part of the management of the company. Good faith on its part is to be presumed. Although these expenses should be scrutinized with care by the commission they should not be disallowed or reduced unless it clearly appears that they are excessive or unwarranted or incurred in bad faith." *Petition of New England Tel. & Tel. Co.,* 115 Vt. 494, 66 A. (2nd) 135, 145.

The good faith of the management of the Company is not challenged in the slightest degree. The question is whether "it clearly appears that the expenses are excessive or unwarranted," or, stated differently, whether expenses in excess of the allowance by the Commission are "within the limits of reason."

In our discussion of this exception we are not concerned with the particular purpose and amount of each charge within the item. In general, promotional expense of the nature under discussion may properly be charged to operations.

The accounts of the Company for the test year show in round figures for sales promotion expenses; commercial de-

partment $147,000, industrial development department $61,000, public relations department $89,000, total $297,000.

From the accounts it plainly appears that the following specific items were disallowed by the Commission:

"COMMERCIAL DEPARTMENT

Administrative	$ 24,602.45	
Commercial Lighting	65,730.23	
Commercial Heating, Cooking and Refrigeration ...	6,982.18	
Farm Service	15,642.53	
Demonstration and Home Service	27,412.92	
Kitchen Planning	31.16	
Domestic	6,427.96	
		$146,829.43

"PUBLIC RELATIONS DEPARTMENT

Institutional Advertising ..		19,442.05
Institutional Displays		410.56
		$166,682.04"

The Commission thus struck out the total expense of the commercial department and allowed the total expense of the industrial development department and the expenses for public relations, less the items for institutional advertising and display.

The Commission, in our view, in striking the specific items of $167,000 from the test year total expense of $297,000 unreasonably substituted its judgment for that of management. The items struck were not, as we read the decree, considered by the Commission to be as a whole improper or unlawful charges against the ratepayers. The Company was left by the Commission with a permitted allowance of $130,000, or less than 50% of its prior experienced expense to meet the needs in the promotional field.

To place such a reduction chiefly on the ground that an expanding utility such as the Company should so severely reduce expense of this type, is clearly a substitution of the Commission for the Company in the management of the utility.

It is unnecessary in our view to consider each charge in detail. The exceptions by the Company covering this item must be sustained. From the record, the Commission will determine the allowance for this item, with proper adjustments in establishing rates for the Company.

Federal income tax deferred because of accelerated depreciation—$353,000.

In our consideration of operating expenses we come to "income tax deferred," to use the Company's terminology, in the amount of $353,000 arising from accelerated depreciation. It may be noted that this item does not represent a tax saving in fact from offset of loss against income, or actual incurred expense such as wages, or oil. As the name indicates, the item, in the opinion of the Company, is an expense to be incurred in later years for which provision ought to be made from today's ratepayers.

Briefly, the situation is this: The Commission charges depreciation for rate making purposes on the straight-line method, and permits (there is no indication that the Commission requires) accelerated depreciation for income tax purposes. In each method the depreciation is spread over the life of the property; in equal installments in straight-line depreciation, and in greater than average amounts in early years under the accelerated methods. The sum-of-the-years-digits method discussed in the Company's brief is one variation of accelerated depreciation.

There is no controversy between the Company and the Commission about the allowance of straight-line depreci-

ation for rate making and the allowance of accelerated depreciation for income tax purposes.

The Company's proposal comes to this:

(1) Depreciation for rate making purposes as at present, "straight-line.";

(2) Depreciation for income tax purposes, at accelerated depreciation, e.g., "sum-of-the-years-digits" method;

(3) The income tax as an operating expense for rate making purposes to be "normalized" at the level produced by straight-line depreciation;

(4) The "normalized" tax to consist of (a) the actual tax, plus (b) the tax reduction arising from use of the accelerated depreciation in early years, or "income tax deferred.";

(5) The balance of "income tax deferred" (in effect an interest free loan to the Company) to be deducted from the value of the property in establishing the rate base;

(6) "Income tax deferred" to be a reserve to provide the difference between actual less "normalized" tax in the later years.

We are unable to agree with the argument for the Company, which is in substance this: (1) in years to come the taxes deferred will be payable and fairness requires equalization of the tax load between present and future ratepayers; (2) Congress, in enacting Section 167 of the Internal Revenue Code of 1954 liberalizing depreciation allowance, intended that the benefit should accrue to the taxpayer and not to the customer or ratepayer as here; (3) "normalization" of income taxes under accelerated amortization (Sec. 168 of the Code, *supra*) requires like treatment here.

From our reading of Section 167 of the Code, *supra,* and the House and Senate Committee reports thereon, to which

the Company has directed our attention, we are unable to find an intent on the part of Congress that the ratepayers of a regulated utility should provide an interest free loan to the Company through present payment of a deferred tax. We must not read more into the Act than reasonably may there be found. 3 U. S. Code Cong. & Adm. News, 83rd Congress, Second Session (1954), House pg. 4048, Senate pg. 4654.

The Company also points to the treatment of accelerated amortization and income taxes by the Commission. Under Section 168 of the Code, *supra,* certain properties may be written off in whole or in part in a five year period. The Commission has permitted the "normalization" of income taxes resulting therefrom, and it is now urged that a like principle governs the "income tax deferred" under discussion.

There are, however, wide differences between the programs. First, accelerated amortization—the quick write-off—bears no relation to the life of the property. It fairly appears that Section 168 was a measure designed to aid the defense effort. Second, in the accelerated depreciation program the cost is recovered during the life of the property precisely as with the straight-line method. In short, accelerated amortization with its quick write-off and limited period of operation is not like accelerated depreciation with its change of pace, but no more, in recovery of cost over the full life of the property.

The proper treatment of depreciation and taxes calls for the exercise of judgment by those trained in the field of utility regulation. There are choices to be made in the impact of both depreciation and taxes upon the present and future ratepayers. The Commission, apart from the matter of accelerated amortization, has allowed only the current income tax as a charge in rate making. It takes the position in substance that the creation of an income tax deferred

reserve under the circumstances outlined would extend into the unforeseeable future charges to provide for expenses which might never arise, or to meet which, when and if the need should arise, the Company could seek relief before the Commission. There is nothing unreasonable in the conclusion reached. For example, a reduction in the tax rate might substantially lessen any anticipated impact on future ratepayers. Rates do not stand forever, and corrections may be made from time to time.

Whether it would be proper for the Company to employ the same method of depreciation for both rate making and income tax we need not, nor do we, consider. We here do no more than approve as a matter of law the ruling of the Commission refusing to allow the requested charge for "income tax deferred" against income.

No decision of a court of last resort on this issue has been called to our attention. In the following cases the problem is fully discussed: *City of Pittsburgh* v. *Pennsylvania Public Util. Com'n.* (Pa. Superior Court), 128 A. (2nd) 372 (denying "normalization" of taxes from accelerated depreciation); *Re Amere Gas Utility Co.,* Docket G-6358 (F. P. C. 1956) 15 PUR (3rd) 339 (accounting case with indication of approval of "normalization"); *The Effect on Public-Utility Rate Making of Liberalized Tax Depreciation Under Section 167,* 69 Harv. Law Rev. 1096 (1956); *Economic and Regulatory Aspects of Accelerated Depreciation* (Guerckken) 58 P. U. Fortnightly 145 (August 1956).

The exceptions of the Company covering this item are overruled.

Rate of Return—5.61%.

The Commission found a rate of return of 5.61% on the rate base was "more than fair and reasonable" on the basis of the evidence before the Commission in the instant case.

The Company's objection to the finding is that it was without support of any substantial evidence and was unfair and unreasonable.

There is no controversy about the applicable rule of law. The Company is entitled to a fair return, and less than a fair return would be confiscatory. We are not here concerned with any limiting factor upon a rate of return imposed by maximum reasonable worth of service. See *Hamilton* v. *Power Co.*, 121 Me. 422, 117 A. 582.

Fair return has been defined and discussed in the following illustrative cases:

> "A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties."
>
> *Bluefield Co.* v. *Public Service Commission,* 262 U. S. 679, 692-693, 67 L. Ed. 1176, 1182-83.
>
> "By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."

> *Federal Power Commission* v. *Hope Natural Gas Co.*, 64 S. Ct. 281, 288, 88 L. Ed. 333, 345.
>
> "It is repeatedly stated or implied in the decided cases, so far as we know without contradiction, that one of the constitutional rights of a regulated utility is the right to earn a sufficient return to maintain its credit and to obtain additional capital when needed to enable it to serve its public."
>
> *New England Tel. & Tel. Co.* v. *Department of Public Utilities*, 327 Mass. 81, 94, 97 N. E. (2nd) 509, 516.
>
> "The public properly demands service and to fulfill these demands the Company must expand. It cannot serve or expand if its financial structure does not attract confidence."
>
> *Central Maine Power Co.* v. *P. U. C.*, 150 Me. 257, 277, 109 A. (2nd) 512.

It will serve no useful purpose in our view to review the mass of testimony from financial experts on the rate of return necessary to support the enterprise and attract new capital. There is no warranty of certainty in matters of this nature.

Much stress is placed by the Company upon the decision of the Commission fixing the rate of return at 5.8% in the 1953 Rate Case, in which the Commission thoroughly covered all aspects of the Company's operations. It was reversible error on the evidence, says the Company, to reduce the rate below the 1953 level.

The Commission, in its decree, said:

> "A great deal of evidence is contained within the confines of the Record in regard to rate of return. Mr. Kosh and Dr. Foster, both expert witnesses with considerable experience in the field, produced detailed exhibits and explained their varying points of view in their testimony. In general, Mr. Kosh concluded that a fair rate of return to this

> Company under present conditions should be between 5.25% and 5.5%. Dr. Foster, on the other hand, maintained that a fair rate should not drop below 5.8%, as requested by the Company."

The Company contends that the Commission, without the support of any substantial evidence, failed and refused to recognize facts, summarized as follows:

The requirements for working capital increased since the 1953 Rate Case. Through changes in the due dates of the corporate income tax, the Company lost benefits from income tax accruals through the year. A larger and more costly inventory was required, and in particular an oil inventory with oil no longer purchased on consignment. The 1957 rate base included a relatively smaller proportion of "current value" (R. S. Chap. 44, Sec. 18) than the 1953 Rate Case.

In brief, the Company argues that the 1957 rate base, acceptable to it in this case, is a minimum rate base and that therefore a higher return than (or at least a return not less than) 5.8% is required.

There was no error, however, in not including additional working capital or giving greater weight to the "current value" factor in the 1957 rate base. The Company in effect would have us make additions to the base, but this cannot presently be done. The issue is not whether the 1957 rate base was correctly computed, but what shall be the rate of return thereon.

The rate of return of a utility is not, and in this the Company does not disagree, static. The 1953 Rate Case decree did not fix 5.8% as the point of departure for 1957. It was admissible in evidence, and in absence of other testimony no doubt would have strong persuasive value for the fact finder. Here the Commission had before it the testimony of experts in the field of utility financing—"fair return" experts. They testified upon the financial requirements of the

Company and gave their opinion upon the rate of return necessary to insure a fair and reasonable return upon the rate base.

Would we, sitting as finders of fact, have fixed the rate of return at 5.61%? This is not the question before us. Our authority and function in cases arising on exceptions from the Commission are found in the statutes and rules of law stated at the outset of the opinion.

We find no reason in law why the Commission in the exercise of its appointed task could not accept the evidence of the one expert and reject the evidence of the other. Having accepted the views of Mr. Kosh, it could properly reach a rate of return of 5.61%. Nor can we say that the line between a fair and unfair return lies at 5.8%, or at a point above 5.61% on the 1957 rate base. The exception relating to the rate of return is overruled.

Summary:

The Commission is upheld and exceptions overruled on issues relating to income tax saved or deferred, additional fuel costs, and rate of return.

The Commission is overruled and exceptions sustained on issues relating to additional wage costs and promotional expenses.

The entry will be

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

MARCEL L. BILODEAU
vs.
MAINE EMPLOYMENT SECURITY COMMISSION
AND
CONTINENTAL MILLS

* * * *

ROLAND E. GERMAIN
vs.
MAINE EMPLOYMENT SECURITY COMMISSION
AND
BATES MANUFACTURING COMPANY

* * * *

ISIDORE SHABAN
vs.
MAINE EMPLOYMENT SECURITY COMMISSION
AND
PEPPERELL MANUFACTURING CO.

Kennebec. Opinion, November 21, 1957.

M.E.S.C. Unemployment Compensation. Strike. Labor Dispute. Work Stoppage.

Sec. 15, Subsec. IV of the Maine Employment Security Law provides that an individual is disqualified if his unemployment is due to a stoppage of work caused by a labor dispute where the individual was last employed, unless such individual was a non-participant and and a non-member of the grade and class of employee involved in such dispute as described in Subsec. IV, A and B.

The term "stoppage of work" refers generally to a cessation of plant operations.

"Labor dispute" broadly includes any controversy concerning the terms or conditions of employment or arising out of the respective interests of employer and employee.

The work made vacant by a strike is not "new work" within the meaning of Sec. 15, Subsec. III, B, 1; the work made vacant by a strike is "new work" only to strangers to the strike.

The Legislature did not intend Subsec. III, B, 1 to operate in direct contradiction to Subsec. IV of Section 15.

The Maine Employment Security Law was never intended to lend itself as a medium through which financial aid would be provided for the prosecution and support of a labor dispute.

ON REPORT.

These are petitions for unemployment compensation before the Law Court upon report following a denial of benefits. Case remanded to the Superior Court for entering of a decree sustaining the decree of the Commission.

Berman, Berman & Wernick, for plaintiff.

Milton L. Bradford, for Commission.

Skelton & Mahon, for Continental Mills.

Baston, Snow, Rice & Boyd and
Maurice Roux, for Pepperell Mfg. Co.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

TAPLEY, J. On report. These cases are reported from the Superior Court for Kennebec County, with stipulation by all the parties that they be considered together as the issues in all three cases are the same. The claimants are employed as laborers in the Bates Manufacturing Company, Continental Mills and Pepperell Manufacturing Co. respectively. The Textile Workers Union of America (C.I.O.) represents the claimants for purposes of collective bargaining and had signed collective bargaining agreements with the three companies. In February of 1955 the three Maine companies notified the Textile Workers Union of their desire to terminate the contracts and thereafter negotiations were undertaken with the ultimate purpose in mind of agreeing on new contracts. Proposals were made on the

one side and the other and finally, on May 1, 1955, Bates Manufacturing Company abandoned its demand for a 10c an hour wage cut and accepted the terms and conditions of the contract which had previously been in force and claimant Germain and the other employees at Bates resumed work on May 2, 1955.

Continental Mills, on May 13, 1955, agreed to accept the previous year's contract and Bilodeau and fellow workmen began work at the Continental on May 16, 1955.

The Pepperell Manufacturing Company remained firm in its wage and hour demands until July 15, 1955 when it also agreed to the terms of the previous year's contract and Mr. Shaban went to work on July 15, 1955.

We shall consider only Mr. Bilodeau's claim as the factual questions and problems of law in each case are substantially the same.

Mr. Bilodeau was employed by the Continental Mills as a Barber-Coleman spooler. He seeks compensation benefits from April 17th to May 14th, 1955. On April 18, 1955 he made application for unemployment compensation which resulted in the finding evidenced by a deputy's decision that "it is decided that your unemployment was due to a stoppage of work because of the labor dispute at the place you were last employed, and that you belong to the grade and class of workers who participated in or who were directly interested in the labor dispute, and you are disqualified for benefits in the period indicated above." The deputy's decision was appealed to the Appeal Tribunal which affirmed the decision of the deputy and this decision in turn was reviewed by the Employment Security Commission. The Employment Security Commission approved the action of the Appeal Tribunal, with one member dissenting.

The Commission based its decision on the provisions of Sec. 15, Subsec. IV of the Employment Security Law as ap-

plied to its findings of fact. The Commission in its decision decided other issues which it considered not pertinent to the disqualification provisions because of the rule laid down in *Dubois and Remillard* v. *Maine Employment Security Commission,* 150 Me. 494, which requires the Commission "to determine all of the issues which are properly and adequately raised by the evidence." According to the Commissioners' decision, the claimant was not entitled to unemployment compensation because the circumstances and facts were such that they worked to his disadvantage in that they disqualified him for benefits under provisions of Sec. 15, Subsec. IV. The Maine Employment Security Law disqualifies individuals for benefits if they come within certain prescribed circumstances:

> "IV. For any week with respect to which the commission finds that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which he is or was last employed, provided that this subsection shall not apply if it is shown to the satisfaction of the commission that:
>
> > "A. He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and
> >
> > "B. He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute;
>
> "Provided that if in any case separate branches of work which are commonly conducted as separate businesses in separate premises are conducted in separate departments of the same premises, each such department shall, for the purposes of this subsection, be deemed to be a separate factory, establishment or other premises."

The Commission decided that the claimant was not entitled to relief because his activities were such in connection with his employer and the Union that he disqualified himself from receiving benefits. We shall first consider the question as to whether the Commission erred in deciding that the claimant was not qualified to receive benefits because the circumstances of his case were found to be within the category of Sec. 15, Subsec. IV. This section sets out what acts or conditions cause disqualification of an individual. The individual is disqualified if the unemployment is due to a stoppage of work caused by a labor dispute where the individual was last employed. These terms of disqualification do not apply, however, if it can be shown to the satisfaction of the Commission that:

> "A. He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and
>
> "B. He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute;"

Claimant maintains that Sec. 15, Subsec. IV becomes a nullity as the circumstances of the case fall within the meaning and intent of Sec. 15, Subsec. III-B, and that the Commission committed legal error in finding Subsec. III-B of Sec. 15 "not applicable to this case." This Subsec. III-B reads:

> "B. Notwithstanding any other provisions of this chapter no work shall be deemed suitable and benefits shall not be denied under the provisions of this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:
>
> "1. If the position offered is vacant due directly to a strike, lockout, or other labor dispute;

> "2. If the wages, hours or other conditions of work are substantially less favorable to the individual than those prevailing for similar work in the locality;
>
> "3. If as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization."

It was the obvious intention of the Legislature in enacting Subsec. IV of Sec. 15 to make a rule which would govern the payment of benefits to individuals who found themselves without employment because of stoppage of work occasioned by a labor dispute. The first paragraph of Subsec. IV provides the individual is entitled to no benefits if the Commission finds that the unemployment is due to a stoppage of work caused by a labor dispute. It is apparent that the Legislature understood there would be cases whereby an employee would suffer loss of employment income as a result of the stoppage of work because of a labor dispute wherein he had no participation, either directly or indirectly. Under these circumstances the Legislature, not desiring to unjustly withhold benefits from an employee, established exceptions to the general rule so that even though the work stoppage was caused by a labor dispute, the employee who did not participate in the financing or was not directly interested in the labor dispute which caused the stoppage of work could receive benefits. The exceptions provide that he must not belong to a grade or class of workers which were participating in financing or directly interested in the dispute. The Legislature has said in words of unmistakable meaning that if the employee loses his employment and income incident thereto because of a work stoppage caused by a labor dispute and he actively participates in this labor dispute, he is not entitled to receive employment compensation as a result of the stoppage of work occasioned by the dispute. On the other hand, if he suffers loss of income because of the work stoppage and is free of participation in

the labor dispute causing it, he should be permitted to qualify for unemployment benefits.

We now consider the facts of the Bilodeau situation which are to be interpreted in the light of Sec. 15, Subsec. IV in order to determine the validity of Mr. Bilodeau's claim. The statute uses the phrase "stoppage of work." There are a number of definitions of words given in the Maine Employment Security Law but we find none defining "stoppage of work." There have been definitions of the term established in other jurisdictions. The term "stoppage of work" refers generally to a cessation of plant operations. *Ablondi, et al.* v. *Board of Review* (Superior Ct. App. Div.), 73 A. (2nd) 262 (N. J.); *Great A. & P. Tea Company* v. *New Jersey Dept. of Labor and Industry,* etc. (Superior Ct. App. Div.), 101 A. (2nd) 573 (N. J.). The State of New Jersey has in its Unemployment Compensation Act a provision practically identical to Sec. 15, Subsec. IV of the Maine Law. In the case of *Gerber* v. *Board of Review,* etc. (Superior Ct. App. Div.), 115 A. (2nd) 575 (N. J.), the question of definition of the term "labor dispute" arose. The court said on page 578:

> "The term broadly includes any controversy concerning terms or conditions of employment or arising out of the respective interests of employer and employee."

It is interesting to note that the *Gerber* case involved a labor dispute occasioned by the breaking down of negotiations seeking the consummation of a labor contract between the Company and the Union.

There can be no question that the unemployment of Mr. Bilodeau was occasioned by the "stoppage of work" within the meaning of the term as used in the Act.

The "stoppage of work" is not sufficient in and of itself to deprive Mr. Bilodeau of his unemployment compensation unless this "stoppage of work" existed because of a labor

dispute at the mill. On April 15, 1953 the Union and the employer entered into a written contract, this contract to continue in force until April 15, 1955. Previous to termination date, the parties attempted negotiations of a new contract but were unsuccessful in their efforts, so on April 15, 1955 the contract terminated without replacement by a new one. There existed an inability on the part of the employer and Union to agree on conditions affecting both labor and management. In other words, there arose a dispute in which labor was vitally concerned, particularly as to fringe benefits and wages. Under these facts there existed a labor dispute which was the primary cause of the work stoppage. *Gerber* v. *Board of Review,* etc., *supra; Unemployment Compensation Commission of Alaska* v. *Aragon,* 329 U. S., 143; *Johnson* v. *Iowa Employment Sec. Com.,* 32 N. W. (2nd) 786 (Iowa). See 28 A. L. R. (2nd) 287.

81 C. J. S., 263, Sec. 175:

> "A 'labor dispute' within the meaning of a provision rendering persons unemployed because of a labor dispute ineligible for unemployment benefits may exist in the absence of a labor contract. Such a dispute exists where a union and the employer are unable to agree on the terms of a contract to be entered into between them. Where an existing contract has expired or is about to expire, a dispute with respect to the terms of a new contract, or the modification of the old, constitutes a labor dispute within the meaning of the statute."

The provisions of the disqualification section (Sec. 15, Subsec. IV) are such that even though the claimant became unemployed because of a work stoppage existing on account of a labor dispute, he may still obtain unemployment benefits if he can show to the satisfaction of the Commission that:

> "A. He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

> "B. He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute;"

The claimant in order to relieve himself of disqualification has the burden of proving to the satisfaction of the Commission that he (1) did not participate in or finance or was not directly interested in the labor dispute; (2) that he did not belong to a grade or class of workers which immediately before the commencement of the stoppage of work were members employed at the premises at which the stoppage occurred, any of whom were participating in financing or directly interested in the dispute. *Wasyluk* v. *Mack Mfg. Corporation, et al.* (Superior Ct. App. Div.), 68 A. (2nd) 264 (N. J.)

Mr. Bilodeau testified, and the record demonstrates, that he was Secretary of the Continental Local and he participated in the meetings as the Secretary as well as a member. He further testified that he attended and joined in a meeting having to do with the question of acceptance of a decrease in pay and a decision to stay away from work. On the question of participation in or being directly interested in a labor dispute, the record discloses the following questions addressed to Mr. Bilodeau and his answers:

> "Q. Now, whether or not, of your own knowledge, as a member of the local union, as a member of the International union, as a secretary of the local union at the Continental, you all went out from your employment on a 'No contract, no work' basis?
>
> A. Yes.
>
> Q. That is correct, isn't it?
>
> A. Yes."

There appears no question that the claimant participated and was directly interested in the labor dispute which caused a stoppage of work and by no conceivable stretch of the imagination does he come within the exceptions which would permit him to receive unemployment benefits.

The claimants strongly urge that this case should be determined under Sec. 15, Subsec. III-B-1, as this subsection in the light of the facts applies and, in effect, nullifies and causes to be ineffectual the provisions of Sec. 15, Subsec. IV.

The Commission in considering Sec. 15, Subsec. III-B-1, found:

> "It seems obvious to us that claimant's contention that the proposal by the Company constituted *new* work is without merit. There is no doubt in our minds that the Legislature did not intend subsection III of Section 15 to operate in direct contradiction to subsection IV of Section 15 and we conclude that subsection III, B of Section 15 is not applicable to this case."

This finding is well supported by *Barber* v. *The California Employment Stabilization Commission,* 278 P. 2d 762 (Cal.) (1955). In the *Barber* case the court was concerned with two provisions of the Unemployment Insurance Act bearing marked similarity to the provisions of the Maine law involved in the instant case. In the *Barber* case the court said on page 772:

> "If the appellants had not left their work because of the trade dispute, a sound argument could be made that they could not be deprived of benefits because they refused 'new work' made vacant because of the strike. But section 13(b) (1) has no application to situations in which section 56(a) is applicable. If the men left their work because of a trade dispute within the meaning of section 56(a), they are ineligible for benefits during the period of the strike, because the jobs thus made vacant are their jobs and not as to them 'new work.' " ****

> "Under sections 56(a) and 13(b) (1) an employee cannot be denied benefits because he refuses to become a strike breaker, but that rule does not apply to work in the claimant's last employment. That is not 'new work.' The work made vacant by a strike is 'new work' only to strangers to the strike. It is not 'new work' to the strikers themselves when they fall within the classification made by section 56(a)."

The claimants' contention is without merit.

The Maine Unemployment Security Law "is designed to create a sound employment security law to encourage employers to provide more steady work, to maintain the purchasing powers of workers becoming unemployed, and thus to prevent and limit the serious social consequences of poor relief assistance." This Act was never intended to lend itself as a medium through which financial aid would be provided for the prosecution and support of a labor dispute. Such use of the Act would be against public policy.

The claimants are not entitled to receive unemployment benefits as they are disqualified under provisions of Sec. 15, Subsec. IV of Chap. 29, R. S. 1954.

The entry will be,

Remanded to Superior Court for entering of a decree sustaining the decree of the Commission.

FARMINGTON DOWEL PRODUCTS CO., INC.
vs.
FORSTER MANUFACTURING CO., INC.

Franklin. Opinion, November 21, 1957.

Unfair Sales Act. Manufacturers. Distributors. Cost. Legislative Intent. Statutory Construction.

The "Unfair Sales Act" being in derogation of the common law, must be strictly construed. R. S. 1943, Chap. 184.

An offending merchant is entitled to be informed by the statute in explicit and unambiguous language what acts and conduct are prohibited.

Courts are generally agreed that to constitute an "unfair sale" two factors must coexist (a) wrongful intent and (b) a sale below cost.

Where the "Unfair Sales Statute" uses a cost definition which is manifestly applicable only to "distributors" of merchandise, that is a sufficient indication of the legislative intent not to apply it to manufacturers.

It is not necessary to pass upon the "good faith" cost rule.

Where one section of a statute refers to a retailer selling merchandise of "his or its own manufacture" with a certain markup to cover cost, the statute does not necessarily apply to manufacturers because the statute so applied is otherwise obscure and the "markup to cover cost" referred to is meaningless as applied to a producer or manufacturer.

ON EXCEPTIONS.

This is a treble damage action brought against a manufacturer under R. S. 1954, Chap. 184. The case is before the Law Court upon defendants' exceptions to the overruling of a Special Demurrer. Exceptions sustained.

Berman, Berman & Wernick,
John J. Flaherty, for plaintiff.

Locke, Campbell, Reid & Hebert, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

WEBBER, J. This case involves a construction of the statute entitled "Unfair Sales Act," R. S. 1954, Chap. 184. Plaintiff here has brought an action at law seeking treble damages resulting from alleged advertising, offers to sell, and sales below cost with intent to injure competitors, including the plaintiff, and to destroy competition. The defendant is a manufacturer and producer alleged to be selling its product at wholesale and retail. By special demurrer the defendant raises several legal issues, perhaps the most important of which is the vital question as to whether the statute under consideration has application to manufacturers and producers.

We have had only one previous occasion to examine this statute. In *Wiley* v. *Sampson-Ripley Co.,* 151 Me. 400, we held that the provision therein that proof of sales below cost constitutes prima facie evidence of an intent to injure competitors and destroy competition was unconstitutional. By dictum we indicated our acceptance of the legal principle that legislative prohibition of sales below cost made with proven intent to injure competitors or destroy competition was within the police power. That opinion, however, has not of course in any way diminished our obligation to scrutinize each set of facts as presented and determine whether or not the statute is in other respects constitutional as applied to those facts.

This statute, being in derogation of the common law, must be strictly construed. *Wiley* v. *Sampson-Ripley Co., supra.* In *Loughran Co.* v. *Lord Baltimore Candy & T. Co.* (1940), 178 Md. 38, 12 A. (2nd) 201, 204, the court said: "In other words, we are not to infer that the Legislature intended to change common law principles beyond what is clearly expressed by the statute." Conduct which was lawful at com-

mon law is by the statute made wrongful. The statute has newly created what may be termed a business crime. The offending merchant may find himself faced with either criminal prosecution, the threat of injunction, or an action at law for damages. In either case he is entitled to be informed by the statute in explicit and unambiguous language what acts and conduct are prohibited.

Many states have taken legislative action to prevent so-called "unfair sales." Courts which have construed these enactments have generally agreed that two essential factors must be shown to coexist, the wrongful intent and the sales below cost. (For the sake of simplicity we refer to sales rather than to advertising or offers to sell.) Absent either factor, the prosecution for violation must fail. Since from the earliest days of trade, merchants, whether starting a new enterprise or engaging in an established business, have entertained the not unnatural inclination to attract as many customers as possible away from their competitors, it must be expected that the intent to injure competitors will often be present. So long as the intent is not implemented by the unlawful act, however, the statute may not be invoked. The merchant who seeks by "building the better mousetrap" or by some lawful competitive inducement to corner the market for himself, but without resort to any conduct prohibited by law, may possess the requisite intent to injure or destroy competition and yet not be in violation of the statute. In short, proof of either of the essential factors without proof of the other will not suffice. Thus the public is assured of the lowest prices which can be produced by fair and lawful competition. It becomes apparent, therefore, that it is most important that the language of the statute inform the business man of ordinary intelligence whether his particular business operations are covered by the statute, and if so, what conduct on his part is specifically prohibited. If the statute is so vague and uncertain with respect to these matters as to leave him to guess as to its

application, it is unenforceable as to him. This basic rule applies alike to criminal prosecution and injunctive relief. As was stated in *Loughran Co.* v. *Lord Baltimore C. & T. Co., supra,* at page 205: "The right of injunctive remedy and the application of penal statutes should not be susceptible of doubt or conjecture.[1]"

We note at the outset that the Maine statute contains language unlike that found in the statutes of other states. In a majority of the states, the statutes are made applicable only to those who are engaged in the distributive trades. A relatively small group of states have extended the restrictions against "unfair sales" to producers and manufacturers. Quite significantly, we think, those statutes which are recognized as applying to producers and manufacturers include a definition of production cost. The definition found in the California law (Ann. Cal. Code, Sec. 17026) is reasonably representative. The term "cost" as applied to production is defined as including the cost of raw materials, labor and all overhead expenses of the producer; and as applied to distribution "cost" means the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor or vendor. It is apparent that students of the subject have regarded Maine as one of the states regulating only the distributive trades. In 1948 an article in 57 Yale Law Journal 391 at 412 contained the following: "Nine of the statutes[2], not confining themselves to distributive trades, deal also with producers and define their costs as 'the costs of raw materials, labor and all overhead

[1] As a result of the Loughran case, the Maryland Act relating to "unfair sales" was re-drafted in 1941 and all the features noted by Loughran as objectionable, some of which appear in the Maine statute, were removed. In its new form the Maryland law was approved in *Blum* v. *Engleman* (1948), 190 Md. 109, 57 A. (2nd) 421.

[2] Callmann, Unfair Competition and Trade Marks, 2d Ed. (1950) page 537, lists ten states which define production cost. They are Arkansas, California, Colorado, Kentucky, Montana, Oregon, Utah, Washington, Wyoming and South Carolina.

expenses.' The remainder refer only to costs of wholesalers and retailers, and state the minimum level to be invoice cost plus the 'cost of doing business.' " In a footnote the author includes Maine as one of the states falling into the latter group (page 413). Were these writers justified in assuming as they apparently did that the Maine law is intended to apply only to the distributive trades, and not to producers and manufacturers? What does the statute say?

Sec. 1, Subsections I and II define "cost to the retailer" and "cost to the wholesaler." It is true of course that every producer and manufacturer must sell his product. This he does usually at wholesale and less commonly at retail. In this limited sense a manufacturer is a wholesaler or a retailer. But in ordinary and accepted business parlance the terms have distinct meaning and do not overlap. In the business world the producer or manufacturer is considered to be one who makes or assembles the merchandise he sells. The wholesaler and retailer are thought of as buying merchandise for resale, the essential distinction between them being ordinarily in the relative quantities purchased and sold. We do not think that the terms "wholesaler" and "retailer," without more, would be understood by business men of ordinary intelligence and possessed of reasonable familiarity with the common and accepted meaning of the terms as having any application to producers or manufacturers. Moreover, the cost definition only serves to support the assumption that only the distributive trades are affected. The "cost to the retailer" is defined as "the invoice cost of the merchandise to the retailer within 30 days prior to the date of sale, or the replacement cost of the merchandise to the retailer within 30 days prior to the date of sale, in the quantity last purchased, whichever is the lower." (To this is added freight, cartage and the cost of doing business as defined.) For purposes of this discussion, the "cost to the wholesaler" is essentially the same. We note at the outset that these cost definitions are in every material

respect similar to those employed in the statutes of other states which seek to regulate *only the distributive trades.* The term "invoice cost" would be understood in the business world to import a purchase of the very merchandise now being sold. It is a term ordinarily employed to designate the cost of merchandise bought in the ordinary channels of trade. It would be inconceivable, we think, that the term would be understood to embrace the cost of raw materials and labor, the two primary costs of manufacture. Surely there is no "invoice cost" of labor in any recognized sense. Our view is further strengthened when we turn to the alternative "replacement cost." For here the phrase is added, "in the quantity last purchased." Here is a clear indication that the Legislature, in defining cost, contemplated a "purchase" of the very goods now being sold. This phrase can in our judgment only relate to the distributive trades.

We note with interest that in 1953 the Legislature amended the Act by adding to Subsection II of Sec. 1 thereof a new paragraph numbered D which reads:

> "D. Sales made by a cigaret *distributor* to a licensed *wholesale dealer* or to the operator of 15 or more vending machines shall not be subject to a markup of 2% as stated in the provisions of the preceding paragraph, but such sales shall be subject to full trade discount only." (Emphasis supplied) (P. L. 1953, Chap. 308, Sec. 112)

This new paragraph was incorporated into the section dealing with the "cost to the wholesaler." Rather significantly the word "distributor" was used. We would be reluctant, in the absence of concise and specific language, to conclude that the Legislature intended its definition of "cost to the wholesaler" to apply to producers and manufacturers or all other products if sold by them at wholesale, but only to distributors of cigarets. We think it more reasonable to conclude that only persons engaged in the distributive

trades were contemplated, whether of cigarets or other merchandise. Moreover, the term "wholesale dealer" appears in the context in such a manner as to exclude the possibility that it was meant to include manufacturers and producers of cigarets. Rather it is suggested that the term as used has a well understood connotation which does not embrace manufacturers and producers and is synonymous with the word "wholesaler" used elsewhere in the statute.

Subsection VI defines "retailer" as follows: "The term 'retailer' shall mean and include every person, co-partnership, corporation or association engaged in the business of making sales at retail within this state; provided that in the case of a retailer engaged in the business of making sales both at retail and at wholesale, such term shall be applied only to the retail portion of such business." Is a producer or a manufacturer engaged *in the business of* making sales at retail within the meaning of the statute? We think not. His business is manufacturing and his sales are in aid of and incidental to that operation. On the contrary, one who buys at wholesale and sells in smaller quantity at retail is obviously in the business, the primary business if you will, of making retail sales. A similar distinction was noted in *J. H. Allison & Co.* v. *Killough et al.* (1927), (Tenn.) 300 S. W. 5. The result is the same when we consider the definition of "wholesaler" found in Subsection VII.

There is but one phrase in the entire Act which suggests that it was intended to apply to producers and manufacturers as well as to the distributive trades. In Sec. 1, Subsec. VIII we find the following:

> "VIII. Where a retailer sells at retail any merchandise *which is the product of his or its own manufacture* or which has been purchased by him or it at the purchase price or prices available to wholesalers, in the absence of proof of a lesser cost, both the wholesale markup of 2% and the retail markup of 6% to cover in part the cost of do-

> ing business, as provided in subsections I and II, shall be added in determining the 'cost to the retailer' of such merchandise." (Emphasis supplied)

Plaintiff sees in the italicized phrase a clear indication that the Act as a whole is intended to regulate producers and manufacturers. We are not persuaded that this is necessarily so. So construed, the statute remains obscure. The markups referred to are to be added, but to what? If to the "cost to the wholesaler" defined in Subsec. II, that "cost" is meaningless as we have already indicated when applied to a producer or manufacturer. If we were compelled to hold that the Act applies to producers and manufacturers, we would feel equally compelled to hold that the cost definition is too vague, uncertain and conjectural when so applied to satisfy the constitutional requirements of due process of law. We prefer to give to the statute that meaning which we think from a reading of the whole Act it was intended to have, and which will obviate the necessity of passing on the constitutional question. In so saying, we follow a well recognized rule of construction. *State* v. *Intoxicating Liquors*, 80 Me. 57, 62; *Hamilton* v. *District*, 120 Me. 15, 20. In *Rust* v. *Griggs* (1938), (Tenn.) 113 S. W. (2nd) 733, an "unfair sales" case, the court supplied the word "not" omitted by inadvertence from the statute to save it from being "senseless and ineffective" and "to carry out the plain legislative intent." We conclude that the phrase in Subsec. VIII which we have italicized is meaningless when read in context with the entire Act. We assume the phrase crept into the law by some inadvertence when it was originally drafted. This is more readily understandable when we consider the history of "unfair sales" legislation here and elsewhere. These statutes had their origin during the economic depression which beset our nation during the thirties. No doubt it was hoped that the imposition of a minimum price base might serve to alleviate some of the economic ills of the

moment. State after state enacted "unfair sales" acts in one form or another. Maine followed suit in 1939 (P. L. 1939, Chap. 240). No uniform law has ever been adopted and it is not surprising that in the framing of legislation in a new field, a phrase was inserted which was inconsistent with the manifest intent, purpose and scope of the new law. The Legislative Record indicates that the Act was passed without debate. The issue as to whether the Act was ever intended to apply to producers and manufacturers seems not to have arisen heretofore. The answer must be found within the four corners of the Act itself.

We are not greatly aided by the decisions of other courts. The precise question which confronts us does not appear to have been raised or decided elsewhere. The voluminous and painstaking research of learned counsel has brought to our attention practically every decided case on the subject and we have examined these authorities with interest and attention. We note that in not one of these cases was a manufacturer or a producer involved. All have been concerned with wholesalers and retailers (giving these terms their ordinary and accepted meaning) engaged in the distributive trades.

A line of cases following the lead of *State* v. *Langley* (1938), 53 Wyo. 323, 84 P. (2nd) 767, has determined (1) that legislative control is justifiable where there is present an intent to injure or destroy competition coupled with sales below cost, and (2) that the cost definition spelled out by the statute should be interpreted as meaning only "the approximate cost arrived at by a reasonable rule," or stated otherwise, the cost arrived at by the dealer "in good faith." *Assoc. Merchants of Montana* v. *Ormesher* (1939), 107 Mont. 530, 86 P. (2nd) 1031; *State* v. *Sears* (1940), 4 Wash. (2nd) 200, 103 P. (2nd) 337; *Dikeou* v. *Food Distributors Assn.* (1940), 107 Colo. 38, 108 P. (2nd) 529; *McIntire* v. *Borofsky* (1948), 95 N. H. 174, 59 A. (2nd) 471. On our

view of the case before us, it is not necessary here to decide whether in an appropriate case we would or would not adopt the "good faith" cost rule. Consideration would most certainly have to be given to the possible danger that when two different cost accounting theories are advanced, the preference felt by the factfinder for one theory may too readily lead to a finding of bad faith on the part of a merchant who adopts the other. Although a violation was perhaps clearly shown in *Dikeou* v. *Food Distributors Assn., supra,* the facts would only need to be altered slightly to present the precise issue as to choice of conflicting cost accounting theories. When applied to the problems of manufacture, especially in the allocation of overhead to unit costs, the difficulties would be complex, if not insurmountable.[3] Suffice it to say in disposition of the case at bar that when a statute uses a cost definition which is manifestly applicable only to distributors, that is a sufficient indication that the Act was not designed to apply to manufacturers.

We neither intimate nor suggest what our holding would be as to the constitutionality of certain portions of this Act when applied to a distributor. That would depend upon the particular facts presented.

There are other reasons why the declaration here is vulnerable to demurrer, but in view of our holding that this action against a producer and manufacturer has no foundation either at common law or by statute, it is unnecessary to consider them here.

The entry will be

Exceptions sustained.

[3] 57 Yale Law Journal 391, 394. "For the theory to operate successfully, there must be agreement on what constitutes 'cost'. 'Accounting principles' do not answer this problem; accountants themselves differ widely as to proper methods of valuing assets, of assigning general expenses to particular products and periods, and of computing other elements of cost."

ARNOLD P. ALLEN, IN EQUITY
vs.
MELROSE KENT

Hancock. Opinion, November 26, 1957.

Equity. Accounting. Review. Joint Adventure.

Where an equity case is submitted by agreement to a sitting justice upon a written record because of the death of the judge who heard the case, the Law Court is free to find the facts without reference to the findings of the sitting justice.

Equity has jurisdiction over joint adventures where the parties are in a fiduciary relationship and the remedy sought and obtained is incidental to an accounting.

On the termination of a joint adventure each is entitled to the return of the property contributed by him.

ON APPEAL.

This is a bill in equity for an accounting. The case is before the Law Court upon appeal. Appeal dismissed. Decree affirmed with costs of appeal to be added to bill of costs below.

Ralph C. Masterman, for plaintiff.

Silsby & Silsby, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

WILLIAMSON, C. J. This is a bill in equity for an accounting of a joint adventure in commercial fishing. The defendant appeals from a decree ordering payment by the defendant to the plaintiff of the value of the "twine" remaining in defendant's possession at the close of the joint adventure in 1951, or $3,172.94.

The case was heard by a justice who died before a decision was rendered. The parties thereupon by agreement submitted the case to the sitting justice who rendered the present decree upon the transcript of the testimony and the exhibits in the record taken before the deceased justice. The sitting justice thus heard the case without any oral evidence and so had no opportunity to see or hear a witness on the stand.

The situation is analogous to that in *Pappas* v. *Stacey & Winslow,* 151 Me. 36, 116 A. (2nd) 497 (agreed statement), and in *Mellen, Jr. et al., Tr.* v. *Mellen, Jr. et al.,* 148 Me. 153, 90 A. (2nd) 818 (construction of a will). In *Pappas,* the court said at p. 38:

> "We are free to find the facts in this appeal without reference to the findings of the single justice. The firmly established principle 'that his decision, as to matters of fact, should not be reversed, unless it clearly appears that such decision is erroneous' found in *Young* v. *Witham,* 75 Me. 536 (1884), is not here applicable. 'The claim has no merit in a case which involves no oral testimony.' *Mellen, Jr., et al., Tr.* v. *Mellen, Jr., et al.,* 148 Me. 153, 90 A. (2nd) 818 (1952)."

We find the facts briefly stated as follows: In 1948 the parties entered into a joint adventure for fishing. The plaintiff agreed to supply seines or "twine" and other materials not in issue. The defendant on his part agreed to furnish the fishing vessel and crew and to engage in the business of fishing. The plaintiff was to receive one sixth of the gross annual receipts. All expenses, except for the purchase and repair of seines and accessories, were to be paid by the defendant.

The joint adventure was to continue each year until it was dissolved, and it ended in fact at the close of the fishing season of 1951. At that time the defendant had in his possession "twine" admitted by him to be of the value of $3,-

172.94. The defendant accounted to the plaintiff for the proceeds of the fishing through the year 1951.

The defendant claimed that he lost a substantial part of the "twine" in a "terrific hurricane" in December 1951. No corroborative evidence of such a loss was introduced, although so far as the record discloses several witnesses were available to testify thereto. At no time did the defendant inform the plaintiff of the claimed loss of "twine" in 1951 prior to the hearing before the deceased justice in May 1956. It seems unreasonable that a co-adventurer would fail to report such a loss. We are unable to accept the uncorroborated evidence of the defendant as sufficient evidence to prove the loss at sea.

Without question, on termination of the joint adventure each party became entitled to the possession of the property contributed by him. For example, the defendant was entitled to the fishing vessel and the plaintiff to the "twine," or what remained of it. The defendant could claim no right to possession of the plaintiff's "twine" at the end of the adventure, and yet, although accounting for the proceeds of the fishing in 1951, the defendant failed to account for, or even to disclose the possession of, this valuable "twine."

The plaintiff, in our view of the case, satisfactorily established the jurisdiction of equity to entertain and decide the case. The parties were joint adventurers and so bore a fiduciary relationship each to the other. In the equity case of *Simpson* v. *Spinning Co.*, 128 Me. 22, 145 A. 250, we said at p. 31:

> "The persons engaging in a joint adventure stand each to the other and within the scope of the enterprise in a fiduciary relation and each has the right to expect and to demand the utmost good faith in all that relates to the common interests. (Citations omitted)
>
> "Each member of the group owes to every other member the duty of fair, open, honest disclosure

and no member by connivance, deceit or suppression of facts within the right or to the advantage of any other member to know can secure or accept secret profits, commissions or rebates to the disadvantage of others, and he holds gains acquired by his breach of faith for the common benefit of his associates in proportion to their respective interests."

The bill specifically sought (apart from general relief) an accounting of a "joint venture for the purpose of fishing" for the years 1952, 1953, 1954, an order for payment of "any amounts that shall be due the plaintiff upon an accounting of all matters and doings" between the parties, and a decree dissolving the joint adventure.

The joint adventure ended, as we have seen, in 1951, and thus there was no reason for the court to order an accounting for the later years. Jurisdiction in equity remained, however, to compel a full and complete accounting for the year 1951, including the questions relating to the "twine" under the prayer "upon an accounting of all matters and doings."

Fairly read, the allegations meet the proof, and the proof, the allegations. The case is within the familiar rule found in *Usen* v. *Usen,* 136 Me. 480, 487, 13 A. (2nd) 738; *Automobile Co.* v. *Hall & L. S. Bean Co.,* 135 Me. 382, 197 A. 558; *Terminal Co. & Railroad Co.* v. *Railroad,* 127 Me. 428, 144 A. 390.

The defendant urges that the plaintiff has a complete and adequate remedy at law. See *Wolf et al.* v. *Jordan Co.,* 146 Me. 374, 82 A. (2nd) 93. It is sufficient to remind ourselves of the fiduciary relationship of the parties and of the necessity here of an accounting by the defendant. The remedy sought and obtained by the plaintiff is incidental to the accounting, which is a proper basis for jurisdiction in equity. See Whitehouse Equity Jurisdiction (1900 ed.) Sections 558, 559, 560.

There was no error in the decree.

The entry will be

Appeal dismissed.
Decree affirmed with costs of appeal to be added to bill of costs below.

J. PRESTON LEAVITT ET AL., IN EQUITY
vs.
ALBERT O. DAVIS ET AL.

Cumberland. Opinion, November 26, 1957.

Deeds. Restrictive Covenants. Words and Phrases.

A covenant in a deed reciting that the grantors "will erect or maintain no building or structure of such a character as to interrupt or interfere with the view over said parcel" reserved to the grantor does not preclude the grantor from using his land thus reserved for an automobile parking lot.

An automobile, bus or other vehicle is not a structure or building within the meaning of a restrictive covenant relating to buildings or structures.

Restrictive covenants ought not to be extended by construction beyond the fair meaning of the words.

ON APPEAL.

This is an appeal from a decree in equity enjoining defendants. Appeal sustained with costs to be taxed below. Case remanded for entry of a decree of dismissal in accordance with this opinion.

Albert E. Anderson and Herbert A. Crommett,
for plaintiff.

Welch & Welch, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, SULLIVAN, DUBORD, JJ. TAPLEY, J., did not sit.

WILLIAMSON, C. J. This is an appeal by the defendants from a decree in equity. The plaintiffs are the owners of a portion of lot numbered 90 at Higgins Beach in front of which lies shore lot numbered 190 owned by the defendants. Lot 190 was used by the defendants for a public parking lot for profit. The decree perpetually enjoined the defendants "from permitting the parking of automobiles, buses or other vehicles" on their lot, thus destroying the parking lot business.

The case arises from the alleged breach by the defendants of a covenant purporting to restrict the use of the land now known as lot 190. The covenant appears in the deed conveying lot 90 given in 1898 by the then owners of both lot 90 and lot 190. It reads:

> ". . . and the said grantors hereby covenant and agree with the said grantee that upon the parcel of land lying in front of said lot Ninety included between Bay View Avenue, and the sea, and the side lines of said lot Ninety produced to the sea, they will erect or maintain no building or structure of such a character as to interrupt or interfere with the view over said parcel from said lot Ninety."

The defendants contend the plaintiffs failed to establish the ownership of both lots in the 1898 grantors, or, in other words, a common ownership at that date of lots 90 and 190. We are satisfied, however, as was the sitting justice, that such was the fact within the agreement of the litigants. In any event, our decision does not turn upon this issue of fact.

The sitting justice, in reaching his conclusion, said in part:

"The plaintiffs contend that the parking of these vehicles cause an obstruction of view and violates the above cited easement. They also object to the building of the retaining wall which they say interferes with their right of view."

* * * * * * * *

"The grantors by this covenant of view burdened the servitude lot 190 for the benefit of the dominant lot 90, thereby creating a covenant running with the land which continues to be of benefit to the land of these plaintiffs.

"The easement created prohibits the maintenance of any structure which is of such a character as to interrupt or interfere with the view from lot 90.

"There appears to be no question that the parking of automobiles, trucks and busses on lot 190 does interrupt and interfere with the view from lot 90."

The decree did not touch the retaining wall and so we dismiss any objection thereto from consideration.

The decisive issue, in our view of the case, is this:

Is an automobile, bus, or other vehicle parked on lot 190 thereby interrupting or interfering with the view from lot 90, a "building or structure" within the meaning of the restrictive covenant? We think not. The vehicles are not buildings, nor do they have the characteristic permanency which we associate with structures.

It is urged in argument that the controlling words of the covenant are not "building or structure" but "to interrupt or interfere with the view." In brief, the plaintiffs' position is that any use of lot 190 which interrupts or interferes with the view violates the covenant.

A restrictive covenant ought not to be extended by construction beyond the fair meaning of the words. We must not attempt to rewrite the agreement of 1898 in the light

of what would be desirable in 1957. The prohibition of "any use" obstructing the view places no limit whatsoever on the types of use prohibited. For example, trees obstructing the view would fall within "any use." If such was the intention of the parties to the 1898 deed, the covenant could readily have guarded against obstruction of the view from *any use,* and not in terms against only *buildings or structures.*

There is no suggestion that the words "building or structure" were not in 1898, as today, words of plain meaning and in ordinary usage. The plaintiffs would utterly destroy their force and effect in the covenant.

A structure is "something constructed or built, as a building, a dam, a bridge; esp., a building of some size; an edifice." Webster's New International Dictionary (2d ed.) Unabridged. In 40 Words and Phrases 323 *et seq.* and 1957 Cumulative Pocket Parts may be found other cases which serve to illustrate the point that motor vehicles are not structures.

> "Deed restricting erection of 'structure' in front of property means something which will interfere with use of street or obstruct view." (Boardwalk) *Hulett* v. *Borough of Sea Girt,* 106 N. J. Eq. 118, 150 A. 202, 205.
>
> "The word 'structure' as used in a zoning ordinance has been held to mean any construction, or any production or piece of work artificially built up or composed of parts joined together in some definite manner." (Zoning) *Paye* v. *City of Grosse Pointe,* 279 Mich. 254, 271 N. W. 826, 827.
>
> "In common usage, the word 'structure' describes something constructed or built, and, in an accepted sense, a trailer house is a structure." (Zoning) *City of Sioux Falls* v. *Cleveland,* 75 S. D. 548, 70 N. W. (2nd) 62, 64.
>
> "Word 'structure' means anything which is constructed or erected and use of which requires more

> or less permanent location on ground or attachment to something having permanent location on ground." (Workmen's Compensation) *Holsey Appliance Co.* v. *Burrow* (Okl.), 281 P. 2d 426, 427.
>
> "The word 'structure' encompasses walls, wells, septic tanks, water tanks, towers, and every other product of construction designed for permanent use where it stands, not included within meaning of the word 'building.'" (Zoning) *A. Dicillo & Sons* v. *Chester Zoning Bd. of Appeals,* Ohio Com. Pl., 103 N. E. (2nd) 44, 47.

The Connecticut Court, in holding that a billboard, while it was a structure, was not a building within a restrictive covenant, stated the principle in these words:

> "In the determination of the meaning in which words in a restrictive covenant are used, the controlling factor, when discovered, is the expressed intent. Intent unexpressed will be unavailing. In the discovery of the expressed intent, there are certain accepted principles of construction to be observed. One is that the words used are to be taken in their ordinary and popular sense, unless they have acquired a peculiar or special meaning in the particular relation in which they appear, or in respect to the particular subject matter, or unless it appears from the context that the parties intended to use them in a different sense. Another is that, if the language of a restrictive covenant, when read in the light which the context and surrounding circumstances throw upon it, remains of doubtful meaning, it will be construed against, rather than in favor of, the covenant. Restrictive covenants, being in derogation of the common-law right to use land for all lawful purposes that go with title and possession, are not to be extended by implication. (citations omitted) There is nothing in the record to indicate that the parties to the covenant intended that the word 'building', as used, was not to be taken in its ordinary and popular sense. There is no basis for concluding that, under the rule to be applied in discovering the ex-

> pressed intent, the word had any other meaning." *Katsoff* v. *Lucertini,* 141 Conn. 74, 103 A. (2nd) 812, 814.

In light of the construction we place upon the covenant, that is to say, that the parked vehicles are not structures and so parking is not prohibited, it becomes unnecessary to consider the binding quality of the covenant upon lot 190. If a building or structure interfering with the view were involved, the effectiveness of the covenant would be a matter for decision.

It is sufficient for our purposes that we look upon the covenant in the view most favorable to the plaintiffs in every respect, except on the point immediately in issue. We are then unable to escape the conclusion that the prohibition of the covenant covers only buildings and structures of a certain character, and that parked motor vehicles do not fall within the class prohibited.

In this opinion we neither express nor intimate any views upon the covenant, except upon the issue, and that alone, stated earlier in the opinion.

The entry will be

Appeal sustained with costs to be taxed below. Case remanded for entry of a decree of dismissal in accordance with this opinion.

BELIVEAU, J. (dissenting)

I am unable to agree with the majority in their interpretation of the covenant quoted in the opinion. I dissent and feel I should give my reasons for doing so.

The rule of construction of a covenant, such as this, is well recognized by the courts. It was ably stated by Chief Justice Rugg in *Allen et al.* v. *Massachusetts Bonding & Insurance Company,* 143 N. E. 499, 33 A. L. R. 669.

> "The inquiry in this respect is to ascertain the intention of the parties in executing and accepting the deeds. That intention is to be found in the words used, interpreted in the light of all the material circumstances and the pertinent facts known to the parties. A servitude over one parcel of land for the benefit of another can be established only when it appears to have been the intention of the grantor, by inserting in his deed words of restriction, to create a right inuring to the benefit of another parcel of land and to be annexed to it as an appurtenance. Bessey v. Ollman, 242 Mass. 89, 91, 136 N. E. 176, and cases there cited."

The rules of construction

> ". . . . . should not be applied in such a way as to defeat the plain and obvious purposes of a contractual instrument or restriction."
>
> *Brown, et al.* v. *Hojnacki et al.* (Ct.), 259 N. W. 152, 97 A. L. R. 621.
>
> "If we were to consider only the precise language of the covenant, we might agree with the contention of the defendant, but, under the circumstances of this case, the rights of the parties are not to be determined by a literal interpretation of the restriction. It is to be construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it, the location and character of the entire tract of land, the purpose of the restriction — whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers, ..."
>
> *Library Neighborhood Association* v. *Goosen,* 229 Mich. 89, 201 N. W. 219-220.

The majority opinion states that "a restrictive covenant ought not to be extended by construction beyond the fair meaning of the words." In this view the majority opinion not only narrows and limits the interpretation of the cove-

nant to "a fair meaning of the words" but ignores the general rule enunciated by Chief Justice Rugg, *supra,* that the words used must ". . . . be interpreted in the light of all material circumstances and the pertinent facts known to the parties." This covenant is nothing more than a contract and the usual rules of construction are to be followed, if the covenant is ". . . . . . . reasonable, not contrary to public policy, not in restraint of trade, and not for the purpose of creating a monopoly." 14 A. J. Sec. 206, page 616. It is not argued, contended or claimed that the covenant under consideration violates this rule.

I have no quarrel with the majority ruling that motor vehicles do not come within the definition of "building or structure." I readily admit that motor vehicles are not within that category.

What was the intention of the grantors in inserting the restriction in their deed and the intention of the grantee when he accepted the deed? It follows, of course, that the execution of a deed is the culmination of negotiations between the parties and expresses their understanding.

In 1898 Walter S. and Edward S. Higgins were the owners of a large tract of land of which Lots 90 and 190 were a part. It being shore property it was their purpose to so dispose of this property as to make it attractive to would-be purchasers, and it requires no stretch of the imagination, to conclude that one of the inducements offered would be that purchasers of Lot 90 would have an unobstructed view from Lot 90 over Lot 190, and this is what the grantee expected when he accepted the deed.

While such a restriction might not be too important as to inland property, such is far from the case where seashore property is involved. One of its most valuable assets is a complete view of the ocean.

The covenant did not prohibit the erection of any building or structure, but only those of such a character as to interrupt or interfere with the view. Is it to be maintained that the owners of Lot 190 were at liberty, at all times, to erect and maintain on that lot any other object on its surface which could interrupt or interfere with the view? Did the parties have in mind interruption or interference by anything but buildings or structures? If so, then the view could be not only obstructed and interfered with but completely destroyed. If they had in mind the view, as I believe they did, then no object of any kind could be constructed or maintained on Lot 190, ". . . . of such a character as to interrupt or interfere with the view."

The view was one of the important incidents of the transaction. It is not reasonable to conclude that the parties intended to limit obstruction and interference to the view, to "building or structure" alone. This interference would, for all practical purposes, completely destroy the purpose of the covenant. Obstruction and interference, of any kind, other than "building or structure" would, in fact, destroy what the parties intended to accomplish.

I would deny the appeal and sustain the decree below.

WILLIAM S. LINNELL, ET AL.,
TRUSTEES UNDER THE WILL OF
GEORGE F. GOODSPEED, IN EQUITY
vs.
DOROTHY I. SMITH, INEZ A. GOODSPEED DAVIS,
FRANCES GOODSPEED RUBIN AND ELINOR GOODSPEED

Franklin. Opinion, December 5, 1957.

Wills. Heirs. Laws of Descent. Words and Phrases.

Where a testamentary trust provides a trust fund with income benefits to testator's surviving children with remainder at the death of the said beneficiary to be "paid to his legal heirs according to the law for descent of intestate estates," the words "legal heirs according to the law for descent" do not include a surviving widow of the beneficiary.

A reference to the "statutes of descent" does not create an enlargement of the phrase "legal heirs."

Technical terms are presumed to be employed in their technical sense with the meaning ascribed to them by usage and sanctioned by judicial decision unless something in the context or subject matter clearly indicates that the testator intended a different use.

ON REPORT.

This is a bill in equity for instructions upon a will and trust. Remanded to the Supreme Judicial Court in Equity for the allowance of fees and disbursements and for a decree in accordance with this opinion.

Linnell, Perkins, Thompson,
Hinckley & Thaxter, for plaintiff.

Verrill, Dana, Walker,
Philbrick & Whitehouse, for Dorothy I. Smith.
Hutchinson, Pierce, Atwood & Allen,
for Inez A. Goodspeed Davis, et al.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

WEBBER, J. On report. This was a bill in equity brought by the Trustees named in the will of the late George F. Goodspeed seeking instructions as to the distribution of certain of the trust funds. The facts are not in dispute and are fully covered by the bill and answer.

The testator died in 1942, leaving a will dated January 29, 1934. Three codicils, the last dated June 24, 1942, have no bearing on the issues raised here, all of which stem from provisions in the original will.

Mr. Goodspeed was survived by his wife, the defendant Inez A. Goodspeed Davis, by a son, George F. Goodspeed, Jr., now deceased, and two daughters, Elinor Goodspeed and Frances Goodspeed Rubin, both defendants in this proceeding.

George F. Goodspeed, Jr. was born October 16, 1923 and died at the age of twenty-five, leaving no issue but survived by his wife, the defendant Dorothy I. Smith. It will be noted that he was eleven years old when his father's will was executed. His untimely death on August 23, 1949 gives rise to the immediate problems presented here. The will, after making the usual provision for debts and funeral expenses, provides a number of specific bequests and devises. Item Fourteenth of the will disposes of the residuum and establishes the trusts in question. 14(c) establishes a $100,000 trust fund with income benefits for life for each of the testator's surviving children, remainder as to each trust at the death of the beneficiary to be "paid to his legal heirs according to the law for descent of intestate estates." 14(d) 2 establishes a trust for each surviving child to be distributed as each child attains age 30, "provided that, if any beneficiary dies before reaching the age of 30 years, his trust shall terminate and the entire net remainder shall be paid to his legal heirs according to the laws at that time governing the descent of intestate estates."

The trustees hold substantial sums comprising principal and accumulated income which must be distributed as a re-

sult of the death of George F. Goodspeed, Jr. to the persons entitled to take the same under the provisions of 14(c) and 14(d) 2 above. Dorothy I. Smith asserts a claim to one-half the remainder as widow of George F. Goodspeed, Jr. Her position, briefly stated, is that the phrase "legal heirs according to the laws at that time governing the descent of intestate estates" creates a class of takers established by the statute governing descent and that the widow is one of that class. The statute in effect at the death of George F. Goodspeed, Jr. (R. S. 1944, Chap. 156, Sec. 1) provided in part: "The real estate of a person deceased intestate * * * descends according to the following rules: I. If he leaves a widow and issue, 1/3 to the widow. If no issue, ½ to the widow."

No doubt exists in the mind of either counsel in this case that if the testator had used the words "legal heirs" without more, the spouse could not take. That such is the law in Maine has long been established. *Lord* v. *Bourne,* 63 Me. 368; *Clarke* v. *Hilton,* 75 Me. 426. Reaffirming the rule, *Golder* v. *Golder,* 95 Me. 259, 262, stated that even though the statute had enlarged the widow's interest from a life estate to an estate in fee, "she still takes not as heir, but as widow." *Morse* v. *Ballou,* 112 Me. 124; *Trott* v. *Kendall,* 125 Me. 85.

When, however, there is added to the words "legal heirs" a reference to the statute governing descent, there is a conflict of opinion as to whether a testator has thereby imparted to those words a meaning broader than their narrow and technical sense. Professor A. James Casner, a recognized authority in this field, stated in 53 Harvard Law Review 207, 221:

> "Frequently in these cases there is a specific reference to the law of intestacy in connection with the gift to the described group. This fact, as we have seen, causes the specified statute to apply when otherwise the jurisdiction would have ascer-

> tained the takers without reference to any statute. In the opinion of the writer such evidence ought to remove all doubt of the intention of the testator to provide for an intestate distribution including the spouse, where otherwise she or he is presumptively excluded, and some courts agree; but other courts have regarded the reference to the statute as mere surplusage."

See also American Law of Property, Vol. V, Sec. 22.59, page 427, and cases cited.

In *Van Dyke* v. *Van Dyke* (1928), 223 Ky. 49, 2 S. W. (2nd) 1057, the court held that although the spouse was not an heir, the addition of the words "in accordance with the law laid down by the statutes of the State of Kentucky" broadened the meaning of "heirs" as used by the testator to include the spouse as one of those who would take under the statute.

The words construed by the court in *Re Garrett's Estate* (1915), 249 Pa. 249, 94 A. 927, were "to his (the legatee's) next of kin in accordance with the intestate laws of the State of Pennsylvania." Recognizing that a husband is not one of the "next of kin" of his wife, the court nevertheless deemed that the words must yield to the controlling reference to the statute under which the husband would take. The court said: "The words 'next of kin' are to be regarded as superfluous, or as having been used by the testatrix in their popular sense, meaning those who are entitled to the personal estate of a decedent under the statute of distribution."

Williams v. *Fulton* (1954), 4 Ill. (2nd) 524, 123 N. E. (2nd) 495, interpreting similar language cited *Re Garrett's Estate, supra,* and followed it.

On the other hand, some courts have treated the reference to the statute as merely an indication of the intended method of distribution among the "legal heirs" or "next of kin,"

preserving for those words their technical meaning. Upon this reasoning, of course, the spouse does not take.

Without finding any necessity to distinguish *Re Garrett's Estate, supra,* the Pennsylvania court excluded the spouse in *Re Stoler's Estate* (1928), 293 Pa. 433, 143 A. 121. In that case the testator left an estate for life to his wife, then to his next of kin "to be divided among them in accordance with the provisions of the intestate laws of Pennsylvania." The court laid great stress on the words "to be divided among them" as indicating a rule of distribution among takers related by blood. Moreover, it was apparently influenced by the fact (as other courts have been) that the wife was expressly provided for by the testator when he made her beneficiary of the life estate.

The Rhode Island court construed the words "to my next of kin and heirs at law, to be divided and distributed among them in the same proportions and shares provided for the descent and distribution of intestate estates of deceased persons under the laws of the State of Rhode Island" as excluding the spouse. The court treated the reference to the statute as merely pointing out the rule of division among heirs and next of kin giving to those words their technical sense. *Lewis* v. *Arnold* (1919), 42 R. I. 94, 105 A. 568.

Until in 1938 a spouse was made a statutory heir, the New York court consistently refused to include the spouse as a taker when language similar to that in the will before us was employed by the testator. *Murdock* v. *Ward* (1876), 67 N. Y. 387; *Matter of Devoe* (1902), 171 N. Y. 281, 63 N. E. 1102.

Whatever disposition we might otherwise have to be persuaded by the reasoning of those who have treated a reference to the statute as an enlargement of the phrase "legal heirs" is effectively overcome by the language employed by our own court in *McCarthy* v. *Walsh,* 123 Me. 157. In that case, the will provided that the remainder "shall be disposed

of according to the laws of inheritance of the State of Maine in fōrce at date hereof." The estate of the testator's widow claimed a vested remainder in her as one of the persons made a taker by statute. The opinion by Mr. Justice Morrill distinguished "inheritance" and "descent" and after pointing out that one who "inherits" takes as an "heir," held that the widow, who takes as "widow" and not as "heir" of her husband, was excluded. By dictum the opinion clearly indicated that if the language had been "shall be disposed of according to the laws of descent of the State of Maine in force at date hereof," the widow would have been included as one of the persons to whom property descends by statute. The opinion, however, went further. It cited with evident approval a decision filed by the late Chief Justice Savage in the case of *Clark* v. *Dixon et al.* arising in equity in Androscoggin County. Apparently this decision was never appealed and never reviewed by the Law Court. The will in that case provided that at the termination of a trust for the benefit of the husband of the testatrix, the trustee should "then divide said trust fund then existing among my then living heirs according to the laws of descent in this state." This language is in all material respects indistinguishable from that used by Mr. Goodspeed, yet the holding in the *Clark* case was that the controlling words were "living heirs" and that the class was not enlarged by reference to the statute so as to include the spouse. It is argued here that the underlying reason in the *Clark* case for excluding the spouse was that he had already been fully provided for by being made beneficiary of the first trust estate, and therefore that it would be unreasonable to assume that the testatrix intended to include her husband as an "heir." We have examined the decision in the *Clark* case and neither there nor in the discussion of it in *McCarthy* do we find any suggestion that such reasoning was followed or even considered. Cf. *Strout, Tr.* v. *Little River Bank & Trust Co.*,

149 Me. 181 as to language of the will, reasoning and holding.

We cannot minimize the effect of the holding and dicta in *McCarthy.* We are called upon to ascertain the intent of the testator from the language he used in his will. He is presumed to know how the language he employed had previously been interpreted by the court. When almost the identical words had been treated by the court as having a certain meaning, even though only by dictum, a testator using those words subsequently may properly be considered to have intended the meaning ascribed to them by the court. This assumes, of course, that there is no other language or content in the will which manifests a contrary intent.

In so saying we are not slavishly following dicta. Rather are we recognizing that in this field of testamentary draftsmanship it is important and even necessary to preserve as nearly as possible the continuity of interpretation given to words and phrases commonly employed in the preparation of wills. If there is a goodly measure of certainty and stability in judicial interpretation, the skilled draftsman can proceed with confidence to make use of certain phrases and to avoid others. As was said in *Hay* v. *Dole,* 119 Me. 421 at 423:

> "It is a general rule of testamentary construction that while untechnical words are understood to be used in their usual, ordinary and popular meaning, technical terms are presumed to be employed in their technical sense with the meaning ascribed to them by usage *and sanctioned by judicial decision* unless something in the context or subject matter clearly indicates that the testator intended a different use. * * * Especially should this rule obtain where, as here, the scrivener was evidently learned in the law, comprehended the exact legal signification of the technical terms employed, and drafted the document with studied care." (Emphasis supplied)

With, we think, very much the same thought in mind, the court said in *Matter of Devoe, supra,* at page 286:

> "I think that the decisions of this court, on the construction of provisions in wills similar to the one now before us, have created a rule of property which we are not justified in overthrowing, especially where the proposition that the testator might have had a different intent from that which we have ascribed to him is the merest surmise. Probably he never thought on the subject, and what testamentary disposition he would have made had the contingency that has arisen been called to his attention, no one can tell."

The *McCarthy* case was decided in 1923, several years before Mr. Goodspeed made his will. We think that in view of the language used in that opinion, he and his scrivener, obviously a skilled draftsman, were justified in assuming that if the words "legal heirs according to the laws at that time governing the descent of intestate estates" were employed, they would be understood and interpreted by the court as expressing his intent not to include a surviving spouse. We think that the language used by the opinion writer in *McCarthy* made it clear that a testator desiring to include the spouse of one of his children as a taker under such circumstances would need to make some clear and express provision which would leave no doubt as to his intention to do so. Mr. Goodspeed's failure to make such provision, viewed in the light of the indication as to how the court might be expected to interpret the language he did use, sufficiently evidences his intention not to enlarge the meaning of the words "legal heirs."

Accordingly, the claim of Dorothy I. Smith as surviving spouse must be denied, and the trustees should make distribution among the other defendants in the proportions fixed by the statute. The sitting justice is directed to fix reasonable counsel fees for all parties, to which shall be

added necessary disbursements, which sums shall be paid by the trustees and allowed in their accounts.

Remanded to the Supreme Judicial Court in Equity for the allowance of fees and disbursements and for a decree in accordance with this opinion.

LEON S. HARMON
vs.
MAXIMILIAN B. ROESSEL

Oxford. Opinion, December 16, 1957.

Contracts. Parol Evidence.

The construction of all written instruments belongs to the court.

Where a contract is to be construed by its terms alone, it is the duty of the court to interpret it.

Whether a contract, if so made, is a legal and binding contract, under the evidence in the case is a question of law which the Law Court must determine independently of the finding of fact by the jury.

Where negotiations between the parties fail to demonstrate a meeting of the minds there is no contract.

Where the deficiencies of the written evidence are not supplied by parol evidence, at least to the extent of providing some basis for a contract, a verdict for defendant is properly directed.

ON EXCEPTIONS.

This is an action for breach of contract. The case is before the Law Court upon exceptions. Exceptions overruled.

Albert J. Stearns,
Robert T. Smith, for plaintiff.

Franklin Stearns, for defendant.

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

SULLIVAN, J. This is an action for alleged breach of contract. The plaintiff avers that in March he owned a furnished cottage which he rented and reserved to the defendant for occupancy at $75 per week during five, specific and consecutive weeks of the summer which followed; that the defendant declined to avail himself of the cottage and has refused to pay the rental. The defendant denies any contract or legal relationship with the plaintiff and urges the Statute of Frauds in bar.

Following the completion of evidence by both parties the defendant moved for a directed verdict which was granted. The plaintiff excepts. His exceptions

> "- - - have the effect of bringing up all the evidence and raising the question of law, whether upon that evidence the case should have been submitted to the jury."

Dyer v. *Power & Light Company,* 119 Me. 224, 225.
Admitted in evidence for the plaintiff were the following letters comprising correspondence between the parties:

"MAXIMILIAN B. ROESSEL

Phone: Newton 1311-J
R. D. 2 — Box 103
Newton, New Jersey
Mar 23, 1956

L. S. Harmon
Lovell, Maine

Dear Mr. Harmon,

Earl wrote that you have 3 cottages for rent on *the* lake. Would you be kind enough to send me description and amount of rent. I would be interested for July and August.

Also please send information to the following, and tell them I asked you to.

Mr. T. B. Roessel, 2154 Westfall Rd. Rochester 18, N. Y.

Mr. H. G. Hesse, 161 N. Woodland St. Englewood, N. J.

Mr. R. I. Ballinger, Barnwood, Radnor, Pa.
We will be up to see Earl around May 7 and will see you then.

Very truly yours,

M. B. Roessel"

- -

"Dear Mr. Roessel:

Rec'd. your letter concerning our cottage, they are all built on the same floor plan and consist of 2 bedrooms full bath large living room with stone fireplace and built in bunks fully equipped kitchen with electric range, refrigerator and water heater, plus large screened porch, and we furnish everything except the bed linens. Our price is 75 per week. One cottage is *booked* until *July 23* one until *July 24* and the *other* to *Aug. 5.*

If you are interested would be *glad to reserve one* or all after the above dates for as long as you would wish, but would have to have an immediate reply as requests are coming in especially fast this year.

Am enclosing a snapshot of ex and interior."

- -

"MAXIMILIAN B. ROESSEL

Phone: Newton 1311-J
R. D. 2 — Box 103
Newton, New Jersey
Mar 31, 1956

Dear Mr. Harmon,

With the provision that the road into the cottage is passable to these low slung cars, and that a boat

dock is available, we will take the cottage which is available on July 24 and until Aug 28 - - 5 weeks. Since we will be up there about May 7, we will see you then, at which time we can complete our arrangements. There may be 6 of us, unless some of the kids go to camp. We should know by then. Say Hello to Earl Roby when you see him.

Very truly yours,

M. B. Roessel"

- -

"MAXIMILIAN B. ROESSEL

Phone: Newton 1311-J
R. D. 2 — Box 103
Newton, New Jersey
May 14, 1956

Dear Mr. Harmon,

When we got home, and before you called, our friends in Phila. - - the Leydons, offered us and we took their cottage for the time we wanted it. Too bad your call was not a few hours sooner.

However, Mr. Hesse also wants to come up earlier, and will, in all probability take the cottage you have for us after 15th of July. He will call you this week to complete arrangements.

I sure hope all this *horseing around* has not inconvenienced you.

Yours very truly,

M. B. Roessel"

- -

The subject matter of negotiations by the parties was the renting for a determinate period of a cottage completely furnished save for bed linens. Arguments have been waged as to whether the transaction contemplated was to effect a license or a lease. We find such a distinction expendable in this case.

The construction of the correspondence in evidence and set forth above, was for the presiding justice.

"The construction of all written instruments belongs to the Court."

Wigmore on Evidence, § 2556.

"Where a contract is to be construed by its terms alone, it is the duty of the court to interpret it; - - - - -"

53 Am. Jur., § 266, P. 223.

"- - - Whether the contract, if so made, is a legal and binding contract, under the evidence in the case, is a question of law which this court must determine independently of the finding of fact by the jury." *Congregation* v. *Savings Bank,* 120 Me. 178, 181.

The letters admitted were offered as a sufficient memorandum or in evidence of a contract. It was for the court as a matter of law to construe them.

The letter of the defendant to the plaintiff, dated March 31, 1956 was not an unequivocal or unqualified acceptance of the offer which had been submitted in the earlier communication of the plaintiff to the defendant. The reply of March 31, 1956 contained three reservations. It was conditioned upon the road into the cottage proving passable to low slung cars, upon the availability of a boat dock and upon a completion of arrangements to follow about May 7th. The road and the dock facility were not mentioned in plaintiff's first letter but were injected by the defendant in his reply thereto of March 31st, 1956, as fresh matter. The defendant in his, same letter informed the plaintiff that the former would not know until May 7th how many of defendant's family would use the cottage. The correspondence thus failed to demonstrate a meeting of the minds or to capture the requisites of a contract. Such is obvious and is a matter of law.

"- - - we look in vain to find in it evidence of a contract *completed;* — a proposition by one party, accepted without modification, by the other."

Jenness v. *Mount Hope Iron Company,* 53 Me. 20, 22.

It remains, then, to be decided if the deficiencies of the written evidence were supplied by parol evidence at least to the extent of providing some basis for a finding favorable to the plaintiff.

The testimony of all establishes that the defendant in May called upon the plaintiff and went to the cottage property. No statement of the defendant accepting a contract to rent or occupy the cottage is made or quoted. The behavior and acts of the defendant are non-committal and without involvement. The following is the reported colloquy as to that:

Plaintiff's testimony.

Q And where did they come to visit? Were you at the camp when they first saw you, them?

A I was.

Q What was the conversation? What took place at that time?

A Practically no conversation. Looked the camp over, apparently thought it was all good and everything. Only question was, Mrs. Roessel wanted to know if there was an electric flat iron, and I said if there wasn't we would have one. Never mentioned the dock or nothing.

Q Did they go over the road to the camp?

A That's right.

Q Were they shown the boat dock?

A The dock was right out front. I didn't show it to them.

Q Was anything in there, do you know, or words indicating there was any dissatisfaction with the camp?

A Not that I could see.

Q And did they say when they were coming down next?

A No.

Cross - Examination

Q Now, in what state was the dock, was the dock or two docks, when Mr. Roessel came down?

A The ones there at that time?

Q Yes.

A They was stationary. Not floating. He wanted barrel floating docks.

Plaintiff's wife

Q You talked about the period of occupancy between July 24th to August 28th.

A That is, he was - - it was understood he was on his way to see if it was what he wanted.

There is no testimony that a barrel floating dock was supplied before August 28th, 1956 although the plaintiff testified that one was at the situs at the time of the trial in February, 1957.

The evidence left no alternative to the presiding justice but to direct a verdict for the defendant.

Exceptions overruled.

OCTAVE FILLION
vs.
PETER ALLAIN

Androscoggin. Opinion, December 16, 1957.

Contracts. Evidence. New Trial.

A verdict which is out of accord with any reasonable interpretation of the evidence cannot stand.

ON MOTION FOR NEW TRIAL.

This is an action of assumpsit before the Law Court upon motion for a new trial. Motion sustained. Verdict set aside. New trial ordered.

Platz & Scolnik, for plaintiff.

Clifford & Clifford, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

WILLIAMSON, C. J. This is an action in general assumpsit to recover the reasonable value of plaintiff's services as a handyman for the period from August 2, 1950 to November 1, 1955. The jury returned a verdict of $4080. The case is before us on motion for a new trial on the usual grounds. The motion must be sustained.

The pertinent facts may be stated briefly:

The plaintiff, 85 years of age at the time of trial in January 1957, was in the employ of the defendant for 35 years in various capacities about the defendant's lumber business. In 1936 or 1937 the plaintiff became unable to carry on strenuous work on a regular basis. The defendant built a two room camp on his property for use of the plaintiff, who

stayed on as a general handyman. His work included shoveling snow, tending the furnace, mowing the lawn, feeding and caring for the horses, and working in the garden.

In 1944 the plaintiff was hospitalized with pneumonia. Acting upon the doctor's advice that the plaintiff would not live long if he returned to the camp, the defendant took the plaintiff into his home. There the plaintiff lived with the defendant and his family until he left the home in November 1955. During this period from 1944 to 1955 the plaintiff continued to perform his duties as a general handyman.

In 1946 a written agreement was drawn by defendant's attorney and executed by the plaintiff and defendant at the attorney's office. In brief, the parties agreed (1) that the existing arrangement should continue during the plaintiff's life; that is to say, it would continue even in the event of the defendant's death, and (2) that the plaintiff had no claims against the defendant. The plaintiff had an original of the agreement from the time it was executed and produced it at the trial.

From 1946 when the agreement was signed until the plaintiff left the defendant's home, the plaintiff received $3 or $4 a week in cash, in addition to room and board, laundry, clothing in small amounts, and once at least hospital expenses. In substance, the parties continued the arrangement existing when the 1946 agreement was signed, except that thereafter the weekly payments in cash were made as stated. On one occasion, and only one, during the nine year period from 1946 to 1955 did the plaintiff ask the defendant for money. This was in 1949 when he asked for money not for wages but to go to Canada. The close relationship between the plaintiff and the defendant and his family is shown by the testimony of the plaintiff:

> "Q You were treated like a member of the family, weren't you, Mr. Fillion?
>
> A Yes, they served me well."

The plaintiff contended that the 1946 written agreement was of no value whatsoever. He testified in substance that he was unable to read, that the agreement was read to him in English, which he did not understand, that he was given no further explanation, and that he signed it at the defendant's request believing he would receive some money therefor from the defendant. The defendant on his part stated in effect that he explained the terms of the agreement to the plaintiff in French, and that the plaintiff apparently understood the agreement. In brief, the plaintiff's position is that the defendant took advantage of his ignorance and of his dependence upon the defendant in securing the written agreement.

It will serve no useful purpose to rehearse the details of conflicts in the evidence. They are minor in nature and do not touch materially the situation.

We have here an elderly handyman living and working under the conditions described who now claims that for over five years he was not paid in full for his services, although he never requested or demanded payment beyond that which he accepted with apparent willingness and in any event without objection.

In our view of the record, the evidence is overwhelming that the plaintiff had an adequate understanding of the 1946 agreement, and that he lived with the defendant and his family and worked under the agreement with no expectation whatsoever of additional compensation. We think it plain that a person in the position of the plaintiff would not have so long delayed seeking the pay for which he brings this action. The finding of the jury that the defendant had unjustly deprived the plaintiff of wages for over five years is without credible foundation. "Believability and credibility may be strained till they snap." *Fish* v. *Norton,* 127 Me. 323, 326, 143 A. 171, 172.

The governing rule is well stated in *Turcotte* v. *Dunning*, 132 Me. 417, 418, 171 A. 908, 909, where the court says:

> "The issues involved were purely of fact. The record discloses a sharp conflict of testimony and we are fully aware that jurors are the authorized triers of fact and are also judges of the credibility of witnesses. We neither desire nor intend to assume their responsibilities nor to usurp their powers; but if a result is reached by them which is so out of accord with any reasonable interpretation of the evidence that we can not place upon it even the stamp of a reluctant approval, our duty is plain. This Court has not hesitated and will not hesitate to set aside a verdict which finds support only in testimony which on its face is incredible or is obviously untrue."

and again in *Garmong* v. *Henderson*, 114 Me. 75, 80, 95 A. 409, 411, where we said:

> "In considering a motion for a new trial on the ground that the verdict is against evidence it is not the province of the court to weigh the evidence for the purpose of determining the preponderance of it between the parties. That is the province of the jury. Where the evidence is conflicting, a verdict will not be disturbed, if it is found to be supported by evidence, credible, reasonable, and consistent with the circumstances and probabilities of the case, so as to afford a fair presumption of its truth, even though it may seem to the court that the evidence as a whole preponderates against the finding of the jury. A verdict will be set aside as against the evidence supporting it when the evidence is not such as reasonable minds are warranted in believing, as when it is incredible, or unreasonable, or inconsistent with the proved circumstances of the case; or when the evidence to the contrary of the verdict is so overweighing and so overwhelming as to induce the belief that the jury were led into mistake, or were so moved by passion or prejudice as not to give due consideration and effect to all the evidence."

The statement by Justice Dunn in *Walker* v. *Norton,* 131 Me. 69, 70, 158 A. 926, is clearly applicable: "But where, as here, on the whole record, no weight of evidence, adequate to satisfy the minds of reasonable men, fairly tended to support the jury's finding, the verdict can not be allowed to stand."

The verdict is explainable only if attributed to sympathy for the plaintiff. Sympathy, however, is not a lawful reason for assessing damages against the defendant. "Justice requires that (the verdict) be set aside." *Garmong* v. *Henderson, supra,* at p. 90. See also *Page* v. *Moulton,* 127 Me. 80, 141 A. 183; *Spang* v. *Cote,* 144 Me. 338, 68 A. (2nd) 823.

The entry will be

Motion sustained.
Verdict set aside.
New trial ordered.

DOMINIC PORETTA
vs.
SUPERIOR DOWEL COMPANY

Oxford. Opinion, December 20, 1957.

Agency. Referees. Undisclosed Principals. Authority. Restatement. Settled Accounts.

In determining whether an "agency" relationship exists the court must consider, not only the contract itself, but also the course of dealings between the parties whether inside or outside the contract.

A referee is not required to make special findings of fact. (Rules of Court)

An undisclosed principal may be shown to be the real party in a transaction in which the agent is the only ostensible person.

The agent or undisclosed principal is liable at the election of a creditor or a person to whom the agent has incurred liability acting within the scope of his authority.

The creditor has a right of action against the undisclosed principal, when discovered, even though he never learned of the existence of the latter until after the bargain was completed, if he can prove that the agent acted within the scope of his authority.

An undisclosed principal is discharged from liability to the other party to the contract, if he has paid or settled accounts with an agent reasonably relying upon conduct of the other party, not induced by the agent's misrepresentations, which indicates that the agent has paid or otherwise settled the accounts. (1 A. L. I Restatement of Agency, Sec. 208)

ON EXCEPTIONS.

This is an action against an undisclosed principal before the Law Court upon exceptions to the acceptance of a referee's report. Exceptions overruled.

Gerry Brooks, for plaintiff.

George W. Weeks, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

DUBORD, J. This case is before us on exceptions of the defendant to the acceptance of a referee's report. The action is one of assumpsit to recover the amount of $2,574.44 for wood delivered by the plaintiff to R. H. Young & Son, Inc., it being the contention of the plaintiff that the defendant was the undisclosed principal of R. H. Young & Son, Inc. The case was heard under rule of reference with right of exceptions reserved in matters of law. The referee found for the plaintiff and assessed damages for the total amount claimed. Over the written objections of the defendant, the report of the referee was accepted and exceptions taken.

For the purposes of convenience the defendant will be hereinafter referred to as Superior and R. H. Young & Son, Inc., as Company.

The defendant, by its objections contends that the evidence, as a matter of law, did not warrant the award against it. Upon this issue, the burden is on the defendant. *Wood* v. *Balzano,* 137 Me. 87, 15 A. (2nd) 188, *Hovey* v. *Bell,* 112 Me. 192, 91 A. 844.

No issue is raised about the findings of fact and defendant relies solely upon his contention that erroneous conclusions were reached by the referee from the evidence in the case.

Superior contends first, there was no agency; second, if there was an agency, the purchase of the wood by the Company was not within the scope of its authority; and third, that payment by Superior to the Company for the wood which forms the basis of the suit, absolves Superior from liability in this action.

The Company was in the business of manufacturing dowels at Bethel, Maine. It appears from the evidence that

Superior was in the dowel business and that about two years prior to January 11, 1954, one of its suppliers suffered a disastrous fire and Superior contacted the Company for the purpose of having the Company manufacture dowels for Superior. The production of the Company being inadequate, Superior advanced substantial sums of money to the Company, so that its manufacturing facilities could be enlarged. For these advancements the Company gave security to Superior.

Prior to January 11, 1954, it appears that the Company and Superior operated purely on an oral basis. On that date Superior and the Company, in a desire to put into writing the business procedure which had existed between them, and to modify and supplement the same, entered into a long and complex written agreement, setting forth the nature of their prior transactions. A short time later this agreement was modified by another long and equally complex writing.

In the preamble to the agreement executed January 11, 1954, is to be found the following provision:

> "Since Young was unable to expend large amounts for the purchase of lumber, Superior Dowel agreed to finance the purchase by Young of the lumber required to fill Superior Dowel's orders for wooden dowels, with Young to purchase the said lumber in its own name and as its property and with Superior Dowel to advance $30.00 per cord to Young for lumber so purchased."

If this statement is to be construed as meaning that prior to January 11, 1954, the lumber purchased by the Company was to be the property of the Company with the only duty on the part of Superior to advance the amount of $30.00 per cord to the Company for the lumber purchased, it appears that this portion of the oral procedure was changed by the fourth paragraph of the agreement, which sets forth the method of making purchases of lumber, and the steps to be

followed thereafter. Paragraph four, among other provisions, contains the following, viz.:

> "FOURTH: In connection with all purchases of lumber hereafter made by Young for the manufacture of wooden dowels for Superior Dowel.
>
> "(a) All such purchases are to be made by Young as agent for Superior Dowel, and with funds transmitted to it by Superior Dowel;
>
> "(b) All such lumber thus purchased is to be considered, at all times, the property of Superior Dowel, and is to be so listed on Young's books and records;
>
> "(c) In connection with each such purchase, Young is to send to Superior Dowel a letter signed by it, in the form annexed hereto and made a part hereof as Exhibit '2';
>
> "(d) Young is to keep said lumber on its premises, separate and apart from lumber belonging to Young or anyone else until processed into finished dowels."

The next paragraph provides that signs satisfactory to Superior, bearing the legend "Property of Superior Dowel Company," indicating ownership of the lumber in Superior, are to be placed upon the wood.

Another paragraph reads as follows:

> "Young shall not, in any event, purchase lumber as the agent of, or on behalf of, Superior Dowel without receiving the express authority of Superior Dowel therefor, in writing before such purchase, and Young shall not be able to require Superior Dowel to loan it money to pay for lumber purchased in its own name unless it receives the express authority of Superior Dowel therefor, in writing, it being the intention of Superior Dowel and Young that Superior Dowel shall not be obligated or required to provide the funds for the purchase of any lumber by Young (as agent of

> Superior Dowel, or otherwise) or to pay for said lumber unless such purchase is expressly authorized in writing by Superior Dowel before the purchase."

Exhibit #2 referred to in subparagraph (c) of the Fourth Paragraph, *supra,* reads as follows:

"(Date)

"Superior Dowel Co.
438 Washington Street
New York 13, New York

Gentlemen:

This is to advise you that we have this day purchased, as your agent, ... cords of wood.

This wood is to be held in our yard (separate and apart from any wood belonging to us or to anyone else) until processed into finished dowels. The finished dowels are to be stored by us until shipping instructions are received from you.

This wood, and the finished dowels to be manufactured therefrom, are, of course, your property, and will be so listed on our books. While the wood is held in our yard, and while finished dowels are stored by us, they are to be marked 'Property of Superior Dowel Co.'

No charge for holding the wood, or storing the finished dowels, will be made to you.

Very truly yours,

R. H. YOUNG & SON, INC.
By"

The agreement specifies the price to be paid by Superior to the Company for the dowels manufactured by the Company and delivered to Superior. The agreement also provides for the method of payment for these dowels by Superior to the Company; and gives Superior authority, as soon as it receives bills from the Company covering storage and shipment of wooden dowels made pursuant to orders placed by Superior, to deduct and retain 40% of

said bills, said 40% to be first applied to the total of purchase price of lumber and loan or advances, and the balance to be applied to other indebtedness from the Company to Superior.

Between February 22, 1954, and April 1, 1954, the plaintiff delivered to the Company the wood which forms the basis of this action. The price of this wood was $34.00 and $36.00 per cord. The evidence discloses that, although the wood delivered by the plaintiff to the Company was not segregated by the Company in accordance with provisions of the agreement, that Superior received all of the wood in the form of dowels delivered to Superior or dowels placed in the Company's warehouse subject to Superior's orders. The finding of the referee in this respect is supported by the evidence.

The referee found that the wood had been delivered to the Company before the Company sent an invoice therefor to Superior. It also appears that no written authority relating to this order was given by Superior to the Company. The evidence further indicates that upon receipt of the invoice by Superior, the latter advanced the sum of $30.00 per cord to the Company. At this point it is significant to note, that the amount advanced did not cover the full price of the wood.

The first issue for determination is whether or not an agency relationship actually existed between Superior and the Company.

To determine this question, as was well stated by the referee, in his decision, not only must we take into consideration the contract itself, but also the course of dealings between the parties whether within or outside the contract.

We have already referred to the fourth paragraph of the agreement which provides that "all such purchases are to be made by Young as agent for Superior Dowel;" and "all

such lumber thus purchased is to be considered at all times, the property of Superior Dowel and is to be so listed on Young's books and records."

The agreement also specified that the Company was to conspicuously display upon its premises, at such place or places as the lumber was kept and stored, signs satisfactory to Superior, bearing the legend "Property of Superior Dowel Co.;" and while it appears that this portion of the contract was not followed by the Company, the evidence indicates that the manufactured dowels were properly marked by the Company as the property of Superior in accordance with another provision of the contract.

The statements contained in the form letter, introduced as Exhibit 2, also supports the finding that an agency relationship was contemplated by Superior.

There is evidence in the case to the effect that in 1954 all dowels manufactured by the Company were sold to Superior; that orders from Superior came "in blanket orders"; that the Company was in touch with Superior weekly; that orders would come in from Superior almost daily; that officers of Superior visited the Company's mill frequently.

The modified agreement, previously referred to, contains a provision that during the one-year period from January 11, 1954, to January 11, 1955, Superior would place with the Company, and the Company would accept and fill, orders for wooden dowels in the aggregate amount of $75,000.00; and immediately after this provision is found the following clause:

> "With each order - - - - Superior Dowel is to agree to allow Young to purchase the lumber, required to fill said order *as its agent* (emphasis supplied) and Superior Dowel is to agree to pay for said lumber so purchased."

The theory that the Company was acting as agent for Superior finds added strength, we believe, in another provision of the contract wherein the Company agreed:

> "Not to sell, give away or deliver any wooden dowels to, or manufacture any wooden dowels for, any person, firm, association or corporation other than Superior Dowel, unless otherwise authorized in writing by Superior Dowel."

We regard the following testimony of the President of Superior as having great significance:

> "Q Bearing in mind the provision in the contract regarding agent, did you and Mr. Young, Sr. and Dick have an agreement regarding that provision?
>
> "A No. We had absolutely no agreement so far as that goes. That was put in for the purpose of protecting me against seizure by any other cutters after what I had paid for.
>
> "Q The contract calls for sending orders for them to purchase wood.
>
> "A It was never followed through.
>
> "Q That was ignored by both sides?
>
> "A Yes.
>
> "Q Do you know the reason for that?
>
> "A Frankly, we never really held to the agreement at all. It was just merely as protection and security we put it on paper."

It is clear that Superior entered into an agreement whereby the Company would purchase wood in the capacity of agent for Superior for the purpose of enabling Superior to claim ownership of the wood and the dowels manufactured therefrom.

At this point, we are induced to enter the field of supposition. Supposing that after the Company had purchased the wood from the plaintiff, the price of wood had gone up.

Without doubt Superior would have obtained and claimed the benefit of the increased value. Supposing the Company had gone out of business and the wood purchased from the plaintiff had remained in its possession. Surely, under the terms of the agreement between Superior and the Company, Superior would have laid claim to the wood. Going one step further, supposing a creditor of the Company had sued the Company and attached the wood in question. Without doubt, Superior would have promptly entered the claim that the wood belonged to it. The position now taken by Superior would be to retain the benefits of the contract, but disavow its liabilities.

It is our opinion there was ample evidence to support the finding on the part of the referee, that an agency relationship existed.

In the course of argument of counsel for the defendant, the contention was advanced that the report should be recommitted because the referee did not pass upon the issue of the abandonment of the contract. There is no written objection to the acceptance of the report setting forth this contention.

The case of *Blanchette* v. *Miles,* 139 Me. 70, 27 A. (2nd) 396 is authority to the effect that a referee under Rule XLII is not required to make special findings of fact and that the failure to do so does not constitute exceptionable error. A distinction was noted between cases where the referee did not pass on "material matters in issue," as was the situation in *Kennebec Housing Co.* v. *Barton,* 122 Me. 374, 377, 120 A. 56, 57.

It is our opinion that if Superior and the Company disregarded any portion of their written agreement, those portions of the agreement which created the agency relationship and established title in the wood and the dowels manufactured therefrom in Superior, were not abandoned. The contention advanced by Superior upon the claim of aban-

donment is not addressed to a material issue. The point is not raised in the written objections as was done in *Kennebec Housing Company* v. *Barton, supra;* and, in any event, the report of the referee indicates that he gave consideration to this phase of the case in arriving at his decision.

We pass now to the second contention of the defendant, that if there was an agency relationship, the purchase by the Company of lumber from the plaintiff was not within the scope of its authority.

The evidence indicates, and the referee so found, that when the invoice for the wood in question was delivered by the Company to Superior, the wood had already been purchased. Superior had knowledge of the weak financial status of the Company and is chargeable with the knowledge that the wood was purchased by the Company on credit. It is our opinion that any deviations from the provisions of the contract relating to the purchase of wood by the Company were waived by Superior; and that Superior, impliedly, at least, authorized the purchase of the wood by the Company on the credit of Superior.

Bearing in mind the course of dealings between Superior and the Company, we are of the opinion that the evidence supports a finding that the purchase of the wood from the plaintiff by the Company was within the scope of its authority as agent for Superior.

Having determined that the wood was purchased by the Company in the capacity as agent for Superior, and having further determined that the actions of the Company were within the scope of its authority, we pass now to the question of liability.

> "It is competent to show that contracting parties were agents of other persons, so as to give the benefit of the contract to, or charge its liabilities upon, the unnamed principal. An undisclosed principal may be shown to be the real party in a trans-

action in which the agent is the only ostensible person." *Putnam* v. *White,* 76 Me. 551, 554.

"The rule is well settled that either the agent or an undisclosed principal is liable at the election of a creditor or a person to whom the agent has incurred liability acting within the scope of his authority." *Libby* v. *Long,* 127 Me. 293, 296, 143 A. 66.

"It is unquestionably the general rule of our law that an undisclosed principal, when subsequently discovered, may, at the election of the other party, if exercised within a reasonable time, be held upon all simple non-negotiable contracts made in his behalf by his duly authorized agent, although the contract was originally made with the agent in entire ignorance of the principal." 2 Mechem on Agency, 2nd Ed., § 1731; 1 Williston on Contracts, Rev. Ed. § 286; 3 C. J. S., Agency § 244; 2 Am. Jur., Agency, § 393; 1 Am. Law Inst., Restatement of Agency, § 186; *Manchester Supply Co.,* v. *Dearborn, et al.,* 10 A. (2nd) 658 (N. H.)

"From the authorities cited above, as well as from the very nature of the situation, this right of action does not depend upon the third person's knowledge, when dealing with the agent, that the latter was acting for another instead of for himself. Obviously everyone, when dealing with an agent for a wholly undisclosed principal, believes that he is dealing with the agent only, relies solely upon the agent individually, and, if credit be extended, extends that credit to no one but the agent. However, and herein lies the anomaly, the creditor has a right of action against the undisclosed principal, when discovered, even though he never learned of the existence of the latter until after the bargain was completed, if he can prove, as in every other case of agency, that the agent's acts were within the scope of authority." *Manchester Supply Co.* v. *Dearborn, et al., supra.*

The defendant contends vigorously that even though there was an agency relationship, and even though the agent acted

within the scope of its authority, that payment by Superior to the Company for the wood absolves Superior from liability.

The issue thus raised presents a problem of novel impression in this State. The issue is:

> "Is an undisclosed principal absolved from liability to his agent's vendor who has sold goods to the agent upon the credit of the agent who has received payment or advances, or a settlement of accounts, from his undisclosed principal before discovery of the undisclosed principal by the agent's vendor.?"

There are two different rules bearing upon the issue. The first one, which appears to be supported by the weight of authority is that an undisclosed principal is generally relieved of his liability for his agent's contracts to the extent that he has settled with his agent prior to the discovery of the agency. The other rule is, that an undisclosed principal is discharged only where he has been induced to settle with the agent by conduct on the part of the third person leading him to believe that such person has settled with the agent.

The decisions appear to be in a state of hopeless confusion.

> "The rule that an undisclosed principal, when discovered, may be held liable upon a contract made in his behalf will not be enforced for the advantage of a third party, if it will work injustice to the principal. An undisclosed principal may be relieved from liability by reason of a changed state of accounts between him and the agent, the rule formerly laid down in England and now very generally followed in the United States being that, where the principal, acting in good faith, has settled with the agent so that he would be subjected to loss were he compelled to pay the third person, he is relieved from liability to the latter, and this

doctrine is, in at least one jurisdiction, in effect prescribed by statute. This doctrine is now held in England, and in a few cases in the United States, to be too broad, and the better rule is stated to be that the principal is discharged only where he has been induced to settle with the agent by conduct on the part of the third person leading him to believe that such person has settled with the agent or has elected to hold the latter. In any event the principal is relieved from liability, where he has been induced by the conduct of the third person to settle with the agent." 2 C. J., Agency § 531; 3 C. J. S., Agency § 249.

> "It is often said that persons dealing in their own names are presumed to deal for themselves as principals, yet if one authorized by another to act as his agent, in acting on behalf of the principal, fails to disclose the principal to the third person, or to disclose that he is acting as agent, the principal, when discovered, may become liable for the acts done in his behalf, and may be sued thereon just as if, at the time the transaction was entered into, the agent had disclosed the fact of his agency and the identity of the principal, unless the principal and the agent have so adjusted their accounts that to hold the principal liable would work an injustice to him." 2 Am. Jur., Agency, § 393.

The expression "unless the principal and the agent have so adjusted their accounts that to hold the principal liable would work an injustice to him," is qualified by 2 Am. Jur. § 399, which reads as follows:

> "The general rule which allows a third person to have recourse against an undisclosed principal is subject to the qualification that the principal shall not be prejudiced by being made personally liable because he has in good faith relied upon the conduct of the third person and has paid or settled with the agent; conversely, the rule is that a third person who deals with the agent of an undisclosed principal can, upon discovering the principal, resort to the latter for payment, unless by his con-

duct he has led the principal in the meanwhile to pay or settle with the agent. The comparable expression of the American Law Institute is that an undisclosed principal is discharged from liability to the other party to the contract if he has paid or settled accounts with his agent, reasonably relying upon conduct of the other party, not induced by the agent's misrepresentations, which indicates that the agent has paid or otherwise settled the accounts. Thus, if the principal has settled with his agent on the basis of receipts or other documents furnished the agent by the seller, the principal cannot be held liable for the price."

The American Law Institute, as of May 4, 1933, adopted and promulgated the following rule:

"An undisclosed principal is discharged from liability to the other party to the contract if he has paid or settled accounts with an agent reasonably relying upon conduct of the other party, not induced by the agent's misrepresentations, which indicates that the agent has paid or otherwise settled the account." 1 Am. Law Inst. Restatement of Agency, § 208.

It would seem, by inference, at least, that Massachusetts would follow the first rule. The case of *Emerson* v. *Patch,* 123 Mass. 541, has been cited in support of this doctrine. However, the issue was not actually determined in that case. Briefly, the facts in this case were that Emerson sold wood to the agent of an undisclosed principal. Before the agency was discovered the principal settled his accounts with the agent. The court implied that such settlement would be a defense, but ruled that question could arise only when it was ascertained as a fact that such a payment had actually been made, and in good faith. The exceptions in that case were sustained, but upon another ground.

In the New York case of *Fradley* v. *Hyland,* 37 Fed. Rep. 49; 2 L. R. A. 749, the following principle was laid down:

> "Where an agent, authorized by a principal to purchase supplies for the use of the principal, and instructed to purchase only for cash, purchases in his own name, upon credit, of a seller who supposes the agent to be buying for himself only, and the principal pays or settles with the agent for the supplies in good faith, supposing that the agent had purchased them for cash or upon his personal credit, he is not liable over again to the seller for the price of the supplies."

It is to be noted that this opinion assumes that the agent had violated his instructions, and was not authorized to purchase upon credit.

This case of *Fradley* v. *Hyland, supra,* has been cited frequently as authority in support of the first rule. However, there is also found in this case the following statement:

> "The rule that a seller who deals with the agent of an undisclosed principal can, upon discovering the principal, resort to the latter for payment, *unless by his conduct he has led the principal in the meanwhile to pay or settle with the agent,* (emphasis supplied) does not apply to a case in which the agent bought contrary to his instructions, and the seller gave credit to the agent supposing him to be the only principal, and the principal has in the meantime paid the agent."

This last statement appears to be inconsistent with the first one, and it is to be noted that the second statement includes a portion of the so-called second rule. Consequently, the reasoning in this opinion is not too clear, and is of little assistance in dissipating the existing perplexities, although it would seem from other quotations in the case that the court sustained the first rule, to the effect that where a purchase has been made by an agent upon credit authorized by the principal, but without disclosing his name, and payment is subsequently made by the principal

to the agent in good faith before the agency is disclosed to the seller that the principal would not be liable.

See also *Montague Mailing Machinery Co.* v. *All-Package Grocery Stores Co., Inc., et al.,* 169 N. Y. S. 920, which is to the effect that an undisclosed principal is liable to a third party, who dealt in good faith with an agent for an undisclosed principal, with the qualification, however, that nothing had in the meantime passed between the principal and its agent to alter the state of their account, such, for example, as payment by the principal to the agent prior to any claim made against the principal by the vendor.

In *Southern Ry. Co.* v. *Simpkins Co.,* 100 S. E. 418 (N. C.), 10 A. L. R. 731, the court followed the rule that:

> "Where one dealing with an agent with knowledge of his agency gave credit exclusively to the agent, he cannot thereafter recover from the principal who has in good faith settled with the agent."

This case as well as the decision in the *Fradley* v. *Hyland* case discusses at some length the history of the varying decisions upon the issue.

In arriving at his decision, in the instant case, the referee first found that there was no evidence of conduct on the part of the plaintiff which led the defendant to pay the agent. This finding of fact is supported by the evidence. The referee, then applied the rule laid down in the Restatement of the Law and found for the plaintiff.

The defendant contends that the referee applied erroneous law, in arriving at his decision, and that he should have ruled that payment by Superior to the Company absolves Superior to the extent of the amount of the payment by Superior to the Company.

We are, therefore, called upon to determine which rule shall become the law in this State.

Manifestly, if we adopt the rule which we have designated as the first rule, as distinguished from the rule laid down in the Restatement of the Law of Agency, then, as the payment made by Superior to the Company is in excess of the amount remaining due to the plaintiff, the exceptions of Superior would have to be sustained. On the other hand, if we adopt the rule laid down in the Restatement, then the decision of the referee was correct and Superior's exceptions should be overruled.

We cite § 292, 1 Williston on Contracts, Rev. Ed.:

> "There is considerable confusion of authority in regard to the question whether settlement by the principal with his agent before the person with whom the agent dealt makes a claim upon the principal is a defense to the latter. The decision of the controversy depends upon whether the liability of an undisclosed principal is to be regarded as an absolute right of one who deals with the agent although confessedly the credit of the agent has been exclusively relied upon, or whether, on the other hand, a person who thus deals with an agent is to be given only such limited right against the undisclosed principal as is consistent with equity. If the first of these theories is sound, the person dealing with the agent cannot be deprived of his right against the principal unless in some way he has subjected himself to an estoppel by misleading the principal. If, however, the second theory is sound, the mere fact that the principal has innocently put himself in a situation where hardship will be caused by holding him liable on the agent's contract should be a defense. The English court has wavered somewhat uncertainly between these two views. The earliest decision on the subject adopted the second theory and held that recovery from the principal was 'subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal.' This rule is supported perhaps by the weight of author-

ity in the United States, but has now been much modified in England, the first of the two theories suggested above having been adopted by a later decision in the middle of the last century, and the principal held liable unless the plaintiff in some way had misled the principal.

"It is still the law of England that if the plaintiff was aware when the contract was made that the agent was acting for some principal, though unnamed, a settlement by the principal with his agent will not preclude a suit against the principal by the third party; but if the settlement by the undisclosed principal was made when the third party was still unaware that the agent was not himself the principal, it has been held that the plaintiff cannot hold the principal. The later English cases find support in a few decisions in the United States. There seems little ground for the fine distinctions taken by the later English cases. It would be better to adopt squarely either the rule that the undisclosed principal is liable in every case unless the plaintiff has discharged him by electing so to do, or by misleading him to his injury; or, on the other hand, to hold that the principal is not liable whenever his action honestly taken makes it undue hardship to hold him. The Restatement of Agency has adopted the former view not only in the case of the undisclosed principal, but also with respect to disclosed and partially disclosed principals."

The development of this phase of the law in the English cases is of interest. The first case which laid down the rule that an undisclosed principal is not liable to the vendor if the principal has paid or settled accounts with the agent, was that of *Thompson* v. *Davenport,* 9 Barn. & Cress. 78, decided in 1829.

The rule set forth in this decision has been known as Lord Tenterden's rule.

The next case was that of *Heald* v. *Kenworthy,* 10 Exch. 739, decided in 1855. In this case Parke, B. ruled that Lord

Tenterden's rule was mere dictum and his decision was to the effect that the undisclosed principal has no defense when he has settled accounts or made payment to the agent, unless the third party has misled the principal into making such payment. This was the first expression of the law now promulgated in the Restatement of the Law of Agency.

Next came the case of *Armstrong* v. *Stokes,* 7 Q. B. 598, decided in 1872. In this case it was held that the rule of Parke, B. was too narrow and the court followed Lord Tenterden's rule.

Then came the case of *Irvine* v. *Watson,* 5 Q. B. Div. 102, decided in 1879, in which the court followed the Lord Tenterden rule and refused to follow the rule of Parke, B. However, upon appeal, the appellate court declared the rule as laid down by Parke, B. as the true one.

It would appear, therefore, that the latest rule in England was laid down in the appeal of *Irvine* v. *Watson,* to the effect that the rule of Parke, B., that is, the present Restatement rule, is the correct one.

In the case of *Irvine* v. *Watson,* the court did not expressly overrule *Armstrong* v. *Stokes,* and spoke of it as "a very remarkable case," the decision of which depended upon "the peculiar customs obtaining in Manchester in relation to the business of commission merchants."

The rule as laid down by Lord Tenterden was approved by Judge Story in his Commentaries on the Law of Agency, and we quote § 449, Story on Agency:

> "The liability of the principal to third persons, where the purchase is made in the name of his agent, and the principal is not known or disclosed at the time, is qualified by another consideration; and that is, that the principal will not be made personally liable, if, in the intermediate time, he has settled with his agent, without any suspicion of his own personal liability, or if he would other-

> wise, without any default on his own part, be prejudiced by being made personally liable. Therefore, if, in the intermediate time, the principal has paid the agent for goods purchased in the name of the latter, or if the state of the accounts between the agent and the principal would make it unjust, that the principal should be held liable to the vendor, such fact of payment, or such a state of accounts, would be a good defence to a suit brought by the vendor against the principal. The same result would arise, if the vendor had accepted a negotiable security from the agent, for the amount, payable at a future day, or had given him a receipt, by which he had in the meantime settled with his principal, or the latter had been induced to deal differently with the agent, from what he would otherwise have done. So, if the vendor had suffered the day of payment for the goods to pass by, without demanding payment, and had thereby induced the principal to suppose, that credit was exclusively given to the agent, and upon the faith of that he had paid over the amount to the agent, or settled it in account with him, the principal would be discharged."

In support of the rule, Judge Story cites the decision in *Thomas* v. *Davenport, supra,* which as has already been pointed out was decided in 1829, and which is no longer the law as decided in the appeal case of *Irvine* v. *Watson, supra.*

Moreover, it is interesting to note that the examples mentioned in § 449 of Story on Agency, are in reality exceptions contemplated by the present statement of the law in the Restatement of the Law of Agency; all of which adds to the existing confusion.

Mr. Mechem in his Treatise on the Law of Agency, 2nd Ed. Vol. 2, points out that the subject of discussion has not very frequently arisen in the United States and has not been thoroughly considered in any recent case by a court of last resort. It is interesting to note that the case of

Emerson v. *Patch* (Mass.), *supra,* was decided in 1878; and the case of *Fradley* v. *Hyland, supra,* was decided in 1888; the case of *Montague Mailing Machinery Co.* v. *All-Package Grocery Stores Co., Inc., et al., supra,* was decided in 1918; and the case of *Southern Ry. Co.* v. *Simpkins Company, supra,* was decided in 1919. The Commentaries on the Law of Agency by Judge Story were published in 1843.

In arriving at his conclusion that the law as now set forth in the Restatement was the correct law, Mr. Mechem had this to say in his Treatise on the Law of Agency, 2nd Ed. § 1749, Vol. II,

> "Nevertheless, the rule of Parke, B., seems on the whole to be reasonable and just. If a principal sends an agent to buy goods for him and on his account, it is not unreasonable that he should see that they are paid for. Although the seller may consider the agent to be the principal, the actual principal knows better. He can easily protect himself by insisting upon evidence that the goods have been paid for or that the seller with full knowledge of the facts has elected to rely upon the responsibility of the agent, and if he does not, but, except where misled by some action of the seller, voluntarily pays the agent without knowing that he has paid the seller, there is no hardship in requiring him to pay again. If the other party has the right, within a reasonable time, to charge the undisclosed principal upon his discovery, - - and this right seems to be abundantly settled in the law of agency - - it is difficult to see how this right of the other party can be defeated, while he is not himself in fault, by dealings between the principal and the agent, of which he had no knowledge, and to which he was not a party."

It is interesting to note that this work on Agency by Mechem was published in 1914.

We think it is pertinent at this point to record something of the establishment, organization and object of the Amer-

ican Law Institute. The Institute was organized on February 23, 1923. The organization meeting was attended by the Chief Justice of the United States, and other representatives of the Supreme Court, representatives of the United States Circuit Courts of Appeals, the highest courts of a majority of the States, the Association of American Law Schools, and the American and State Bar Associations. The Institute was composed of Justices of the Supreme Court of the United States, senior judges of the United States Circuit Courts of Appeals, the chief justices of the highest courts of the several States, and president and members of the Executive Committee of the American Bar Association, the presidents of certain learned legal societies, and the deans of member schools of the Association of American Law Schools. Its object as expressed in its charter was "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice and to carry on scholarly and scientific legal work."

The Restatement may be regarded both as the product of expert opinion and as the expression of the law by the legal profession.

The Committee on Agency which prepared the Restatement of the Law of Agency was composed of outstanding representatives of the leading law schools of the country. It was headed by Mr. Floyd R. Mechem, who at the time was regarded as the foremost living authority on the subject of agency. Its rule as set forth in § 208 promulgated on May 4, 1933 expounds the thinking of some of the best legal minds in the country.

The purpose of the Institute in the promotion of clarification of the law can be applied to no more needy situation than that of the question before us for determination. It is our opinion that the reasoning of Mr. Mechem in support of the doctrine promulgated in the Restatement is sound.

The adoption of this doctrine by this court will establish a clear cut and explicit rule of law free from the confusion, complications and perplexities which have existed throughout the years.

We, therefore, adopt the rule as laid down in the Restatement of the Law of Agency.

Having already ruled that the Company was the duly authorized agent of Superior and that when it purchased the wood from the plaintiff, it was acting within the scope of its authority, we now rule that the referee applied the proper law and that his decision was correct and should be affirmed.

Exceptions overruled.

FRANK F. HARDING, ATTORNEY GENERAL
PETITIONER FOR WRIT OF QUO WARRANTO
ON RELATIONS, ALFRED ERICKSON ET AL.

vs.

WILLARD A. BROWN

Knox. Opinion, February 5, 1958.

Quo Warranto. Town Officers. Stagger System.

P. L. 1957, Chap. 405, Sec. 1, provides an orderly process for the adoption or abandonment by towns of the "stagger" system, so called. R. S. 1954, Chap. 90A, Sec. 36, Subsec. IV.

Resignation of a public office may be implied. What acts constitute abandonment depend upon circumstances and controlling law.

To constitute abandonment there must be a voluntary and intentional relinquishment of office.

ON EXCEPTIONS.

This is a *quo warranto* proceeding to test the legality of one holding public office. The case is before the Law Court upon exceptions to an order by the Superior Court that respondent be ousted. Exceptions sustained. Remanded for entry of judgment dismissing the information.

Christopher S. Roberts, for plaintiff.

Sanborn & Sanborn, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

WEBBER, J. On exceptions. This is a proceeding begun by an information in the nature of *quo warranto* brought by the attorney general of Maine on the relation of certain voters and taxpayers of the town of South Thomaston seeking judicial determination as to whether or not the re-

spondent Willard A. Brown legally holds the offices of selectman, assessor and overseer of the poor in that town. The matter was heard on the pleadings and a stipulation as to certain facts. The justice below decided that the respondent was without title to the offices in question and must be ousted therefrom.

The facts are not in dispute. At its annual town meeting in 1950, under proper warrant, and pursuant to the authority vested in towns by R. S. 1944, Chap. 80, Sec. 14, the town adopted the so-called "staggered system" by electing one selectman for one year, one for two years and one for three years. In 1951 at the annual meeting, the single vacancy was filled but for one year only, but two months later at a special meeting the town elected the incumbent for a term of three years. In each of the five succeeding years the town elected one selectman for a three year term. In 1957, however, at the annual meeting one William Robinson was elected selectman but only for a term of one year. The legality of his election for a term shorter than three years was raised by the respondent who had been defeated for the office by Robinson. Robinson then joined with the other two selectmen in signing a warrant for a special town meeting to be held April 8, 1957 "to choose the necessary Selectmen, Assessors, Overseers of the Poor, and Town agent to serve until the Annual Town *(sic)* of 1960." It is stipulated that this was a legal town meeting which necessarily means that the warrant was signed by Robinson at least seven days before April 8, 1957. R. S. 1954, Chap. 91, Secs. 2 and 7. At this special meeting Robinson and the respondent were both nominated for the office of selectman for a term of three years and the respondent was elected. The town had already voted that its three selectmen should also act as assessors and overseers of the poor. Brown was duly sworn and qualified. A short time later Robinson sent to the selectmen a letter of resignation from the board

carrying the postscript, "to settle some peoples *(sic)* opinion."

A question has been raised as to whether the town, having adopted in 1950 the "staggered system" by vote (rather than by ordinance as provided by R. S. 1944, Chap. 80, Sec. 83, Subsec. XII) could thereafter legally elect a selectman for a term of only one year. On our view of the factors which are decisive here, it is unnecessary to determine that issue. An interpretation of the statute (R. S. 1944, Chap. 80, Sec. 14), not otherwise required for a determination of this case, would be at best an academic exercise in view of the fact that the statute was repealed by P. L. 1957, Chap. 405, Sec. 2, and an orderly process established by which towns may adopt and later, if they so desire, abandon the so-called "staggered system." P. L. 1957, Chap. 405, Sec. 1 enacting R. S. 1954, Chap. 90 A, Sec. 36, Subsec. IV. Suffice it to say that if the action of the town at the annual meeting in 1957 was in violation of the statute, Robinson was never elected and the office was vacant when the respondent accepted it. If on the other hand Robinson was legally elected, he vacated the office by his voluntary action. The result is the same in either case.

Considering further the latter alternative, it has been said that the resignation from a public office may be implied. McQuillan on Municipal Corporations, 3rd Ed., Vol. 3, Sec. 12.123 states the applicable rule as follows:

> "An office may be vacated by abandonment. Abandonment may be treated as a constructive resignation * * * *. A resignation of a public office may be either express or implied. A resignation by implication may take place by an abandonment of official duty without leave of absence or without good cause shown. But what acts will constitute abandonment or implied resignation of an official depend, of course, upon the circumstances of the particular case and the controlling law."

In determining whether there has been an abandonment of office, it is important to ascertain the intention of the official. As was said in *State* v. *Harmon,* 115 Me. 268 at 272:

> "It is a well settled principle that a public office may be abandoned by the incumbent so that a vacancy in the office is thereby created. To establish such abandonment, however, the proof must show a voluntary and intentional relinquishment of the office by the incumbent, for there can be no abandonment of an office or any other right without an intention, actual or imputed, to abandon it. Such intention is a question of fact, and may be inferred from the party's acts. If his conduct is such as to clearly indicate that he had relinquished the office, an intention to do so may be imputed to him."

We think the events as they transpired in the case before us sufficiently evidenced an intention on the part of Robinson to abandon the office of selectman and such other derivative offices as he held. Very soon after the legality of his election at the annual meeting was questioned, he signed a warrant calling a special meeting for the purpose of filling a vacancy in the office of selectman. No useful purpose would be served by calling such a meeting unless a vacancy in fact existed. It is apparent then that Robinson intended to create the vacancy which would require another election if such vacancy did not already exist. His subsequent conduct was entirely consistent with such an intention. He allowed his name to be put in nomination at the special meeting and participated as an active candidate for the office. Having been defeated by the respondent, he subsequently tendered an express written resignation which we think may be fairly considered as a confirmation of his previous resignation by implication. The quoted postscript inferentially indicates his desire to remove all doubts as to his previous intention and lay at rest any opinion

that he had not intended to abandon the office. Mr. Robinson is not one of the relators in this proceeding and makes no claim to the office. It seems fair to attribute to his acts the motive and intention which would best serve the public interests of the town. Those interests are not well served either by having a long continued vacancy in office or by having an incumbent in office whose lawful claim thereto is doubted or doubtful. He proceeded in the manner best calculated to stabilize the position of the town by providing the voters a new opportunity to fill a vacancy. The town availed itself of this opportunity by electing the respondent selectman for a term of three years, which office together with the derivative offices of assessor and overseer of the poor he now holds. The entry will be

Exceptions sustained.
Remanded for entry of judgment dismissing information.

EVERETT A. GETCHELL
ERNEST L. LECLERC
ROSA M. ATWOOD, WIDOW OF BYRON J. ATWOOD
vs.
LANE CONSTRUCTION CORPORATION
AND
LIBERTY MUTUAL INSURANCE CO.

Cumberland. Opinion, February 5, 1958.

Workmen's Compensation. "Course of Employment."

Where it was common practice for an employee to use the turnpike, not yet open to the public, in going to and from work, a fact known to the company, employees injured by a collision while so traveling are injured "in the course of" and "arising out of" employment.

Where an accident which might have been anticipated did in fact occur, it occurred "in the course of" and "arose out of" employment and is compensable.

ON APPEAL.

This is an appeal before the Law Court from a *pro forma* decree of the Superior Court sustaining an award of compensation.

Appeal dismissed. Decree affirmed. Allowance of $250 ordered to petitioners for expenses of appeal.

William H. Clifford, for plaintiff.
Forrest E. Richardson, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

WEBBER, J. On November 29, 1955 the claimants Getchell and Leclerc in company with the decedent Atwood were riding in Getchell's truck. They were all employees of the respondent Lane Construction Corporation working on the construction of the Maine Turnpike. Shortly after their work had ended for the day they were involved in an accident with another vehicle in which Getchell and Leclerc were injured and Atwood was killed. The Industrial Accident Commission awarded compensation and the matter is before us on appeal (the three claims having been heard and decided together).

Reference may be had at the outset to the statement of facts and applicable law which is contained in our opinion in the case of *Rita J. Babine, Pet'r.* v. *Lane Construction Corporation et al.,* 153 Me. 339, filed this day. The respondents are the same in both cases. The claimants Getchell and Leclerc and the decedent Atwood were all working for the same contractor and upon the same project under substantially the same conditions as was *Babine.*

The facts vary only slightly from those in the *Babine* case. The turnpike was more nearly completed in November and the surfacing of the traveled portion had been finished. The road was still, however, not open to public travel and work was in progress on the shoulders and the "islands" between lanes. After the death of Babine a practice had been inaugurated of issuing passes to all employees which permitted them access onto the turnpike area at any entrance. It was still, however, as in the *Babine* case, common practice for the employees to use the turnpike going to and coming from work, a fact known to the company. The company considered it useless to attempt to prevent this practice and made no effort to do so.

Mr. Getchell was an assistant foreman. Mr. Atwood worked with him. Mr. Leclerc was a roller operator. On the day of the accident, Getchell and Atwood worked around the bridge at Gray. They then moved in Getchell's truck several miles to a section near the South Portland exit and worked there. In the meantime, Leclerc worked first near the Falmouth interchange and later drove his roller to a work area near the South Portland area, leaving his car parked on the traveled portion of the north bound lane. At the request of a foreman and as a matter of convenience and accommodation rather than duty, Getchell agreed to convey Leclerc back to his parked car at the close of work. Getchell, with Atwood as his passenger, intended to continue on northerly toward Auburn on their way home. Several other contractors were also performing work in the completion of the turnpike involving the use of men and equipment. Vehicles were moving in both directions on both the north bound and south bound lanes. While the Getchell truck was proceeding northerly in the north bound lane and before they reached the location of Leclerc's parked car, it was involved in a collision with another vehicle moving in the opposite direction.

In the *Babine* case we stated at length our reasons for holding that the accident occurred "in the course of" and "arose out of" the employment. We are satisfied that no change in the facts as above stated produces a different result. Even though the paving work had been finished, the work operation continued on up and down the area with crews moving, as did the claimants, for long distances from one work area to another. This was not yet a public highway or street. It was a work project with the general public excluded from any permitted use of the area. The employees were free to move about over it in the discharge of their tasks and in the process of going to and coming from work. The entire area was still a zone of employment risk and hazard. In argument, counsel for the respondents has conceded that Mr. Leclerc's accident is compensable and has abandoned his contentions as to him. We cannot agree that Leclerc stands in any better position than do the other two claimants. Getchell and Atwood were also on the employer's "premises" returning home from work by a customary and convenient route not forbidden to them. The confusion and lack of control created by the nature of the work and the circumstances under which it was being done gave rise to the hazard of collision of vehicles within the work area. When an accident which might well have been anticipated did in fact occur, it occurred "in the course of" and "arose out of" the employment, and is compensable.

Appeal dismissed. Decree affirmed. Allowance of $250 ordered to petitioners for expenses of appeal.

RITA J. BABINE, PET'R.
vs.
LANE CONSTRUCTION CORPORATION
AND
LIBERTY MUTUAL INSURANCE COMPANY, RESPTS.

Cumberland. Opinion, February 5, 1958.

Workmen's Compensation. Highways. Employer's Premises. Course of Employment.

A road construction worker injured while traveling upon a turnpike, not yet opened to the public, to his work assignment is "in the course" of employment where the employer had not issued orders nor promulgated rules prohibiting employees from using the turnpike area as a route to and from the place of work.

In matters of highway construction, the employer's premises are transitory and temporary, changing as the work proceeds from day to day or hour to hour and ordinarily includes *only* those portions of the highway on which construction is *actually* in progress.

To say that an injured employee might have entered the turnpike at a point closer to his work assignment and thereby have exposed himself to less of the risks of employment, is to say no more than that the "premises" were extensive.

ON APPEAL.

This is a petition for compensation before the Law Court upon appeal from a decree of the Superior Court sustaining an award. Appeal dismissed. Decree affirmed. Allowance of $250 ordered to petitioner for expenses of appeal.

Berman, Berman & Wernick,
John J. Flaherty, for plaintiff.

Forrest E. Richardson, for defendant.

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

WEBBER, J. Louis C. Babine, deceased husband of the petitioner, lost his life in an accident while employed by

Lane Construction Corporation on August 20, 1955. There is no material dispute as to the essential facts which were fully found by the Industrial Accident Commission. Babine's employer was under contract with the Maine Turnpike Authority to place the "final top" on the turnpike including the traveled portion and shoulders in the area extending from the South Portland exit northerly to the Androscoggin River in Auburn. As is well known, the new turnpike is designed to be a divided, limited access, toll highway running from Kittery to Augusta. On the day of this accident the contractor's work was by no means completed. Work of various types was in progress in areas in the section covered by the contract. The pavement was in varying stages of completion and work was being done on the shoulders in some places. Sections of both the north bound and south bound lanes were closed to the movement of vehicles. The turnpike had not been open to public travel and, although some members of the public were undoubtedly driving vehicles over the area at times, it is fair to assume from the undisputed evidence that most, if not all, of them were there without invitation or license. Several other contractors were engaged in other phases of the construction at the same time and in the same areas.

On the evening before the accident, Mr. Babine, a roller operator, had left his roller at a point on the turnpike where he had ceased operations at the close of the work day. His work schedule called for his resumption of work at the same place at 7 A.M. on the day he was killed. He was temporarily residing at a hotel in Lewiston. On the day of the accident he was awakened by the desk clerk about 5 A.M. A short time later he appeared wearing clothes suitable for work. He had breakfast with a fellow employee, after which both set off in their own cars. At about 6:40 A.M. the Babine car was observed entering the turnpike area from the public highway known as Route 122 in Auburn.

The turnpike at this point was within the section being constructed by the employer. Mr. Babine then proceeded about half a mile in the south bound lane and in a southerly direction, the north bound lane then being closed to the movement of vehicles. At this point the fatal accident occurred. The automobile was then traveling toward the site of Mr. Babine's own work assignment some sixteen miles away. From this evidence the Commission concluded and found as a fact that the deceased was then on his way to work. We do not understand that respondents now press their contention that this was a finding of fact without supporting evidence, but in any event we think the inference is entirely reasonable and we doubt that any other could properly be drawn from the circumstances.

The morning was foggy and the visibility poor. Near the scene of the accident the hard top had not been placed on the surface of the road and work was in progress on the shoulders. A stone spreader was parked on the south bound lane, partly on the roadway and partly on the shoulder. Mr. Babine, traveling at about 40 to 45 miles per hour, pulled to the left to pass the stone spreader and then, failing promptly to turn back to the right, collided with a truck owned by the respondent contractor and proceeding at about 40 miles per hour in the opposite direction. Mr. Babine was instantly killed.

It is true that the deceased need not have entered the turnpike area where he did in order to get to the place where his work called him. There was a public highway available from which he could have entered the area at any one of several points. Without doubt he chose the course for his own convenience. Nevertheless he had traveled the area frequently in the past as had other employees. There was no company rule or order in effect prohibiting employees from traveling the area going to and coming from work even though the company was aware that employees

were using the turnpike for that purpose. Each employee furnished his own transportation to the point where his work was to be performed and therefore it was necessary for him to travel for some distance over the turnpike area even though that distance might be short.

Upon this evidence the Commission found that the accident occurred "in the course of" and "arose out of" the employment. No case yet decided in Maine determines the issues here presented.

The requirement that the accident to be compensable must have occurred "in the course of" the employment relates of course to time, place and circumstances. "An accident arises in the course of the employment when it occurs within the period of the employment at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties or engaged in doing something incidental thereto." *J. Fournier's Case,* 120 Me. 236, 240. That case clearly indicated that one who is in a forbidden place or on a forbidden route is not in a place where he may reasonably be and his accident is therefore not "in the course of" employment. It is therefore significant that in the case at bar the employer had not issued orders or promulgated rules prohibiting employees from using the turnpike area as a route to and from the place of work. Apart from such prohibitions, the employee ordinarily enjoys the protection of the Act while going to and coming from the location of his work assignment and while on the employer's premises. In *Roberts' Case,* 124 Me. 129 at 131 the court stated that " 'the course of his employment' does not begin and end with the actual work he was employed to do, but covers the period between his entering his employer's premises a reasonable time before beginning his actual work and his leaving the premises within a reasonable time after his day's work is done and during the usual lunch hour, he being in any place where he

may reasonably be in connection with his duties or entering or leaving the premises by any way he may reasonably select." Roberts' case went on to extend coverage to a private way leading to the employer's premises which the employer and his employees had a right to use but over which the employer had no control, this way being the *only* means of access by vehicles to the employer's premises from the nearest public street.

What constitutes an employer's premises is sometimes difficult to determine. It cannot be doubted that when a contractor takes his crew upon the premises of another to perform a contract for that other, those premises become the premises of the contractor employer for the purpose of determining whether an accident occurs "in the course of" the employment. When the construction of highways is involved, problems of unusual difficulty present themselves. In *Kattera* v. *Burrell Const. & Supply Co.* (1943) 152 Pa. Super. 591, 33 A (2nd) 498, 500, the court said:

> "'It cannot be seriously contended when an employer engages in highway construction that the premises shall, therefore, take in its entire length and breadth of the route. * * * The courts, in cases of this kind, have restricted the term 'premises' in work of this character to include only that portion of the highway (on) which construction is in actual progress, so that the 'premises' of the employer in such cases are transitory and temporary, changing as the work proceeds from day to day or hour to hour.' "

Our court has refused to extend coverage to the employee on a public highway or street; *Dinsmore's Case,* 143 Me. 344; *Paulauskis' Case,* 126 Me. 32; *Kinslow's Case,* 126 Me. 157; unless the circumstances fall within the exceptions stated in *Rawson's Case,* 126 Me. 563. It may be noted, however, that in each of these cases the employee had left the zone of employment created risk and entered the area

of common hazard, of risks shared equally by all members of the public. In *Ferreri's Case*, 126 Me. 381, the claimant was crossing a public highway open to the public. His employer, a contractor, was engaged in work on the shoulders of the highway and along the sides of the road not involving the traveled portion or impeding the flow of traffic thereon. No duty of his employment required the employee to be where he was when he was struck by a vehicle. Our court treated the claimant as subjected only to the risks incurred by any pedestrian on a public highway. It refused to consider that the traveled portion of the road was, under these circumstances, part of the "premises" of the employer; but the court said at page 382:

> "It might well be that such a section of highway, *while under actual construction,* could be so considered." (Emphasis supplied)

In so saying, the court recognized that a persuasive argument can be made that modern road construction of the traveled portion of a highway creates risks and hazards to those employees who work there, and that the work area is converted, temporarily at least, into the employer's "premises" for compensation purposes. The court further stated at page 383:

> "When the work had reached a point where the traveled portion of the highway was completed, the road opened for public travel and there was no longer necessity for employees to go upon it in the performance of the duty which they owed to their employer, that portion of the highway *ceased to be included* in the premises of the employer, *even if it might be assumed to have been properly so included prior to that time.*" (Emphasis supplied)

Upon facts which closely resemble those in the case before us, a Justice of the Supreme Court of New York held that workmen's compensation was the exclusive remedy in

Tynan v. *Ellingwood et al.* (1953) 122 N. Y. S. (2nd) 768 (affirmed without opinion by the Appellate Division 130 N.Y.S. (2nd) 926). Here the employer was engaged in building the New York Thruway which had not been opened to public travel. The claimant was injured while riding in the car of a fellow employee on his way to work. The collision occurred on the portion of the thruway which was under construction, on which construction the plaintiff was employed. The court treated the area as the "premises" of the employer and therefore found that the accident occurred "in the course of" the employment.

We are satisfied as was the Commission that Mr. Babine's fatal accident occurred "in the course of" his employment. When he left the public highway at Route 122 and entered the turnpike area, he entered upon the "premises" of his employer for compensation purposes. The area was under construction by his employer. No road had been completed and the area was not open to public travel. It is safe to say that the very risks and hazards of construction were inconsistent with safe public travel and furnished a sufficient reason for not inviting public use. It is true that the decedent had many miles left to travel before he would arrive where his roller was parked, but that is to say no more than that the "premises" here were extensive. There can be no doubt but that during the whole course of his travel over the turnpike area, Mr. Babine would have been constantly exposed to the risks and hazards attendant upon highway construction in progress.

We liken this area to a long factory building fronted on its entire length by a public street with doors at either end of the building and at intervals along the street. An employee who approaches the north end of the plant from his home but whose machine or work station is near the south end may, if he desires, walk along the street to the south end, encountering as he proceeds only those hazards which

are common to the general public. He may, however, in the absence of a company rule to the contrary, enter at the north door and walk through the building exposing himself to whatever dangers are created by the employment. In the latter case he is on the employer's premises for compensation purposes. So Mr. Babine could have driven by public highway to the entrance nearest his work and then for only a short distance exposed himself to the risks of his employment. Instead he chose to traverse the entire zone of employment hazard. His death at such a time and place and under these circumstances was incurred "in the course of" his employment.

Did the accident also "arise out of" the employment? Was the employment the cause of death? The construction in progress necessarily tended to create confusion especially with respect to the movement of vehicles and self-propelled machinery. The surface was at different stages of completion. Sections were blocked off. Vehicles and machinery moved in both directions on both lanes. Machinery was parked in such a manner as to obstruct the movement of vehicles. The laws and rules of the road regulating and controlling the speed and method of operation of vehicles on public highways had no application here. This was a work area, not a highway. Surely there was an ever present danger that such a condition would produce a collision of vehicles. Mr. Babine was the victim of one of the hazards of his employment, and the Commission properly awarded compensation to his widow. The entry will be,

Appeal dismissed. Decree affirmed. Allowance of $250 ordered to petitioner for expenses of appeal.

LIPMAN POULTRY COMPANY
vs.
ERNEST H. JOHNSON, STATE TAX ASSESSOR
RIVERSIDE POULTRY FARMS
vs.
ERNEST H. JOHNSON, STATE TAX ASSESSOR
COLDBROOK FARMS
vs.
ERNEST H. JOHNSON, STATE TAX ASSESSOR

Kennebec. Opinion, February 6, 1958.

Taxation. Sales Taxes. Poultry. Feed. Medicines.

Antibiotics and hormone preparations are not feeds within the meaning of R. S. 1954, Chap. 17, Sec. 10, Subsec. VII, exempting "feed" in agricultural production, since they function as catalysts to assist assimilation rather than as foods.

"Sawdust" purchased for use as litter is not "fertilizer" within the meaning of the exemption, even though when mixed with excretion and subsequently removed, it may be used as fertilizer.

NOTE: P. L. 1957, Chap. 402 amended exemptions to include "hormones, litter and medicines."

ON EXCEPTIONS.

This case is before the Law Court upon exceptions by both parties to certain rulings of the Superior Court upon an appeal from the State Tax Assessor. R. S. 1954, Chap. 17, Sec. 33. Appellant's exceptions to the ruling that hormone preparation is not feed are overruled. Appellant's exceptions to the ruling that litter (sawdust) is not fertilizer are overruled. Appellee's exceptions to the ruling that anti-biotics are poultry feed are sustained. Case remanded to the Superior Court for decree in accordance with this opinion.

Brann & Isaacson, for plaintiffs.
Ralph Farris, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

TAPLEY, J. On exceptions. These cases by stipulation are to be considered together as the facts and circumstances pertaining to Lipman Poultry Company are applicable to the other appellants. An appeal was taken to the Superior Court under provisions of Sec. 33, Chap. 17, R. S. 1954 from a decision of the State Tax Assessor on the sales and use taxability of certain products purchased by the appellant for use in its poultry business. The appeal was heard and determined by a single justice of the Superior Court. Both the appellant and appellee took exceptions to the findings of the single justice.

The appellant, Lipman Poultry Company, contends in its exceptions that the justice below was in error when he found that the hormone preparation (capette pellets) and the sawdust used for litter were subject to the sales and use tax while, on the other hand, the appellee, Ernest H. Johnson, State Tax Assessor, complains that the justice was in error in classifying antibiotics as poultry feed. The appellee further complains in his bill of exceptions that the justice below "failed to enter such order and decree as the nature of the case required so that the parties to this case could determine whether the assessment was proper and the appellee further states he failed to order the appellants to pay the tax due or for the appellee to abate the tax which he considered not due." This portion of appellee's exceptions was not argued orally nor in his brief so it will be regarded as waived. *Poirier* v. *Venus Shoe Manufacturing Co.*, 136 Me. 100.

The parties by stipulation have confined the issue to the determination of the taxable status of the following items:

"1. Antibiotics (terramycin oil suspension referred to in the trade as 'TOS'; terramycin animal formula,—'TAF' and terramycin poultry formula, 'TPF');

2. A hormone preparation called 'capette' pills; and
3. Litter (in this case, sawdust)."

Appellant contends that the items in issue are exempt from taxation because they come within the purview of Chap. 17, Sec. 10, Subsec. VII, R. S. 1954 "Sales of seed, feed and fertilizer used in agricultural production - - -."

The record of the case discloses the justice below had for evidence upon which to base his findings two exhibits and the testimony of Frank J. Lipman, an officer of the appellant corporation, and Milton L. Scott, a qualified expert in the field of animal and poultry nutrition. The appellee submitted no evidence.

The issue has been narrowed by agreement so that it becomes a matter of definition as to whether antibiotics and hormone preparations are feeds and sawdust used for litter is fertilizer within the classification of use in the poultry business as considered by the legislators at the time of the enactment of Chap. 17, Sec. 10, Subsec. VII, R. S. 1954.

The antibiotics and the hormone preparation are used in the raising of poultry and the purpose of their use is to shorten the period of growth of the birds and to increase their weight. The antibiotics are used primarily as a "chick starter." The antibiotics are in a powder form and sometimes mixed in the feed so that they become an integral part of the mixture while at other times they are mixed with the water and introduced into the body in that manner. The hormone preparation (capette pellets) are injected under the skin of the bird. There appears to be no question that the introduction of these two elements into the system results in a faster increase of weight than would occur when reliance is had on the use of feed not containing these ingredients. Professor Scott stated that the use of anti-

biotics causes an increase in the weight and growth of the birds but was unable to state the reason why the increase takes place. He speaks of a number of different theories propounded, none of which have ever been established as proven. It actually sums up to the effect that the use of antibiotics in the production of poultry causes an increase of weight and growth but the reason for it is not known.

The case was heard by a single justice without intervention of a jury and in order to overrule his findings of fact, it must be shown that they are not supported by credible evidence. It is 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, et al.*, 132 Me. 111. *Weeks* v. *Hickey, et al.*, 129 Me. 339.

If the record of the evidence supports the findings of the justice below, then the exceptions will be overruled, otherwise they will be sustained.

We are here concerned with an industry that has had rapid growth in recent years and there has been demonstrated a marked departure in the method of feeding poultry for the purpose of sale. It is the obvious purpose of the industry to raise the birds to that point of growth and weight which will cause them to be marketable in the shortest period of time. In order to accomplish this purpose, new methods have been employed which require the introduction of antibiotics and hormones into the system of the bird. The justice below in his findings characterized antibiotics as feed and the hormone preparation (capette pellets) as not being within that category.

Professor Scott has a substantial knowledge of poultry nutrition gained through study and experimental research and since 1949 he has been working with antibiotics as to

their influence in poultry nutrition. Professor Scott explains that "nutrition" is the process of assimilating food, while "nutrient" is "One: 'nourishing; affording nutriment.' And Two: 'A drug which affects the nutritive or metabolic processes of the body.'" He further says that nutrition does not only deal with food material but also with the process of assimilating the food. He contends that the antibiotic is a nutrient affecting the nutritive or metabolic processes of the body which in some unknown way increases body tissues and improves the diet, causing an increased growth. It acts "'in improving the efficiency with which food is converted to an increase in body weight in growing animals.'"

Professor Scott in speaking of the relationship of antibiotics to nutrition quoted a statement of which he approved from a book written by Dr. Jukes, an authority in the field of antibiotics as related to nutrition. This quoted statement is in the following language:

> "'There is a large amount of experimental evidence that establishes an effect of antibiotics in improving the efficiency with which food is converted to an increase in body weight in growing animals.'"

Dr. Jukes believes that an antibiotic is in the nature of an agent when used with food, causing in some manner a chemical reaction with the end result of converting the food more efficiently to increase the body weight in growing poultry.

Concerning the use of hormones (capette pellets), Dr. Scott testified that this drug affects the metabolic process of the body causing increased growth of all tissues more especially those of a fatty nature. It is administered by injection under the skin as it is poorly absorbed in the intestinal tract if taken through the medium of the stomach.

Professor Scott places these hormones in the field of nutrients and in speaking of vitamins, which he calls nutrients, he says:

> "They do not form a permanent part of the body tissue. They are used as catalysts in the body to help other reactions take place; that is, the reactions between the various minerals and protein constituents which do make up the body frame and tissue and then after they serve their usefulness they are excreted and must be replaced with a further supply."

A careful analysis of the testimony of Professor Scott brings us to the conclusion that antibiotics and hormones are in their nature catalysts and function not as food but as an assist to its assimilation. According to the description of these drugs and their uses, it is reasonable to say that by their use alone they would not supply sufficient nourishment while, on the other hand, when these ingredients are administered in conjunction with poultry feed, the result is an accelerated growth of the birds.

There seems to be no place in the definition of feed as used in the statute for the inclusion of antibiotics and hormones.

The findings below determined that litter (in this case, sawdust) was not fertilizer and, therefore, is subject to the sales and use tax. The sawdust is used for litter and bedding in the chicken houses. During its use it becomes intermingled with the excretions of the chickens and when it is removed it is used by farmers to fertilize the land. The appellant takes the position that as the sawdust, in combination with the poultry manure, is used as fertilizer, it should be classed as such. This sawdust was bought and used for the prime purpose of litter and bedding as a necessary part of the process of raising poultry. It was not purchased to be used as fertilizer.

The finding, that sawdust as used in this case was not fertilizer, is correct.

It is to be noted that since the inception and trial of this case, Secs. 10 of Chap. 17, Subsec. VII, R. S. 1954 has been amended by Sec. 4, Chap. 402, P. L. of 1957, to include hormones, litter, and medicines used in agricultural production as exemptions to the sales tax. We are not, however, concerned with this amendment in arriving at our decision in this case.

Appellant's exceptions to the ruling that the hormone preparation is not feed are overruled.

Appellant's exceptions to the ruling that litter (sawdust) is not fertilizer are overruled.

Appellee's exceptions to the ruling that antibiotics are poultry feed are sustained.

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

THEODORE BLANCHARD

vs.

ROBERT E. BASS

Penobscot. Opinion, March 5, 1958.

Negligence. Contributory Negligence. Wanton Misconduct. Nonsuit.

Where the declaration sets forth a case sounding in both (1) ordinary negligence and (2) wanton misconduct, but the case is tried solely on the theory of *wanton misconduct*, the propriety of a nonsuit will be governed by the standards governing a case of *wanton misconduct.*

There are no degrees of negligence under Maine law. Wanton misconduct differs from negligence in kind and degree; it is neither a wilful wrong in the sense of an intentional infliction of harm, nor negligence in the sense of a failure of due care.

A reckless disregard of danger to others is a characteristic of wanton misconduct.

In wanton misconduct the reckless act but not the infliction of injury is intended.

Contributory negligence does not bar recovery for wanton misconduct, although wanton misconduct of a plaintiff will bar his recovery. Restatement Torts, Sec. 482.

Where the evidences and all reasonable inferences to be drawn therefrom fall short of proof of nonsuit is properly directed.

ON EXCEPTIONS.

This is a tort action for wanton misconduct before the Law Court upon exceptions to the direction of a nonsuit for defendant. Exceptions overruled.

Harmon & Nichols, for plaintiff.

Mitchell & Ballou, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

WILLIAMSON, C. J. This automobile accident case is before us on exceptions to the granting of defendant's motion for a nonsuit at the close of the plaintiff's evidence. The plaintiff seeks to recover damages caused, in the words of the bill of exceptions, "solely by the wanton misconduct of the Defendant."

The rule governing our consideration of a case thus taken from the jury is well established. Our duty is "simply to determine whether, upon the evidence, under the rules of law, the jury could properly have found for the plaintiff." *Johnson* v. *New York, New Haven & Hartford R. R.*, 111 Me. 263, 265, 88 A. 988; *Glazier* v. *Tetrault,* 148 Me. 127, 90 A. (2nd) 809; *McCaffrey et al.* v. *Silk, Jr.*, 150 Me. 58, 104 A. (2nd) 436; *Sanborn* v. *Elmore Milling Co.*, 152 Me. 355, 129 A. (2nd) 556.

A jury could find the following facts:

The accident took place on North Main Street in the City of Brewer at about seven-thirty o'clock on an evening in late November. The weather was "misting and snowing, rain mixed," and the street was slippery. There was considerable traffic on the street.

The defendant, a television repairman, was at work at a nearby house. He had left his automobile parked without lights on the northerly side of the street headed in an easterly direction. In the words of the police officer, "It was parked on the wrong side of the road headed in the wrong direction." The plaintiff placed the right wheels three or four feet from the center of the street and "pretty well out in the center of the road."

The plaintiff was traveling westerly in his sedan. He came over the top of a slight rise 300 to 500 feet from the

scene of the accident and, proceeding at a speed of 20 to 25 miles an hour, crashed head-on into the front of the defendant's automobile. The lights from several trucks approaching from the opposite direction momentarily blinded the plaintiff, and his first glimpse of the parked automobile came at the moment of the collision. He had then no opportunity to get around the defendant's car without hitting oncoming trucks.

The parties are not in accord upon the ground of the nonsuit and the applicable rules of law. The disagreement chiefly centers on whether wanton misconduct under our law differs from negligence as urged by the plaintiff.

The defendant, who made the motion for a nonsuit, takes the position in substance that wanton misconduct is no more than negligence dressed in a colorful phrase and that the plaintiff is barred by contributory negligence as a matter of law. On his part the plaintiff contends that wanton misconduct is not negligence, that the action is solely for wanton misconduct, and that accordingly contributory negligence is not a bar.

Neither party loses sight of the possibility that his position may not be sustained. Understandably, therefore, the plaintiff argues that the case should go to a jury if it is determined to be a negligence action, and the defendant that the nonsuit was properly granted if it is determined to be an action for wanton misconduct.

We shall later develop the point that wanton misconduct differs from negligence. It remains important, however, to ascertain the theory on which the case was tried.

We note that in each of the two counts (identical, except that one covers personal injuries and the other property damage) the plaintiff alleges that he "was in the exercise of due care," and also facts sufficiently setting forth negligence on the part of the defendant with further allegations such

as "grossly indifferent to his duty . . . with utter disregard for the rights of the Plaintiff . . . directly due to the wanton misconduct of the (defendant)," and "with reckless disregard for the safety of the Plaintiff and his property . . ." The plaintiff also seeks punitive damages.

The declaration is a sufficient vehicle for the ordinary tort action with the essential allegations of plaintiff's due care and defendant's negligence. There is also set forth a claim for wanton misconduct. In short, the declaration is good, either for negligence or for wanton misconduct.

The case was tried, it must be noted, on the theory that the damages *were caused solely by wanton misconduct.* It is so stated in the bill of exceptions, seen by the defendant and allowed by the presiding justice. We consider, therefore, that the case is governed by the law applicable to wanton misconduct.

The sensitive point in the plaintiff's position is the treatment of contributory negligence. The defendant's duty to the plaintiff was of course not to harm him through lack of due care. Proof of a defendant's negligence presents no problem to a plaintiff who rests his case on wanton misconduct. It is readily apparent that the plaintiff here charges wanton misconduct and not negligence for the purpose of eliminating the bar of contributory negligence.

Wanton misconduct is defined in Restatement, Torts Sec. 500, in these words:

> "The actor's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him."

> "*Special Note:* The conduct described in this Section is often called 'wanton or wilful misconduct' both in statutes and judicial opinions. On the other hand, this phrase is sometimes used by courts to refer to conduct intended to cause harm to another."

It is of interest that the Legislature used the above definition from the Restatement in creating the misdemeanor of reckless homicide in "An Act Relating to Negligently Operating a Motor Vehicle so as to Cause Death." P. L., 1957, Chap. 333 (R. S., Chap. 22, Sec. 151-B).

Wanton misconduct differs from negligence in kind and degree. In our view, wanton misconduct is neither a wilful wrong in the sense of an intentional infliction of harm, nor negligence in the sense of a failure to use due care. *Blanchette* v. *Miles,* 139 Me. 70, 27 A. (2nd) 396. Due care is the care exercised by the reasonably prudent man under like circumstances. *Raymond* v. *Portland R. R. Co.,* 100 Me. 529, 62 A. 602.

Carelessness is the characteristic of negligence; a reckless disregard of danger to others, of wanton misconduct. In *Standard Oil Company* v. *Ogden & Moffet Company,* 242 F. (2nd) 287, at p. 291, the court said:

> "'Wantonly' means without reasonable excuse and implies turpitude, and an act to be done wantonly must be done intelligently and with design without excuse and under circumstances evincing a lawless, destructive spirit. It is a reckless disregard of the lawful rights of others, such a degree of rashness as denotes a total want of care, or a willingness to destroy, although destruction itself may have been unintentional."

See also *Menzie* v. *Kalmonowitz,* 107 Conn. 197, 139 A. 698; *Sankey* v. *Young,* 370 Pa. 339, 88 A. (2nd) 94; *Universal Concrete Pipe Co.* v. *Bassett,* 130 Ohio 567, 200 N. E. 843, 119 A. L. R. 646; Prosser on Torts, 2d ed. 290; 38 Am. Jur.,

Negligence Sec. 178; 65 C. J. S., Negligence Sec. 9c; 4 Blashfield, Cyclopedia of Automobile Law and Practice, Sec. 2771.

We are familiar with the concept of wanton misconduct in our law. For example, in the land cases we measure the duty to an invitee by negligence or lack of due care and to a licensee or trespasser in terms of wanton, wilful or reckless injury. *Kidder* v. *Sadler,* 117 Me. 194, 103 A. 159; *Robitaille* v. *Maine Central Railroad Co.,* 147 Me. 269, 86 A. (2nd) 386.

> "To entitle a trespasser to recover for an injury, he must do more than show negligence. It must appear that a wanton or intentional injury was inflicted on him.
>
> * * * * * * * * *
>
> "There was, on the part of defendant, no premeditation, no formed intention to do injury, by violence, to the person of either plaintiff; there was no wantonness; not even a recklessness that might be said to partake of the nature of wantonness."
>
> *Foley, Malloy* v. *Farnham Co.,* 135 Me. 29, 35, 188 A. 708.

The defendant, as we have seen, contends that wanton misconduct in reality is no more than a degree of care or negligence. He then invokes the principle firmly established in Maine and elsewhere with few exceptions that there are no degrees of care or negligence. Following are illustrative statements:

> "There are no degrees of care. 'Ordinary care' or 'due care' is the legal rule, and the amount of care depends on the circumstances, and must be commensurate with the danger involved."
> *Cratty* v. *Aceto & Co.,* 151 Me. 126, 131, 116 A. (2nd) 623.
>
> "The legal duty of the defendant towards plaintiffs' intestates in negligence cases of this type in

this jurisdiction is to use due or ordinary care under the attendant circumstances. It makes no difference what type of carriage is averred in the declaration. However, in the observance of due care differing facts necessarily change the rule of conduct of one who would perform his duty as to such care. There are no degrees of care and no degrees of negligence in this state. The significance of the term 'ordinary care' varies with the attendant and surrounding circumstances."

Nadeau v. *Fogg, Watier* v. *Fogg,* 145 Me. 10, 14, 70 A. (2nd) 730.

"While the law of negligence on the civil side of the Court in this State knows only one degree of care, namely due or ordinary care, yet in the observance of due care differing facts necessarily change the rule of conduct of one who would perform his duty as to such care. The practice of distinguishing degrees of negligence, such as gross, ordinary and slight, tends to confusion."

Young v. *Potter,* 133 Me. 104, 112, 174 A. 387.

The familiar rule is applicable in cases of negligence; that is to say, in cases where the lack of care is measured by the standard of the reasonably prudent man. We decline to place duty or obligation in such situations upon the amount of variation from the standard. To illustrate, in the automobile guest case liability rests, in our state, on lack of due care, and in Massachusetts, on gross negligence. *Avery* v. *Thompson,* 117 Me. 120, 103 A. 4.

"Gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence. But it is something less than the wilful, wanton and reckless conduct which renders a defendant who has injured another liable to the latter even though guilty of contributory negligence, or which renders a defendant in rightful possession of real estate liable to a trespasser whom he has injured. It falls short of being such reckless

> disregard of probable consequences as is equivalent to a wilful and intentional wrong."
>
> *Learned* v. *Hawthorne,* 269 Mass. 554, 169 N. E. 557.

See also *Commonwealth* v. *Welansky* (Mass.), 55 N. E. (2nd) 902, arising from the Cocoanut Grove fire.

The types of conduct under discussion; namely, negligence, wanton misconduct, and wilful misconduct are often defined in terms of degree and negligence. In discussing the well understood differences between civil and criminal negligence, we said in *State* v. *Hamilton,* 149 Me. 218, 239, 100 A. (2nd) 234:

> "In cases of this kind, in order to convict a respondent of manslaughter based upon negligence, it is incumbent on the State to establish a degree of negligence or carelessness which is denominated gross or culpable. *State* v. *Wright,* 128 Me. 404. 'Gross or culpable negligence in criminal law involves reckless disregard for the lives or safety of others. It is negligence of a higher degree than that required to establish liability upon a mere civil issue.' *State of Maine* v. *Ela,* 136 Me. 303, 308."

See also *State* v. *Jones,* 152 Me. 188, 126 A. (2nd) 273.

"Gross negligence" is wanton or reckless misconduct under our cases, but not in Massachusetts. "Gross negligence" is the equivalent of wanton or reckless misconduct. *Avery* v. *Thompson, supra; Austin* v. *Ins. Co.,* 126 Me. 478, 139 A. 681; *Bouchard* v. *Ins. Co.,* 114 Me. 361, 96 A. 244; *Learned* v. *Hawthorne, supra.*

Any confusion from the terminology used does not, of course, alter the basic principles, namely, that there are no degrees of care or negligence under our law, and that negligence and wanton misconduct differ in kind and degree.

Wanton misconduct, however, cannot be entirely separated from negligence. The reckless act but not the inflic-

tion of injury is intended and so the injury or damage is accidentally suffered. The contention that the usual automobile liability insurance policy covering accidents does not cover the assured in such a situation was forcefully disposed of in *Sheehan* v. *Goriansky,* 321 Mass. 200, 72 N. E. (2nd) 538, 173 A. L. R. 497.

It is well settled that contributory negligence, that is, lack of due care, does not bar recovery for wanton misconduct. Wanton misconduct, however, on the part of the plaintiff is such a bar. The rule is stated in Restatement, Torts Sec. 482:

> "(1) Except as stated in Subsection (2), a plaintiff's contributory negligence does not bar recovery for harm caused by the defendant's reckless disregard for the plaintiff's safety.
>
> "(2) A plaintiff is barred from recovery for harm caused by the defendant's reckless disregard for the plaintiff's safety if, knowing of the defendant's reckless misconduct and the danger involved to him therein, the plaintiff recklessly exposes himself thereto."

In Massachusetts lack of due care is a defense to gross negligence in the passenger guest case, but not to wanton misconduct. *Learned* v. *Hawthorne, supra;* 2 Harper and James, Torts 1213; Prosser, Torts 290 (2d. ed.) ; 65 C. J. S., Negligence Sec. 131a; 38 Am. Jur., Negligence Sec. 178. See also Annot. 38 A. L. R. 1424 and 72 A. L. R. 1357.

Our court has used language of interest in two ordinary negligence actions in which contributory negligence of the plaintiff was sharply in issue and in neither of which was wanton misconduct the problem. In *Cooper & Company* v. *Can Company,* 130 Me. 76, 79, 153 A. 889, we said:

> "There can be no recovery unless there was negligence on the part of defendant's driver. But, since no willful or wantonly reckless act is claimed,

> there can be no recovery if Mr. Crosby stepped out by the bumper from a position of safety and obscurity, without taking the precautions that due care for his own protection demanded."

The words used plainly indicate that our law was in accord with the principles stated above. In *St. Johnsbury Trucking Co.* v. *Rollins,* 145 Me. 217, 219, 74 A. (2nd) 465, we said:

> "For the defendant to have his truck standing as it was, under the conditions then and there present, unlighted, when it was equipped with headlights in working condition, was a breach of the duty to use due and reasonable care which he owed to travelers approaching his truck from the direction in which the plaintiff was coming. A finding to the contrary by the jury could not be sustained. Such unexplained conduct on such a night and under such conditions was a wanton disregard of the rights and safety of the travelling public."

The words "wanton disregard" in the setting of the opinion are descriptive of the acts of the defendant within the bounds of ordinary negligence. There is no suggestion to the contrary.

We come now to the application of the pertinent rules to the evidence taken most favorably for the plaintiff.

In our view the evidence with all reasonable inferences drawn therefrom falls far short of proof of wanton misconduct sufficient to submit to a jury. The defendant parked on a city street on a dark evening without lights. Blinded by lights of oncoming trucks the plaintiff failed to see the defendant's car. What reckless disregard of consequences to other travelers lies in this act? At most we find no more in the defendant's actions than negligence, or lack of due care.

Negligence of defendant and due care of plaintiff were not the issues before us. The accident was caused, says the

plaintiff, solely by the wanton misconduct of the defendant, and it is here that the plaintiff failed to present a case to the jury.

The entry will be

Exceptions overruled.

STATE OF MAINE
vs.
VAUGHN HENDERSON

York. Opinion, March 5, 1958.

Criminal Law. Rape. Prior Acts. Particulars. Pregnancy. Chastity.

Prior acts of intercourse (to those alleged) between a respondent and prosecutrix are admissible for the purpose of demonstrating relationship between the parties, even though not set forth in the bill of particulars.

Where pregnancy of a complaining witness in a rape is brought into the case by the State, it is evidence of probative force against a respondent and tends to corroborate the testimony of the prosecutrix. In such case, it is proper for a defendant to attack it by being permitted to show that another than he was responsible for the prosecutrix's condition.

Where the fact of birth of a child, or other corroborating circumstance, is first brought out by the accused, the rule is otherwise.

ON EXCEPTIONS.

This is criminal action by indictment for statutory rape. R. S., 1954, Chap. 130, Sec. 10. The case is before the Law Court upon exceptions. Exception III overruled. Exceptions IV, V, VI, VII, sustained.

Marcel R. Viger, for State.

Chapman, Nixon & Earles,
Philip F. Chapman, Jr., for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

TAPLEY, J. On exceptions. The respondent, by indictment, was charged with the crime of statutory rape (Chap. 130, Sec. 10, R. S., 1954). The cause was tried before a jury at the November Term, A. D. 1956 of the Superior Court, within and for the County of York. The docket entries show the respondent filed a motion for a new trial addressed to the presiding justice which was denied. The record of the case discloses an appeal to this denial but the respondent's written argument is silent as to the appeal so we shall consider it as abandoned. Respondent has perfected thirteen exceptions.

EXCEPTIONS I AND II

These exceptions deal with the court's refusal to strike from the bill of particulars (denominated specifications in the record) certain alleged prejudicial language, the admission of evidence of pregnancy and the overruling of respondent's motion for continuance because of the physical appearance of the prosecutrix being indicative of pregnancy which he said would be highly prejudicial to the respondent's case.

Counsel for the respondent in his brief and argument admits "that it is proper for the prosecution to show that someone had carnally known the prosecutrix at or about a certain date and pregnancy is proof of a most impelling and cogent kind to support such a fact." The respondent thereby makes it unnecessary to consider Exceptions I and II.

EXCEPTION III

The State sought to introduce evidence of a prior act of sexual intercourse between the respondent and the prosecutrix on May 30th, some weeks previous to the date of the act of rape as charged in the indictment. This evidence was offered not in proof of the crime alleged in the indictment but for the purpose of showing a prior relationship between the parties as bearing on the probability of the occurrence of the alleged rape. At the time of the introduction of the testimony, through the prosecutrix, the presiding justice said to the jury:

> "And at this point I would say to the jury in reception of this evidence, which allegedly happened at some time in May, bearing in mind that the indictment alleges an offense in July, and that at this point I think it is wise to caution you that ultimately, if a Charge is given in this matter, that this evidence you have just heard relating to an incident in May, is not the one for which the respondent is being tried and that evidence has been ruled admissible only for the purpose of showing the relationship between the parties leading up to the incident in July; so I want you to bear that in mind in your reflection of the case."

The justice below in his charge pointed out to the jury that proof of prior acts of intercourse between the respondent and the prosecutrix would not justify a conviction under the indictment. He very carefully explained the purpose of the use of this testimony by saying that they might consider such evidence, if believed, as tending to show a relationship between the parties.

The rule laid down in the case of *State* v. *Berube,* 139 Me. 11, unequivocally allows evidence of prior acts of a similar nature to be shown for the purpose of demonstrating the relationship between the parties. On page 14, the court said:

> "In the instant case we have no exception to the charge nor could one have been taken, since the testimony was admitted only for the purpose of showing the relationship between the parties, for which it was entirely proper."

We have reaffirmed this principle in the case of *State* v. *Norton,* 151 Me. 178. Counsel for the respondent argues that the justice also erred in admitting proof of the prior act because it was not described in the State's bill of particulars. The office of a bill of particulars in a criminal case is in the nature of a pleading and is to advise the accused and the court of additional information concerning an accusation that the defendant has committed an act or acts constituting a criminal offense. It enables the accused to prepare his defense and to more effectively plead his acquittal or conviction in bar of another prosecution for the same offense. It also has the effect of compelling the prosecution to observe certain limitations in the submission of evidence. The prosecution is not, however, required by its use to furnish the accused with the evidence which it expects to use. 42 C. J. S., Sec. 156, page 1092. Attention is called to the following quote from 42 C. J. S., Sec. 253; at page 1271:

> "The admission of evidence of matters not referred to in a bill of particulars is not erroneous where the bill contains general statements which might be deemed to include such matters."

The burden on the State required it to prove beyond a reasonable doubt the crime alleged in the indictment. The bill of particulars particularized the crime alleged by setting forth the time, the place and some details surrounding its commission. The introduction of the testimony of the previous act between the parties was admissible evidence for jury consideration and could be accepted by them as evidence of the relationship between the prosecutrix and the

respondent. The fact that the State in its bill of particulars did not mention this element of evidence did not cause it to be inadmissible.

Exceptions overruled.

EXCEPTION IV

Counsel for the respondent in cross-examination of the prosecutrix sought to question her regarding sexual relations that she may have had with other persons. This line of questioning was objected to by the State and the objections were sustained by the court. Evidence of sexual acts performed by prosecutrix with other persons than the respondent is not admissible as an alement of defense. "The fact that a woman is unchaste is not a defence to rape." *State* v. *Dipietrantonio,* 152 Me. 41. *State* v. *Flaherty,* 128 Me. 141. The respondent contends that he should be permitted benefit of cross-examination as to the subject matter of sexual activity of the prosecutrix with others which may have taken place at or near the time of the alleged rape because of the evidence of pregnancy. Respondent's counsel has conceded that "pregnancy is proof of a most impelling and cogent kind to support" carnal knowledge of the prosecutrix. He admits the general rule that evidence of unchastity is inadmissible under the circumstances of this case but argues his right of cross-examination of the prosecutrix as to acts of intercourse with others as being an exception to the admitted rule where pregnancy corroborates the testimony of the prosecutrix.

The alleged act of rape took place on July 11, 1956. Trial was had on December 7, 1956, at which time the mother of the girl testified her daughter was then pregnant, thus the condition of pregnancy became known to the jury. The presiding justice told the jury in his charge "Whether or not

this young girl became pregnant as a result of an alleged rape is not to be considered by you as any proof of the respondent's guilt. Conversely, the fact that pregnancy may have ensued from sexual contact with some other person is not a defense, if you find factually that there had been an act of sexual intercourse between - - - - and this respondent, applying, of course, the rules previously given you; so you will in your deliberations give no weight to the fact that this girl may be pregnant in determining the guilt or innocence of this respondent." The person upon whom the rape was alleged to have been committed is a girl thirteen years of age and because of statutory provision, one who has intercourse with her, even with consent, is guilty of statutory rape. *State* v. *Morin,* 149 Me. 279. Evidence of general reputation in the community for unchastity is admissible for the purpose of impeaching the prosecuting witness as to want of consent but in the instant case, where consent is not an element, such evidence is not allowed. *State* v. *Dipietrantonio, supra.* Applying the rules to this case, no evidence is admissible tending to show that the prosecutrix consented to the act.

Counsel for the accused seeks to show by cross-examination of the complaining witness that she on or about the time of the alleged act had intercourse with other persons than the respondent. He argues that the inquiry is not made for the purpose of showing unchastity but because the State has produced evidence that she is pregnant and that her physical appearance, as she testifies, is indicative of pregnancy. He continues by saying that pregnancy is a corroborating circumstance and that the respondent has a right to attack this corroboration in an endeavor to show that someone other than the accused is responsible for the pregnancy in order to minimize its corroborating effect. The prosecutrix testified in detail to the act of sexual intercourse and the events surrounding its commission but nowhere in her direct examination did she involve herself

as having the sexual act with anyone other than the respondent.

There is authority to the effect that where pregnancy of a complaining witness in a rape case is brought into the case by the State, it is evidence of probative force against the respondent tending to corroborate her testimony. Under these circumstances it is proper for the respondent to attack it. In *Commonwealth* v. *Duff,* 139 N. E. 351 (Mass.), the court held, on page 352:

> "But in the case at bar evidence of pregnancy and miscarriage had been admitted as a fact of the government's case, against the objection and exception of the defendant; it was evidence of probative force against the defendant and tended to corroborate her testimony. As it was competent for this purpose, it was proper for the defendant to meet it by being permitted to show that another than he was responsible for her condition. This evidence was admissible and it was error to exclude it."

Wigmore on Evidence, Vol. 1, Sec. 168:

> "- - - in prosecutions for rape, rape under age, and seduction, the pregnancy is admissible as evidence at least of the intercourse; the accused's identity being provable by other evidence."

Vol. 44, Am. Jur., Sec. 69, page 942 speaks of evidence of pregnancy in statutory rape cases in the following language:

> "Evidence of pregnancy is properly admitted in a prosecution for statutory rape, since, as has often been pointed out, pregnancy is evidence of intercourse, and intercourse is one of the constitutive elements of the offense charged."

See *People* v. *Boronski,* 47 N. W. (2nd) 42 (Mich.); 75 C. J. S., page 536:

> "Specific acts with others than accused may be shown to rebut corroborating circumstances, as

> when the female, whether above or below the age of consent, is pregnant, or has miscarried or given birth of a child, except where the fact of the birth of a child to the prosecutrix, or other corroborating circumstance, is first brought out by accused."

Reference is made to 140 A. L. R., page 361, where a most *comprehensive treatment of the question may be found.* The case of *State* v. *Jameson,* 134 P. (2nd) 173 (Utah), at page 175 states:

> "In offenses of this kind it is proper to admit evidence of the pregnancy and birth of a child to the prosecutrix who is an unmarried female as corroborative of her testimony of illicit intercourse, State vs Thompson, 31 Utah 228, 87 P. 709 ---, Cosilito vs State, 197 Ind. 419, 151 N. E. 129."

It is plain to be seen that the introduction by the State of evidence of pregnancy was proper to corroborate the statement of the girl that she had had intercourse with the respondent and the fact of pregnancy, if so found by the jury, could be the basis of inference by them that it occurred as a result of the alleged rape. Counsel for the respondent was not seeking by cross-examination to attack chastity or to show consent but rather he desired by its use to test the probative force of the evidence of pregnancy in its corroborative aspect. This testimony in the minds of the jury could have been most damaging to the respondent, whereas if the right of cross-examination had been granted there could have developed a situation wherein the jury would be faced with a factual determination as to whether the pregnancy was caused by the respondent or some other person. The answers of the prosecutrix could conceivably destroy all corroborative effect of pregnancy.

The respondent should have been allowed the benefit of cross-examination of the prosecutrix on the question of pregnancy.

Exceptions V, VI and VII are sustained in so far as evidence of pregnancy is concerned for the reasons outlined under Exceptions IV.

The sustaining of Exceptions IV, V, VI, and VII makes it unnecessary for us to consider Exceptions VIII, IX, X, XI, XII and XIII.

Exception III overruled.

Exceptions IV, V, VI, VII sustained.

DOUGLAS S. COX ET AL.
vs.
HERSCHEL E. SINCLAIR

Penobscot. Opinion, March 17, 1958.

Negligence. Mechanical Failure. Brakes. Inevitable Accident. Emergency. Witness.

It is a general rule that plaintiffs having called defendant's driver as their witness are bound by his testimony and cannot question it; but this rule would not apply if contradicted by credible evidence of probative value.

Where there are questions of negligence for the jury, notwithstanding the uncontradicted evidence of a sudden failure of brakes, the verdict should not be disturbed.

"Here" and "there" testimony relating to chalk marks placed upon a blackboard is of no benefit to the Law Court, even though beneficial to the jury.

ON EXCEPTION AND MOTION FOR NEW TRIAL.

This is a negligence action before the Law Court upon exceptions to the refusal of the presiding justice to direct a verdict for defendant and motion for a new trial after verdict for plaintiff. Exceptions overruled. Motion denied.

Gerald E. Rudman, for plaintiff.

Dubord & Dubord, for defendant.

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

BELIVEAU, J. On exception and motion for new trial. At the close of the evidence the defendant moved for a directed verdict, which motion was denied and exception taken. After verdict for the plaintiffs the defendant filed the usual motion for a new trial.

The parties agree that the exception and motion raise the same question, and, for that reason, will not be discussed separately in this opinion.

On the 4th of January 1956, the plaintiff and his wife were owners, as joint tenants, of a house located at 373 Hancock Street in Bangor. On the same day the defendant was the owner of a crane, weighing about 24 or 25 tons, which was then in charge of, and operated by, one Glendon I. Sinclair, who was the brother and agent of the defendant. On the morning of that day, Glendon operated the crane from Veazie, some few miles from Bangor, with the railroad yards in Bangor as his destination. In the operation of the crane, he had occasion to bring it to a stop several times before he reached Birch Street in Bangor. It is his testimony that the brakes operated properly until he reached Birch Street. He came on to Birch Street from State Street when he had occasion to bring the crane to a stop. After he entered Birch Street and before he started to go down grade on that street, he applied the brakes, as he says, to ease the crane down the hill and for the first time that morning, so he testified, the brakes failed to function. He then shifted to high gear and on inquiry by the court testified he shifted to fifth gear and that this gave him more speed while going down grade on Birch Street. As a result of this situation,

he directed the crane down Birch Street, across Hancock Street and on the lawn situated between the house of the plaintiffs and a neighbor's. At that time the crane was in motion and continued across this lawn, down a steep embankment and landed on the railroad tracks of the Maine Central Railroad. As he crossed this lawn, he struck the corner of the plaintiffs' home and completely demolished a shed which was attached to the buildings.

Defendant advances the argument that the plaintiffs having called the driver as their witness, are bound by his testimony and cannot question it, and as authority for this, the defendant cites *Harmon* v. *Perry,* 133 Me. 186. In that case our court recognized this as the general rule, but said it would not apply if "contradicted by credible evidence of probative value." In this case there was evidence which, if believed by the jury, would make this rule inapplicable.

The plaintiffs' case is based on their claim that the defendant was negligent in the operation of the crane. On the other hand, the operator of the crane testified that when he applied the brakes, just before reaching the incline on Birch Street, they refused to function and that this created an emergency, for which the defendant was not responsible and for that reason the plaintiffs are not entitled to any damages.

The rule is well established in Maine, affirmed time and time again by this court, that a verdict cannot be disturbed,

> ". . . if, giving to the plaintiffs the most favorable view of the facts and of every justifiable inference to be drawn from them, different conclusions as to the defendant's negligence could fairly have been drawn by different minds."
>
> *Andreu, Dostie* v. *Wellman,* 144 Me. 38

Having in mind the rule, can it be said that the jury erred? Our answer is in the negative.

Assuming that evidence of a sudden failure of the brakes stood uncontradicted and entirely consistent with the course taken by the crane, were there nevertheless questions for the jury to determine? Here was a vehicle weighing approximately 25 tons about to start down an incline. The operator knew that because of its length the crane would have to be brought to a full stop part way down the hill in order to make a sharp turn. The operator committed his vehicle to the grade at a speed of 10 miles per hour and in a middle gear rather than a low gear. The jury could find on the evidence that the road surface was wet, snowy, slushy and slippery and that where the snow was packed down it was icy. The operator had a duty to exercise care in accordance with the size and weight of the crane, his ability to steer and control it especially around steep curves, the steepness of the grade and the condition of the road surface. It was therefore for the jury to say whether or not under all these circumstances the operator should have started down the hill relying only upon his brakes; whether or not he should have approached and reached the top of the grade at a lesser speed or in low gear; and whether or not he should have tried his brakes or taken any other precautions before letting his vehicle actually begin to descend. The jury must have decided, as they could upon the evidence, that in one or more of these respects the defendant's agent was negligent and that negligence was a proximate cause of the accident.

There is much "here" and "there" testimony which is not helpful to the court. A chalk, no part of the record, was placed on the blackboard and from this some of the witnesses pointed, for the jury's benefit, certain spots or places to show the location where some of the events took place. We do not get the benefit of this testimony.

We might or might not reach the same conclusion as that reached by the jury, but, in our opinion there is enough evidence in the case to justify the verdict.

Exception overruled.

Motion denied.

STATE OF MAINE
vs.
CHARLES M. ROBINSON

Cumberland. Opinion, March 20, 1958.

Indecent Liberties. New Trial. Credibility.

A verdict of "guilty" cannot be sustained where the quality of the evidence is not such as to carry conviction to a reasoning mind.

When it becomes evident that a child witness possesses attributes of slyness and wilfulness, great care and caution must be exercised in order that a respondent may not be convicted on flimsy or insufficient evidence.

ON APPEAL.

This is criminal action by indictment for indecent liberties (R. S., 1954, Chap. 134, Sec. 6). The case is before the Law Court upon appeal from the denial of a motion for new trial. Appeal sustained. New trial ordered.

Arthur Chapman,
Clement Richardson, for State.

Bennett B. Fuller II, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

WEBBER, J. On appeal. The respondent was tried by a jury and convicted of a violation of R. S., 1954, Chap. 134, Sec. 6. The statute reads: "Whoever, being 21 years or more of age, takes any indecent liberty or liberties or indulges in any indecent or immoral practice or practices with the sexual parts or organs of any other person, male or female, under the age of 16 years, either with or without the consent of such male or female person, shall, upon conviction thereof," (here follows the punishment). It has frequently been remarked that this offense is usually committed in secret and the charge is one easily made and difficult to defend. The very nature of the accusation is so abhorrent to the mind of the ordinary citizen that it is sometimes difficult for him to appraise the attempted proof with that cool and objective detachment which alone will suffice in any search for truth. Moreover, we have a natural inclination to assume the innocence and truthfulness of children of tender years, at least where sexual immorality is concerned. We would be naive indeed, however, if we failed to recognize that in a society which has discarded many of the social restraints of a former day, there are children who have acquired knowledge without wisdom and whose innocence and regard for truth have been undermined and sullied by their environment. Our review of the evidence here has convinced us that this is such a case. The quality of the evidence is not such as to carry conviction to a reasoning mind. The testimony of the two girls, aged ten and eleven respectively, upon which the State was forced to rely, disclosed many material inconsistencies. Their entire conduct before, during and after their encounter with the respondent was not such as to inspire confidence in their veracity. As a result, we are assailed by grave doubts, founded in reason, as to the guilt of this respondent. We are satisfied that no jury, once free from the influence of such passion and prejudice as might be engendered by the nature of the charge and the youth of the State's principal

witnesses, could fail to entertain similar doubts and for the same reasons.

On the day in question, the prosecutrix decided in the morning that she would not attend school but would "play hooky." Meeting her friend, she persuaded her to join in absenting herself from school. It appears from the later events of the day that they desired some spending money and formed the plan of visiting the respondent in order to get some. They had visited him before and admit that they had stolen money from his apartment. Both girls later acknowledged that he had never molested them and that nothing "bad" had ever happened on any of these prior visits. They arrived about 9 A.M. and were admitted by the respondent. They remained for about two hours. The girls admitted that the respondent admonished them for staying out of school and suggested that he might inform their mothers. The prosecutrix testified that she told him she was out of school because she wanted to be and that if he saw fit to tell her mother, he might "go ahead because it was too late to go to school." The girls first retired to the bathroom while the respondent worked at his desk. While there, the girls wrote three notes which are in evidence and which they subsequently handed to the respondent. These notes are couched in gutter language which is vulgar and coarse and constitute a solicitation to engage in sexual intercourse. If the respondent had a disposition to commit the unlawful acts of which he is accused, it would seem he would require no more enticement than was contained in the notes themselves. His response, however, was to write a note of his own which stated, "I still say you both are to *(sic)* young to be thinking of such things." We recognize that the writing of a note seems unusual conduct on the part of the respondent under such circumstances and may well have had an adverse effect in the mind of the jury. Yet we cannot overlook the fact that the content is in the nature of remon-

strance. Moreover, there is a clear indication from the note itself that on one or more prior occasions the children had displayed this preoccupation with sex and the respondent had given them the same advice. His remonstrance, although seemingly mild under the circumstances, indicated clearly that he entertained no thought of taking advantage of the situation created by the improper overtures of the girls. The evidence as to the events which followed is hopelessly confused. No useful purpose will be served by making the sordid details a part of this opinion. Suffice it to say that the version given by the two girls to the police on the day of the event was essentially different from that which they gave at the trial. Moreover, the stories told by the two girls at the trial are inconsistent with each other in many important respects. We think that if the respondent had done the acts of which he is accused, the impression on the minds of girls of this age would have been such that their memory of all but the trivia would have been essentially the same. The inconsistencies as to the very acts complained of bear the imprint of imagination and fabrication. On the other hand, the story told by the respondent remained unshaken and tended to reconcile consistently the events which all agree did occur.

There are other significant straws in the wind which tend to create a reasonable doubt as to the guilt of the respondent. If he had a consciousness of guilt, why did he not destroy the notes which became the State's most effective weapon against him? They were readily recovered from the waste basket by the police and obviously no effort had been made at concealment. One of the girls admitted she had lied to the respondent about a matter of secondary importance. She thereby displayed a light regard for truth which necessarily affects her credibility. If the version given by the prosecutrix, uncorroborated by her friend, and denied by the respondent, is to be believed, the girls had reason to ex-

pect that the respondent would give them some money before they left. However, they admittedly asked for no money before leaving and the respondent offered them none. On the contrary, they acknowledged that they ransacked drawers without the knowledge of the respondent and stole money before leaving the apartment. The girls were obviously reluctant to admit the exact amount which they had stolen. There is no claim by either girl that the respondent urged them to secrecy or made any effort to dissuade them from divulging the events of the morning. All of these facts seem more consistent with the innocence of the respondent than with his guilt.

As to the respondent, he was living in natural relationship with his wife who was at work on the day of these events. He is the owner of property and enjoys a good reputation in his neighborhood. Although he was presented with numerous opportunities, he had never shown any prior disposition to make any improper advances to either of these girls.

After leaving the apartment, the girls used the stolen money to attend a local theatre where they were found by the police late in the day. When the police inquired where they got the money for the theatre they made their first accusation against the respondent. Why then should these girls make false accusation against the respondent if in fact he had not molested them? We think that if one will but shed the illusions as to the purity of motive and innocence of all children which one would like to retain, the answer is not hard to find. These girls had during the day been guilty of both truancy and theft. They admitted that when the police found them they were in fear of punishment. However reluctantly, we must recognize that children who have shown themselves capable of moral depravity and wile to gain their ends and whose environment has already dulled the fine edge of conscience, are equally capable of awareness

and recognition that children can often avoid punishment by attracting sympathy. Just so it happened here. Once the hue and cry was raised against the respondent, all thought of punishment of these girls for their misconduct vanished. The seriousness of the accusation completely overshadowed the misdemeanors of the accusers and in place of punishment they were treated to a brief moment in the limelight. We are not without historical precedent for the proposition that some children display evidences of cunning and guile beyond their years. We need only recall the trials in an earlier century in Salem, Massachusetts, wherein the cruel fabrications of children sent many virtuous and innocent women to the gallows. Children are born with varying degrees of intellectual capacity. Beyond this their training and environment differ widely. When children become witnesses in court, we must be ever mindful that they are individuals, each with his own partially formed character, and that they do not automatically fall into any set pattern or mold merely because they are children. One may be truthful, innocent and modest—another knowing, sly and wilful. When it becomes evident that the child witness possesses the latter attributes, great care and caution must be exercised in order that a respondent may not be convicted on flimsy and insufficient evidence. See *State* v. *Ranger,* 149 Me. 52, 57. The evidence in this case, undermined by contradiction and inconsistency, falls far short of overcoming the presumption of innocence beyond a reasonable doubt.

The entry will be

Appeal sustained.

New trial ordered.

RULE 5 AMENDED

STATE OF MAINE

In the SUPREME JUDICIAL COURT for the State.

All of the members of the Court concurring, Paragraph One of Rule 5 of Rules Applicable only to Proceedings in the Supreme Judicial Court, is hereby rescinded and in lieu thereof the following paragraph is adopted to replace Paragraph One of Rule 5 above referred to:

> "No cause standing for argument on the law docket will be heard except by agreement of parties and by leave of the Chief Justice, unless, at least, thirty-five days before the commencement of the term at which such cause would be in order for hearing, the Clerk of the Law Court has been furnished with eighteen copies of the case properly indexed, printed or fairly and legibly written or typewritten on good paper of the size of 8 x 10½ inches, containing the substance of all the material pleadings, facts and documents on which the parties rely."

This amendment shall become effective on June 1, 1958.

s/ ROBERT B. WILLIAMSON, *Chief Justice*
s/ DONALD W. WEBBER
s/ ALBERT BELIVEAU
(SEAL) s/ WALTER M. TAPLEY, JR.
s/ FRANCIS W. SULLIVAN
s/ F. HAROLD DUBORD

Dated March 18, 1958.

A true copy
Attest:

ROBERT B. WILLIAMSON,
Chief Justice

HARRY McMANN

vs.

RELIABLE FURNITURE CO.

Cumberland. Opinion, April 1, 1958.

Negligence. Pedestrians. Crosswalks. Damages.

A plaintiff pedestrian has the burden of proving his own due care under the circumstance in which he found himself just prior to the injury; and after verdict for the plaintiff, a defendant must demonstrate (1) that the plaintiff did not exercise such care and (2) that reasonable minds could not differ in concluding that he did not.

A plaintiff crossing upon a cross walk is legally fortified with the assumption that all vehicles will obey the city ordinances and state statutes (requiring motor vehicles to yield to pedestrians—Art. VI, Sec. 66, City of Portland Traffic Ordinance; R. S., 1954, Chap. 22, Sec. 87), although such assumption is not intended by the law to be perverted by the plaintiff into false security or rash presumption.

Damage assessment is the sole province of the jury and the amount fixed must stand unless it can be demonstrated that the jury acted under some bias, prejudice or improper influence, or have made some mistake of fact or law.

A reviewing court will not interfere *merely* because the award is large.

In the instant case the admission or exclusion of evidence concerning the details of a surgical operation performed upon plaintiff's injured hip was for the sound discretion of the presiding justice; and it will be presumed that his rulings were right, unless the exception shows affirmatively it was wrong.

ON EXCEPTIONS AND MOTION FOR NEW TRIAL.

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

Herbert H. Bennett, for plaintiff.

William B. Mahoney,
Francis C. Rocheleau,
James R. Desmond,
Bernstein & Bernstein, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, JJ. BELIVEAU, J., sat at argument but retired before the opinion was adopted.

SULLIVAN, J. The plaintiff was a pedestrian upon a public street. He was struck and injured by the defendant's truck. The jury awarded him a verdict.

During the trial the plaintiff offered some testimony of a physician. The evidence was admitted over the objection of the defendant which excepted.

At the close of all the evidence the defendant moved for a directed verdict upon the contention that all of the evidence considered most favorably to the plaintiff had not sustained the burden of the plaintiff to prove his due care but had, as a matter of law, established his contributory negligence. To a denial of such motion the defendant excepted.

A motion for a new trial was filed by the defendant for decision by this court. *Waye* v. *Decoster,* 140 Me. 192, 194.

The exceptions and motion are presented for determination.

The defendant concedes that the issue of the defendant's negligence was a question of fact for resolution by the jury.

The defendant attacks the verdict upon three particulars:

1. That the evidence plainly reveals the contributory negligence of the plaintiff;

2. That the damages awarded are excessive;

3. That in admitting certain evidence of the technique and details of a surgical operation performed upon the plaintiff whilst he was under a general anaesthetic the presiding justice erred and in so doing could only have aroused the sympathy of the jury to the prejudice of the defendant.

1. *Contributory Negligence.*

In considering this topic upon the motions of the defendant the legal principles are axiomatic.

> "It is well settled that a verdict should not be ordered for the defendant by the Trial Court when, taking the most favorable view of the plaintiff's evidence, including every justifiable inference, different conclusions may be fairly drawn from the evidence by different minds. Collins v. Wellman, 129 Me., 263, 151 A., 422; Young v. Chandler, 102 Me., 251, 66 A., 539."
>
> *Howe* v. *Houde,* 137 Me., 119.
>
> In considering the motion we will apply the familiar rules that the evidence with all proper inferences drawn therefrom is to be taken in the light most favorable to the jury's findings and that the verdict stands unless manifestly wrong. Morneault v. Inh. of Town of Hampden, 145 Me. 212, 74 A. (2nd) 455; and Lessard v. Samuel Sherman Corporation, 145 Me. 296, 75 A. (2nd) 425
>
> *Bragdon* v. *Shapiro,* 146 Me. 83, 84.

From the testimony the jury could have distilled the facts now narrated.

Congress Street in Portland runs east and west and intersects Pearl Street which courses north and south. Congress Street roadway is 47 feet wide and Pearl Street, 34 feet wide. There are 4 outlined crosswalks. At each of the 4 corners is a traffic light. Lights serving Congress Street traffic are green for 38 seconds, yellow or amber for 3 seconds and red for 26 seconds plus an additional 3 seconds. Complementarily, lights serving Pearl Street traffic are red

for 38 seconds plus 3 more seconds, green for 26 seconds and yellow for 3 seconds. At no time are a red and yellow light illuminated simultaneously. There is no pedestrian interval afforded at this intersection. Therefore, vehicular traffic is never stopped contemporaneously by the lights in both east-west and north-south directions.

On the afternoon of May 7, A. D. 1955 the day was clear and the streets dry. The plaintiff stood on the sidewalk at the northwest corner of the intersection facing a red light at the southwest corner. Immediately to his left, facing south was a stopped car. At the southeast corner facing north was a halted car known as the Harmon car but the plaintiff does not remember seeing the defendant's truck. The light at the southwest corner changed to green. The plaintiff looked up and down Congress Street. He saw one stationary car on Congress Street, headed west at the northeast corner. He stepped down upon the crosswalk and started to pass southerly. The car to his left started. Plaintiff looked at it and watched to see if its directional lights were flashing. They were not and the car proved to be proceeding southerly. Plaintiff did not stop walking. The car last noted passed the plaintiff completely about the middle of the intersection. Plaintiff heard the Harmon car at the southeast corner and glanced to his left to see it advance northerly across the intersection. The driver of that car had not responded at once to the green light facing him and had been nudged to attention by the passenger with him. The plaintiff turned his eyes to the front and the car which had just passed him upon his left, going south, loomed in his vision. He gazed to his right and west. No traffic was on Congress Street from that direction. He directed his attention ahead once more and beheld the defendant truck just as it struck him at a spot about 4 feet from the southwest corner of the intersection. He was thrown to the ground upon the crosswalk. The truck stopped immediately, 3 or 4 feet from the curbing at the southwest corner, in a

position pointing west. The left hip of the plaintiff was fractured by the impact of the truck.

The plaintiff was hit just before the Harmon car reached the center of the intersection.

The defendant truck was of the furniture, moving van type, some 9 or 10 feet high, 15 to 17 feet long and 12 to 14 feet wide. It was yellow with black letters outlined in silver.

No traffic officer was functioning at the intersection. The defendant's truck driver did not sound his horn before the accident.

The plaintiff did not recall having seen the defendant's truck until it was upon him. There was testimony that the truck had stopped behind the Harmon car at the southeast corner before the change in the traffic lights.

Admitted in evidence was the following portion of a traffic ordinance of the City of Portland, in effect at the time of the accident:

> "Article VI
>
> -
>
> Sec. 66. Crossing at other than crosswalks.
>
> -
>
> (b) On the following streets or parts of streets it shall be unlawful and a violation of the provisions of this ordinance for a pedestrian to cross said streets at any place except within a crosswalk:
>
> -
>
> CONGRESS STREET — State Street to Washington Avenue
>
> -
>
> The provisions of this subsection apply to both sides of the intersection of the limiting streets.
>
> (c) A pedestrian starting to cross a street in any crosswalk in the City of Portland on a green or 'Go' signal sign, or where a red and yellow

'Pedestrian Interval' signal is provided, or where a police officer or fireman is directing traffic, shall have the right-of-way over all vehicles, including those making turns, until such pedestrian has reached the opposite curb. It shall be unlawful and a violation of the provisions of this ordinance for the operator of any vehicle to fail to yield the right-of-way to any pedestrian who is crossing a street as herein provided.

- -

Notwithstanding the provisions of this section, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, and shall give warning by sounding the horn when necessary, and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway."

See R. S. (1954) c. 91, § 86, VI, X.

R. S. (1954) c. 22, § 87 is as follows:

"Whenever traffic is controlled by traffic-control signals exhibiting the words 'Go,' 'Caution' or 'Stop,' or exhibiting different colored lights successively one at a itme, or in combination, or with arrows, the following colors only shall be used and said terms and lights shall indicate and apply to drivers of vehicles and pedestrians as follows:
1 Green alone or 'Go'

A. Vehicular traffic facing the signal may proceed straight through or turn right or left unless a sign at such place prohibits either such turn; but vehicular traffic shall yield the right of way to other vehicles and to pedestrians lawfully within the intersection at the time such signal is exhibited.

B. Pedestrians facing the signal may proceed across the roadway within any crosswalk."

Defendant contends that the facts arrayed and susceptible to jury finding and the law quoted confirm the contributory negligence of the plaintiff as a matter of law. The plaintiff

did not remember seeing the defendant's truck until the collision. The defendant insists that it was legally obligatory for the plaintiff to have looked in the direction of that large, conspicuous vehicle, and to have noticed it and that the failure to have done so was a proximate cause of plaintiff's misfortune.

> "Mere looking is not sufficient. One is bound to see what is obviously to be seen."
>
> *Martin* v. *Atherton,* 151 Me. 108, 110.

Plaintiff at his trial had the burden of proving his own due care under the circumstances in which he found himself just prior to his injury. The defendant must now, after verdict, demonstrate that the plaintiff did not exercise such care and that reasonable minds could not differ in concluding that he did not.

The evidence depicts the plaintiff as a pedestrian normally preoccupied with his own safety from the time of his station on the northwest corner of the intersection until the serious mishap. His testimony accounts for each instant with some vigilance of the moment. He was wary at all times but the sufficiency of his attention and his heedfulness to his observations are severely impugned by the defense. The defendant is insistent that the failure of the plaintiff to prove that he noticed the colorful bulk of the defendant's truck and alerted himself to its movement was legally culpable and insuperable.

As the plaintiff started with the stir of traffic he was abreast of one car to the middle of the intersection where it outstripped him and went southerly. The Harmon car waiting at the southeast corner was sluggish and responded to the light only after some lapse. Plaintiff's attention was caught by the noise of the latter car. Potentially the Harmon car was in a position to execute a left turn in the direction of plaintiff's crosswalk. As the Harmon car eliminated

itself as a possible hazard by holding to a northerly course the plaintiff drew back his gaze to see the first car which had accompanied his across the intersection continuing toward or in Pearl Street. He gazed west to anticipate exposure from any chance, non-conforming Congress Street traffic. When he faced front once more the defendant's truck came at him. Defendant's driver had not sounded his horn. Plaintiff had then traversed all but some 4 feet of the 47 foot crosswalk.

As the plaintiff traversed his crosswalk he was legally fortified with the assumption that all vehicles would obey the city ordinance and the state statute. *Day* v. *Cunningham,* 125 Me. 328, 333; *Ross* v. *Russell,* 142 Me. 101, 105. That was something palpable although it was not intended by the law to be perverted by the plaintiff into false security or rash presumption. It did affect reasonable foreseeability somewhat for the plaintiff. Plaintiff was at the last 1/12th of the distance to safety when hurt. In his conduct in the presence of moving variants and variables at that activated intersection was he remiss in not detecting so near the opposite curbing what proved to be the real menace? Were his efforts at vigilance sensible and intelligent to a reasonable degree? Did he observe all that was reasonably imminent? Should he also have noticed the truck and followed its operation to the possible neglect of objects more immediate? Was the behavior of the defendant's driver occasioned by the inertia of the Harmon car which may have provoked the truck driver into cutting a sharp corner? In the existing choices of movements for drivers of vehicles was such a one to have been then and there fairly apprehended by the plaintiff? What effect upon any judgment of the plaintiff's behavior must be given to the failure of the truck driver to sound his horn? As a matter of law was the plaintiff negligent? We do not believe so. We cannot say that there was not a jury question presented or that the jury who

viewed the locale of the collision and heard the testimony were not supported in their findings.

2. *Damages.*

The jury verdict was $65,650 and defendant vigorously protests that it is excessive.

Damage assessment is the sole province of the jury and the amount fixed must stand unless it can be demonstrated that "the jury acted under some bias, prejudice or improper influence, or have made some mistake of fact or law." *Cayford* v. *Wilbur,* 86 Me. 414, 416.

The computation of damages is just as difficult as it is indispensable in our administration of justice. Ponderables, probabilities, intangibles, variables and concrete sums are added and subtracted and must be placed on one side of an equation upon the other side of which is a liquidated amount of money. No science could be more practical and inexact. None is more necessary. There are certain fixed principles but the facts of cases differ so as to make few, comparable precedents. Translating pain and suffering, past and future, into terms of money compensation is but an example of the incongruous tasks of the jury. In the natural light of reason conservative commitments must be made for an unknowable future. There are few absolutes available. Considering the problems encountered the doctrine has in practice been reasonably satisfactory. No other has survived empirical probation.

The amount awarded the plaintiff was objectively large.

> "- - - - - It is not for the reviewing court to interfere merely because the award is large, or because the court would have awarded less. Unless a verdict very clearly appears to be excessive, upon any view of the facts which the jury are authorized to adopt, it will not be disturbed. - - - - -"
>
> *Baston* v. *Thombs,* 127 Me. 278, 281.

Credible testimony related in detail to the jury, the plaintiff's severe injuries, his long, protracted period of pain and suffering, his heavy expenses, financial loss and permanent disability. Plaintiff was injured on May 7, A. D. 1955. He submitted to 6 necessary, major operations spanning a period of 20 months. The diagnosis was a severe, comminuted fracture of the left femur, inter and sub-trochanteric, with several loose bone fragments. Osteomyelitis or infection of the bone resulted. There are a sequel and wake of hip and knee impairments.

The first operation on May 8, 1955 was an affair of 3 hours under a general anaesthetic, to reduce the fracture by traction and by means of a long incision to affix a metal plate. On June 2, 1955 there followed a second operation since by that time infection of the bone had been corroborated. The wound was drained and bone chips were removed. On July 7, 1955 was had a third operation. Infection had extended the length of the metal blade on the outer surface. The bone was scraped. A drain was left in the wound. On December 28, 1955 a fourth operation was performed and the metal plate was removed with more bone scraping. The fracture had healed but the efflux continued. The fifth operation occurred on February 14, 1956. There was more leakage. The wound was packed open. On January 8, 1957 was the sixth and last operation. Two fragments of dead bone were removed and the wound was again packed open.

The infection necessitated many blood transfusions. Plaintiff was catheterized.

During a period of 23 months, with the exception of 8 weeks, the operative wounds were draining. Plaintiff was hospitalized for some 10 months and during much of such time was in complete bodily constraint as to mobility. He developed back sores. When activity became possible he was obliged to use crutches for some time until ultimately a cane

became adequate. At the time of the trial he required the aid of a cane for walking.

The physical pain and suffering of the plaintiff described by witnesses was persistent and extremely intense at recurring intervals through many months. The pus excretions from the infected bone were denominated as odorous and revolting. A major ordeal of the plaintiff was thus described by a specialist, physician witness:

> "Osteomyelitis in its acute stage is no different, except it is located in bone, from a boil, a deep boil."

The first few dressings during the periods when the wound was permitted to remain open were characterized by one of the surgeons as extremely painful.

The mental suffering of the plaintiff by inference was necessarily excessive.

The osteomyelitis which became chronic is in the judgment of three specialists arrested but not for a surety cured. The medical opinion was in accord that the condition can be reactivated by trauma or external force of no great magnitude and differed as to whether spontaneously it is possible or probable that such condition will revive. The progressive passage of time without recurrence of the inflammation was deemed to be definitely in favor of the plaintiff against a revisitation.

The left hip of the plaintiff is impaired. His left knee is very unstable. It is classified expertly as a "20 degree knock-knee" liable to go out from under the patient during some activities. Future surgery is indicated entailing 3 or 4 months hospitalization, the wearing of a cast for 6 or 8 weeks and convalescence for 4 to 6 months. The prospect of success from such surgery was estimated by an orthopedist as only a "fifty-fifty chance."

On May 7, A. D. 1955 plaintiff was 48 years old and possessed a life expectancy of 24.52 years. He had progressed through the third grade at school in his formal education. He had been a laborer by occupation and a steady worker. His health had been sound. His average yearly earnings could be accepted as $4,000. His future earning capacity was predicted by a medical expert from whose examination are quoted these colloques:

"Q. You don't think he will ever do any heavy construction, either?

A. No, sir.

Q. Do you think he could do some light work?

A. Yes.

Q. Such as what? What would be the nature of the work he could do, assuming he could find it, Doctor?

A. He could have a job sitting at the entrance of a quarry, checking trucks as they went by, taking numbers on trucks. Under certain circumstances I am sure he could run an elevator - - - He might perform a job which he does with his hands if he had an opportunity of changing positions. I think he would tend to get stiff and sore and aching in one standing position. If he had a chance to move about a bit occasionally and do most of the work with his hands. I think he could perform that occupation. I don't know specifically just what job that might be.

Q. Could he work in an elevator in which there is no seat?

A. I think that is a difficult question to answer because it depends a great deal upon the amount of discomfort and pain as well as the willpower of the person. Some people in Mr. McMann's condition, if that were the only job available for them they would do it, and have to spend the rest of the time in bed, and others

> just couldn't do it. You get into psychological questions there."

The jury may well have concluded that wages for such work as the plaintiff may in the future secure and perform would be meager.

The jury were mindful that the plaintiff could have but one verdict for all past and future damages. The purchasing power of money at the time of the trial was less than it had been when cases of other years had been decided. The medical expenses were $7347.49.

A graph such as the following, of synthetic elements which are warranted and justified by the evidence would vindicate the verdict of the jury as one "within reasonable limits based upon the testimony." *Savoy* v. *McLeod,* 111 Me. 234, 238.

Medical expenses, pre-writ,	7347.49
Pre-writ loss in earning capacity,	8455.56
Other, future medical expenses,	?
Loss in future earning capacity, 22 years @ $2000 annually; present value @ 3% rate, savings bank schedule	32830.00
Future operation on knee ($1000); extra loss of earning capacity involved, ($1000),	2000.00
Pain and suffering, past and future,	15016.95
	$65650.00

The review of the facts which the jury was authorized to adopt fails to make the verdict appear clearly excessive. *Baston* v. *Thombs,* 127 Me. 278, 281.

3. *Exceptions to evidence.*

An orthopedic surgeon testified at the call of the plaintiff concerning the performance by that witness of the first operation upon the plaintiff. This doctor had utilized a Blount blade plate of metal to affix the broken bone in staid

alignment and thus reinforce the knitting process. An "exact replica" of the Blount blade plate was exhibited in court and identified by the witness. Defendant resisted the "unnecessary detail" of what was done but not the results.

The doctor explained:

> "I stated only that I think it '(the plate)' is material in that this particular wound became infected and it required a couple of other operations, one in particular which consisted of removing this metal. In that respect, it is the only respect that I know of - - - - it required another operation and this may have contributed to the infection."

The record of the trial then continues:

> "Q. Will you go on, Doctor, and explain the operation to us, the first operation?
>
> A. The Blount blade plate is placed along the - - -
>
> (Defense Counsel) May I object again to this detail? I am sorry to interrupt but I have got to protect my rights.
>
> THE COURT: He may answer that question and your exception will be noted.
>
> Doctor, please do it very objectively.
>
> -
>
> A. The Blount blade plate is placed on the drill wire in order to get it in the right direction. When it is in there it is held with one screw, as you see in the x-ray and a picture is taken to be sure it is in the right position. Nine screws are added to the plate. We added a little extra bone because these fractures are a little slow to heal, and with several more sutures we closed the wound and put him back to bed.
>
> Q. How is the plate put into the bone?
>
> A. By hammer.
>
> (Defense Counsel): I object.

THE COURT: He may answer. Exception will be noted.

A. By hammer, and a holder that goes onto the blade plate.

Q. How are screws attached to the bone?

(Defense Counsel): Objection.

THE COURT: Admitted: Exception noted.

A. With a screw driver.

Q. With a screw driver?

A. Yes."

The objections of the defendant were that evidence was thus admitted which was not material or pertinent to the issue of the trial and which was highly prejudicial to the rights of the defendant.

The replica of the Blount blade plate was not offered or admitted in evidence and is not before this court. The plate used appears in an x-ray exhibit but not very comprehensively.

Later in the trial the same surgeon in relating the events of the fourth operation of December 28, 1955 testified:

"Q. What was your diagnosis when he came back at that time, Doctor?

A. Osteomyelitis.

Q. Will you explain to us what osteomyelitis is?

A. Infection of bone. - - - Itis means infection and osteo - - means bone.

It is bone infection. Bugs and so forth get into the bone tissue, itself. It is a little harder to heal up bone infection than it is ordinary infection of the skin because the organisms get into the bone.

THE COURT: Doctor, as a result of this diagnosis, what did you then do?

A. We felt that the metal might have been contributing to the infection and we therefore opened up the wound and removed the metal and the band and the screws and again scraped underneath the plate. He had been draining during this period and that is the reason why we felt that we should operate a fourth time. By that time we felt the fracture was healed and that is the reason why we waited until that length of time. Earlier we would have taken the metal out if we had felt that the fracture was healed, but it had not."

In view of the statements of this expert witness the Blount blade plate, its "exact replica" and the technique of its affixation were conceivably applicable to issues in the case — the injuries to the plaintiff, their chain of causality, their extent, the drastic nature of the operations occasioned, their aftermath and any subsequent, conscious suffering of the patient. The metal plate was regarded as having contributed to the infection. We are not told how precisely it could have done so. Nor are we enlightened as to whether or not it was necessary to recite such details as the use of screws, hammer and screw driver in order to account fully for the genesis and the development of that infection. It was not explained if the use of screws, hammer or screw driver disposed the bone to infection or subserved infection more than non-usage or whether such usage affected later conscious suffering. The evidence disputed was arguably both relevant and material, as the record stands. *Torrey* v. *Congress Square Hotel Co.*, 145 Me. 234, 240.

"- - - - - The determination of relevancy and materiality rests largely in the discretion of the presiding justice. - - - - -"

State v. *Hume*, 146 Me. 129, 140.

"- - - - - It will be presumed that the ruling of a Judge, receiving or rejecting evidence, was right,

unless the exceptions show affirmatively it was wrong - - - - -"

Sweeney v. *Cumberland County Power & Light Co.,* 114 Me. 367, 371.

"It is a matter of very little consequence whether a reason assigned by a Judge at nisi pruis for his ruling is or not technically accurate and sound. Doubtless what may be denominated a sound legal instinct produces many correct results upon the admissibility of testimony when the Judge who made them might not be ready to state the true reason with precision or even with a perfect comprehension of the proper grounds upon which the admission or exclusion should be placed. The question before us is not whether the presiding Justice placed the admission of the testimony upon exactly the true ground but whether or not it is competent testimony." State v. Wagner, 61 Me. 178.

State v. *Mosley,* 133 Me. 168, 173.

The defense protests further that such evidence admitted over its objections was highly prejudicial to the rights of the defendant and subjected the jury to gruesome but superfluous details which were calculated to and did inculcate bias, sympathy and prejudice. We have stated earlier in this opinion our considered judgment that the verdict was within justifiable bounds as to damages awarded and in that respect at least was not a result of inflamed will rather than reason.

The admission or exclusion of the challenged evidence was a subject for the sound discretion of the presiding justice.

In *Jameson* v. *Weld,* 93 Me. 345, 354 the plaintiff at the trial had been permitted over the objection of the defendant in a malpractice suit to exhibit her injured arm to the jury. This court said:

"- - - - - The present condition of the arm is claimed by the plaintiff to have been the consequence of the

> defendant's want of skill and care. Such is the effect of her evidence. This is denied by the defendant. - - - - - In the view of the plaintiff's contention ant evidence, we think it was clearly within the discretion of the court to permit the arm to be shown to the jury."

In *Rogers* v. *Rogers,* 80 N. H. 96, 97 the rule is thus stated:

> "- - - - - In other words, the plaintiffs invoke the undue prejudice rule. 3 Wig. Ev., c. 1904. This rule excludes relevant facts whenever it appears that the prejudice they would excite will be so great that it is probable they will mislead the trier. State v. Lapage, 57 N. H. 245.
>
> In short, such facts are excluded, not because they have no tendency to prove the matter in issue, but because they have too great a tendency to prove it. 1 Wig. Ev. 55 - 57.
>
> The test therefore to determine the admissibility of relevant facts capable of exciting prejudice is to inquire whether the prejudice they will excite will be so great as to overbalance any assistance they may be to the trier. - - - - - While it can be said that these letters were capable of exciting prejudice, it cannot be said that their capacity for exciting it is so great that it is probable they misled the master. In other words, notwithstanding the letters might have been excluded under the undue prejudice rule, it cannot be said that the master erred when he admitted them."

The disputed evidence was in part, to be sure, unalloyed realism but the injuries to the plaintiff in this case were generally of such gravity that by their very nature and even when less graphically described they would have been capable of shocking lay sensibilities. The plaintiff was warranted in proving his case by the clearest evidence subject only to the duty of the presiding justice to prevent

abuse. The case may be close but we are not satisfied of a demonstrated misuse of judicial discrimination.

The entries must be:

Exceptions overruled.

Motion denied.

AGNES DESCHAINE
vs.
LEONARD P. DESCHAINE

Kennebec. Opinion, April 14, 1958.

Negligence. Insurance. Remarks of Counsel. Waiver.

Insurance in negligence cases is immaterial, prejudicial and not admissible; and the rule applies with equal force to arguments of counsel. This rule of exclusion is equally applicable to plaintiff and defendant.

If counsel in addressing the jury exceed the limits of legitimate argument, objection must be made at the time; if not so made it is considered as waived.

Where a plaintiff gives the court no reason to correct what he now claims after verdict against him is an error prejudicial to his case, his complaint comes too late.

ON MOTION FOR NEW TRIAL.

This is a negligence action before the Law Court after verdict for defendant upon plaintiff's motion for a new trial. Motion overruled.

Jerome G. Daviau, for plaintiff.

Robinson, Richardson & Leddy, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, JJ. DUBORD, J., did not sit. BELIVEAU, J., sat at argument but retired before the opinion was adopted.

WILLIAMSON, C. J. This is an action by a mother against her son for personal injuries arising from an automobile accident. The mother was a passenger in a car driven by the son. The jury found for the defendant. The case is before us on a motion for new trial on the ground that liability insurance was improperly introduced into the case by defendant's counsel in his argument to the jury.

A motion for new trial on the usual grounds understandably was not argued by the plaintiff and is considered abandoned. Apart from issues arising from defendant's argument, the case presented a typical jury question.

The defendant was proceeding in traffic on a main highway behind the Plouff car. The road was slippery and it was raining or sleeting. Liability turned on whether defendant was negligent in failing to stop his car in time to avoid striking the rear of the Plouff car. The defendant testified in substance that Plouff started to pass a car ahead and suddenly turned back into the defendant's lane. This fact did not appear in statements by the defendant shortly after the accident to the investigating police officer.

It is sufficient to say the evidence was conflicting, and the issue of whether the defendant acted as a reasonably prudent person under the circumstances was for the jury to decide. The case ended with the verdict for the defendant unless the special ground of error requires a new trial.

Insurance appeared in the case no less than three times. First, on cross-examination by plaintiff's counsel, the defendant testified he did not tell the police officer about the Plouff car attempting to pass a car ahead. The record reads:

"Q Did you tell anybody else?
A I told my insuring man.

Q Now, did you - -

Mr. Leddy: (counsel for defendant) Just a minute. Your Honor - -

(Bench Conference followed by Conference in Chambers)

(Defendant's counsel addressed to the Court:

A motion for a mistrial. Motion denied. Exception noted for Defendant.)

THE COURT: I will instruct the jury now and shall instruct them later that you will disregard entirely the statement made by the last witness, who is the defendant himself. You will disregard his last statement."

Second, in argument defendant's counsel said, to adopt his recollection, "This defendant has nothing to lose, no matter which way this case goes . . ." Plaintiff's counsel objected and at his request a record was made of the remainder of the argument. He made, however, no request for any action by the court, nor did he make a motion for mistrial.

At a later hearing to establish the facts surrounding the incident, defendant's counsel said:

"It is my recollection that during the course of my argument to the jury in this case, I had been talking to the jury along the lines of their right to appraise a witness, the witness' testimony, with respect to that witness' interest in the outcome of a case. That part of my argument, which is allegedly offensive, followed this general subject, and I also said, after saying in effect that part which is claimed to be offensive, 'I think you know what I mean.' "

In argument before us counsel for the defendant, with commendable candor, stated that he meant insurance. Third, the presiding justice, with great care, and with the complete approval of counsel for both parties, instructed the jury in his charge to disregard insurance. The justice said, in part:

> "Agnes Deschaine is not suing any insurance company. She is suing her son, Leonard Deschaine. Whether or not he has any insurance means absolutely nothing. Again I say to you that I am reposing my confidence in you because I know you are men and women of sound judgment and that you will decide this case between Agnes Deschaine and Leonard Deschaine purely and simply upon the evidence you have heard in this case and upon nothing else."

We have then before us a run-of-the-mill accident case with the unusual feature of insurance brought into the case in defendant's argument. The rule governing exclusion of insurance is plain. Insurance has no bearing on the issues in a negligence action and is prejudicial. Whether the fact enters the case through witnesses on examination by counsel for either side, or in argument, and whether it is introduced purposely and wilfully or inadvertently, is of no great importance if the evil to be prevented is present. The rule of exclusion is equally applicable to plaintiff and defendant.

> "It (evidence of insurance) is evidence entirely irrelevant to the issues in this case, and there is as much impropriety in its introduction by a defendant as by a plaintiff." *Skillin* v. *Skillin,* 130 Me. 223, 225, 154 A. 570.

In *Albison et al.* v. *Robbins & White,* 151 Me. 114, 116 A. (2nd) 608, a blasting case, we recently reaffirmed the rule. There the plaintiff sought unsuccessfully to introduce statements by the defendant's superintendent,

> ". . to the effect that the defendant was covered by liability insurance and that there was no cause for

> worry on the part of the plaintiffs and that he (the superintendent) would continue to use the same charges, because the insurance company would pay for any damage caused by the explosions."

We said, at p. 124:

> "The Maine Court, however, has several times considered the admissibility of similar evidence and has uniformly held that statements relative to the fact that the defendant was protected by liability insurance were not proper. See reasons stated in *Sawyer* v. *Shoe Company,* 90 Me. 369 (38 A. 333); *Richie* v. *Perry,* 129 Me. 440, (152 A. 621); *Skillin* v. *Skillin,* 130 Me. 223 (154 A. 570)."

Other illustrative cases are: *Beaudoin* v. *Mahaney, Inc.,* 131 Me. 118, 159 A. 567; *Beaulieu* v. *Tremblay,* 130 Me. 51, 153 A. 353; *Trumpfeller* v. *Crandall,* 130 Me. 279, 155 A. 646; *Poland* v. *Dunbar,* 130 Me. 447, 157 A. 381; *Goodie* v. *Price,* 125 Me. 36, 130 A. 512; *McCann* v. *Twitchell,* 116 Me. 490, 102 A. 740.

Defendant's counsel gained no right or privilege to bring insurance into his argument from the "my insuring man" answer of defendant on cross examination. No door was opened to the defendant or his counsel thereby. The evidence had been stricken from the record and the jury instructed to disregard it. The presiding justice found no harm or prejudice in the incident sufficient to require removal of the case from the jury, otherwise he would have granted the motion for mistrial. Relief from the claimed error in denying the motion for mistrial was available to defendant only in this court upon the exception to the ruling, and not by self-help in bringing insurance again into the case in argument or otherwise. In brief, the defendant gained no right on his part to inject insurance into the case from what had taken place prior to his argument.

The defendant's case is apparently based on the view that defendant may show his own interest in the outcome of the case by introducing evidence of insurance coverage. The argument seems to be that insurance makes the son's evidence of his due care more worthy of belief. In other words, he ought to be believed if he denies liability to his own mother when he is insured.

The reasoning of the defendant in our view is unsound. It leads logically to a removal of all prohibitions on the introduction of insurance. In the case before us, we have noted there was not a shred of evidence of insurance in the record when defendant's counsel made his argument, and for this reason alone the argument would have been objectionable.

If argument of this nature is proper, it follows evidence of insurance is admissible. Could the purpose be limited to credibility of the insured? We think not.

If the defendant may introduce insurance to bolster his credibility, the plaintiff may do likewise in attack. If insurance is admissible, so also must be the fact of no insurance, or the extent of coverage. Suppose A sues X (insured) and Y (not insured). On defendant's theory Y may show X is insured and that Y is not insured. Further, it may be that A is insured and that an insurance company is the real plaintiff in interst.

The reasons for excluding reference to poverty or wealth of parties are equally applicable in the case of insurance. In *Mizula and Cherepowitch* v. *Sawyer,* 130 Me. 428, 157 A. 239, an automobile accident case, the court said, at p. 430:

> "The special motion presents a peculiar situation. It appears that counsel for Sawyer, in closing the case to the jury, dwelt on her age and limited financial ability. Just exactly what he said is not agreed upon, but very plainly his argument was irrelevant, improper and prejudicial.

> "References to the wealth or poverty of parties, unless the issues involved make such references admissible, may constitute reversible error."

We leave the rule as it has existed since at least 1897; that is to say, insurance in negligence cases is immaterial, prejudicial, and not admissible. *Sawyer* v. *Shoe Co., supra.* The rule obviously applies with equal force to arguments of counsel.

The motion, however, must be overruled. The plaintiff did not take action at the time of the offending argument necessary to bring his motion forward. There is no indication in the record that the plaintiff requested, expected, or indeed desired the presiding justice to take any action or to intervene in any manner. There was for example no request that the jury be then instructed to disregard the argument, or motion for mistrial. The offending argument was stopped and there the incident ended with no dissatisfaction on the part of the plaintiff, so far as the record shows.

The language in *Mizula and Cherepowitch* v. *Sawyer et al., supra,* at p. 432, is here applicable:

> "The rule is well settled. If counsel in addressing the jury exceed the limits of legitimate argument, it is the duty of opposing counsel to object at the time, so that the presiding Justice may set the matter right, and instruct the jury with reference thereto. If the Justice neglects or declines, after objection, to interfere, redress may be sought by a bill of exceptions. If the offending counsel, after being required to desist or retract refuses to do so, the remedy is by a motion for a new trial. So, if the remarks are of such a character that even the intervention of the Justice is not deemed to have removed the prejudice and cured the evil, the remedy is by motion. But in any event, objection must be made at the time; if not so taken, it is considered as waived. Knowlton v. Ross et al, 114 Me., 19."

The plaintiff preferred to await the outcome of the case without request for action by the presiding justice. He gave the court no reason to correct what he now claims after verdict against him was an error prejudicial to his case. *McGuffie* v. *Hooper*, 122 Me. 118, 119 A. 111. His complaint comes too late.

The entry will be

Motion overruled.

FRED P. RAY
vs.
WILLIAM E. LYFORD

Penobscot. Opinion, April 14, 1958.

Exceptions. Certificate. Findings.

The certification that exceptions are allowed is conclusive unless the certificate or exceptions themselves show the contrary.

There is no error of law if the findings of fact by a presiding justice are supported by any credible evidence but a finding without evidence does not meet the test of law.

ON EXCEPTIONS.

This is an action of contract before the Law Court upon exceptions by defendant. Exceptions sustained.

Gerald E. Rudman, for plaintiff.

Matthew Williams, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, JJ. BELIVEAU, J., sat at argument but retired before the opinion was adopted.

WILLIAMSON, C. J. On exceptions by the defendant. This case was heard by the presiding justice at a term of the Superior Court by agreement without a jury. R. S., Chap. 106, Sec. 17. The docket does not show a reservation of the right to except as to matters of law, and so ordinarily the case could not be brought forward. The defendant, however, is saved by operation of the rule stated by Chief Justice Fellows in *Ouellette & Ouellette* v. *Pageau, et al.*, 150 Me. 159, 163, 107 A. (2nd) 500, which reads:

> "It is, therefore, the rule of practice in Maine that where a cause is tried by a presiding justice without the intervention of a jury, in accordance with statute, exceptions to the judge's rulings in matters of law do not lie, unless there has been an express reservation of the right to except."
>
> * * * * * * * * * * *
>
> "If the judge, however, signs the bill of exceptions, the certification that exceptions are allowed is conclusive, provided there is nothing in the bill of exceptions itself or in the certificate of the judge to show the contrary."

The defendant objects in his exceptions to three material findings of fact by the presiding justice. There is no dispute about the applicable principle of law. There is no error of law if the finding is supported by any credible evidence. *Everett* v. *Rand,* 152 Me. 405, 131 A. (2nd) 205. *Consumers Fuel Co.* v. *Parmenter,* 151 Me. 83, 116 A. (2nd) 138; *Green Acre Baha'i Institute* v. *Eliot,* 150 Me. 350, 110 A. (2nd) 581.

The controversy arises from transactions between the parties with respect to potatoes grown by the defendant in 1954 and 1955. The plaintiff seeks to recover a balance due on "seconds" included in the 1955 crop sold by the defendant to the plaintiff, and now resold by him to the defendant. On his part the defendant in setoff claims a balance due under a contract for the purchase of "commercials" and "seconds" grown by him in 1954.

The decisive issue in our view is found in the claim for a balance due on 1954 "commercials," which for convenience we will first discuss.

FIRST EXCEPTION

The defendant objects to the finding by the presiding justice "That on or about April 2nd, 1955 plaintiff purchased Kennebec potatoes from the defendant. These potatoes were so-called commercial grade and were paid for in full by plaintiff as they were delivered."

In April 1955, the parties made an oral agreement for the purchase and sale of an estimated three thousand barrels of "commercials" of the 1954 crop in defendant's potato house. The plaintiff made a deposit of $500 thereon, and paid the agreed price per barrel as he took them. The dispute comes from the fact that the plaintiff did not take or pay for all of the commercials properly racked.

The defendant contends that the evidence conclusively points, and points only, to a firm contract of sale, and with this view of the record we agree. Indeed, the plaintiff (the buyer) testified:

> Q What was the initial agreement that you had with (the defendant) in the 1954 crop, the one with the water damage to it?
> A I think he says he had approximately around 3,000 barrels.
>
> Q And of those 3,000, how many did you agree to take?
> A Whatever they racked out."

We find nothing in the record to destroy the force of the plaintiff's own understanding of the transaction.

In our view, therefore, the finding of the presiding justice does not meet the test of the law. The exception must be sustained.

SECOND EXCEPTION

The objection to the finding of fact that the proposed sale of a thousand barrels of so-called "seconds" or "pickouts" "discussed on that same occasion (April 1955) never progressed beyond the negotiation stage and that no contract existed by which the plaintiff was to purchase the thousand barrels of seconds."

In view of the decision on the first exception and the necessity of a new trial with a different record, it will serve no useful purpose to discuss this exception at length. It is sufficient to say that the evidence of an agreement to purchase and sell an estimated 1,000 barrels of "seconds" of the 1954 crop in the defendant's potato house was conflicting. The defendant says that the plaintiff agreed to purchase the "seconds" at $1.00 a barrel. The plaintiff testified in substance that the defendant raised the price to $1.00 a bag, or an equivalent of $1.50 a barrel, and at this point negotiations ended.

In short, the evidence is conflicting on the vital point of whether the parties entered into a contract relating to the "seconds." Hence under the rule, the finding stands and the second exception is overruled.

THIRD EXCEPTION

We turn from the setoff to plaintiff's action against the defendant to recover a balance due for "seconds" from the 1955 crop resold by the plaintiff to the defendant. The objection is to the finding of the presiding justice "that on or about April 28, 1956, the plaintiff sold the defendant 800 bags (barrels) of potatoes at an agreed price of $2 a bag (barrel), which sum has not been paid by the defendant to the plaintiff."

Admittedly the defendant owed the plaintiff something on this account. The quantity of "seconds," and that alone,

was in dispute. As in the second exception, it is unnecessary to review the record in detail. The evidence is conflicting. It is sufficient under the Rule to uphold the finding. The third exception is overruled.

The presiding justice found for the plaintiff in the amount of $1,282.50. We are not here concerned with items totaling $317.50 on which the presiding justice found for the defendant in setoff against the $1,600 due the plaintiff for the 1955 "seconds."

The entry will be

Exceptions sustained.

ANCIL S. YOUNG

vs.

HORNBROOK INCORPORATED

Aroostook. Opinion, April 14, 1958.

Contracts. New Trial.

Where the meaning of a written contract is plain and unambiguous parol evidence of its meaning is not admissible, so that the trial court properly excluded evidence as to the propriety and cost of "mulching" where the contract did not, by express terms, require "mulching."

Where a defendant is not harmed by a ruling of the presiding justice, an exception to the ruling is properly overruled.

In the absence of a provision in the contract providing otherwise, the "area" covered by a land grading and seeding contract must be determined by proof and not by a third party.

A new trial will not be granted unless the verdict is clearly wrong.

ON EXCEPTION AND MOTION FOR NEW TRIAL.

This is an action of assumpsit to recover a balance due upon a contract. The case is before the Law Court upon defendant's exceptions to the exclusion of certain evidence and motion for a new trial. Exceptions overruled. Motion denied.

Gerald L. Keenan,
Asa H. Roach, for plaintiff.

Roland A. Page,
George B. Barnes, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, JJ. BELIVEAU, J., sat at argument but retired before the opinion was adopted.

WILLIAMSON, C. J. This is an action in assumpsit to recover a balance allegedly due from defendant under a written contract to pay one cent per square foot for grading and seeding land at the Limestone Air Force Base. The case is before us after verdict for the plaintiff on exceptions by the defendant to the exclusion of certain testimony and on general motion for a new trial.

The controversy centers (1) about the area in square feet for which payment is due, and (2) about the meaning of the written contract, and in particular whether "mulching" was included in the obligation of the plaintiff.

We state the pertinent evidence without detail. On April 26, 1954, the plaintiff and the defendant entered into a written agreement, providing in part as follows:

> "The Sub-contractor (the plaintiff) agrees to furnish lime, fertilizer, and grass seed, and to finish grade from a bulldozer finish and seed down all area requiring such finish grading and seeding in

> accordance with plans and specifications of a construction contract which the Contractor (the defendant) now has at Limestone Air Force Base.
>
> "Contractor agrees to pay Sub-contractor therefor at the rate of $0.01 per square foot for all land so graded and seeded; payment to be made as work progresses, according to regulations customarily included in such government contracts, with 90% of the contract price upon completion, and the remaining 10% upon final approval by the Army Corps of Engineers."

The "construction contract" at the Air Base referred to above was the contract between Consolidated Constructors, Inc. and the defendant, from which it appears that Consolidated in turn had a contract covering the work in question with the United States Government. The record also includes pertinent extracts from the Government specifications on "Turfing" and on "Quantity Surveys." The parties are in agreement that the contract between the plaintiff and defendant included the Consolidated contract and the specifications.

The plaintiff completed, so he says, his contract at the Base and was paid $5300 on account. There is a substantial difference between the measurements of the areas involved on the evidence offered by the plaintiff and by the defendant.

On his part the defendant contends that the parties are bound by the measurements found by the representative of the Government. He also says that he is entitled to reduce any amount due from him on the square foot basis by the cost of mulching certain areas. The question on this point is whether mulching was called for by the contract. If so, the evidence offered of mulching and its cost was erroneously excluded. In addition, the defendant also seeks to reduce the claim by certain charges for gasoline and for reseeding in the "bomb storage" and "officers' mess" areas.

It may be noted that the defendant admittedly owed a balance under the contract. The jury found the full amount claimed by the plaintiff, adopting his measurements and denying the claims of the defendant.

EXCEPTIONS

The exceptions are mainly directed to the exclusion of expert evidence to show that mulching of seeded slopes was the general practice, good practice, and necessary for a good workmanlike job of seeding. The exclusion was on the ground that the evidence was not material for the reason the contract did not, by express terms, require mulching. The question is not whether expert evidence as distinguished from other evidence was admissible to interpret the contract.

The test to be applied by the trial judge in a situation such as this is whether the written contract has a plain meaning. If so, parol evidence of meaning is not admissible. In placing their agreement in written words, contracting parties are held to the plain meaning thereof.

Let us take the contract between plaintiff and defendant step by step to ascertain, if we may, the plain meaning from the words used, or whether evidence may be introduced under the rule to interpret the language of the contract on the issues here in dispute. *Haskell* v. *Tukesbury,* 92 Me. 551, 43 A. 500; *Fenderson* v. *Owen,* 54 Me. 372; *Emery* v. *Webster,* 42 Me. 204; 9 Wigmore, Evidence Sec. 2461 *et seq* (3d ed.); 3 Williston, Contracts Sec. 609 (rev. ed.); 32 C. J. S., Evidence Sec. 959, p. 896.

> "Where the language employed in a contract has an ordinary meaning or where the meaning is plain and unambiguous when read in connection with other provisions of the contract, extrinsic evidence as to its meaning is not admissible." 20 Am. Jur., Evidence Sec. 1143.

> "Whenever the terms of a contract are susceptible of more than one interpretation, or an ambiguity arises, or the extent and object of the contract cannot be ascertained from the language employed, parol evidence may be introduced to show what was in the minds of the parties at the time of making the contract and to determine the object on which it was designed to operate." 20 Am. Jur., Evidence Sec. 1147.

> "The principle which governs the admissibility of extrinsic evidence explaining the meaning of a contract, denying the admissibility of such evidence when the meaning is plain and unambiguous, but permitting such evidence to be introduced when a contract is susceptible of more than one interpretation or where an ambiguity arises or the extent and object of the contract cannot be ascertained from the meaning of the language employed, in general governs the admissibility of extrinsic evidence of a usage or custom which it is asserted affects the rights and obligations of parties to a written contract or other written instrument." 55 Am. Jur., Usages and Customs Sec. 30.

We turn to the provisions of the contract from which we have quoted above. The plaintiff subcontractor agrees "to furnish lime, fertilizer, and grass seed, and to finish grade . . . and seed down . . . in accordance with plans and specifications of a construction contract . . ." The price is $0.01 per square foot "for all land so graded and seeded; . . ." We find no reference whatsoever to "mulch" or "mulching" in the language used by the parties.

Our next step is to examine the contract between Consolidated and the defendant covering certain "clearing, excavation and grading work in accordance with the plans and specifications . . ." of the general contract between Consolidated and the Government. The plaintiff's position as a subcontractor under the defendant for only a small portion of defendant's contract with Consolidated is shown by the fact that, on the plaintiff's figures, his contract totaled under

$10,000 of the $198,000 involved in the Consolidated contract.

The control exercised by the Government is evidenced by the following provision in the Consolidated contract:

> "The Subcontractor (the defendant) shall be bound by the decision of those authorized by the General Contract as to the meaning of any of the plans, specifications, details and contract provisions which affect the work hereby let to the Subcontractor. All the General Conditions of the specifications insofar as they pertain to the labor and materials necessary to perform this Subcontract, are all made a part hereof as if herein set forth in full."

In the specifications entitled "Turfing" are detailed provisions for materials, inspections and tests, preparation of turfing areas, topsoiling, seeding, sodding, compacting, mulching, establishment, repair, cleanup, measurement and payment.

We are concerned obviously with only those specifications which touch upon the contract between plaintiff and defendant. For example, there is no suggestion that the specifications for "sodding" are applicable.

We cannot within the reasonable limits of an opinion set forth in detail the pertinent provisions of the specifications which in their entirety cover twenty-two pages in the record. From our examination we are convinced that seeding and mulching under the specifications (and thus under the plaintiff's contract) are separate and distinct processes, and that the former in this contract at least does not include the latter. There are detailed provisions for seeding and mulching, of which the following are of interest. "MULCHING.—Upon completion of the final rolling of seeded areas the surface of such areas shall be protected by the application of a top mulch."

The distinctive nature of mulching under the contract is further evidenced in the specification on Measurement and Payment. Under the Government contract with Consolidated, areas indicated to be topsoiled and seeded are measured by the square yard with the price including certain costs and specifically mulching. Areas to be "seeded only" are measured by the acre with the price including certain costs without the mention of mulching.

We conclude that seeding and mulching are plainly distinguished in the specifications and hence in the plaintiff's contract. The term "seeding" thus has a plain meaning to the extent at least that the meaning was challenged by the defendant. In short, the contract plainly does not include mulching. The offered evidence was properly excluded and the exceptions on this point are overruled.

The remaining exception was taken to the exclusion of testimony of the vice president and defendant's foreman on the job of the number of square feet seeded in the "bulk storage area." From the record it appeared the witness watched the surveyor take measurements and together with the surveyor made the necessary computations.

The plaintiff's witnesses placed the "bulk storage area" at 3,124 square feet; the government representative (whose figures were accepted by the defendant) at 3,368 square feet. The jury found the smaller area. It is at once apparent that the defendant suffered no harm whatsoever from the ruling. Accordingly, on well established principles, the exception is overruled. In doing so, we have not considered the merits of the exception and in no way do we intimate any view thereon.

MOTION

The motion for new trial raises the question of whether the measurements found by the jury were against the evi-

dence and against the weight of the evidence. The jury returned a verdict for the plaintiff apparently reached in this manner:

925,556 square feet @ $0.01 (plaintiff's claim)		$9,255.56
Less agreed payments		5,300.00
	Balance	$3,955.56
	Interest	119.64
	Verdict	$4,075.20

The defendant admits there is due the plaintiff $1,364.68, arrived at as follows:

772,560 square feet @ $0.01		$7,725.60
Less agreed payments		5,300.00
		$2,425.60
Less credits for gasoline	$ 4.81	
Cost replacement unsatisfactory work	355.48	
	$360.29	
Mulching expense	700.63	
		$1,060.92
		$1,364.68

We will dispose of the claimed credits at the outset. The items totaling $360.29 were before the jury and the jury found adversely to the defendant. They presented an everyday jury question. The defendant cannot now complain of the jury finding on this score.

The mulching item was considered in the exceptions. Evidence of mulching and of its cost was excluded, and not before the jury, and so cannot be considered in passing upon the motion.

Returning to the issue of area "graded and seeded," we show the different claims in the following table:

(Quantities are in square feet)

Description area	Quantities Paid for by Prime Contractor according to figures of Corps of Engineers.	Quantities Billed to Defendant by Plaintiff in Dec. 1954.	Quantity claimed by Plaintiff in his writ May 1955 and found by Jury.
Diesel Electric Plant & Corps of Engineers' Bldg.	34,967	34,967	55,286
Sewage Disposal	25,000	45,045	71,634
Bulk Storage	3,368	3,124	3,124
Officers' Mess	10,187	10,187	10,187
Igloos & Barricades	77,013	151,806	153,705
Bomb Storage	622,025	631,620	631,620
Square feet	772,560	876,749	925,556

The defendant would have the measurements determined between the plaintiff and the defendant by the Corps of Engineers. In other words, he urges that the findings of area under the contract between Consolidated and the Government are adopted by the plaintiff and defendant under their subcontract.

It appeals to one's sense of orderliness in business that this should be so. The Government pays the contractor (here Consolidated) for the work. Certainly it would be simpler for all concerned if the basis of the payment, in measure of work, could be used down the line of subcontracts.

The contract in this instance, however, in our view does not so provide. First, there is no such condition in words in the agreement signed by the plaintiff and defendant. Area, that is the square footage under the agreement quoted above, is determined by proof and not by a third party. Second, the provision of the specifications forming a part of plaintiff's contract and hitherto discussed do not provide for acceptance by the plaintiff of the Government measure.

The specification reads:

> "SC-25. QUANTITY SURVEYS. — *a.* The contractor will furnish all personnel, except chief of parties and instrument men, equipment and material required to make such surveys as are necessary to determine the quantities of work performed or in place. Chief of parties, and instrument men will be provided by the Government at no expense to the contractor. All original field notes, computations, and other records taken by the contractor for the purpose of quantity surveys shall be furnished promptly to the representative of the Contracting Officer at the site of the work; they shall become the property of the Contracting Officer and shall be used to the extent necessary in determining the amounts of payments due to the contractor under the article of the contract*or* entitled 'Payments to Contractors.'
>
> "*b.* Unless waived in each specific case, quantity surveys shall be made under the direction of a representative of the Contracting Officer."

It is unnecessary for us to determine the weight to be given the quantity surveys in the settlement between the Government and Prime Contractor (Consolidated). The parties here it must be remembered are two subcontractors. Lying between the plaintiff and the Government are the defendant and Consolidated, both charged with performing the work included in the plaintiff's subcontract. Consolidated and the Government participate in the quantity surveys, but the plaintiff and defendant do not necessarily do so. In our view it would stretch the meaning of the quantity survey provision beyond its plain limits to hold it binding upon one not directly concerned therewith. We may well ask why, if it was intended for the plaintiff to be bound thereby, a provision to such effect was not placed in his contract with the defendant.

The jury was not compelled in our view to accept the quantity surveys made under the Government contract. Hence the figures in the first column of the table do not mark the limits of the defendant's liability.

The differences of consequence between the figures of the Corps of Engineers and the plaintiff's claim lie in the Diesel Electric Plant, Sewage Disposal, and Igloos and Barricades items. There are also substantial increases in the claims of plaintiff between the bill rendered in December 1954 and his writ in the Diesel Electric Plant and Sewage Disposal items.

The plaintiff introduced evidence of measurement of the several areas. Explanation was offered that the increase in amount claimed in the writ arose from errors made in preparing the December bill.

The widest difference between the parties is in the item for Igloos and Barricades, which for our purposes were man-made mounds to be "seeded down." The plaintiff offered evidence in some detail of the methods used in arriving at his figures and pointed out that the Igloos and Barricades had sloping surfaces and contained more area for grading and seeding than a flat surface. It is suggested there that certain areas appear by error in both Igloos and Barricades and Bomb Storage. The evidence on this point, however, did not reach beyond guess or surmise, and in any event did not compel such a finding by the jury.

On the whole, although the evidence does not have the preciseness and definiteness desirable in a matter involving measurements of land areas, yet we cannot say that the evidence did not, under the general principles applicable to the motion, warrant the jury accepting the evidence of the plaintiff in preference to that of the defendant.

> "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." *Bowie* v. *Landry,* 150 Me. 239, 241, 108 A. (2nd) 314.

See also *Fillion* v. *Allain,* 153 Me. 303, 137 A. (2nd) 377; *McNally* v. *Patterson,* 153 Me. 115, 135 A. (2nd) 281; *Turcotte* v. *Dunning,* 132 Me. 417, 171 A. 908; *Garmong* v. *Henderson,* 114 Me. 75, 95 A. 409.

The entry will be

Exceptions overruled.

Motion for new trial denied.

ANTONIO J. PALLERIA
vs.
FARRIN BROS. & SMITH

Knox. Opinion, April 14, 1958.

Practice. Exceptions. New Trial. Rule XVII. Waiver. Pleading. Negligence. Contributory Negligence. Nuisance.

The filing of a motion for a new trial with the presiding justice pursuant to Rule XVII does not result in a waiver of exceptions previously noted and otherwise preserved by order of the court providing for the time of filing the transcript and extended bill (R. S., 1954, Chap. 113, Sec. 60). If, however, it develops that the issues to be decided upon the exceptions and the motion are the same, manifestly a decision on one is sufficient; likewise an error in perfecting one is not fatal to the other.

R. S., 1903, Chap. 84, Sec. 53 (Chap. 87, Sec. 57, R. S., 1916), was superseded by Sec. 59, Chap. 113, R. S., 1954 and Rule XVII, and provides that a report of the evidence may be authenticated by an official reporter.

The allegation of existing duty and breach thereof constitute better pleading even though the duty claimed to have been breached may be supported by the averment of facts from which the law will imply a duty and breach thereof.

Contributory negligence is an appropriate defense to an action based on nuisance which is in fact grounded on negligence.

ON EXCEPTION AND MOTION FOR NEW TRIAL.

This is a negligence action before the Law Court upon exceptions and motion for a new trial. Exceptions sustained.

Harmon & Nichols, for plaintiff.

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

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, JJ. BELIVEAU, J., sat at argument but retired before the opinion was adopted.

DUBORD, J. This case comes up to this court on exceptions to the refusal of the presiding justice to grant a motion of the defendant, made at the close of the evidence, to direct a verdict for the defendant; and on general motion.

The plaintiff advances the contention that the motion is not properly before this court because the provisions of Rule XVII, 147 Me. 470, have not been complied with. He argues that the evidence in the case was not signed by the presiding justice, nor certified by him to the Law Court; and that the evidence was not filed within 30 days of the entry of the motion.

The pertinent sections of Rule XVII read as follows:

> "Motions made to have a verdict set aside as against the law and the evidence, whether addressed to the presiding justice or to the Law Court, must be filed during the term at which the verdict was rendered but in any case never more than thirty days after the rendition of such ver-

> dict, excepting only that such a motion addressed to said Law Court after denial of a like motion by the presiding justice must be filed within ten days after decision adverse to the moving party is filed by the presiding justice."
>
> "No exceptions lie to the decision of the presiding justice and no appeal except in cases of felony."
>
> "When such motion is addressed to the Law Court, the party making it shall cause a report of the whole evidence in the case to be prepared, signed by the presiding justice or authenticated by the certificate of the official court stenographer, and filed within such time as the presiding justice shall by special order direct, and, if no such order is made, it must be done within thirty days after the adjournment of the term at which the verdict was rendered or within thirty days after the filing of the motion, whichever is later; if not so done, the motion may be regarded as withdrawn, and the clerk, at a subsequent term, may be directed to enter judgment on the verdict."

The record indicates that at the close of the evidence, the defendant addressed a motion to the presiding justice praying that a verdict for the defendant be directed. This motion was denied. Exceptions were noted and at that time the presiding justice, by special order, directed that a transcript of the evidence be filed on or before April 30, 1957. The transcript was filed on April 29, 1957. A date was also fixed for the filing of an extended bill of exceptions which bill was filed within the time allowed.

Subsequent to the motion for a directed verdict, the defendant addressed a motion for a new trial pursuant to the provisions of Rule XVII, to the presiding justice. This motion was denied.

Within 10 days after decision adverse to the defendant, a motion for a new trial addressed to the Law Court was filed. This procedure is authorized by Section 60, Chapter

113, R. S., 1954, and by Rule XVII. No new order was filed by the presiding justice fixing a date for the filing of the evidence.

Plaintiff argues that by filing a motion for a new trial addressed to the presiding justice, the exceptions previously taken were waived; and as a result of this waiver all prior proceedings were in effect, effaced from the docket, and that it became necessary for the presiding justice to issue a new order specifying a date for filing the evidence. In support of his contention, plaintiff cites *Mills* v. *Richardson,* 126 Me. 244, at 249; 137 A. 689; and *Fort Fairfield* v. *Millinocket,* 136 Me. 426, at 428; 12 A. (2nd) 173. Further reference to these decisions will be subsequently made in this opinion.

It now becomes pertinent, we think, to decide whether or not in a civil case, the filing of a motion for a new trial addressed to the presiding justice, constitutes a waiver of prior exceptions, taken to the refusal to direct a verdict, in the light of § 60, Chapter 113, R. S., 1954, which authorizes the filing of a motion for a new trial addressed to the Law Court within ten days after an adverse decision on the part of the presiding justice upon the motion addressed to him.

In the very enlightening treatise of former Chief Justice Edward F. Merrill, entitled "Some Suggestions On Taking A Case To The Law Court" to be found in Volume Forty of the Reports of the Maine State Bar Association, the author had this to say; at Page 197:

> "In civil cases a general motion to the presiding justice to set aside a verdict waives exceptions to refusal to direct a verdict. See *Mills* v. *Richardson,* 126 Me. 244, 249 where the court said: 'An exception to the refusal to direct a verdict for the defendant is waived by the prosecution of a motion for a new trial before the presiding justice, or otherwise the defendant would be seeking the same remedy through two tribunals, getting the benefit of the second if he failed in the first.' The same

rule formerly applied in criminal cases, whether felonies or misdemeanors. Since the case of *State* v. *Bobb,* 138 Me., 242, felony cases are not subject to this rule. This result was based upon the ground that now by statute the decision of the single justice is not final, but an appeal therefrom lies to the Law Court. Whether the change in the statute with respect to the finality of the ruling by a single justice on a motion for a new trial in civil cases, and the allowance of a second motion therefor to the Law Court, will bring about a change in the law of waiver in such cases has not been decided. It is to be noted that in the criminal case the appeal is from the denial of the motion by the presiding justice, while in the civil case the motion to the Law Court is a new, separate and distinct motion and in no way attacks the ruling of the presiding justice. While I neither express nor intimate an opinion on the question, discretion would indicate that if one wished to preserve his exceptions to the denial of a motion for a directed verdict in a civil case, a motion should not be made to the presiding justice to set the same aside. Precaution should be further taken if one did make a motion to the presiding justice in such case and he denied the same, to make a new motion to the Law Court within the 10 days allowed therefor by statute, and not rely alone upon the exceptions to the refusal to direct a verdict, as the medium for obtaining a review by the Law Court."

The history of the decisions of this court on the question of waiver is of interest. In the case of *State* v. *Simpson,* 113 Me. 27; 92 A. 898; a respondent was under indictment for a misdemeanor. After the State had introduced all its evidence, the respondent requested the presiding justice to direct a verdict in his favor on the ground of insufficient evidence. This motion was denied and exceptions taken. After a verdict of guilty, the respondent filed a motion addressed to the presiding justice to set aside the verdict as against the law and the evidence. This motion was over-

ruled, and exceptions noted. The court said that a respondent had a right to except to the refusal of the presiding justice to direct a verdict in his favor, and upon denial of the motion, he could have taken exceptions, and in that manner take the case to the Law Court and obtain a decision and opinion as to the sufficiency of the evidence. However, the court further said, he abandoned that remedy and that course of procedure, and sought the decision and opinion of the presiding justice upon precisely the same question. It follows, the court said, that exactly the same question was presented to the determination of the presiding justice by the motion which would have been presented to the Law Court on the first exception. The court ruled that the decision of the presiding justice on the motion was final; that it was a matter within his discretion, and that exceptions did not lie to his ruling. It was pointed out that in a civil case, no appeal lies from the decision of the presiding justice to the Law Court and a defeated party cannot be heard on a motion both before the single justice and the Law Court. He must exercise his option and take one course or the other. And, having exercised his choice is bound by the result.

The court called attention to the distinction between procedure in the case of a misdemeanor and of a felony. In the latter procedure provision is made by statute for an appeal to the Law Court from the denial of a motion for a new trial by the presiding justice. Section 30, Chapter 148, R. S., 1954.

The court then went on to say:

> "This Court has frequently held both in criminal and civil cases that the prosecution of a motion for new trial before the presiding justice is a waiver of all rights of exception."

Several old decisions of this court were cited in support of this last quotation.

It will be seen from this broad statement that even exceptions taken during the progress of the trial, such as exceptions to the admission of evidence, or exceptions taken to the refusal to give requested instructions to the jury would be waived. Such is not the law now as was pointed out in the case of *Labbe* v. *Cyr,* 150 Me. 342; 111 A. (2nd) 330; and the cases cited in *State* v. *Simpson,* in support of the foregoing statement are no longer applicable by virtue of statutory changes cited in *Labbe* v. *Cyr, supra.*

The next case to be considered is that of *State* v. *Power,* 123 Me. 223; 122 A. 572. This was a search and seizure process for intoxicating liquor, a misdemeanor. The jury returned a verdict of guilty. Exceptions were entered by the respondent to a ruling admitting certain testimony, to the refusal to give requested instructions, and also to a ruling overruling a motion in arrest of judgment. The respondent then filed a motion for a new trial, which was overruled by the presiding justice.

Relying upon the decision in *State* v. *Simpson, supra,* the court ruled that the respondent had deprived himself of any claim to be heard on any exceptions arising before a hearing on the motion for a new trial.

This decision is overruled by *Labbe* v. *Cyr, supra,* at 345.

The case of *Mills* v. *Richardson,* 126 Me. 244; 137 A. 689, was decided in 1927 prior to the enactment of Section 60, Chapter 113, R. S., 1954.

Relying on the decision in *State* v. *Simpson, supra,* the court stated that an exception to the refusal to direct a verdict for the defendant is waived by the prosecution of a motion for a new trial before the presiding justice, as otherwise, the court said, the defendant would be seeking the same remedy through two tribunals, getting the benefit of the second if he failed in the first.

However, the court noted a distinction between a motion addressed to the presiding justice and one addressed to the Law Court, and had this to say:

> "An exception to the refusal to direct a verdict for the defendant is waived by the prosecution of a motion for a new trial before the presiding justice, as otherwise the defendant would be seeking the same remedy through two tribunals, getting the benefit of the second if he failed in the first. *State* vs. *Simpson,* 113 Me. 29. The exception is not waived by the prosecution of the general motion before the Law Court. The exception and motion are not inconsistent. They each raise the same question, whether on the evidence *a* verdict can be sustained. The general motion may also, as in this case, raise the further question whether *the* verdict can be sustained."

The next case to be considered is that of *Symonds* v. *Free Street Corporation,* 135 Me. 501; 200 A. 801. This case was decided in 1938 and like the case of *Mills* v. *Richardson, supra,* was decided prior to the enactment of § 60, Chapter 113, R. S., 1954. In this case a motion for directed verdict for the defendant was filed and denied. In a motion addressed to the Law Court by the defendant, the court said:

> "As the motion raises the same question for our consideration as does the exception, the exception is regarded as waived."

At first glance, it would appear that this decision is directly *contra* to the one of *Mills* v. *Richardson, supra,* in which it had been held that a motion addressed to the Law Court did not waive exceptions taken to a denial of a motion for a directed verdict.

Careful study of the two decisions, however, indicates no inconsistency. Undoubtedly, in *Symonds* v. *Free Street Corporation, supra,* the court meant that in view of the fact the exceptions and motion actually raised the same question,

only one need be considered, and the result would control both. A motion for a directed verdict raises the question of whether or not the case is one for the jury. If it is decided that the case should have been sent to the jury, the motion addressed to the Law Court for a new trial may, nevertheless, be in order on other issues, as for example, the question of damages, as was the fact in *Mills* v. *Richardson, supra.* In other words, if the motion for a new trial addressed to the Law Court covers points not included in the exceptions to the refusal to direct a verdict, then both the exceptions and the motion are properly before the Law Court; but if the issues are the same, there is no need of deciding both of them.

In such event, the exceptions are "regarded as waived" by the filing of a general motion addressed to the Law Court. However, as was said in *State* v. *Bobb*, 138 Me. 242, at 246; 25 A. (2nd) 229, while the two methods are available to bring the issue to the attention of the appellate tribunal, "it should not follow, however, that if there be error in perfecting the second method, it is fatal to the first."

The case of *Fort Fairfield* v. *Millinocket,* 136 Me. 426; 12 A. (2nd) 173, is the first case decided after the enactment of Chapter 66, P. L., 1939, now Section 60, Chapter 113, R. S., 1954.

In this case we find an expression similar to the one used in *Symonds* v. *Free Street Corporation,* viz:

> "The exceptions taken to the denial of the defendant's motion for directed verdict and the general motion for a new trial raise the same question. That exception must be regarded as waived."

Undoubtedly, the court meant that the issues, encompassed in the general motion addressed to the Law Court, were no broader than those covered by the exceptions to the refusal to direct a verdict, in which event, there was no reason for deciding both.

The case of *State* v. *Bobb, supra,* was one involving an indictment for a felony. Exceptions were taken by the respondent to a denial of a motion for a directed verdict, and exceptions were taken to a denial of a motion for new trial after verdict. It is to be noted that the respondent did not follow the procedure provided for in Section 30, Chapter 148, R. S., 1954. This procedure authorizes an appeal to the Law Court from the decision of the presiding justice denying a motion for a new trial. The court pointed out that it was without jurisdiction to review a motion for new trial after verdict on exceptions to the refusal of the trial judge to grant such motion. Consequently, because of the failure of the respondent to comply with the statutory procedure relating to an appeal, if his motion for a new trial addressed to the presiding justice constituted a waiver of the exceptions to a refusal to direct a verdict, then he was left without a remedy. The court said:

> "The statute, R. S. Chapter 146 § 27 (Now § 30, Chapter 148, R. S. 1954) by its fiat says that the decision of the presiding justice in felony cases on a motion for a new trial is not final, and that respondent may, by appeal, submit the question to the Law Court. Exceptions to refusal of directed verdict accomplish precisely the same result. Therefore, in felonies, two methods are available to bring the issue to the attention of the appellate tribunal. Both are not necessary. It should not follow, however, that if there be error in perfecting the second method, it is fatal to the first."

The court held that the exceptions to the refusal to direct a verdict for the defendant were not waived by a motion filed with the presiding justice. The decision in *State* v. *Simpson, supra,* was distinguished on the basis that in a misdemeanor case the decision of the presiding justice is final. If such a decision is final, a motion addressed to the presiding justice waives the exceptions to a refusal to direct

a verdict, but does not waive other exceptions pertaining to matters arising during the course of the trial.

The ruling of the court in *State* v. *Bobb, supra,* is equally applicable to civil cases. Consequently, we rule that the filing of a motion addressed to the Law Court, pursuant to the provisions of Section 60, Chapter 113, R. S., 1954, and of Rule XVII, is not a waiver of exceptions taken to the refusal to direct a verdict. Of course, if it develops that the issues to be decided upon the exceptions and the motion are the same, manifestly there is no need of deciding both of them. A decision on one is sufficient.

And, if it should develop that there has been an error in perfecting the general motion, then, as was said in *State* v. *Bobb, supra,* the error is not fatal to the exceptions. Likewise, an error in perfecting the exceptions would not affect the motion.

The decision of *Labbe* v. *Cyr, et al.,* 150 Me. 342; 111 A. (2nd) 330, is of interest. In that case, after a verdict for the plaintiff, the defendant addressed a motion for a new trial to the presiding justice. The motion was denied. Defendant then attempted to prosecute exceptions taken to rulings of the court during the progress of the trial. Plaintiff contended that by his motion for a new trial to the presiding justice, defendant had waived his right of exceptions. In arriving at the decision that exceptions to ruling of the presiding justice during the trial were not waived by motion for a new trial subsequently addressed to the presiding justice, this court, in its opinion, developed in a very interesting and clear-cut manner the historical aspects of cases pertinent to this issue.

The points raised by counsel for the plaintiff to the effect that the evidence was not signed by the presiding justice nor certified by him to the Law Court are not well taken. In support of his position that the presiding justice should

have signed the transcript of the evidence, plaintiff cites *Hills* v. *Paul,* 116 Me. 12. The decision in this case is based on the then existing statute which was Section 53, Chapter 84, R. S., 1903 (Chapter 87, § 57, R. S., 1916) which provided that:

> "When a motion is made in the Supreme Judicial Court to have a verdict set aside as against law or evidence, a report of the whole evidence shall be signed by the presiding justice."

This section is superseded by § 59, Chapter 113, R. S., 1954, which reads as follows:

> "When a motion is made in the Superior Court to have a verdict set aside as against law or evidence, a report of the whole evidence shall be signed by the presiding justice or authenticated by the certificate of the official court reporter."

Rule XVII is based upon this new section. See *White* v. *Schofield,* 153 Me. 79, at 83; 134 A. (2nd) 755.

The record shows that the evidence which was filed, was authenticated by the certificate of the official court stenographer. This was sufficient compliance with Rule XVII, and it was not necessary for the evidence to be signed by the presiding justice.

As previously indicated, the record, substantiated by the docket entries, shows that a date was set by the presiding justice for the filing of the evidence. True, this was done by him at the time the defendant noted his exceptions to the refusal to grant a directed verdict, but, in our opinion, the entry of a new order by the presiding justice serves no useful purpose.

It is our opinion that the defendant has fully complied with the Rule and that his exceptions and motion are properly before us.

On December 3, 1955, the plaintiff was driving an automobile owned by him, in a general westerly direction on a public highway known as Route 3 in Belmont, Waldo County, Maine. He was proceeding from Belfast to Togus, Maine. At the time in question, the highway for a distance of several miles was under construction. The defendant was the contractor constructing the highway under a contract with the State Highway Commission. At a point about four miles from where the plaintiff first came on to the highway, which was under construction, the defendant, for the purpose of installing a culvert, had dug a ditch which was four feet wide and four feet deep and extended from the northerly side of the highway towards the southerly side a distance of about twenty feet. This twenty feet took up approximately two-thirds of the travelled part of the highway, and, as will be noted, was on the plaintiff's right hand side of the highway. The plaintiff contends that he suddenly found himself in the hole which he did not see before driving his vehicle into it. As a result of the accident, plaintiff suffered an inguinal hernia. He brought this action to recover for property damage and personal injuries, with attendant pain and suffering, and consequential expenses. The evidence clearly shows that there were no barriers, fences, lights or signals indicating the presence of the hole. Neither was there any watchman at the scene and neither were there any workmen in or about the hole at the time of the accident.

The jury returned a verdict for the plaintiff. Defendant bases its motions for a directed verdict and for a new trial on the grounds that plaintiff should be barred from recovery by reason of his contributory negligence.

It seems clear that the jury was justified in finding negligence on the part of the defendant, and so the sole issue before this court is the question of whether or not, under the

circumstances, the plaintiff, as a matter of law, was guilty of contributory negligence.

The plaintiff, in his declaration, alleged his own due care. He further alleged the negligence of the defendant in allowing the excavation to remain open without the protection of barriers, fences, or signals. The plaintiff then alleged that by these acts of negligence, the defendant had created a nuisance.

There is no allegation in the declaration of any duty owed the plaintiff by the defendant. In the case of *Foley* v. *Farnham Company,* 135 Me. 29, at 30, 188 A. 708, it is stated that:

> "In order to maintain an action for injury from negligence, there must be shown to exist some obligation or duty from the person inflicting the injury, to the person on whom it was inflicted, and that such obligation or duty was violated by a want of ordinary care on the part of the defendant."

The allegation of an existing duty and a breach thereof would constitute better pleading. However, the defendant has not raised this issue and the case was tried like an ordinary negligence action.

Moreover, this court has held that:

> "In actions for the recovery of damages for personal injury the duty claimed to have been breached and the breach of it may be pleaded either by forthright assertion or the averment of facts from which the law will imply them." *Glidden* v. *Bath Iron Works Corporation,* 143 Me. 24; 54 A. 2d. 528; *Bartley et al* v. *Couture,* 143 Me. 69; 55 A. 2d. 438.

In this case there are sufficient averments of fact in the declaration from which the law will imply a duty and breach thereof.

Defendant contends that a highway contractor, such as was the defendant at the time of the accident, cannot be guilty of creating a nuisance, while in the performance of duties properly authorized by a contract under which he was operating. As contributory negligence is a defense, not only in an ordinary negligence action, but in cases based on nuisance as well, we do not need to decide this point.

In an action based on nuisance in permitting a telegraph wire to remain across the highway, this court said in *Dickey and Wife* v. *Maine Telegraph Company,* 43 Me. 492, at 496:

> "It was not sufficient for the plaintiffs to prove that the defendants were in fault. To entitle themselves to a verdict, the plaintiffs were bound to show that there was no neglect, or want of ordinary care, contributing to the injury, on the part of the female plaintiff. She was required to exercise due and proper care to protect herself from injury. If her own negligence, or rashness, or want of ordinary care, concurred in producing the injury of which they complained, the plaintiffs ought not to have recovered damages for it, against the defendant company. The burden of proof was on the plaintiffs to show, affirmatively, the exercise of such due and proper care and vigilance, on her part."

In *Benson, Executrix* v. *Titcomb,* 72 Me. 31, at 32, our court said:

> "The steam engine situated, as it was, near the road, may have been a nuisance, but that affords no excuse for carelessness or negligence on the part of the plaintiff's husband. If the rattling of the barrels, and the carelessness of the driver were efficient and contributory causes to the disaster, there cannot be a recovery. If the deceased so far contributed to the misfortune by his own negligence or want of care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have

> happened, the plaintiff cannot recover. *Dickey* v. *Maine Telegraph Co.* 43 Maine, 496. The plaintiff must show that he was in the exercise of due care, or that the injury was in no degree attributable to any want of common care on his part."

See also 66 C. J. S. *Nuisances* § 11 b. Page 755, to the effect that contributory negligence is an appropriate defense to an action based on nuisance which is in fact grounded on negligence. For a similar rule, see also, 39 Am. Jur. *Nuisance* § 200, Page 475.

The instant case was tried like an ordinary negligence action. The presiding justice carefully and explicitly explained the law of negligence to the jury, and his charge included adequate instructions upon the issue of contributory negligence. Neither counsel objected to the manner of trial and no exceptions were taken to any portion of the charge of the presiding justice, and no request for additional instructions were made by either counsel.

It is elementary that the law will not allow a party to recover for injuries to which his own negligence contributed as a proximate cause.

> "The burden to prove the negligence of the defendant, and to prove that no lack of due care contributed to the injuries, was upon the plaintiffs. *Baker* v. *Transportation Co.*, 140 Me. 190; *Rouse* v. *Scott,* 132 Me. 22. The standard of measurement for both parties is, therefore, the care and caution exercised by a person who is ordinarily prudent and thoughtful. One who falls below this level, when in dangerous circumstances, is negligent. The law does not expect the impossible, but it does expect ordinary or reasonable care." *Barlow, Pro Ami* v. *Lowery,* 143 Me. 214, 217; 59 A. 2d. 702.

> "In actions of tort to recover damages for personal injuries, a defendant is not liable, unless as be-

tween himself and the plaintiff the negligence of the defendant solely caused the accident and harm." *Rogers* v. *Forgione & Romano Company,* 126 Me. 354, 355; 138 A. 553.

See also *Herson* v. *Charlton,* 151 Me. 161; 116 A. (2nd) 632.

"Care and vigilance on the part of vehicular travelers should always vary, according to the exigencies which require vigilance and attention. An automobile driver is bound to use his eyes, bound to see seasonably that which is open and apparent, and take knowledge of obvious dangers. When he knows, or reasonably ought to know, the danger, it is for him to govern himself suitably. Thoughtless inattention on the highway, as elsewhere in life, spells negligence." *Callahan* v. *Bridges Sons, Inc.,* 128 Me. 346, 348; 147 A. 423.

"A motor vehicle operator is bound 'to use his eyes to see seasonably that which is open and apparent, and take knowledge of obvious dangers. When he knows, or reasonably ought to know, the danger, it is for him to govern himself suitably. Thoughtless inattention on the highway, as elsewhere in life, spells negligence." *Rouse* v. *Scott,* 132 Me. 22, 24; 164 A. 872.

See also *Baker* v. *McGary Transportation Company, Inc.,* 140 Me. 190, 36 A. (2nd) 6; *Spang* v. *Cote,* 144 Me. 338, 343; 68 A. (2nd) 823; *Bridgham* v. *W. H. Hinman Company, Inc.,* 149 Me. 40; 97 A. (2nd) 447.

Now let us consider the evidence in relation to the foregoing decisions of this court. The plaintiff knew that the road upon which he was travelling was under construction. He admitted that he had seen the construction signs on the highway. The weather was clear, the sun was shining, the road was level and straight. The defendant had left a grader close to the excavation. This grader was 25 feet long, 8 feet wide and weighed 10 tons. The plaintiff says

he did not see this grader. The defendant had caused 7 yards of gravel to be dumped near the excavation for purpose of back filling. Plaintiff says he did not see this pile of gravel. A temporary road had been constructed to the left of the excavation and was 14 feet wide. The plaintiff says he did not see this temporary road. Neither did he see the excavation.

It is difficult to conceive how an alert driver could fail to see the large piece of road construction equipment and the large pile of gravel close by the excavation. The driver of a motor vehicle cannot excuse lack of attention by merely stating that he did not see things which are apparent to any prudent person. The law places upon him the responsibility, not only of seeing things which are apparent, but he is charged with the consequences of failing to see what, in the exercise of ordinary care, he should have seen. In the light of proven facts, and of his own admissions, all of his actions indicate that degree of inattention which this court has said many times spells negligence.

We conclude that he was negligent as a matter of law, and that his negligence was a proximate cause of the accident. We are of the opinion that the presiding justice erred in not directing a verdict for the defendant. As the general motion raises the same question presented by the exceptions, there is no need of a ruling on the motion. As to the exceptions, the entry will be:

Exceptions sustained.

GERALD YORK
vs.
DAY'S, INC.

Cumberland. Opinion, April 17, 1958.

Imputed Negligence. Contributory Negligence. Bailment. Minors. Bailor - - Bailee.

Contributory negligence of an eighteen year old minor who is driving his father's automobile upon a personal mission is not imputable to the father-owner so as to preclude the father's right to recovery for damages to his automobile, even though R. S., 1954, Chap. 22, Sec. 156 provides that "any person who gives or furnishes a motor vehicle to such minor, shall be jointly and severally liable with such minor for any damages caused by the negligence of such minor in operating such vehicle."

Statutes in derogation of the common law must be accorded strict interpretation.

In the interpretation of statutes the basal quest of the court is the expressed intention of the legislature.

The words "liable with such minor" connotes a legal accountability of the bailor with the bailee to third persons.

The word "any damages caused" pertains to damages to third persons.

Juvenile accident statistics might well counsel a legislative policy of deterring bailors by imputing the negligence, sole and contributory, of youthful bailees in the promotion of careful driving. But until such an intention is manifest it is the duty of the Law Court to interpret, not make the law.

ON EXCEPTIONS.

This is a negligence action before the Law Court upon defendant's exceptions, after verdict for plaintiff.

Exceptions overruled.

Berman, Berman & Wernick, for plaintiff.

William B. Mahoney,
James R. Desmond,
Francis C. Rocheleau,
Lawrence P. Mahoney, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, JJ. BELIVEAU, J., sat at argument but retired before the opinion was adopted.

SULLIVAN, J. The plaintiff sued for damages to his automobile, caused by the negligent operation of a car by a servant of the defendant in the service of his employer. At the time of the collision the plaintiff's vehicle was operated by his less than eighteen year old son who was upon a personal and not a vicarious mission. At the trial there was testimony sufficient to sustain a jury finding of negligence in the instance of the defendant and of causative contributory negligence upon the part of the plaintiff's son. At the close of all the evidence the defendant requested this instruction:

> "It has been agreed between the parties that the plaintiff was the owner of a certain motor vehicle which he caused or knowingly permitted his son, a minor under the age of eighteen years, to operate - - - on a public highway. I, therefore, charge you that it you find any negligence on the part of the plaintiff's driver and you find that such negligence is a proximate contributing cause of the resulting damage, then the plaintiff cannot recover and you must find for the defendant."

The presiding justice refused to comply but instructed the jury as follows:

> "I instruct you that if you find any negligence on the part of the defendant's driver, and you find that that negligence was a proximate contributing

> cause of the resulting damage to the plaintiff's vehicle, then your verdict must be for the plaintiff."

To the refusal so to instruct and to the instruction given, the defendant seasonably excepted. A verdict for the plaintiff was returned and defendant now prosecutes its exceptions.

R. S. (1954) c. 22, § 156 reads as follows:

> "Every owner of a motor vehicle causing or knowingly permitting a minor under the age of 18 years to operate such vehicle upon a highway, and any person who gives or furnishes a motor vehicle to such minor, shall be jointly and severally liable with such minor for any damages caused by the negligence of such minor in operating such vehicle."

The issue is whether or not the foregoing statute affords the owner of an automobile who suffers a minor under the age of 18 years to operate it upon a highway for that youth's private ends, the right to recover from the driver of another vehicle for damages to the owner's car which were caused as a resultant of the negligence of both operators. In such an experience or contingency does the statute impute to the car's owner the youth's negligence and thus deny the owner any recompense for his loss?

The significant, legal relationship of the plaintiff and his son in the instant case was that of bailor and bailee. By the common law because a bailee-son operated the borrowed vehicle so as to cause damage to a third person there is no liability upon a father-bailor "because he owned the car or because the driver at the time of the accident was his son or because he permitted his son to use the car for his own purposes." *Pratt* v. *Cloutier,* 119 Me. 203, 206; *Robinson* v. *Warren,* 129 Me. 172, 175. See, also, *Maddox* v. *Brown,* 71 Me. 432 (1880) of the "horse and buggy" era. Nor at common law is a mere bailor hindered in recovering from a

blameworthy third person damages to his chattel because of the confluent contributory negligence of his bailee. *Robinson* v. *Warren,* 129 Me. 172, 177 and cases cited.

Whatever liability, therefore, is predicated upon a bailor-father for any damages resulting from the negligent operation by a bailee-son of an automobile supplied to the latter for his personal use by his father is generated entirely by R. S. (1954) c. 22, § 156. Furthermore, the refusal of recompense to the father-bailor from a culpable third person for harm to his car because of the effective contributory negligence of the son-bailee can obtain only because of a statutory fiat.

Hence it follows that the statute before this forum for construction is in derogation of common law and so must be accorded strict interpretation.

> "- - - The statute imposes a new liability before non-existent, and hence if susceptible of more than one construction it should receive that imposing the lightest burden, - - - -" *Flynn* v. *Banking & Trust Co.,* 104 Me. 141, 146.

> "- - - But no statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express. - - - -" *Wing* v. *Hussey,* 71 Me. 185, 188.

> "In enacting these statutes the legislature was aware that they could not be extended by implication, but would be construed strictly as in derogation of the common law, and as modifying a long approved policy. - - - -" *Haggett* v. *Hurley,* 91 Me. 542, 553.

> "In Palmer v. Town of Sumner, 133 Me. 337, 340, 177 A., 711, this Court very recently gave effect to the well-established rules of statutory construction that the common law is not to be changed by doubtful implication, be overturned except by clear and unambiguous language and that a statute in

> derogation of it will not effect a change thereof beyond that clearly indicated either by express terms or by *necessary* implication." *Chase, Adm.* v. *Town of Litchfield,* 134 Me. 122, 129.

In the interpretation of statutes our basal quest is the expressed intention of the legislature.

> "In the construction of a statute the fundamental rule is the legislative intent."
>
> *Hunter* v. *Totman,* 146 Me. 259, 265.

This court has already had occasion to decide that by the above statute the legislature thereafter rendered the bailor defined liable to third persons for the effects of the negligence of his autonomous bailee. *Strout* v. *Polakewich,* 139 Me. 134. In the case at bar it must be determined if the statutory bailor because of the statute, expressly or by necessary implication, is precluded by the contributory negligence of his bailee from recovering damages from a negligent third party who with the bailee caused the damage to bailor's motor vehicle.

The notable words of the act, of primary moment here, are:

> "- - - shall be jointly and severally liable with such minor for any damages caused by the negligence of such minor in operating such vehicle."

The phrase, "liable with such minor," accepted for the familiar and commonplace language which it is connotes a legal responsibility and accountability of the bailor with the bailee to third persons. It has never been customary or conventional usage to allude to a person as being liable to himself in expounding that he cannot recover from others for his damages but must defray his own losses. The words utilized by the legislature were at least inept if by them that body intended to ascribe to the statutory bailor the contributory negligence of his bailee. From a consideration of the

language of the act it seems clear that the legislature in framing it sensed and felt no existing advantage to be secured from including within the subject matter and purview of the statute the attributing of the bailee's contributory negligence to the bailor. To capture such an effect the words of the lawmakers must be multiplied or extended. The expression, "any damages caused," is very inclusive but pertains to damage to third parties rather than to the bailor or his chattel if read within their context. Had the legislature in reality addressed its thought and efforts to imputing contributory negligence to the bailor the appropriate wording would have been readily forthcoming.

In considering the act in correlation with the old law, the mischief obtaining and the remedy supplied we find that as originally enacted by P. L., 1929, c. 327, § 10 the statute was verbatim as it now stands, R. S. (1954) c. 22, § 156, save for the latter substitution of "operate" and "operating" for the original "drive" and "driving."

Our court in *Strout* v. *Polakerwich,* 139 Me. 134, 140 thus accounts for the legislation:

> "Apparently this part of the statute was added because the legislature mistrusted the judgment and sense of responsibility of minors under eighteen years of age, in the use of motor vehicles upon the highway. For that reason, those persons who were responsible for such use, by giving or furnishing such vehicles to such minors, are made liable for damages caused by the negligent operation of such vehicles on the highway by such minors - - - - -"

In the same case Justice Murchie in his dissent wrote:

> 146. " - - It is common knowledge among members of our Courts, our Bar, and citizens generally, that with the advent of the automobile and its widespread use, the strict principles of agency law resulted in much damage through negligent operation of motor vehicles

> by the minor children of their owners without recovery of compensation. The situation was nationwide. It clamored for remedy. In some states reform was accomplished by judicial legislation adopting the 'family use doctrine.' This never became effective in Maine. Farnum v. Clifford, 118 Me., 145, 106A, 344, Pratt v. Cloutier, 119 Me., 203, 110 A., 353, 10 A. L. R., 1434. In others legislative action imposed liability on the owners of motor vehicles for damages caused by any person operating by express or implied consent. In Maine and Kansas liability was limited to operation by minors and the application of the Act was defined by the words already discussed - - - -"

Harper and James, The Law of Torts, Vol. 2, § 23.6, P. 1274.

> "Even as the last traces of the older imputation of contributory negligence (*beyond* the scope of vicarious liability) were vanishing, the seriousness and growth of the automobile accident problem and the plight of uncompensated accident victims led to increasing pressure for providing financially responsible defendants. One response to this pressure was the extension of vicarious liability by the court-made 'family purpose' doctrine and by statutes having similar (or broader) effect. Some of the latter, for example, imposed vicarious liability on automobile owners for the negligence of anyone opreating the car with the owner's consent. This represented a departure from the fault principle so as to impose liability on innocent parties for reasons similar to those leading to workmen's compensation—the owners were better distributors of the risks which their lawful activities created than were their victims."

Our statute concerns itself only with minors under 18 as bailee, a group almost uniformly impecunious. It would seem that when P. L., 1929, c. 327, § 10, now R. S. (1954) c. 22, § 156, was promulgated as law the remedy fashioned was

designedly financial and any consequential deterrence effected, so far as it was envisioned at all, was a fortuitous by-product.

A further sanction for the statute could have been an exercise of police power, a measure of health and welfare regulatory of the use of public highways by motor vehicles.

> "- - - Another purpose of such statutes is to induce care by car owners in selecting persons to whom they entrust the car - - - -"
>
> *Harper and James, supra,* P. 1275.

Today, juvenile accident statistics might very well counsel a legislative policy of deterring bailors by imputing the negligence, sole and contributory, of youthful bailees in the promotion of careful driving. But until such a rationale is manifested and unequivocally expressed it is our duty "to interpret, not to make the law." *Farris, Att. Gen.* v. *Goss,* 143 Me. 227, 230. The case at bar is one of physical damage to an automobile. That is serious enough. But, when we consider that there are actions involving critical injuries and death to bailors, to read into the statute by extension the legal innovation of the imputation of the contributory negligence of the bailee would be drastic indeed.

The authorities are not classifiable without difficulty because of varying statutes.

In Delaware the statute was quite identical with P. L., 1929, c. 327, § 10. The court construed the act to mean that the minor-bailee was to be treated as the agent of the bailor-owner only for the purposes of holding the owner liable for damages or injuries to third persons and that imputation to the bailor of the bailee's contributory negligence would be judicial extension. While the case was pending for decision the Delaware Legislature added these words to the statute:

> "and the negligence of such minor shall be imputed to such owner or such person for all purposes of civil damages."
>
> *Westergren* v. *King* (Del.) (1953), 99 A. (2nd) 356.

The California court imputed the contributory negligence of a borrowing bailee to his bailor but the statute contained this clause:

> "and the negligence of such person shall be imputed to the owner for all purposes of civil damages."
>
> *Milgate* v. *Wraith,* (Cal.), (1942), 121 P. (2nd) 10.
>
> See, also, *Fox* v. *Schuster,* (Cal.), (1942), 123 P. (2nd) 56.

The Municipal Court of Appeals for the District of Columbia imputed the contributory negligence of the bailee to the bailor under its Automobile Financial Responsibility Act on the analogy of the principles of agency. The Act says in part:

> "- - - the operator thereof, shall, in case of accident, be deemed to be the agent of the owner of such motor vehicle - - - -"

As one purpose of the statute the court found the deterrent element:

> "- - - (2) to promote more careful driving."
>
> *National Trucking & Storage Co.* v. *Driscoll,* (1949), 64 A. (2nd) 304.

The Iowa court denied the imputability to the bailor of the bailee's contributory negligence under a statute containing the following:

> "In all cases where damage is done by any car by reason of negligence of the driver, and driven with the consent of the owner, the owner of the car shall be liable for such damage."

The court in so holding reversed its former decision of *Secured Finance Co.* v. *Chicago, R. I. & P. R. Co.* (1929), 207 Iowa 1105, 224 N. W. 88. Financial responsibility, not deterrence, was stressed.

Smith v. *Pilgrim,* (1956), 74 N. W. (2nd) 212.

The Minnesota court in an elaborate dictum in *Christensen* v. *Hennepin Transp. Co., Inc.,* (1943), 10 N. W. (2nd), 406, rejected the interpretation of imputation of the bailee's contributory negligence to the bailor and its conclusion was affirmed in the case of *Jacobsen* v. *Dailey et al.,* (1949), 36 N. W. (2nd) 711. The statute reads in part:

> "- - - the operator thereof shall, in case of accident, be deemed the agent of the owner of such motor vehicle in the operation thereof."

The court in *Christensen* v. *Hennepin Transp. Co., Inc., supra,* at page 415 said:

> "Express manifestation of legislative intent is confined to establishment of financial responsibility on the part of the owner to injured persons and to securing satisfaction of their claims by payment in money. Financial responsibility means obligation to pay a third party - - -"

The Wisconsin court in *Scheibe* v. *Town of Lincoln,* (1937), 271 N. W. 47 imputed the contributory negligence of the minor-bailee to the father-bailor under a statute with this clause:

> "- - - for any and all damages growing out of the negligent operation - - - -"

The court held that the statute made the bailment tantamount to agency. The decision could well have been affected by the existence of a division or proportion of damage rule.

The Louisiana court in *DiLeo* v. *DuMontier,* (1940), 195 So. 74 imputed the contributory negligence of the minor-

bailee to the father-bailor under the Civil Code, Article 2318, which ran as follows:

> "The father, or after his decease, the mother, are responsible for the damage occasioned by their minor or unemancipated children, residing with them - - -"

> See, also, *Pancoast* v. *Cooperative Cab Co.,* (1948) (La.), 37 So. (2nd) 452.

The New York Court of Appeals in *Mills* v. *Gabriel,* (1940), 31 N. E. (2nd) 512 Affirmed that under its statute the bailor-owner was not barred by the contributory negligence of the autonomous bailee from recovering damage from a negligent third person. The statute as applicable reads:

> "Every owner of a motor vehicle or motor cycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle or motor cycle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner - - -"

The court below had said (18 N. Y. S. (2nd) 78, 80):

> "The statute was enacted to remove the hardship which the common law rule visited upon innocent persons by preventing 'an owner from escaping liability by saying that his car was being used without authority, or not in his business.' "

Deterrence is not discussed.

> See, also, *Buckin* v. *Long Island R. Co.,* (1941), 36 N. E. (2nd) 88.

In the *Restatement Of The Law, Torts, Negligence,* § 485, *Bailees,* we find:

"Comment on Caveat:

- -

b. A statute may make the owner of an automobile liable for any harm done to others by the manner in which it is driven by any person whom the owner permits to drive it. The Caveat leaves open the question whether the effect of such a statute is to create a universally applicable vicarious responsibility and, therefore, to make the negligence of such a bailee a bar to recovery by the owner for harm to him or the car. The question is one of statutory construction. If the purpose of the statute is to give to persons injured by the negligent operation of automobiles an approximate certainty of an effective recovery by making the registered owner, who is required to take out insurance to cover his liability or who is likely to do so, responsible as well as the possibly or probably irresponsible person whom the owner permits to drive the car, the statute does not make the driver's contributory negligence a bar to the owner's recovery for harm done to the car by the negligence of a third person."

This court must conclude that the intent of our legislature expressed in statute under consideration requires that our mandate be:

Exceptions overruled.

WILLIAM H. GREGORY, ADMINISTRATOR OF THE ESTATE OF HENRY L. GREGORY

vs.

WILMER H. JAMES

Androscoggin. Opinion, April 18, 1958.

Practice. Exceptions. New Trial. Rule XVII. Negligence. R. R. Crossing

Even though defendant's exceptions taken to an order of the presiding justice denying a new trial are a nullity under Rule XVII, such fact does not destroy the efficacy of an order entered in connection therewith extending the time for filing a transcript of testimony where defendant subsequently addressed a general motion for a new trial to Law Court. This is so even though the order relating to the filing of the transcript extends the time beyond that otherwise required by Rule XVII as it pertains to motions for a new trial addressed to the Law Court.

Rules of Court are not to be so interpreted as arbitrarily to destroy rights of appeal.

A new trial will not be granted unless the verdict is clearly wrong.

ON MOTION FOR NEW TRIAL.

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

Edward J. Beauchamp,
Daniel J. Murphy, for plaintiff.

Frank W. Linnell, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, JJ. BELIVEAU, J., sat at argument but retired before the opinion was adopted.

DUBORD, J. This is an action for damages resulting from the instantaneous death of plaintiff's intestate. He met his

death, while riding as an employee of Maine Central Railroad Company, on a motor driven work car, as a result of a grade crossing collision with an automobile operated by the defendant. The action is based on the alleged negligence of the defendant.

The jury returned a verdict for the defendant and the case is before us on plaintiff's general motion for a new trial.

One of the contentions of the defendant is that the case is not properly before us because of plaintiff's failure to comply with Rule XVII of the Revised Rules of the Supreme Judicial and Superior Courts.

The case was tried at the March 1957 Term of the Superior Court in Androscoggin County.

The docket entries show that after a verdict for the defendant, on the 19th day of the term, the plaintiff addressed a motion for a new trial to the presiding justice. This motion was denied and exceptions noted, allowed and filed.

At the same time an order was entered by the presiding justice, which is noted on the docket, that a transcript of the record be filed by July 1, 1957; and the extended bill of exceptions to be filed by July 22, 1957.

On the 20th day of the term a general motion for a new trial, addressed to the Law Court, was filed by the plaintiff.

At the June 1957 Term, the justice who presided at the March Term extended the time for the filing of the transcript to September 1, 1957, and also extended the time for filing the extended bill of exceptions to September 15, 1957.

No further action is indicated on the bill of exceptions. On August 30, 1957, a transcript of the testimony was filed and the case marked "Law."

The pertinent sections of Rule XVII, read as follows:

> "Motions made to have a verdict set aside as against the law and the evidence, whether addressed to the presiding justice or to the Law Court, must be filed during the term at which the verdict is rendered but in any case never more than thirty days after the rendition of such verdict, excepting only that such a motion addressed to said Law Court after denial of a like motion by the presiding justice must be filed within ten days after decision adverse to the moving party is filed by the presiding justice.
>
> "When such a motion is addressed to the presiding justice, it may be heard during the term or during the ensuing vacation at the court's discretion. If the matter is heard during the term, the court's decision thereon, if not rendered during said term, shall be rendered during the ensuing vacation or at the next term following. If the matter is heard during vacation, the court's decision thereon shall be rendered during said vacation. *No exceptions lie to the decision of the presiding justice and no appeal except in cases of felony.* (Emphasis supplied.)
>
> "When such motion is addressed to the Law Court, the party making it shall cause a report of the whole evidence in the case to be prepared, signed by the presiding justice or authenticated by the certificate of the official court stenographer, and filed within such time as the presiding justice shall by special order direct, and, if no such order is made, it must be done within thirty days after the adjournment of the term at which the verdict was rendered or within thirty days after the filing of the motion, whichever is later; if not so done, the motion may be regarded as withdrawn, and the clerk, at a subsequent term, may be directed to enter judgment on the verdict."

Because Rule XVII specifically provides that no exceptions lie to the decision of the presiding justice in refusing

to grant a new trial, defendant now contends that everything which took place prior to the filing of the general motion was a nullity; that a new order should have been entered by the presiding justice fixing a time within which the transcript of evidence should be filed; and having failed to do so, and the thirty day period provided by the Rule having expired, the evidence was filed too late and thus there has been no compliance with Rule XVII.

We are of the opinion that the technicality upon which defendant's contention is based is such as to be disregarded. True, if a bill of exceptions founded upon the denial of the motion by the presiding justice had reached this court, the exceptions would have been dismissed, because of the interdictory provision of Rule XVII. However, as previously pointed out, the exceptions were not prosecuted and it may well be that counsel for the plaintiff promptly discovered his error in noting the exceptions. Undoubtedly, when the presiding justice entered his order fixing a date for the filing of the evidence, he had in mind that the order would apply to any subsequent procedure taken in the case. That such was his intention is further indicated by the fact that he extended the time specified in the original order.

As we said in the very recent opinion of *Palleria* v. *Farrin Bros. & Smith*, "the entry of a new order by the presiding justice serves no useful purpose."

> "Rules of Court are designed primarily to implement procedural statutes, discourage procrastination on the part of litigants and their counsel, and provide a smooth and orderly flow of litigation. They are not to be so interpreted as arbitrarily to destroy rights of appeal and review." *White* v. *Schofield,* 153 Me. 79, 83; 134 A. (2nd) 755, 757.

We rule that plaintiff's motion for a new trial is properly before us.

Plaintiff seeks a new trial on the usual grounds that the verdict is against the evidence and against the weight of the evidence, and he also advances as another ground an allegation that the great preponderance of the evidence shows that the defendant failed to exercise the degree of care incumbent upon him, before attempting to cross the railroad track. We construe this allegation as merely another manner of expressing that the verdict is against the weight of the evidence.

As this court said in *Bragdon* v. *Shapiro,* 146 Me. 83, 84; 77 A. (2nd) 598; in considering the motion we will apply the familiar rules that the evidence with all proper inferences drawn therefrom is to be taken in the light most favorable to the jury's finding and that the verdict stands unless manifestly wrong. See *Morneault* v. *Inh. of Town of Hampden,* 145 Me. 212; 74 A. (2nd) 445; *Lessard* v. *Samuel Sherman Corporation,* 145 Me. 296; 75 A. (2nd) 425.

> "It hardly seems necessary to reiterate the rule, so well known and so consistently applied in this state, that the jury is the arbiter of the facts and that this is a court of law which will not interfere with a jury's verdict unless it is clearly and manifestly wrong." *Inh. of Enfield* v. *Buswell, et al.,* 62 Me. 128; *Weeks* v. *Inh. of Parsonsfield,* 65 Me. 286; *Hill* v. *Finnemore,* 132 Me. 459, 464; 172 A. 826; *Lessard* v. *Samuel Sherman Corporation, supra.*

> "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. The burden is on the moving party to show that the adverse verdict is clearly and mani-

> festly wrong." *Stinson* v. *Bridges, Admr.*, 152 Me. 306, 312; 129 A. (2nd) 203.

That jury determination as to the credibility of witnesses and the weight of their testimony will ordinarily not be disturbed by the Law Court is established by a long line of decisions. See *Day* v. *Isaacson*, 124 Me. 407, 409; 130 A. 212; *Gilman* v. *Bailey Carriage Company*, 127 Me. 91, 101; 141 A. 321.

> "Upon conflicting evidence in which the credibility of witnesses was an important factor the jury found for the plaintiff on these notes. The credibility of witnesses and the weight to be given testimony is peculiarly within the province of the jury, and their finding cannot be set aside unless manifest error is shown or the verdict appears to result from bias or prejudice. None of these grounds of reversal are found." *Gilman* v. *Bailey Carriage Company, supra.*

The evidence indicates that on the day of the accident, plaintiff's intestate was riding on a motor driven work car, which was travelling in a westerly direction from Wiscasset and proceeding towards Bath. The defendant was operating an automobile in a general southerly direction on the old Bath Road, so-called. Both vehicles were approaching a crossing of said old Bath Road and the railroad right of way. Because of bushes, tall grass and weeds and also because of the general topography, the railroad crossing in question was a "blind crossing."

The record indicates that the collision occurred when defendant's automobile had almost crossed the railroad tracks.

Section 152, Chapter 22, R. S., 1954, provides in part as follows:

> "Every person operating a motor vehicle upon passing any sign provided for in sections 90 and 91 of Chapter 23, which is located more than 100 feet from a grade crossing shall, upon reaching

> a distance of 100 feet from the nearest rail of such crossing forthwith reduce the speed of the vehicle to a reasonable and proper rate and shall proceed cautiously over the crossing."

The record further indicates that a sign had been erected in accordance with the provisions of sections 90 and 91, Chapter 23.

The operator of the motor driven work car, upon which the plaintiff was riding at the time of the collision, testified that his employer had regulations requiring the operator of a motor driven work car, such as he was driving at the time of the accident, to operate at such a speed as would permit an instant stop in the event he could see something on the track. He also testified that while endeavoring to use his brakes and stop the vehicle, he accidentally hit the clutch which had been disengaged and caused the clutch to be re-engaged and thus increase the speed of the vehicle instead of stopping it, or retarding its speed.

The presiding justice in his charge read to the jury the foregoing excerpt from section 152, Chapter 22, relating to the duties and responsibilities of the driver of a motor vehicle approaching a grade crossing. He also carefully and explicitly explained to the jury the law relating to negligence and due care, as well as giving the jury proper instructions on proximate cause.

The question of proximate cause is ordinarily one for the jury.

> "It is true that the issue of proximate cause is also one of fact, not of law, and is to be submitted to the jury under proper instructions unless the court can say with judicial certainty that the injury is or is not the natural and probable consequence of the act of which complaint is made." *Nicholas* v. *Folsom,* 119 Me. 176; 110 A. 68, 69; *Elliott* v. *Montgomery,* 135 Me. 372, 374; 197 A. 322.

The evidence in this very important case was conflicting in many aspects. The jury could have found that the defendant had complied with the provisions of Section 152, Chapter 22. They also could have found that the proximate cause of the accident was the act of the operator of the work car in causing the clutch to become reengaged and thus increase the speed of the vehicle.

We have studied all of the evidence with great care. We are of the opinion that there were presented only questions of fact about which intelligent and conscientious men might differ; and this court, in accordance with many prior decisions, will not substitute its judgment for that of the jury.

We find nothing to indicate that the jury reached the verdict through bias, prejudice, or mistake of law or fact. In our judgment the evidence supports the verdict.

Motion overruled.

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

Cumberland. Opinion, April 18, 1958.

Taxation. Exceptions. Reasons for Appeal. Rule 6.

A bill of exceptions must fail which does not include all that is necessary to enable the court to decide whether the rulings complained of are erroneous. (i.e., the evidence and reasons for appeal in instant case.)

A reason for appeal which refers to R. S., 1944, Chap. 14-A, Sec 10 (a Subsection of P. L., 1951, Chap. 250), containing nineteen subparagraphs and does not apprise the court of the particular error complained of is vague, ambiguous and entirely inadequate.

Where no brief or argument is filed within the time prescribed (Rule 6 of Supreme Judicial Court), the case must be decided under the Rule "without argument."

ON EXCEPTIONS.

This is a petition for tax abatement under the Sales and Use Tax Law. R. S., 1954, Chap. 17, Sec. 20. The case is before the Law Court upon exceptions by petitioner. Exceptions overruled.

Edward J. Beauchamp,
Daniel Murphy, for plaintiff.

Ralph Farris, for State.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, JJ. BELIVEAU, J., sat at argument but retired before the opinion was adopted.

DUBORD, J. On April 6, 1954 the State Tax Assessor assessed a tax against the appellant under the provisions of § 18, Chapter 14A, R. S., 1944, enacted as Chapter 250, P. L., 1951, and known as the Sales and Use Tax Law, Section 18, is now § 20, Chapter 17, R. S., 1954.

Appellant filed a petition for reconsideration of the assessment and after a hearing the assessment was affirmed. On April 6, 1954, appellant filed an appeal which was entered at the June 1954 Term of Superior Court in Cumberland County. This appeal was filed pursuant to the provisions of § 30, Chapter 14A, R. S., 1944 (Chapter 250, P. L., 1951).

This section provides that the appellant shall "file an affidavit stating his reasons of appeal and serve a copy thereof on the assessor, and in the hearing of appeal shall be confined to the reasons of appeal set forth in such affidavit."

The affidavit sets forth five reasons of appeal. The first three merely recite in substance that a tax has been assessed pursuant to certain named sections of the statute.

The fourth reason for appeal reads as follows:

> "Appellant affirms that under § 10 of Chapter 250, Laws of 1951 the assessment is in error."

The fifth reason of appeal was waived during progress of the hearing.

At the November 1954 Term of the Superior Court, the matter was referred with right of exceptions reserved in matters of law. The referee filed a report sustaining the State Tax Assessor. The appellant filed objections to the acceptance of the report. The report was accepted and appellant filed an extended bill of exceptions.

In *Morrill* v. *Johnson,* 152 Me. 150; 125 A. (2nd) 663, this court sustained the exceptions on the ground that the statute authorizing an appeal from an assessment of the State Tax Assessor did not permit a reference. See § 30, Chapter 14A, R. S., 1944, (Chapter 250, P. L., 1951) now § 33, Chapter 17, R. S., 1954.

Following the certification of the case by the Law Court, it was heard, upon agreement of the parties, by a Justice of the Superior Court in vacation, upon the original record taken out in the hearing before the referee. Rights of exception were reserved.

The Justice of the Superior Court sustained the assessment of the State Tax Assessor and dismissed the appeal.

To this ruling, the appellant excepted and filed his extended bill of exceptions.

It is to be noted that the bill of exceptions does not make the evidence a part of the record. Neither are the reasons for appeal incorporated into the record.

> " 'The excepting party is bound to see that the bill of exceptions includes all that is necessary to enable the court to decide whether the rulings of

which he complains were or were not erroneous. Failing to do so, his exceptions must fail.' " *Bronson Aplt.*, 136 Me. 401, 402; 11 A. (2nd) 613; *Bradford* v. *Davis et al.*, 143 Me. 124, 128; 56 A. (2nd) 68.

"The complete report of evidence taken in any case is not necessarily a part of a bill of exceptions unless the bill of exceptions states that it is a part. *Doylestown Co.* v. *Brackett Co.*, 109 Me. 301; 84 A. 146; *Jones* v. *Jones*, 101 Me. 447; 64 A. 815. The court cannot go outside the bill itself to determine that rulings are erroneous and prejudicial, even if the evidence accompanies the bill. The bill itself must state the grounds of exceptions in a summary manner. The bill must be 'able to stand alone.' "

Bradford v. *Davis, supra.*

In order to find the reasons of appeal, it has been necessary for us to go to a record which was not made a part of the case. To insure that the rights of the appellant may be accorded full protection, we have, nevertheless, given consideration to the sole alleged reason of appeal. By statute, the appellant is confined to the reasons of appeal set forth in his affidavit. In his reason for appeal, appellant has referred to Section 10, Chapter 250, P. L., 1951. We assume that he means Section 10, Chapter 14A, R. S., 1944, which section is a subsection under Section 1 of Chapter 250, P. L., 1951. This particular section relates to exemptions from the Sales and Use Tax and at the time this case was heard, there were nineteen subparagraphs of Section 10.

This court is not apprised by the reason set forth by appellant of what errors he claims exist. The reason is vague, ambiguous and entirely inadequate.

This case was in order for argument at the February 1958 Term of the Law Court. Appellant, not having filed his brief, pursuant to the provisions of Rule 6 of the Rules applicable to Proceedings in the Supreme Judicial Court, was

ordered to argue in writing within thirty days. No brief or argument on his behalf having been filed within the time limited, the case must be decided under the Rule "without argument." See *State of Maine* v. *White,* 145 Me. 381, 382; 71 A. (2nd) 271.

In dismissing the appeal, the judge who heard the case and to whose finding the present exceptions were filed, adjudged that the deficiency assessment complained of was made in accordance with the provisions of the Sales and Use Tax Law.

We find no justification for disturbing this ruling.

Exceptions overruled.

STATE OF MAINE
vs.
BURTON E. HAINES, APLT.

Oxford. Opinion, January 7, 1958.

Criminal Law. Warrant. Seal.

Where a complaint occupies a top two thirds of a sheet of paper and the warrant the bottom one third of the same sheet, a seal at top of the sheet at the commencement of the complaint is a sufficient ensealing of the warrant under R. S., 1954, Chapter 146, Section 13.

ON EXCEPTIONS.

This is a criminal action before the Law Court upon exceptions to the overruling of a demurrer. Exceptions overruled.

David R. Hastings, for plaintiff.

Louis Scolnik, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

WILLIAMSON, C. J. On exceptions from the overruling of demurrer. On appeal in the Superior Court the respondent demurred to a complaint and warrant issued from a municipal court on the sole ground that the warrant was invalid for lack of a seal.

In the bill of exceptions we read:

> "The Complaint and Warrant appear on one and the same paper with the Complaint appearing first in order from top to bottom and occupying two thirds of the sheet and the Warrant occupying the bottom one third of the space on the sheet. The Municipal Court Seal appears at the top of the

> sheet and more specifically, at the top or beginning of the formal commencement of the Complaint. This is the only place on the paper where the seal appears, some six inches distant from the formal commencement of the Warrant which occupies the bottom third of the paper."

A photostatic copy included in the record and examined by the court, without objection by either the State or the respondent, shows the complaint and warrant form one page of a printed form with the addition of typewritten words, written signatures and the municipal court seal.

Unless a warrant bears a seal it is invalid. The statute provides for a seal. R. S., Chap. 146, Sec. 13 reads, in part:

> "Warrants issued by such magistrates in criminal cases shall be under seal and be signed by them at the time they are issued."

It has been established law for over a century in our State that a seal is an essential requirement upon a warrant of arrest. Chief Justice Shepley in *State* v. *Drake,* 36 Me. 366, 58 Am. Dec. 757, said at p. 368:

> "There can be little doubt, that the common law required, that warrants issued for the arrest or imprisonment of a person, by magistrates, should be under seal. The practice appears to have conformed to it in England and in this country. No case has been presented or noticed, in which a warrant issued without a seal, for such a purpose, has been decided to be valid. To require a seal in such cases, may not be important, only as a matter of form. It gives the instrument a higher grade of character, arrests the attention in the hurry of business, allowing a pause for reflection."

The *Drake* case has been cited with approval in *Miller* v. *Wiseman,* 125 Me. 4, 130 A. 504; *Cushman Co. et al.* v. *Mackesy et al.,* 135 Me. 490, 200 A. 505; *Town of Warren* v. *Norwood,* 138 Me. 180, 24 A. (2nd) 229. See also Annot., 30 A. L. R. 730.

The issue before us is then not whether the warrant should be sealed, but whether in fact it is sealed. The respondent says that the seal goes only with the complaint, and the State, that it goes with the warrant.

In our view the seal of the municipal court affixed to this printed form may fairly be considered to be a seal affixed to the warrant. If held to be a seal on the complaint only, it serves no useful purpose for a complaint requires no seal. Surely the municipal court judge sealed the paper not for a useless purpose, but to give life and vitality to the process, i.e., the warrant of arrest issued over his signature.

We note from the photostatic copy that the warrant incorporates the complaint in these words, ". . . in the foregoing complaint of John Marshall which is expressly referred to as a part of this warrant . . ." In this manner the State meets the requirement of the statute that the magistrate "shall . . . issue a warrant for his arrest, stating therein the substance of the charge." R. S., Chap. 146, Sec. 13.

> "The complaint is always annexed to the warrant and expressly referred to as a part of it, and this is held to be sufficient to comply with the requirements of our statutes. State v. McAllister, 25 Me. 490."
>
> Whitehouse and Hill Criminal Procedure (1912 ed.) Sec. 1, note 1.

It may be argued that the seal, if it is on the complaint alone, traveled with the complaint into the warrant. We do not place our decision, however, upon such a narrow ground. We prefer to approach the problem, having in mind the statutory requirement of a seal, the underlying reasons therefor, and also reasonable methods of conducting the business of the courts on the criminal side. There is no reason whatsoever, as we have suggested, to believe that the municipal court judge intended to seal the complaint and not the warrant. Is there any reason whatsoever to believe that

the warrant forming with the complaint one paper on a printed form carried less weight because the seal was affixed at the top of the form? We think not.

In reaching our decision we have in mind *State* v. *Coyle,* 33 Me. 427. Justice Tenney, speaking for the court in an oral opinion, in holding the warrant was valid, pointed out that the language of the warrant showed it was designed to be sealed and that the one paper containing both the complaint and the warrant could be divided into two parts, the one a complaint and the other a warrant under seal, without mutilating either instrument.

In the instant case there is no language in the warrant indicating such a design and the paper cannot fairly be torn apart to form a complaint without a seal and a warrant under seal.

The *Coyle* case, however, in our view did not establish the boundary line between warrants sealed and unsealed. The court determined no more than that the particular warrant fell within the class of warrants under seal. We are therefore not bound to consider *Coyle* as opposed to our present opinion. Indeed, if we were so bound, we would feel constrained not to follow a rule so narrow and rigid. In short, *Coyle* is limited to the facts there present.

We conclude that the statute has been complied with in substance and that the warrant before us is under seal and hence valid.

The entry will be

Exceptions overruled.

STATE OF MAINE

In Senate, January 13, 1958

WHEREAS, a bill entitled "An Act Relating to Educational Aid and to Clarify the Procedure of Reorganization of School Administrative Units" Legislative Document 1637 has been introduced into the Senate and is now pending before that body and it is important that the Legislature be informed as to the constitutionality of the proposed bill; and

WHEREAS, it appears to the members of the Senate of the Ninety-eighth Legislature that certain provisions of the bill present important questions of law and the occasion is a solemn one;

NOW, THEREFORE, *Be It Ordered,* that in accordance with the provisions of the Constitution of the State, the Justices of the Supreme Judicial Court are hereby respectfully requested to give this Legislature their opinion on the following questions:

I.

Do any of the provisions of Sections 1 and 2 of Legislative Document 1637 delegate legislative power to the State Board of Education and the School District Commission in violation of Section 1 of Part First of Article IV of the Constitution of Maine?

II.

Must every city or town that is a participating municipality in a school administrative district, consisting of two or more municipalities to be created under the provisions its proportionate part of the indebtedness incurred by such district in computing the extent of its ability to create debt of Section 2 of Legislative Document 1637, take into account

or liability under the provisions of amended Section 15 of Article IX of the Constitution of Maine?

III.

Would a school administrative district, consisting of two or more municipalities to be created under the provisions of Section 2 of Legislative Document 1637, be subject in any manner to the provisions of amended Section 15 of Article IX of the Constitution of Maine limiting the amount of debt or liability that may be incurred by cities and towns?

IV.

Do the provisions of Section 2 of Legislative Document 1637 which allow two or more municipalities to join together to form a new municipality known as a School Administrative District, which district after its formation owns, operates, and controls all the public schools within the district, violate any of the provisions of Article VIII of the Constitution of Maine?

V.

Do any of the prohibitions against the passage of emergency legislation found in Section 16 of Part Third of Article IV of the Constitution of Maine, prevent the passage of Legislative Document 1637 as an emergency measure to become effective upon approval by the Governor?

VI.

Does Section 111-L of Legislative Document 1637 which provides for the financing of the operations of any School Administrative District to be created under this act violate Section 8 of Article IX of the Constitution of Maine?

Name: Sinclair
County: Somerset

A true copy:
Attest: CHESTER T. WINSLOW

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

* * * * * *

QUESTIONS PROPOUNDED BY THE SENATE IN AN ORDER DATED JANUARY 13, 1958 ANSWERED JANUARY 14, 1958

SENATE ORDER PROPOUNDING QUESTIONS

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 submit the following answers to the questions propounded on January 13, 1958.

QUESTION (I): Do any of the provisions of Sections 1 and 2 of Legislative Document 1637 (An Act Relating to Educational Aid and to Clarify the Procedure of Reorganization of School Administrative Units) delegate legislative power to the State Board of Education and the School District Commission in violation of Section 1 of Part First of Article IV of the Constitution of Maine?

ANSWER: We answer in the negative.

The problem raised here is whether or not the Legislature has established adequate criteria which will control the exercise of a sound discretion by the State Board of Education or School District Commissions. We are satisfied that these sections of the proposed Act furnish such standards. We note no instance in which powers which can be properly

exercised only by the Legislature have been improperly delegated to any subordinate agency.

QUESTION (II): Must every city or town that is a participating municipality in a school administrative district, consisting of two or more municipalities to be created under the provisions of Section 2 of Legislative Document 1637, take into account its proportionate part of the indebtedness incurred by such district in computing the extent of its ability to create debt or liability under the provisions of amended Section 15 of Article IX of the Constitution of Maine?

ANSWER: We answer in the negative.

A School Administrative District organized under the proposed Act, a "body politic and corporate" (Sec. 111-F), is separate and distinct from the municipalities participating in its creation. It is a quasi-municipal corporation of the familiar pattern of school, water, recreational, and sewerage districts. The indebtedness of a School Administrative District thus is not the indebtedness of such municipalities. *Kelley* v. *School District,* 134 Me. 414; *Hamilton* v. *Portland Pier Dist.,* 120 Me. 15; *Kennebec Water Dist.* v. *Waterville,* 96 Me. 234.

QUESTION (III): Would a school administrative district, consisting of two or more municipalities to be created under the provisions of Section 2 of Legislative Document 1637, be subject in any manner to the provisions of amended Section 15 of Article IX of the Constitution of Maine limiting the amount of debt or liability that may be incurred by cities and towns?

ANSWER: We answer in the negative.

The Constitution reads in part, "No city or town shall hereafter create any debt or liability, which . . . shall ex-

ceed . . ." The limitation on municipal indebtedness applies to cities and towns and not to other entities, or, as here, a School Administrative District. Our Court has so held in the cases cited in our answer to QUESTION (II).

QUESTION (IV): Do the provisions of Section 2 of Legislative Document 1637 which allow two or more municipalities to join together to form a new municipality known as a School Administrative District, which district after its formation owns, operates, and controls all the public schools within the district, violate any of the provisions of Article VIII of the Constitution of Maine?

ANSWER: We answer in the negative.

The issue arises from the words in Article VIII of the Constitution, "A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people; to promote this important object, the legislature are authorized, and it shall be their duty to require, the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools; . . ."

In *Sawyer* v. *Gilmore,* 109 Me. 169, at p. 184, involving the constitutionality of the levy of a tax for the support of schools, our Court said with respect to Article VIII:

> "Who is to determine what is suitable? Clearly the Legislature itself. 'Suitable' is an elastic and varying term, dependent upon the necessities of changing times. What the Legislature might deem to be suitable and therefore necessary under some conditions, they might deem unnecessary under others."

In 1876, in an Opinion of the Justices, 68 Me. 582, approving the constitutionality not of a particular bill but in general of a school mill tax, the suitable provision Article was referred to, and the Justices pointed out that the Legis-

lature could do more. In brief, the Constitution marks the mandatory duty of the Legislature, but is not a prohibition upon its powers.

Municipalities providing for their public school system by the medium of School Administrative Districts will nevertheless thereby be making suitable provision for the support and maintenance of public schools, and by their proportional contributions to the expense incurred by such Districts will be in compliance with both the letter and spirit of the Constitution. The Legislature, by making provision therefor, will have satisfied the mandatory constitutional requirements imposed upon it.

QUESTION (V): Do any of the prohibitions against the passage of emergency legislation found in Section 16 of Part Third of Article IV of the Constitution of Maine, prevent the passage of Legislative Document 1637 as an emergency measure to become effective upon approval by the Governor?

ANSWER: We answer in the negative.

The Constitution reads, in part:

> "An emergency bill shall include only such measures as are immediately necessary for the preservation of the public peace, health or safety; and shall not include (1) an infringement of the right of home rule for municipalities, (2) a franchise or a license to a corporation or an individual to extend longer than one year, or (3) provision for the sale or purchase or renting for more than five years of real estate."

The preamble to the Act sets forth that, ". . . it is essential that safe and adequate facilities for such administrative units be constructed without further delay;" Evidence of such facts would constitute a matter of public safety as a matter of law. Whether the facts so stated exist is for the Legislature, not for us to determine. *Morris* v. *Goss,* 147

Me. 89, 94. As for home rule, municipal plebiscites fulfill such requirements. The creation of a body politic and corporate is not the granting of a franchise or license within the meaning of the constitutional prohibition. The proposed Act contains no grant of any franchise or license but does no more than to provide mechanics by means of which municipalities may initiate voluntary action to form School Administrative Districts. Nor does the Act by its terms produce or compel a sale, purchase or renting of real estate within the intendment of the Constitution.

QUESTION (VI): Does Section 111-L of Legislative Document 1637 which provides for the financing of the operations of any School Administrative District to be created under this act violate Section 8 of Article IX of the Constitution of Maine?

ANSWER: We answer in the negative.

The Constitution reads, in part:

> "All taxes upon real and personal estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof;"

The Act proposed observes the requirements of the Constitution for equal taxation by adopting the state valuation. *Sawyer* v. *Gilmore,* 109 Me. 169, 188.

Dated at Augusta, Maine, this 14th day of January, 1958.

Respectfully submitted:

s/ ROBERT B. WILLIAMSON
s/ DONALD W. WEBBER
s/ ALBERT BELIVEAU
s/ WALTER M. TAPLEY, JR.
s/ FRANCIS W. SULLIVAN
s/ F. HAROLD DUBORD

HARRY KIMBALL
vs.
CECILE BRETON, EX'X ESTATE OF JOSEPH H. BRETON

MARGARET KIMBALL
vs.
CECILE BRETON, EX'X ESTATE OF JOSEPH H. BRETON

Androscoggin. Opinion, January 20, 1958.

Exemptions. Fires. Negligence. Proximate Cause.

It must, to justify a directed verdict, be discernible from the evidence with every justifiable inference—considered most favorably to the plaintiff, that reasonable persons could only conclude that the harm suffered was the result of contributory negligence or not caused by defendant's negligence.

The failure of a defendant to perform a duty imposed by R. S., 1954, Chap. 97, Sec. 49, for the benefit of tenants, which proximate results in harm or is the natural and probable result thereof, is, at least, evidence of actionable negligence to be submitted to the jury.

The violation of R. S., 1954, Chap. 97, Sec. 49, is prima facie evidence of negligence.

Whether the violation is the "proximate cause" of the harm is to be submitted to the jury under proper instructions, unless the court can say with judicial certainty that the injury is or is not the natural and probable consequence of the act complained of.

If a person is injured by the negligence of another, he may recover for the natural and probable consequences of such negligence, although the injury, in the precise form in which it resulted, was not foreseen.

Whether negligence is the proximate cause of injury depends upon reasonable foreseeability, not the intervening and contributing act of a third person. Each of two independent torts may be a substantial factor in producing injury.

A pure error in judgment is not of itself contributory negligence. If one uses that degree of care of an ordinarily prudent person in the same emergency, it is not negligence.

ON EXCEPTIONS.

This is a negligence action before the Law Court upon exceptions to the refusal of the trial judge to grant defendant's motion for directed verdict. Exceptions overruled.

John Platz, for plaintiff.

Frank W. Linnell, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

SULLIVAN, J. These companion cases arise upon exceptions by the defendant to the denial by the presiding justice of her motions for directed verdicts, made at the close of the evidence. The jury rendered verdicts for both plaintiffs.

In one instance, the plaintiff and wife sues the defendant for personal injuries received by her and ascribed to the defendant's negligence. In the other, the husband seeks to recover damages from the defendant for losses consequential to him from a tort to his wife.

The plaintiffs pleaded in gist that the defendant owned and controlled a three story tenement house occupied by more than two families; that the plaintiffs were tenants of the defendant there, on the second floor; that the defendant owed a duty, because of the Revised Statutes of Maine (1954), Chapter 97, Section 49, to supply the second story of the building with more than one way of egress by stairways on the inside or fire escapes on the outside of the house but that she negligently failed to comply with the law; that a fire occurred on the second story, which compelled the plaintiff-wife to seek escape for herself and her children; that due to the want of the required exits the plaintiff-wife was constrained in the emergency to break a window by the use of her arm, thus injuring herself and derivatively

causing loss to the plaintiff-husband; that both plaintiffs throughout the entire episode observed due care.

The plea of the defendant was a general denial.

The province of this court in these actions as they have evolved is to decide if the verdicts are legally assailable.

> "As is well settled in this jurisdiction, a motion by the defendant for a directed verdict is equivalent to a demurrer to the evidence. Exceptions raise the question, not whether there is sufficient evidence to take the case to the jury, but whether upon all the evidence as it appears in the record a verdict for the plaintiff could be permitted to stand. Dyer V. Power & Light Company, 119 Me., 224, 110 A., 357. See also Mills V. Richardson, 126 Me., 244, 246, 137 A., 689."
>
> *Ward* v. *Power & Light Co.,* 134 Me. 430, 431.
>
> "It is well settled that a verdict should not be ordered for the defendant by the Trial Court when, taking the most favorable view of the plaintiff's evidence, including every justifiable inference, different conclusions may be fairly drawn from the evidence by different minds. Collins V. Wellman, 129 Me., 263, 151 A. 422; Young V. Chandler, 102 Me., 251, 66 A., 539."
>
> *Howe* v. *Houde,* 137 Me. 119.
>
> "A verdict should not be ordered by the trial court when, giving the party having the burden of proof the most favorable view of his facts and of every justifiable inference, different conclusions may fairly be drawn from the evidence by different minds. Young V. Chandler, 102 Me., 251."
>
> *Collins* v. *Wellman,* 129 Me. 263.
>
> "It is firmly established in this State, that the Trial Court should direct a verdict for either party entitled to it, if the evidence raises a pure question of law, or if the evidence is such that reasonable minds would draw but one conclusion therefrom.

> If different inferences of fact may be drawn from the evidence, or if there is any substantial conflict relating to a material issue, a verdict should not be directed. It must be apparent that a contrary verdict could not be sustained."

Giguere v. *Morrisette,* 142 Me. 95, 101.

For the defendant, then, to avail by her motion it must be discernible from the evidence with every justifiable inference—considered most favorably to the plaintiffs that reasonable persons could only conclude that the injuries and losses of the plaintiffs here were the result of the contributory negligence of the plaintiff-wife or were not caused by negligence of the defendant.

The cause of the plaintiffs is dependent upon the proven exercise of reasonable care by the plaintiff-wife.

Tibbetts v. *Harbach,* 135 Me. 397, 402.

The plaintiffs complained that the defendant negligently disobeyed the mandates of R. S. (1954) Chap. 97, § 49. That statute in its relevance reads as follows:

> "Each story above the first story of a building used as a - - - tenement house occupied by more than 2 families - - - shall be provided with more than one way of egress, by stairways on the inside or fire escapes on the outside of such building. Such stairways and fire escapes shall be so constructed, in such number, or such size and in such location as to give reasonably safe, adequate and convenient means of exit, in view of the number of persons who may need to use such stairway or fire escape, shall at all times be kept free from obstruction and shall be accessible from each room in each story above the first story."

If the failure of the defendant to perform a duty imposed upon her by this statute, for the benefit of her tenants in her building, was the proximate cause of injury or loss to those tenants and if the injury or loss was the natural and

ordinary consequence of such failure upon the part of the defendant, then it is, at least, evidence of actionable negligence upon her part to be submitted to the jury. *Carrigan* v. *Stillwell,* 97 Me. 247, 54 A. 389, 61 L. R. A. 163.

It is conceded in argument by all of the parties to these actions that the question of whether the building of the defendant conformed with the foregoing statute was a matter for jury determination.

The issues to be determined are whether the jury verdicts may stand, whether there was a veritable question for the jury as to the due care of the plaintiff-wife, negligence of the defendant placing the plaintiff-wife in imminent peril and injuries to the plaintiff-wife as a proximate result of the defendant's negligence.

The record would justify a finding by the jury of these, narrated facts.

The plaintiffs were tenants of the defendant upon the second floor of a two and one half story, frame building in the overall possession and control of the defendant. There were four tenements, all tenanted, two on the first floor and two on the second. Within the building there was no stairway leading from the first story to the second. The only, outside means of ingress and egress to and from the second floor were two flights of stairs in the rear which met upon a single, sheltered landing at the back of the second story rents. Each rent was served respectively by a door leading within from the common landing. The two doors were separated by a partition, for a distance of twelve to eighteen inches. The partition was of wooden frame covered with sheetrock. Each door opened upon a separate shed to be traversed incident to entering or leaving the respective tenement. Much of the interior was wood but there is no evidence as to the material of the building as a whole. Above the second story there was no tenement.

Each upper rent shared about one half of the second floor area. The nondescript disposition of the rooms as delineated upon the plan in evidence would dictate the inference that the second floor was formerly a single, living unit later adapted to separated and dual occupancy. Provided doors encountered were not locked, one could proceed inside through one of the two, outside doors, advance by a somewhat meandering route through each second floor rent and return outside through the other, outermost door. Sometimes the doors of the tenements were kept locked by the occupants.

A feature of the plaintiffs' apartment was a porch enclosed with glass. To reach the essential, living quarters of the Kimballs it was necessary to pass through their shed and this porch.

The plaintiff-wife was twenty-one years of age. The plaintiffs had occupied their rent for three weeks, with their two, infant daughters, one three months old and the other eighteen months old. A Mr. Pennell, his wife and children occupied the adjoining rent. The plaintiff-husband was absent from home at his occupation. At 7:30 in the morning the wife, clad in nightdress and housecoat, was in the kitchen with her babies. The older child was in a highchair by the window overlooking the street; the younger lay in a crib near the window looking upon the porch. The mother who had finished bathing the latter and was preparing to feed her glanced out of the window to the porch where the milk was. She testified: "- - - all I could see was smoke. - - - Smoke; just all smoke." She went at once into the kitchen of the Pennells and told Mrs. Pennell of the smoke. Mrs. Kimball through the glass in the kitchen door of the Pennells then noticed flames in the Pennell shed. The fire seemed to her to embrace, amongst others, the area about the common partition between the Kimball and Pennell sheds. She returned to her own kitchen to find that room

filled with smoke and her babies choking and crying for air. She, too, was choking. She rushed to a window and drove her fist and arm through a glass pane. She called to two nuns upon the street. As the nuns turned toward the house, Mr. Pennell came into the room. At his direction the mother and he each took a baby and went to the Pennell rent, through the burning shed and outdoors. Although her arm was severely lacerated Mrs. Kimball was not conscious of her injuries until they were called to her attention sometime after she had reached safety.

Considerable damage was done to the Pennell shed by the fire and some to that of the Kimballs. Both tenements suffered from smoke and heat. The partition between the two sheds was gutted.

The mother testifies that alone she was not capable of carrying her two babies out. She said that she did not leave through her own porch because it was filled with smoke. There was nothing to prevent her from raising the window, but the time element gave her concern as her answer reveals:

> Q. "Well, you didn't have time
>
> A. If you see a room full of smoke and babies are choking you wouldn't think about it; you would just think about getting them out."

Mrs. Kimball was excited. She did not open the door leading onto the porch to examine conditions there.

The extent of the injuries to the plaintiff-wife was the lacerations and their resultants.

As heretofore observed the defendant has acknowledged that the question of a violation by the defendant of R. S. (1954) Chap. 97, § 49 was a proper subject for jury consideration. From the record there can be no doubt that a jury would have been justified in finding such a violation

and that it constituted negligence. The statute was patently one enacted for public safety.

> "- - - - If such violation is admitted, or proven by the evidence, it is prima facie evidence of negligence, as it is sometimes said, and as otherwise expressed, raises a presumption of negligence. While not conclusive, the defendant must overcome the presumption against him - - - -"
>
> *Nadeau* v. *Perkins,* 135 Me. 215, 216.
>
> "- - - - Regardless of the nature and extent of the violation, however, casual connection between it and the accident must be established. Unless it was a contributing proximate cause, evidence of its commission is of no probative value and must be disregarded - - - -"
>
> *Tibbetts* v. *Harbach,* 135 Me. 397, 403.
>
> "It is true that the 'issue of proximate cause is also one of fact, not of law, and is to be submitted to the jury under proper instructions unless the court can say with judicial certainty that the injury is or is not the natural and probable consequence of the act of which the complaint is made.' Nicholas V. Folsom, 119 Me., 176, 110 A. 68, 69, and cases there cited."
>
> *Elliott* v. *Montgomery,* 135 Me. 372, 374.

From the evidence reviewed above a jury would have been further warranted in finding that a statutory infringement by the defendant was a contributing, proximate cause of an emergency which beset the plaintiff-wife. The disposition of the rooms and exits upon the second floor of the defendant's building, the fact that communicating and intercepting rooms were sometimes, for privacy or security, locked, the presence of a lone mother with two infants, of smoke and fire, of the choking and crying of the babies and human behavior responsive to such conditions as an integrated whole could all be fairly regarded as within "the

range of reasonable apprehension" and thus to have been foreseeable by the defendant.

> "In many cases courts have said that in determining what is the proximate cause, the true rule is that the injury must be the natural and probable consequence of the negligence complained of. But in the use of the word probable in this definition, it is not meant that the defendant did anticipate or by the exercise of ordinary prudence should have anticipated the precise form in which the injury actually resulted. If a person is injured by the negligence of another, he may recover for the natural and probable consequence of such negligence, although the injury, in the precise form in which it resulted, was not foreseen. It is sufficient that after the injury it appears to have been a natural and probable consequence of the defendant's negligence." (authorities cited)
>
> *Marsh* v. *Great Northern Paper Company,* 101 Me. 489, 502.

There is no implication and no proof in the record that the defendant was in any manner responsible for the fire. Her negligence has to be, if any, her prior, tortious violation of the safety statute. But that negligence could have been determined to be abiding, persistent and sufficient to sustain a full recovery by the plaintiffs.

> "The question whether or not negligence is a proximate cause of an injury is answered, not as a rule by determining that the act of a third person contributing to the result does or does not intervene, but rather by deciding whether the occurrence should have been foreseen or reasonably anticipated. The rule is thus stated by Judge Smith in the article previously referred to. 25 Harv. L. Rev., 113. 'By the decided weight of authority, A. would be liable if he foresaw, or ought to have foreseen, the commission of B.'s tort, and the resultant damage, as a not unlikely consequence of his earlier tort.' "
>
> *Hatch* v. *Globe Laundry Co.,* 132 Me. 379, 384.

> "- - - - The sole issues are whether the defendant was negligent, and, if so, whether his negligence was also a proximate cause. It is well established law that where two persons acting independently are negligent, one damaged thereby may recover from either. Hutchins V. Emery, 134 Me. 205, 183 A. 754 and cases cited therein. As that case declares: 'Each of two independent torts may be a substantial factor in the production of injury.'" *Robinson* v. *LeSage,* 145 Me. 300, 301.

A jury upon the evidence would have an objective basis for a finding that the plaintiff-wife, in the emergency created, comported herself as a reasonably prudent person in an ostensible crisis. Subjectively, to one in the predicament of Mrs. Kimball, there were many aspects of an entrapment of her and her babies. There was combustible material in the substance of the house. There was smoke in her porch. There was no knowing with assurance the extent or location of the fire or its tempo. When Mrs. Kimball went to the Pennell kitchen she observed flames in the Pennell shed. She returned to her own kitchen to find her own children already in throes. The infants were completely helpless to succour themselves. To carry both of them unharmed and at once through the burning structure to safety could have appeared hopeless or at least doubtful. Mrs. Kimball was susceptible to the fervent emotions of a mother and within generous bounds could be condoned and admired for them. She judged that she should not chance any waste motion. She broke a window with her arm, possibly to effect a vent, to secure assistance or to afford a means of escape. She called for help. With the aid of Mr. Pennell and by his direction she took her children out of danger. The fire in its aftermath proved formidable enough. Her injuries could be fairly deemed no fault of hers and such a resolution of probabilities could be within the sensible latitude of rational judgment.

> "- - - - It is well settled law that if a person is suddenly confronted by an unexpected peril, and must

choose on the instant between alternative hazards, it is not necessarily negligence if he chooses unwisely, not even if it appears that by choosing the other alternative he would have escaped danger entirely. Larrabee V. Sewall, 66 Maine, 376; Tosier V. Haverhill, etc., Ry. Co., 187 Mass. 179. A mere error in judgment is not of itself contributory negligence. Wolf Mfg. Co. V. Wilson, 152 Ill., 9; Hoyt V. R. R. Co., 6 N. Y. St., 7. An instinctive effort to escape a sudden impending danger, resulting from the negligence of another, does not relieve the latter from liability (cases cited). When one in imminent peril is compelled to choose instantly between two hazards, he is not guilty of contributory negligence if he exercises that degree of care that an ordinarily prudent person might exercise under the same circumstances. It is always a question of ordinary care. And ordinary care is a question for the jury. In this case the plaintiff was in a trap. - - - -"

Borders v. *Boston & Maine Railroad,* 115 Me. 207, 210.

"- - - - If she used that degree of care which an ordinarily prudent person would have used under the same circumstances and in the same emergency, - - - she was not guilty of negligence. - - - - -

"We are not concerned with consideration of what might have happened or might not have happened if parties had exercised extraordinary care, because such a degree of care is not required. - - - -"

Byron v. *O'Connor,* 130 Me. 90, 93.

"- - - - But 'hindsight' is not available to a person faced with an emergency with which he is suddenly confronted and which requires instantaneous action upon his part. He must act promptly, taking into consideration the circumstances as they may then present themselves."

St. Johnsbury Trucking Co., Inc. v. *Rollins,* 145 Me. 217, 222.

> "- - - - Unless in extreme cases and where the facts are undisputed, which of two alternatives an intelligent and prudent person traveling the highway should select as a mode of escape from collision the law will not say, but will send to the jury the question whether the traveler acts with ordinary care. - - - -"
>
> *Coombs* v. *Mackley*, 127 Me. 335, 339.

This court concludes that upon the issues of actionable negligence of the defendant and of reasonable care of the plaintiffs these actions presented questions appropriate for and necessitating jury judgment.

Exceptions overruled.

PUBLIC UTILITIES COMMISSION
vs.
COLE'S EXPRESS
RE: MOTOR COMMON CARRIER RATE INCREASES AND DECREASES

Kennebec. Opinion, January 21, 1958.

P. U. C. Motor Carrier Rates. Review. Judicial Notice. Administrative Law. Administrative Practice.

When rulings of the P. U. C. are based upon its findings of fact, the Law Court has no right to sustain exceptions on questions of fact, if there be any evidence to sustain the findings, yet it is a well recognized principle of law that whether on the record, any factual finding underlying order and requirement, is warranted by law, is a question of law, reviewable on exceptions.

Courts may properly take judicial notice of facts that may be regarded as forming part of the common knowledge of every person of ordinary understanding and intelligence.

Administrative bodies should make no use of relevant matters in their personal (supposed) knowledge, or in their official documents, without stating them and putting them into the record during the hearing. This principle applies to annual reports filed by other motor carriers, special tariff studies filed with the Commission or the I. C. C., cost sheets filed in other proceedings, and cost studies made by motor rate bureaus.

An administrative body exercising adjudicatory or quasi judicial functions must act solely on the basis of the evidence before it and may not act on the basis of personal knowledge or on matters dehors the record. However, the fact that the administrative body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result.

Exception filed under R. S., 1954, Chapter 44, Section 67 are a proper remedy for raising questions of law relative to decrees of the P. U. C. even though section 70 provides for petition for review and section 69 provides for a petition in equity.

ON EXCEPTIONS.

This is an action by exceptions to certain rulings of the P. U. C. Exceptions sustained.

Frank M. Libby,
Peter Kyros,
Samuel W. Earnshaw, for Commission.

Watkins & Rea,
Eaton, Peabody, Bradford & Veague,
Frank E. Southard, for Cole's Express.

Raymond E. Jensen, for Intervenor.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

DUBORD, J. This case comes to the Law Court on exceptions to certain rulings by the Public Utilities Commission.

By an order dated November 17, 1952, the Public Utilities Commission, on its own motion, ordered investigation into and concerning the reasonableness and lawfulness of class' rates and minimum charges relating to transportation of freight and merchandise by common carriers by motor vehicle.

Following the issuance of this order, the Maine Motor Rate Bureau, a Maine corporation whose purpose is to make rate studies for motor carriers, prepare tariffs and act as agent for carriers in issuing the same, in cooperation with the Public Utilities Commission, engaged in a study of carrier operating costs.

As a result of that study the carriers throughout the state, including the respondent, Cole's Express, except as between points where it is in direct competition with the Bangor & Aroostook Railroad, filed, effective August 6, 1956, tariff schedules providing for increases and decreases in individual and joint motor common carrier freight rates and charges so as to produce uniform rates for all. As to all carriers other than Cole's Express, the rates as filed were permitted to go into effect. As to Cole's Express, although the rates were permitted to go into effect as to its operation between Portland and Bangor which are competitive with other common carriers, a hearing, upon motion of the Public Utilities Commission, was ordered as to motor common carrier class rates and minimum charges applicable from, to and between points in Aroostook County served by the respondent. To restate these facts: Following a study instituted by an order of the Public Utilities Commission, the carriers throughout the state filed uniform rates adjusted only to meet rail competition of the Bangor & Aroostook Railroad. These rates were permitted to go into effect as to all carriers as to the portion of the operation of Cole's Express, which involved no motor common carrier competition. These operations were treated on a different basis. Lower rates are prescribed by the Commission.

The respondent contends that on the record of this case, the findings of the Commission are not supported by any substantial evidence and that the applicable law under the legislative declaration of policy relating to discrimination has been erroneously applied by the Commission.

Maine Motor Rate Bureau was allowed to intervene.

Exceptions were filed by Maine Motor Rate Bureau and Cole's Express under the provisions of § 67, Chapter 44, R. S., 1954; and pursuant to this section the Clerk of the Public Utilities Commission certified the exceptions.

The exceptions of Maine Motor Rate Bureau are five in number. Exception 1, is a general one which alleges that the findings of the Commission are erroneous in law because they are not supported by substantial evidence.

Exceptions 2, 3, 4, and 5, allege that in the absence of a showing by the evidence of a need for deviation from a general base for rates, the action of the Commission in selecting Cole's Express from all other carriers, and applying special rates where Cole's Express had no motor carrier competition, is a violation of the declaration of policy relating to discrimination, as set forth in § 19, Chapter 48, R. S., 1954, which provides that discrimination in rates charged be eliminated.

The respondent, Cole's Express, attacks the decree of the Commission by means of 15 exceptions.

Exception 1, is a general one and alleges that the decree is not supported by substantial evidence.

Exception 2, charges that the decree of the Commission is based upon information not in the record and as a result the respondent has been denied a fair hearing in violation of Article 1, § 6 and § 21 of the Constitution of Maine and of the 14th Amendment of the Constitution of the United States.

In 15 subparagraphs to Exception 2, the respondent sets forth the matters which it says the Commission considered in arriving at its decision, and which matters were not introduced as evidence and made a part of the record in the case.

Exceptions 3, 4, 5, and 6, attack specific findings by the Commission which the respondent says are based on purported information of the Commission extraneous to the record.

Exceptions 7, 8, 9, 10, 11, and 12, attack the decree of the Commission on the grounds that it is a violation of the discrimination provisions of § 19, Chapter 48, R. S., 1954.

Exception 13, alleges that, under the circumstances of this case, the Commission was in error in applying to the respondent the rule of burden of proof, set forth in § 36, Chapter 44, R. S., 1954.

Exception 14, again attacks the decree on the grounds of discrimination and alleges that the burden of proof required of the respondent was met when it filed rates based upon the average costs of a representative group of carriers, including the respondent.

Exception 15, again attacks the decree on the grounds of unfair discrimination.

The position taken by the Commission is that the respondent did not sustain its statutory burden of proof as to the justness or reasonableness of the proposed rate increases. The Commission says that the sole question before this court is whether or not Cole's Express sustained its statutory burden of proof. It contends that if Cole's Express and Maine Motor Rate Bureau desired to challenge the facts stated in the decision, they could have done so, either by way of petition for review of the order, under § 70, Chapter 44, R. S., 1954, or by petition in equity to re-

view both the facts and the law under § 69, Chapter 44, R. S., 1954, or both.

This is an over-simplification of the issues with which we do not agree. Section 70 of Chapter 44, R. S., 1954, authorizes the Commission to rescind, alter or amend any of its orders upon notice to the public utility and after opportunity to be heard.

Section 69 of Chapter 44, R. S., 1954, provides for an alternative method of review by this court.

Prior to the enactment of § 69, the statutory method providing for exceptions in § 67, Chapter 44, R. S., 1954, was the exclusive remedy for raising questions of law relative to decrees of the Public Utilities Commission. *Casco Castle Co., Petitioner,* 141 Me. 222; 42 A. (2nd) 43.

The excepting parties are properly in this court.

While we recognize that when rulings of the Public Utilities Commission are based upon its findings of fact, this court has no right to sustain exceptions on questions of fact, if there be any evidence to sustain the findings, yet it is a well recognized principle of law that whether on the record, any factual finding underlying order and requirement, is warranted by law, is a question of law, reviewable on exceptions. *Public Utilities Commission* v. *Utterstrom Brothers, Inc.,* 136 Me. 263; 8 A. (2nd) 207.

> "When the Commission decides a case before it without evidence, or on inadmissible evidence, or improperly interprets the evidence before it, then the question becomes one of law." *Central Me. Power Co.* v. *Public Utilities Commission,* 150 Me. 257, 261; 109 A. (2nd) 512, *New England Tel. & Tel. Co.* v. *Public Utilities Commission,* 148 Me. 374, 377; 94 A. (2nd) 801, *Chapman, Re: Petition to Amend,* 151 Me. 68, 71; 116 A. (2nd) 130.

As it is clear that the decree of the Commission is based upon information not in the record, and upon assumptions

based on such information, as complained of in the exceptions of Cole's Express, 2, 3, 4, 5, and 6, the first question for determination is whether or not the matters complained of were properly considered by the Commission under the doctrine of judicial notice.

> "The matter of which a court will take judicial notice must be a subject of common and general knowledge. In other words, judicial knowledge of facts is measured by general knowledge of the same facts. A fact is said to be generally recognized or known when its existence or operation is accepted by the public without qualification or contention. The test is whether sufficient notoriety attaches to the fact involved as to make it proper to assume its existence without proof. The fact that a belief is not universal, however, is not controlling, for there is scarcely any belief that is accepted by everyone. Those matters familiarly known to the majority of mankind or to those persons familiar with the particular matter in question are properly within the concept of judicial notice. Judicial knowledge is continually extended to keep pace with the advance of art, science, and general knowledge." 20 Am. Jur. 49, § 18, Evidence.

> "Judicial notice in any particular case is not determined or limited by the actual knowledge of the individual judge or court. There is a basic distinction between judicial notice and judicial knowledge. In those instances where a judge is personally conversant with a fact which is judicially cognizable, proof thereof is not required. It is not essential, however, that matters of judicial cognizance be actually known to the judge. If they are proper subjects of judicial knowledge, the judge may inform himself in any way which may seem best to his discretion and act accordingly. On the other hand, facts which are not judicially cognizable must be proved, even though known to the judge or to the court as an individual. In other words, the individual and extrajudicial knowledge

on the part of a judge will not dispense with proof of facts not judicially cognizable, and cannot be resorted to for the purpose of supplementing the record." 20 Am. Jur. 52, § 21, Evidence.

"Courts may properly take judicial notice of facts that may be regarded as forming part of the common knowledge of every person of ordinary understanding and intelligence. Other common statements of the rule are that the courts will take notice of whatever is, or ought to be, generally known within the limits of their jurisdiction; and that they ought not to assume ignorance of, or exclude from their knowledge, matters which are known to all persons of intelligence. On the other hand, judicial knowledge of facts is measured by general knowledge of the same facts, and courts will not take judicial notice of facts which are not matters of common and general knowledge." 31 C. J. S. 510, § 9, Evidence.

The Commission in an endeavor to sustain its position upon this issue states that it was within its power to properly take notice of facts within the normal scope of its expert knowledge and administration in the transportation field; and it sets forth the following citations in support of its position.

Milo Water Co. v. *Inhabitants of Milo,* 136 Me. 228; 7 A. (2nd) 895.

Market St. R. Co. v. *Railroad Commission of California,* 324 U. S. 548.

Re Casco Castle Co., 141 Me. 222; 42 A. (2nd) 43.

State of Wisconsin v. *Federal Power Comm.,* 201 F. (2nd) 183.

Nichols v. *Nichols,* 126 Conn. 614, 13 A. (2nd) 591.

Wigmore, *Evidence* (3rd Ed.) Sec. 2567.

42 Am. Jur. *Public Administration Law,* Sec. 217. 18 A. L. R. (2nd) 552 *et seq.*

A careful study of the foregoing citations discloses that not only do they not support the position taken by the Commission but, on the contrary, support the position taken by Cole's Express.

In the case of *Milo Water Company* v. *Milo, supra,* the Commission, in giving consideration to matters not strictly in the record merely viewed the pending petition, not as an isolated proceeding, but as part of former proceedings involving the same issue; and the position of the Commission was sustained by this court.

In the case of *Market St. Ry. Co.* v. *Railroad Commission of State of California et al.,* 324 U. S. 548; 65 Sup. Ct. Rep. 770, the court held that:

> " 'Due process' requires that commissions proceed upon matters in evidence and that parties have opportunity for cross-examination and rebuttal."

However, the decision was based on the court's interpretation of the rule to the effect that due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on ultimate rights.

In the case before us for consideration and determination, we are of the opinion that the matters complained of are not trivial, but are matters of substance.

In the case of *State of Wisconsin* v. *Federal Power Commission,* 201 F. (2nd) 183, the court, apparently recognizing the general doctrine that due process requires ordinarily an opportunity for cross-examination and rebuttal, held that there are occasions when a regulatory agency can and should take official notice of the reports filed with it by a regulated company. The issue before us now is not at all identical.

> "Most matters which the court may notice fall into one of two classes, those which come to the knowledge of men generally in the course of the ordinary

> experience of life, and are therefore in the mind of the trier, or those which are generally accepted by mankind as true and are capable of ready demonstration by means commonly recognized as authoritative." *Nichols* v. *Nichols,* 126 Conn. 614; 13 A. (2nd) 591, 595.
>
> "Moreover, where it is necessary to make an adequate record of the case for an appeal, the source of information should be read into the record or be marked as an exhibit; or, if the trial court refuses to take notice of the matter, it should, unless it would otherwise appear of record, be marked for identification; and, in a jury trial, the court may in its discretion cause the matter to be submitted to the jury either by having it read into the record or marked as an exhibit, or may place it before them in its charge." *Nichols* v. *Nichols, supra.*

There is nothing in § 2567, Vol. IX, Wigmore on Evidence, 3rd Ed., which supports the contentions of the Commission.

On the contrary, § 1805, Vol. VI, Wigmore on Evidence, 3rd Ed., sustains the position of Cole's Express. Here the author says:

> "A special danger of the infraction of this fundamental rule is found in proceedings before administrative officials, - - such as the Interstate Commerce Commission, the Federal Trade Commission, and other administrative bodies where in their accumulated experience a certain amount of information lies hidden. It ought to be elementary, as it is fundamental, that they should make no use of relevant matters in their personal (supposed) knowledge, or in their official documents, without stating them and putting them into the record during the hearing. Otherwise, the party affected has no fair chance to test and perhaps dispute that supposed knowledge; nor is the appellate tribunal furnished with a dependable record. Yet the breach of this fundamental rule has been not infrequent.

The author in the same Vol., Page 258, also quotes with approval the following statement of Justice Cardozo in *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292; 57 Sup. Ct. Rep. 724, at 729.

> " 'From the standpoint of due process - - the protection of the individual against arbitrary action - - a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists; as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms. What the Supreme Court of Ohio did [in sustaining the order of the Commission] was to take the word of the Commission as to the outcome of a secret investigation, and let it go at that. 'A hearing is not judicial, at least in any adequate sense, unless the evidence can be known' "

> "Administrative officers who are required to make a determination upon or after a hearing in the exercise of a judicial or quasi-judicial function cannot act on their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and nothing can be treated as evidence

which is not introduced as such, for there is no hearing where a party cannot know what evidence is offered or considered and is not given an opportunity to test, explain, or refute. A board required to reach a finding after a hearing cannot supply the lack of evidence by its own unaided opinion. Papers in the files of a commission, special knowledge gained from experience or other hearings, or information secured by independent investigation apart from the hearing, and not made known upon the hearing, is not evidence properly in the case. It is a denial of the fundamentals of a trial for a commission to reach a decision on evidential facts not spread upon the record and upon information secretly collected and not disclosed, which the party complaining had no opportunity to examine or analyze, explain, or rebut." 42 Am. Jur., 464, Public Administrative Law, § 130.

"The process by which proof is simplified in a judicial proceeding by the court's taking judicial notice of matters of common knowledge permits an administrative tribunal to take official notice of the same facts of which a court takes notice. However, administrative agencies necessarily acquire special knowledge in the fields of their activities, and the acquisition of this knowledge is the purpose of their existence in many instances. Accordingly, the field in which official notice may relieve from the necessity of proof is broadened to permit administrative officers to use such knowledge, but administrative officers should make no use of their personal knowledge or of data accumulated by them unless the matter is disclosed and put upon the record so that the supposed fact may be supplemented, explained, or refuted by contrary evidence, and so that a court, on judicial review, may be informed of what facts the agency has utilized, so as to determine the existence of evidence in support of the decision." 42 Am. Jur., 464, Public Administrative Law, § 130.

The following general rule is set forth in an interesting Annotation on the subject in 18 A. L. R. (2nd) 552, at 555:

> "As a general proposition, it is not proper for an administrative authority to base a decision of adjudicatory nature, or findings in support thereof, upon evidence or information outside the record, and in particular upon evidence obtained without the presence of and notice to the interested parties, and not made known to them prior to the decision."

A Maine decision, *Gauthier's Case,* 120 Me. 73; 113 A. 28, is cited in support of the foregoing rule. While the *Gauthier Case* was a workmen's compensation case, the position of Cole's Express is supported. In this case a decree was based in part upon alleged facts, recited in the Commission's findings, which did not appear in the evidence. In sustaining the appeal, this court said:

> "It should go without saying that such final findings must be founded upon evidence produced under such circumstances as to give to both parties a full opportunity for explanation and refutation."

> "It is generally held that, in an adjudicatory or quasi-judicial proceeding before a public administrative body, nothing may be treated as evidence which has not been introduced as such and incorporated in the record. It is the duty of an administrative body to consider as evidence everything introduced as such and nothing more; a decision or finding not supported by the evidence may not be sustained on the theory that the administrative body had before it extraneous, unknown, but presumptively sufficient information to support its finding or decision. An administrative body exercising adjudicatory or quasi-judicial functions must act solely on the basis of the evidence before it and may not act on the basis of personal knowledge or on matters dehors the record. However, the fact that the administrative body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result.

> "An administrative body may not receive and consider evidence without apprising the parties of that fact and giving them an opportunity to meet it. It may not rely on evidence produced in other proceedings where the parties are not notified and given an opportunity to rebut such evidence. Papers in the files of an administrative tribunal but not introduced in evidence may not be considered, and it may not base its decision on a report made by its investigator, unless the report is introduced in evidence." 73 C. J. S., 442, § 123, Public Administrative Bodies and Prodecure.

Among the cases cited in support of § 123, *supra,* are *Application of Palmer,* 87 N. Y. S. (2nd) 655, where the court held that Administrative hearing officials may not act upon and on their own knowledge nor base their decisions on matters dehors the record.

In this case the court further said:

> "A trier of facts can find facts only on evidence, not on his own knowledge."

The court further pointed out that the right of judicial review becomes naught but an empty form if the administrative hearing officials, no matter how well qualified, are permitted to determine contested matters on the basis of their own professional opinions rather than the printed record.

See also *Hunter* v. *Zenith Dredge Co., et al.,* 19 N. W. (2nd) 795 (Minn.)

The Commission in its brief cites the following excerpt from 18 A. L. R. (2nd) 552, at 584.

> "An error of an administrative authority in basing a decision upon evidence outside the record or obtained without the presence of and notice to the parties, is not prejudicial where an aggrieved party has an opportunity to meet such evidence in administrative review proceedings."

The Commission then argues that the respondent had full opportunity to file a petition for amendment of the Commission's order under § 70, Chapter 44, R. S., 1954, or by filing a petition in equity under the provisions of § 69, Chapter 44, R. S., 1954. We have already indicated that § 70 does not give the respondent authority to file a petition for amendment, but the authority is given to the Commission to rescind, alter or amend its decrees; and we have also pointed out that § 69, is an alternative procedure; and that the respondent is properly before this court under the provisions of § 67, Chapter 44, R. S., 1954.

It is our opinion that the Commission erred in basing its findings upon evidence or purported knowledge which is not made a part of the record. Without listing in detail all of the matters complained of in the exceptions of Cole's Express numbered 2 to 6 inclusive, we recite as objectionable, references to annual reports filed by other motor carriers, to special studies of tariffs filed either with the Commission or with the Interstate Commerce Commission, to cost sheets filed by Cole's Express in other proceedings, and to a cost study made by the New England Motor Rate Bureau. The exceptions of Cole's Express, 2 to 6 inclusive, must be sustained.

As previously indicated, Exceptions 1 of both appellants attack the decree on the grounds that it is not supported by substantial evidence. In the absence of a complete record, we do not pass upon this issue.

Exception 2 of Maine Motor Rate Bureau alleges the decree is unlawful and unreasonable, and is an unwarranted abuse of discretion for the reason that it singles out certain class rates of Cole's Express and applies different treatment without any evidence in the record to warrant such treatment.

Exception 3 alleges that in this case a uniform increase rate structure of all common carriers is under investigation,

and thus uniform and non-discriminating rates are required unless there is evidence to show a need for deviation from the general base. This exception further alleges that there is no such evidence in the record, and as a consequence, the decree violates the declaration of policy set forth in § 19, Chapter 48, R. S., 1954.

Exception 4 alleges the decree is unlawful and without evidence to support it, because it requires Cole's Express to maintain a lower scale of class rates where there is no motor carrier competition than where there is motor carrier competition, when there is no evidence of any different transportation conditions.

Exception 5 specifically attacks a statement in the decree of the Commission viz.:

"We are not of the opinion that the declaration of policy as set forth in Section 19, Chapter 48, R. S., 1954, contemplates that all motor common carriers shall observe the same level of rates regardless of their costs of operations." It is contended that such a statement is incorrect and inapplicable for the reason that only uniform class rates based upon average costs are involved, and that the declaration of policy as applied to make a uniform rate structure does require that all motor common carriers observe the same level of the uniform class rates regardless of their costs of operation.

Exception 7 of Cole's Express alleges there is no proper and lawful basis for prescribing rates except on a uniform basis as set forth in the tariff schedule of rates which treated all carriers alike on a mileage basis and regardless of location.

Exception 8 alleges that the decree is unlawful and prejudicial to the rights of the respondent in that it prescribes intrastate class rates lower than interstate class rates for the same service, and thus amounts to a confiscation of re-

spondent's interstate revenues for the purpose of subsidizing the movement of intrastate traffic.

Exception 9 attacks the statement of the Commission contained in Exception 5 of Maine Motor Rate Bureau.

Exception 10 attacks the decree on the grounds that it is an unwarranted abuse of discretion as it singles out certain class rates of Cole's Express for special and different treatment without any evidence in the record to warrant such action.

Exception 11 attacks the decree on the grounds that there is no evidence to warrant a need for deviation from the general basis of rates where the dockets under investigation created a uniform class rate structure for all motor carriers.

Exception 12 attacks the decree on the ground that Cole's Express was required to maintain a lower scale of class rates where there is no motor carrier competition without a showing of any different transportation conditions.

Exceptions 13 and 14 allege that the Commission erroneously applied the rule of burden of proof where a uniform class rate structure was under consideration, and further avers that the burden of proof was met when Cole's Express filed rates based upon the average cost of a representative group of carriers including Cole's Express.

Exception 15 avers that the rates prescribed by the Commission are discriminatory and unjust, in that they give unfair advantages between shippers.

It will be seen that excluding Exception 1 of Maine Motor Rate Bureau, and Exceptions 1, and 2 to 6 inclusive of Cole's Express, the remaining exceptions constitute an attack upon the decree of the Commission on the grounds it is a violation of the discrimination provisions of § 19, Chapter 48, R. S., 1954. This issue cannot be decided without a study of the complete record in order to determine whether or not

a need is shown for a deviation from the general rate base. Consequently, we do not rule upon these remaining exceptions.

As to the exceptions of Cole's Express, 2 to 6 inclusive, the entry will be:

Exceptions sustained.

FRED T. LAROU, PETITIONER

vs.

TABLE TALK DISTRIBUTORS, INC.

AND

AMERICAN MOTORISTS INSURANCE CO.

Androscoggin. Opinion, January 22, 1958.

Workmen's Compensation. Course of Employment. Employees. Independent Contractors. Highways.

The question whether an act of an employee arose out of and in the course of the employment depends ultimately upon the facts and circumstances of each case.

Findings of the Industrial Accident Commission upon questions of fact, are final if supported by competent evidence.

Whether a deviation by a traveling employee from his usual or prescribed route, schedule, or mode of travel, constitutes such a departure from his scope or course of employment as to deprive him of the right to compensation for an injury sustained during or as the result of such deviation depends ordinarily upon the extent, purpose, and effect thereof.

It is not every slight deviation that deprives an employee of benefits.

The Legislature has imposed a rule of liberal construction.

ON APPEAL.

This is an appeal from a *pro forma* decree confirming a decision of the Industrial Accident Commission awarding compensation. Appeal dismissed. Decree below affirmed.

Jacob Agger,
Edward Newman, for plaintiff.

Robinson, Richardson & Leddy, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

DUBORD, J. This is an appeal from a *pro forma* decree of the Superior Court confirming a decision of the Industrial Accident Commission awarding compensation to the plaintiff.

The petition is in the usual form and alleges an accident occurring on February 7, 1957, while petitioner was working as a driver-salesman in the employ of Table Talk Distributors, Inc., at Auburn, Maine. The petition alleges knowledge of the accident on the part of the employer or notice thereof. It is also alleged that the accident arose out of and in the course of employment.

The answer is a general denial, but the principal defense is that the accident did not arise out of and in the course of petitioner's employment.

At the hearing before the Commissioner, it was contended by the insurer that the relationship of employer and employee did not exist, but that the petitioner was in fact an independent contractor.

The Commissioner found that there was a relationship of employer and employee, and counsel for the insurer, in his brief concedes that this finding was a question of fact and, therefore, final.

It appears from the evidence that the petitioner was employed by Table Talk Distributors, Inc., as driver-salesman. It was his duty to pick up a quantity of pies in Portland by a given hour on each day. His principal territory was in Waterville and its environs. However, the employer testified

that the petitioner had authority to sell the pies at any place and if any other salesman complained of encroachment on his territory, that was a matter to be worked out between the parties involved. The employer furnished the motor truck used by the petitioner. His compensation was $25.00 per week, plus a commission on sales.

On February 7, 1957, the petitioner was on his way back to Portland at the end of the day. Upon arriving on Minot Avenue in Auburn, he parked his vehicle on the westerly side of the highway, near a street light opposite a filling station and diner located on the other side of the highway and known as Jimmy's No. 1 Filling Station, and Jimmy's Diner. Minot Avenue runs generally north and south. The gasoline station lies southerly of the diner and one portion of the station is only about eight feet from the diner. The petitioner testified that he frequently stopped at this gasoline station, and that he was in the habit of selling pies to a man named Brown, an employee at the station. On the day in question, after the petitioner had parked his truck, he left the truck, accompanied by his wife, and walked in a diagonal direction approximately 90 to 100 feet to the door of the gasoline station. Brown was absent, but upon being contacted by telephone said he wanted two pies. Thereupon petitioner returned to his truck for the pies, brought them back to the station, and received his pay from one of the attendants. The day's work was practically done, and the petitioner then left the gasoline station and walked to the door of the diner, accompanied by his wife, a distance of about 70 feet. In the diner he had a glass of beer and his wife had a light lunch. They then left the diner and started for the truck. From the door of the diner to the truck, there was a distance of between 60 and 70 feet. Petitioner's wife preceded the petitioner on the way back to the truck. While at a point about 3 feet from the truck, the petitioner was struck by an oncoming automobile and seriously injured.

The insurance carrier contends that the finding of the Commissioner that the plaintiff crossed the street for the purpose of selling pies is not supported by the evidence; and vigorously contends that the accident did not arise out of or within the scope of the employment, because the petitioner had deviated from his employment when he went from the gasoline station to the diner.

The Commissioner found for the petitioner upon all of the issues. He found that the employer had knowledge of the accident. This finding is supported by the evidence.

The Commissioner made this finding:

> "We find that petitioner went to Jimmy's Filling Station No. 1 to sell pies to Mr. Brown and that under the job arrangement it was permissible for him to do so and was in the interest of his employer as well as in his own interest for the additional commission he would receive. It follows that this action was in the course of his employment."

This finding is supported by the evidence.

Quoting further from the decision, the Commissioner said:

> "He (the petitioner) made a return trip to the truck to get the desired merchandise, came back to deliver it at the station, and was paid for it. He then went to the diner with his wife, who had come to the station with him and waited while he returned to get the pies. It was nearly 6:00 P.M. and he had yet to drive back to Portland. To us it was a very natural thing for him to do to get refreshment before finishing his trip. Mr. Pavlakis (the employer) stated that he could eat when and where he wanted to although the company did not pay for his meals. - - - - If petitioner had gone some distance from his course and been injured while off the course, rather than to a place immediately adjacent to the filling station where he sold his goods it might constitute an unreasonable departure or deviation which gave rise to an ex-

posure not contemplated in the course of his employment, but such is not the case here. Taking refreshment in this case did not take employee out of the course of his employment.

"Moreover, even if taking refreshment as this petitioner did is to be considered as a deviation from the course of employment, when he had left the diner and started back to his truck he was again in the course of his employment and any deviation had ended. Certainly this is true when he had arrived within 2 or 3 feet of the truck where he was struck. He had to get back to the truck from the filling station and it cannot be said that the point of impact was any different than it would have been had he come from the station instead of from the diner. To hold that the time he was returning was a few minutes later than it would have been had he gone directly back from the station and thus that he was not in the course of his employment would not be a liberal interpretation of the provisions of the Act. He had no more calls to make but had to return to Portland and that trip was part of his employment.

"The nature of petitioner's work required that he use the highway and thus the case falls within the exceptions to the general rule that accidents on a public highway are not compensable.

"We believe, and therefore find, that the accident arose out of and in the course of employment."

"This court has held that the great weight of authority sustains the view that the words 'arising out of' mean that there must be some casual connection between the conditions under which the employee worked and the injury which he received; and that the words 'in the course of' refer to time, place and circumstances under which the accident occurs. *Westman's Case,* 118 Me. 133. In other words, it must have been due to a risk to which the deceased was exposed while employed and because employed by the employer. Both ele-

ments must appear, and in the hearing before the commission the burden of proof rests upon the claimant to prove the facts necessary to establish a right to compensation under the Workmen's Compensation Act. *Mailman's Case,* 118 Me. 172." *Taylor's Case,* 126 Me. 450, 451, 139 A. 478.

"To arise out of the employment the injury must have been due to risk of the employment. To occur in the course of the employment the injury must have been received while the employee was carrying on the work which he was called upon to perform, or doing some act incidental thereto. The accident may occur in the course of the employment although it may not arise out of it. The compensation depends on the fact that the accident not only takes place in the course of the employment, but also that it arises out of the employment. *John D. Wheeler's Case,* 131 Me. 91. There must be some casual connection between the conditions under which the employee worked and the injury which he received. If the injury is sustained by reason of some cause that has no relation to the employment it does not arise out of it. *Gouch's Case,* 128 Me. 86; *Mailman's Case,* 118 Me. 172; *Saucier's Case,* 122 Me. 325. The accident to be compensable must occur within the period of the employment at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties, or engaged in doing something incidental thereto." *Boyce's Case,* 146 Me. 335, 341, 81 A. (2nd) 670.

"However loath courts may have been to class a hazard of the streets, common to all users thereof, as producing compensable injury if accident thereon occur to an employee, the consensus of a great majority of the State courts is that where the employment requires the employee to travel on the highway, and accident causes injury to the latter when he is using the highway in pursuance of his employment, or in doing some act incidental to his employment, with the knowledge and approval of

his employer, such injury is compensable." *Kimball's Case,* 132 Me. 193, 195, 168 A. 871.

"An identifiable deviation from a business trip for personal reasons takes the employee out of the course of his employment until he returns to the route of the business trip, unless the deviation is so small as to be disregarded as insubstantial. In some jurisdictions, the course of employment is deemed resumed if, having completed his personal errand but without having regained the main business route, the employee at the time of the accident was proceeding in the direction of his business destination." Larson's Workmen's Compensation Law, Volume 1, § 1900.

"Whether a deviation by a traveling employee from his usual or prescribed route, schedule, or mode of travel constitutes such a departure from the scope or course of his employment as to deprive him of the right to compensation for an injury sustained during or as the result of such deviation depends ordinarily upon the extent, purpose, or effect thereof. An unauthorized deviation may preclude recovery of compensation for any injury caused by an added peril to which the employee is thereby exposed during the period of the deviation, but the compensability of an injury occurring after the deviation has ended and the employee is again in the course of his employment is not ordinarily affected thereby." 58 Am. Jur. 734, § 227. Workmen's Compensation.

"An employee does not necessarily depart from the course of his employment by reason of a slight deviation from his work or from the locus of his employment, for some purpose personal to himself, so as thereby to deprive him or his dependents of the right to compensation for an injury sustained during or as the result of such deviation. A deviation from his work or the locus of his employment to serve some purpose of his own may, however, under some circumstances, take a workman out of the course of his employment. In some cases, where a

> servant had deviated from his employment to go on a personal errand, but has accomplished his purpose, and has, at the time an accident occurs, started back toward the place where he is to do some act or perform some service for his employer, the injury has been held to have arisen out of and in the course of the employment, notwithstanding such deviation. In other cases, however, compensation has been denied. 58 Am. Jur. 744, § 240. Workmen's Compensation.

See also Annotation in 76 A. L. R. 357, where it is indicated by numerous decisions that it is not every slight deviation from an employee's duty that would deprive him or his dependents of their right to compensation; and that the question whether an act of an employee arose out of and in the course of the employment depends ultimately upon the facts and circumstances of each case.

In the case at bar, if there was a deviation, it did not increase the perils to which the employee was exposed; and, moreover, the Commission was correct in finding that if a deviation had occurred, that when the employee started from the diner to return to his truck, he was again in the course of his employment.

The Legislature has imposed a liberal construction rule. Section 30, Chapter 31, R. S., 1954.

So many times has this court said that in the absence of fraud, the findings of the Industrial Accident Commission, upon questions of fact, are final if supported by some competent evidence and reasonable inferences therefrom, that citation of decisions is unnecessary.

The findings of fact by the Commissioner are supported by the evidence and his legal conclusions are sound.

Appeal Dismissed.
Decree Below Affirmed.
Allowance of $250 ordered to petitioner for expenses of appeal.

VERNON S. BROWN, PETR.
vs.
STATE OF MAINE

Aroostook. Opinion, January 23, 1958.

Forma Pauperis. Coram Nobis.

That petitioner is a pauper within the intent of *in forma pauperis* proceedings is plainly a preliminary and indispensable fact.

Whether *in forma pauperis* available *in coram nobis* not decided.

Whether *coram nobis* available after sentence completed not decided.

ON EXCEPTIONS.

This is a petition to proceed in *forma pauperis* in *coram nobis.* The case is before the Law Court upon exceptions to the dismissal of the action for "want of authority." Case remanded (to determine whether petitioner is a pauper).

Roberts & Roberts, for plaintiff.

Roger A. Putnam, for State.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

PER CURIAM.

This case is before us on exceptions to the denial of a petition to proceed in *forma pauperis* in connection with an application for a writ of error *coram nobis.* The petitioner alleged that he is "a pauper and without funds, or other means, with which to pay the costs of this action for remedy, give security therefor, or obtain the assistance of legal counsel." In the *coram nobis* application it is alleged that the petitioner on a plea of *nolo contendere* was found guilty of attempt to murder and sentenced to imprisonment "of

not less than two and one-half years nor more than five years at hard labor in the State prison."

The presiding justice at the April Term 1956 of the Aroostook County Superior Court denied the petition "for want of authority." In so doing we assume the justice found as a fact that the petitioner was a pauper and in need of assistance as alleged, and based his ruling upon lack of authority to grant a request to proceed in *forma pauperis* in a matter of this nature.

The issue raised by the exceptions therefore is substantially whether a petitioner may proceed in *forma pauperis* in a *coram nobis* proceeding arising from a criminal action.

At our December Term 1957 we were advised in open court (1) that the sentence which the petitioner was serving at the time his request was denied at the April Term 1956 had terminated, and (2) that the petitioner was believed to be gainfully employed and no longer a pauper or in need of assistance.

That the petitioner is a pauper within the intent of *in forma pauperis* proceedings is plainly a preliminary and indispensable fact. Without such a finding there is no reason to consider in this or any other type of proceeding whether counsel or other assistance should be supplied by the State without expense to the petitioner.

In the light of the sharp change in the circumstances of the petitioner, we think it proper and just that the cause be remanded to the Superior Court for determination, after hearing, by the justice who entered the judgment before us, whether the petitioner is now a pauper within the intent of *in forma pauperis* proceedings. The finding of the justice when certified by the clerk of the Superior Court to the clerk of the Law Court will be incorporated by the latter in the record before us.

In taking this action there are two questions on which we neither express nor intimate any opinion whatsoever. First, we have not considered whether "in forma pauperis" procedure is available in *coram nobis*. This is the limited issue raised by the exceptions. Second, we have not considered whether *coram nobis* is a procedure available to the petitioner in light of the completion of his sentence.

Remanded for action in accordance with opinion.

EVERETT H. ADAMS
vs.
HARRY ARTUS

Piscataquis. Opinion, January 23, 1958

New Trial. Damages.

A verdict will not be set aside unless it appears to be clearly wrong.

It is within the province of the jury to assess punitive damages in cases of criminal conversation and alienation of affections, if they believe the situation serious enough.

ON MOTION FOR NEW TRIAL.

This is an action for alienation of affections and criminal conversation. The case is before the Law Court upon motion for new trial. Motion denied.

Louis Villani,
John L. Easton, for plaintiff.

Judson C. Gerrish,
W. R. Atherton, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

BELIVEAU, J. On motion for a new trial. The writ in this action contained two counts, one alleging alienation of affection and the other criminal conversation. The jury found for the plaintiff and assessed damages in the amount of five thousand dollars.

It is admitted that the plaintiff Everett H. Adams and his former wife, Maxine V. Adams, were husband and wife and were living together as such up to September 1, 1955, at Milo in this State. They were divorced in 1955 on the husband's petition.

The rule is well established in this State that the verdict will not be set aside unless it appears to be clearly wrong.

The evidence submitted to the jury, by both sides, during the trial, raised a question of fact and made it essentially a jury question. The jury having accepted the plaintiff's version of what occurred, based on testimony heard by them, and proper and reasonable inferences to be drawn from that testimony, their verdict should not be disturbed. There is ample evidence to justify the jury's verdict.

Before the separation of the plaintiff and his former wife, and for many years prior thereto, the defendant, a widower, visited the home of the plaintiff frequently. Many of these visits, according to the testimony of some of the neighbors, occurred in the evening while the plaintiff was away at work. These neighbors further testified that the house, on many of these occasions, was in absolute darkness; that the defendant was seen going upstairs where the bedrooms were situated and that several times they were seen embracing each other. There is also testimony that he remained over night at a camp occupied by the plaintiff's former wife, alone with her and a young child; that the former wife accompanied the defendant to Boston and other places on trips which at times were of several days' duration. In Boston

they were guests at the same hotel, sometimes for several nights.

It further appears, in the testimony, and admitted by the defendant, that he bought presents, some of these costly, and that he had a safe deposit box in Bangor in their joint names. The defendant admits to many of the visits to the plaintiff's home, trips alone with the plaintiff's former wife but maintained that nothing of an improper nature ever occurred. Defendant, older than the former wife, testified he had known her since she was a young girl and his affection for her was no more than a father would have for his daughter.

It is difficult from the evidence in the case to expect the jury, familiar with human weaknesses, to believe this story.

There was sufficient evidence to support both counts. The jury could well have been satisfied not only that the defendant alienated the affections of the plaintiff's wife but that they were also guilty of improper conduct.

It was within the province of the jury to assess, in addition to the actual damages, punitive or exemplary damages, if they believed the situation was serious enough.

Motion denied.

HENRY R. HINCKLEY
D/B/A HENRY R. HINCKLEY & COMPANY
vs.
ERNEST H. JOHNSON, STATE TAX ASSESSOR

Hancock. Opinion, January 31, 1958

Taxation. Sales. Conditional Sales. Installments. Construction Contracts.

Where a contract for the construction of a yawl provides for the sale of materials supplied thereunder and title to the materials by the clear intendment of the contract passes to the buyer as they are appropriated to the job the State cannot levy a Sales and Use Tax upon the completed yawl under Sec. 2 relating to Conditional Sales and Installment Lease Sales. R. S., 1954, Chap. 17, Sec. 2.

ON REPORT.

This is an appeal from a sales tax assessment before the Law Court upon report. Case remanded.

Hutchinson, Pierce, Atwood & Allen, for plaintiff.

Ralph W. Farris, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN, DUBORD, JJ.

WEBBER, J. This appeal from the assessment of a sales tax is reported to the Law Court on an agreed statement of fact. Hinckley is in the business of building and selling boats and accessories. On August 25, 1954 he entered into a written contract with one Haskell for the construction of a 73 foot yawl. As the express provisions of the contract seem determinative of the issues here presented, we quote it in full:

"HENRY R. HINCKLEY & COMPANY

Southwest Harbor, Maine

AGREEMENT between Harry G. Haskell, Jr. hereinafter called 'BUYER' and Henry R. Hinckley of Southwest Harbor, Me. hereinafter called 'BUILDER'.

1. The Builder will provide all the material and perform all the work for the construction of a 73′ yawl according to plan number prepared by Sparkman & Stephens and the specifications prepared by Sparkman & Stephens and attached hereto.

2. The Builder agrees that the performance of this contract on his part shall be given its proper place in his line of production prior to Construction Contracts bearing subsequent dates hereto; that the work shall be completed and delivered to the Buyer on or before April 1, 1956, in the water at Southwest Harbor, Maine, completely rigged and equipped pursuant to said specifications in a workman-like manner, provided, however, that the contract of the Builder is subject to delays in the prosecution or completion resulting, directly or indirectly from fire, lightning, earthquakes, storm, strike, walkout, failure to procure materials or labor, orders or restrictions from any governmental authority or from any other cause beyond the control of the Builder, and in the event of such delay or delays, the time herein named for the completion of the work shall be extended for a period equivalent to the time lost by reason thereof.

3. In consideration of this agreement to be performed by the Builder, the Buyer agrees to pay in current funds as hereinafter provided. The actual cost of labor is to be billed at the actual cost plus 87%. Material will be billed at direct cost plus 10% plus the cost of transportation.

4. The Buyer agrees to pay for the labor and material going into the yacht on a monthly schedule.

5. Title to said yacht shall be and remain at all times in the Buyer, subject, however, to any lien of the Builder for sums due thereon.

6. At all times during the construction of said yacht, until delivery, the Builder shall arrange for insurance coverage, of all kinds, hereinafter stipulated, on said yacht and parts thereof and material intended therefor insofar as owned by the Builder. The expenses of the insurance shall be paid for by the Buyer. The insurance coverage shall provide indemnity against all damage by fire, launching, water or injury of any kind incidental to the construction, launching of said vessel in an amount equal at all times to the cost for the benefit of the Buyer and the Builder as their interests may appear.

IN WITNESS WHEREOF, the parties have set their hands and seals this 25th day of October, 1954.

M. M. Hartman Witness for Buyer	H. G. Haskell Buyer
H. Wesley Reed Witness for the Builder	Henry R. Hinckley Builder"

At the time of this transaction R. S., 1954, Chap. 17 imposed a sales tax at the rate of 2% on the value of all tangible personal property sold at retail in this state. Sec. 2 of the Act defined "sale" to mean "any transfer, exchange or barter, in any manner or by any means whatsoever, for a consideration in the regular course of business." The Act, after defining the "sale price" provided: "* * * nor shall 'sale price' include the price received for labor or services used in installing or applying or repairing the property sold, if separately charged or stated." The sales tax was paid in full on the materials entering into the construction. The only issue here is whether or not a tax may be legally imposed on the sale of the completed yacht.

The terms of the contract are plain and unambiguous. The builder was to provide the materials and perform the work necessary to the "construction" of a yacht. Labor and materials were to be billed separately and the price was determined for each. The builder was to be paid each month for the labor and materials furnished. Title was to remain in the buyer at all times. In other words, title to the materials by the clear intendment of the contract passed to the buyer as they were appropriated to the job. The builder retained the right to the lien provided by R. S., 1954, Chap. 178, Sec. 13, which is enforceable by attachment. In the case of the builder the retention of the lien is clearly inconsistent with any theory that he retained title. The insurance clause, read in context, recognized the right and title of the buyer and his insurable interest in the partially completed yacht and likewise recognized the interest of the builder in the "materials intended therefor insofar as owned by the Builder."

One has only to read the agreement to discover that here was no contract for the sale of a completed yacht. There was a sale, to be sure, but it was the sale of materials supplied under a contract for construction. The tax on that sale has been paid. The State can claim no more.

The Sales and Use Tax Law provided in part in Sec. 2 thereof: "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." The appellee contends that this was such a "conditional sale" with title retained by the builder until delivery of the yacht and its acceptance by the buyer. The contract having quite explicitly provided the contrary, we cannot see that the argument is tenable.

It seems unnecessary to discuss in detail any of the authorities cited to us, first because they are not decisive of the

issue presented here, and secondly because none of them dealt with a contract like the one before us. We do, however, find numerous expressions by the several courts which clearly indicate that their construction of the contract before us would not differ from ours. The parties could have, if they had so desired, contracted for the sale of a completed yacht with title retained by the builder until delivery or until final payment. They simply did not do so in this case.

The assessment in final form was as follows:

"Balance of sales tax claimed due on Haskell yawl	$3,741.49
Interest claimed thereon	130 95
Miscellaneous items of sales tax	857 61
Miscellaneous use tax items	124 97
Interest on miscellaneous items	34 30
Total	$4,889.32"

The first two items which total $3872.44 must be disallowed. The other three items are not involved in the issues tendered in this case and are admitted by the appellant to be due. The parties have stipulated the elimination of penalties and costs. The appellee is entitled to judgment for $1016.88 with additional interest as provided by R. S., 1954, Chap. 17, Sec. 15, but without costs.

Case remanded to the Superior Court for a decree in accordance with this opinion.

IN MEMORIAM

SERVICES AND EXERCISES

BEFORE THE SUPREME JUDICIAL COURT

AT BANGOR, DECEMBER 12, 1957

IN MEMORY OF

HONORABLE RAYMOND FELLOWS

Late Chief Justice of the Supreme Judicial Court

Born October 17, 1885 Died September 3, 1957

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

PRAYER

John E. Trowbridge, Unitarian Church, Bangor, Maine.

O Eternal, in whose depths every event of life is recorded, from the falling of the sparrow to the doings of men, we come this day remembering Raymond Fellows.

We rejoice in the life we have shared with him, both in those times of joy and in the times of sorrow. We are thankful for those services we have been able to render him, and those kindnesses, known and unknown, which he has shown toward us.

We come rejoicing in strength, in courage which our hearts are open to find in remembrance of him. We come rejoicing in the lives of all men and women who have made this world a more beautiful, a happier place in which to live.

To Thee always may there be honor and the glory, forever, AMEN.

MR. ALBERT C. BLANCHARD

President Penobscot County Bar Association

May it please the Court:

It now becomes my duty as President of the Penobscot County Bar Association to formally call your attention to the decease on September 3, 1957, of the Honorable Raymond Fellows of Bangor, formerly Chief Justice of the Supreme Judicial Court of Maine.

For many years Judge Fellows was an active and respected member of our county bar association, and we will long remember him as a friend, as an able lawyer, and as a conscientious, impartial, and kindly Judge who well earned and kept the respect of all of us who had the privilege to know him and to work with him.

I have been requested at this time to ask the Court to receive resolutions prepared by our Committee on Resolutions, and to permit attorneys in attendance to submit remarks to the Court in tribute to their feeling for Judge Fellows and in tribute to his life, his attainment, and his memory. And with your permission, Mr. George F. Peabody, a member of our Committee on Resolutions, will now address the Court.

RESOLUTIONS OF PENOBSCOT COUNTY BAR ASSOCIATION

GEORGE F. PEABODY, ESQ.

May it please the Court:

The Penobscot County Bar Association, through its Committee appointed for that purpose, desires to present to this Honorable Court resolutions in memory of Raymond Fellows, late Chief Justice of this Court.

These are busy times which find people in all stations of life hastening about in the performance of their duties, be they of greater or lesser importance. Unfortunately under such circumstances it is not often that time is either available or taken to reflect properly upon the accomplishments even of those who have done much to assist in the conduct of our affairs. Indeed we are all too inclined to take such efforts for granted and to assume that a deed well done has only been performed in the way in which it should be performed and without consideration for the careful planning, the thought and the courage that are invariable essentials to the successful accomplishment of almost every such deed.

In times such as these, it is particularly pleasing that the Supreme Judicial Court of the State of Maine finds it both possible and fitting to interrupt its deliberations and to meet in Bangor this day in order to reflect for a moment on the life of one who has contributed so much to its dignity, reputation and accomplishment.

The problems confronting the members of our Courts are many. Conflicting arguments are earnestly presented by counsel for opposing parties. The responsibilities of decision are heavy. The way in which those responsibilities are met quickly demonstrates the quality of the individual both as to character and ability. It is clearly evident that Raymond Fellows has passed each test successfully, for it has been well said that the highest reward that can come to a lawyer is the esteem of his professional brethren.

There are others who will follow me who have had the benefit of many more years of practice before the Bar than I and who have both worked with Raymond Fellows as a practicing attorney and before him as one of the Justices of our Courts. The esteem in which they hold him is and has been self-evident. I have had the privilege of appearing before him on many occasions. The still younger members of the Bar have also had that privilege and, of course, the

benefit of his counsel as well. All of us have found him courteous, kindly, sincere and scholarly. He has earned the esteem of his brethren.

A brief biographical sketch of his career seems in order at this time:

> Raymond Fellows was born October 17, 1885, at Bucksport, Maine, the son of Oscar F. and Eva F. Fellows. He attended the Eastern Maine Conference Seminary in Bucksport, later the University of Maine and the University of Maine College of Law. From the University he received his Bachelor of Arts degree in 1908, a Master of Arts degree in 1926 and an honorary degree of Doctor of Laws in 1946.
>
> Passing the Maine State Bar examination with a rank of 98 he was admitted to the Bar in Penobscot County on August 10, 1909 and commenced the practice of law in Bangor, Maine, in partnership with his distinguished father Oscar F. Fellows under the firm name of Fellows & Fellows. Later his brother, the late Congressman Frank Fellows, joined the partnership which became one of the leading law firms in the State.
>
> He served as Attorney General for the State of Maine from 1925 to 1929, in which office he prosecuted twenty-five murder cases and argued several causes before the Supreme Court of the United States.
>
> He was appointed a Justice of the Superior Court December 29, 1939, by the then Governor Lewis O. Barrows, and served on that Court until his appointment to the Supreme Judicial Court on May 1, 1946, by the then Governor Horace A. Hildreth. He was appointed Chief Justice of the

Court on April 7, 1954, by then Governor Burton M. Cross, serving as such until his resignation from the Court on September 15, 1956.

He served as a Trustee of the Bangor State Hospital from 1909 to 1912.

He served as President of the Bangor Historical Society from 1933 until his death. In this connection he had a large and valuable collection of rare books, documents, autographs and correspondence which had been owned or authored by famous men and women in history and which included hand written letters or documents signed by all of the Presidents and Vice-Presidents of the United States.

Subsequent to his resignation from the Supreme Judicial Court he was appointed by Governor Edmund S. Muskie in September, 1956, as Chairman of the newly created Maine Citizen's Committee on the Survey of State Government. He served actively as Chairman of this Committee and as Counsel for the newly formed Bangor Water District until his death on September 3, 1957.

He was married to Madge Gilmore February 11, 1909, and to them were born three children, a son, Frank G. Fellows, Esq., of Bucksport, and two daughters now married, Rosalie Randall of Boston, Massachusetts, and Margaret F. White of Bangor, Maine, all of whom survive him as do six grandchildren, viz.: Judith and Ralph White, and Patricia, Frances, Martha and Ann Fellows.

He was a life long member of the Unitarian Church.

Such a summary is by no means adequate but it discloses a life full both of action and accomplishment. More intimate details will be revealed by those who follow me in these exercises.

And now, in behalf of the Penobscot County Bar Association it is my privilege to present the following resolutions:

RESOLUTIONS

RESOLVED: that in the death of Raymond Fellows, late Chief Justice of the Supreme Judicial Court of Maine, his community and his state have sustained a deep and grievous loss; the loss of a great jurist and the loss of one of its most distinguished sons.

RESOLVED: that as an accomplished and resourceful counsellor and advocate, as a learned, impartial and upright judge, both the Bench and the Bar of our state will long remember and be inspired by his good works and his contribution to the cause and concept of human justice.

RESOLVED: that the members of the Penobscot Bar feel deeply the loss of a true friend, — one who by his never failing patience, kindness and fairness won our deepest affection and respect and who by the very manner of his life and its well deserved rewards brought to all of us great pride; that we therefore wish to render our tribute to his memory.

RESOLVED: that our deepest sympathy is extended to the members of his family whose loss and sorrow is greater than we can know.

RESOLVED: that these resolutions be presented to this Court with the request that they be entered upon its per-

manent records, and that a copy thereof be sent to his widow in token of our respect and sympathy.

Committee on Resolutions
For the Penobscot County Bar Association:

James M. Gillin
Lawrence V. Jones
Edward J. Conquest
George F. Peabody
Ballard F. Keith
James E. Mitchell
Albert C. Blanchard

Remarks of James E. Mitchell, Esq.

May it please the Court:

De mortuis nihil nisi bonum.

Though I knew Raymond Fellows for over thirty years I believe I can speak objectively of him. Others, some now here, may speak with the intimacy which comes from very close personal association; I cannot. During his active practice at the Bar, in nearly every case in which we had a mutual interest we were adversaries. And yet the first jury case I tried, not long out of law school, came to me through his suggestion and kindness. He was then early in office as Attorney General of this State and, as Attorney General and because the State had an interest in the trial, he sat with me. I did not fully realize how much I was depending upon his quiet presence until some emergency called him away, and I was left with the full weight and responsibility of the trial. His earlier assurance and encouragement, however, sustained me. I saw much of him in subsequent years and appeared before him on many occasions after his ap-

pointment to the Superior and later to the Supreme Courts of Maine.

He was always a kindly gentleman. He was slow to anger, so slow that I cannot personally recall any expression of real anger on his part. He could quiet discordant voices. He was not quick to condemn, either as a lawyer or as a judge, and such condemnation as I ever observed of him was made up of mild but effective admonition. He was guileless, or if he possessed any of a lawyer's guile it was gentle and often transparent. But he was not artless. He lived in no ivory tower. He knew what he was doing, better than most lawyers know.

I recall when he was named to the Superior Court and at a dinner then given in his honor by the Penobscot Bar he remarked: "If I err as a judge I shall err on the human side." By that I think he unconsciously expressed his warmth of feeling for all men and his conviction that the law was made for and by fallible human beings. No doubt he had a share of the frailty which besets us all. He was a man, however, who seemed to be singularly free of error and evil. He was not vain, as lawyers can be. His judicial decisions and opinions did not bear a personal impress as if to record the spokesman rather than the subject. They have a purity and conciseness about them which mark the man far more than he would ever pretend. He had no pride of opinion. As a judge he was thoughtful, considerate and attentive to the matter and to the advocates before him. We are greatly in his debt because of his efforts over many years in collecting and recording important Maine historical items.

He was possessed of much sweetness, great charm. We lawyers at this his home Bar, and in this what I am sure he considered his home court room, can see him now drawing from inside his coat and gently reading the sheets of irregular verse which more than once launched a new judge upon

his peregrinations; and in none of his verse or speech was there ever a word of hurt or blemish. He could not wound another. At a meeting of the State Bar Association a few years ago Judge Webber exclaimed of him: "He loves everybody!" He did have within him a well of affection which flowed to those who did and sometimes to those who did not merit sharing therein. He loved the law and especially lawyers.

He was simple, polite, unostentatious. He had a quiet, and often deceptive, assuredness. He had courage, fortitude, and he had need of these. He was not cynical. He did not despair nor have within him the seeds of destruction. He was hopeful and had a deep appreciation of the need we all have, each for the other.

And so on this occasion we must paraphrase the ancient Latin aphorism: Of this dear vanished man nothing but good can be spoken. To recount his virtues is a revelation. He was a good lawyer, a good judge, a good husband, a good father, a good man. No mortal could ask a finer epitaph.

JAMES E. MITCHELL

REMARKS OF JAMES M. GILLIN, ESQ.

May it please your Honors:

I first met Ray at the beginning of our lives in our childhood. My family had gone to visit with his at their picturesque home in Bucksport. There were many such visits betwixt the families in those bygone days.

I met Ray again in our young manhood at the Bar, and the boyhood acquaintance grew and developed into an intimate, enriching friendship for him and his beloved brother, Frank.

The life we knew in those early days was so simple, so peaceful, so secure. There was in it so much of serenity and gracious manner, so much of honor and dignity, so much of the truths and ideals and the traditions which had been handed down to us by the early ones. We lived to see that manner of life disappear from the face of the earth in the complexities and carelessness of the later years.

That was Ray's true background. He lived with and cherished those early truths and ideals and traditions til the end of his days.

From an illustrious father he inherited all his manly qualities, his intrepid heart, his unbounded energy, his zeal, and his courage. From a sweet and saintly mother he inherited all his tender virtues. His fine mind and his charming personality he had from both.

This was Ray's heritage, and I feel that he would have me say that over and beyond all of that, that inspiring background, that generous tradition, he had Madge—the sweetheart of his boyhood, the kind companion of his life. The abiding love they had, one for the other, their so complete togetherness in mind, in soul, and spirit enriched his life in God's own bounteous measure.

It was for her he strove and attained so worthwhile ends, his so richly-deserved honors, his great rewards — to lay them at her feet in grateful accolade, his maiden fair, like a knight of old.

To his friends he brought inspiration, and there are so many kindnesses of his gentle friendship. How true spake the poet of such as he! The greater portions of a good man's life are his little, nameless, unremembered acts of kindness and of love.

Life moved ever on, and I know that there will be other happy autumn evenings when we will forgather on the shores of his beloved Verona Island and gaze across the

placid beauty of the slumbering sea; 'neath the glories of the sunset, mysterious, profound; 'neath God's canopy of early, sparkling stars and new-born crescent moon; and remember him again, and say: " I once knew a man like that. He stayed here for a little while and then he went away. How good a man; how just!"

And may the beneficent God show to the loved ones that he left behind, the goodness and the mercy that shall follow them to the end of their days, and how fitting it is here today for us who know and loved him so well, together to tender our last and fondest farewell — from the bottom of our sorrowful hearts.

REMARKS OF CLARENCE H. CROSBY, ESQ., OF THE PENOBSCOT BAR, IN BEHALF OF THE COMMITTEE ON MEMORIALS OF THE MAINE STATE BAR ASSOCIATION

May it please the Court:

The character, mind and personality of Raymond Fellows had many facets. Others have spoken today of him as a lawyer, a judge and a citizen. I wish to speak briefly of him as a man and a friend, informally and intimately as he would wish it. His modesty was such that he would deprecate a formal and solemn ceremony such as this. "Don't do that," he would say. "Instead, let's all go down to Verona Island for some lab work on the chemistry of a Maine coast fish chowder, with the usual preliminary concomitants that 'maketh glad the heart of Man.' " As a host he was without a peer and was supremely happy when moving among a cheerful group of friends dropping a kind word here, a homely and amusing anecdote there, and always an inquiry for an absent or sick associate. He loved his friends and he liked people. His recipe for a fish chowder was as basic

and immutable as the Rules of Court for taking a case up to the Law Court. The culinary frills of city chefs were anathema; his list of ingredients was honest and simple—salt pork scraps, onions, potatoes, fresh haddock, raw milk, butter and a generous cap of pilot bread. "And don't try to rush it!" he would admonish. The Penobscot Bar can agree that his coffee could walk under its own power. Verona Island was his haven of escape from the hard work and tensions of his office. He loved to putter around there, checking on the pile of fireplace wood, making minor repairs and casting an affectionate eye over his domain.

His wit and humor were a fundamental part of his make-up. When in an unguarded moment he once appointed your orator a Master in Chancery he suggested the re-reading of Dickens' *Bleak House* with particular reference to the famous case of *Jarndyce* vs. *Jarndyce* and the intricate footwork of Mr. Tulkinghorn in the area of equity pleadings and procedure.

Ray Fellows was and is truly a part of the Peters-Pattangall saga, and the Maine Bar will be forever grateful to him and to Brother Conquest for preserving for posterity the life, times and eclectic anecdotes of the inimitable "Patt." As a word-smith and a composer of blank verse on the contemporary scene Ray ranks with Holman Day if not with Chaucer. He got everything into his verses from the sublime to the ridiculous, but never a barb or an unkind word. It is hoped that his literary executor will see that they are preserved.

His patience and kindness to the younger lawyers seeking his advice will always be remembered. He was a true friend and treasured his countless friendships. He will always live in the memories of his family, his associates and acquaintances - - - a true immortality. The Maine State Bar Association is proud that Raymond Fellows was one of its

most distinguished members, and recalls to you a verse of Shakespeare — so old that it is new again:

> "His life was gentle, and the elements
> So mix't in him that Nature might stand up
> And say to all the world 'This was a man!' "

CLARENCE H. CROSBY

HONORABLE ABRAHAM M. RUDMAN,

Justice Superior Court

Mr. Chief Justice Williamson, Justices of the Supreme and Superior Courts, Brethren of the Bar:

It is an honor and a privilege for me to speak for the Superior Court at this Memorial Service and I am grateful for the opportunity to pay tribute to the memory of one who was my intimate friend and for whom I had a sincere affection.

The sorrow that his death brings to me personally, and the joy that is mine in the rich recollection of his friendship and of his brilliant and delightful companionship, at times seems to me to be strangely variant; and yet, upon reflection, I realize that their relationship is orderly and natural enough. The loss, the end of things we prize most highly must always be to us a source of sorrow—must always leave us with a heavy sense of sadness and regret.

I shall remember him for his wisdom, for his great gift of expression, and for the lavish manner in which he gave of his talents. No person who ever knew him can think of his passing without experiencing the sense of loss which has come to all of us.

Judge Fellows was a rare individual. He was quiet of manner, dignified, and bore a certain air of serenity and calm. His strong and kindly face reflected his intellectual supremacy and the fine attributes of heart. His modesty, his simplicity and graciousness of manner never carried with them any suggestion of weakness but rather seemed always to reflect a conscious strength and rectitude of purpose. His life was in accordance with the divine plan. It was a finished life. It had a lofty purpose and that purpose was fulfilled. Therefore, as has been said, the world is better because such a man as Raymond Fellows lived.

He was a lover of books, which he regarded as personal friends, and his library was his favorite haunt. Not only was he learned in the law but he knew the classics, he knew the Scriptures and frequently and appropriately quoted from the same. He cared little for the modern. The old and seasoned in literature, and especially historical subjects, were his intimates and these he read and reread with ever increasing delight.

Justice Fellows spoke for the Superior Court at the memorial exercises held for the late Chief Justice Dunn before the Law Court at Augusta on March 14, 1941. His words I borrow as more truly descriptive of himself than any that I might utter. He "was blessed with a phenomenal memory. Not only did he remember *what,* but he remembered *where.* He was willing at all times to share his knowledge and he was never too busy to answer." His door was always open, especially to the young attorneys who needed counsel, and his genuine friendliness and desire to be of assistance encouraged them to seek his counsel.

"He believed that the court should be loyal as proclaimed by constitution, by statute, and by long accepted judicial opinion. He regarded the constitution as the supreme guide —but it was the constitution as construed by a Marshall."

He loved the society of his fellow lawyers. He frequently sponsored and encouraged social gatherings of Bench and Bar, entering most heartily into the pleasures of conversation and the exchange of anecdotes.

He loved all that was brave and beautiful. He detested and avoided all that bore the stigma of sham and sophistry.

Judge Fellows was never known to express an unjust, an unkind or uncharitable thought respecting any person within the circle of his acquaintance. He had no envy of another's fame and was always generous in his commendation of the ability and learning of the members at the Bar and his associates on the Bench.

For the judicial office he held the highest respect. No one knew or appreciated better than he its important functions and its strict demands or placed a higher estimate upon all the dignity and honor that attach to it.

It was the first Tuesday of January 1940 when Justice Fellows began his service on the Superior Court by presiding at the January Term in Penobscot County. He brought to the Bench the rich experience of thirty years of practice of the law and the trial of causes, commenced with his distinguished father, Oscar F. Fellows, and later joined by his brother, the late Congressman Frank Fellows.

In the trial of causes before the jury, he never forgot that he was presiding over a tribunal in which the dearest interests of the people were constantly at stake, and all the faculties of his keen and cultivated intellect, the ripe fruits of his valuable experience and the best qualities of an honest and kindly heart were constantly employed in the furtherance of justice.

At hearings held before him, even under trying circumstances, he displayed the patience of Job and the wisdom of Solomon, and always gave close attention to the arguments

of counsel. Then he had the ability to cut through to the very heart of the matter, revealing the vital issues involved. And the decision which followed was not made until the authorities and precedents had been examined and all aspects of the case had been fully considered.

He was an admired and respected colleague of the Superior Court.

After having served with distinction as a Justice of the Superior Court for seven years he was appointed as Associate Justice to the Supreme Judicial Court on May 1, 1946, being advanced to the position of its Chief Justice on April 7, 1954. His written opinions began with the case of *Hogue, Admx.* v. *Roberge* reported in 142 Me. 89, written within six weeks of his appointment, and ended with *State* v. *Arsenault,* 152 Me. 121, a total of more than one hundred opinions. They are expressed in language that is clear and accurate. Their reasoning, convincing and compelling, the product of a well trained mind. They constitute a most valuable and lasting contribution to the jurisprudence of our State and reflect his legal ability and industry, and stand as a monument to his memory. His opinions are the equal of the great jurists of the Nation and will continue to light the way of truth and justice for generations to come.

He was a great man. His memory will long be held dear by those who knew him and will be kept alive as splendid tradition by those who succeed him. In the history of the State his name will be written with those of its great lawyers and judges. His life sheds lustre upon the administration of justice and will be an inspiration for the Bench and Bar as long as this is a government by laws and not by men.

There are five present members of the Superior Court who served under Chief Justice Fellows. Each of us has benefited by his knowledge and experience in solving the day to day problems which arise in the functions of the Court.

He did not always have the immediate answer but his ready word of encouragement was ever reassuring to us all.

In speaking for the Superior Court I felt it would truly be more representative if I was able to incorporate in my remarks the comments of the other Justices, and I have their comments.

Our senior Justice, The Honorable Harold C. Marden, makes this observation:

> "To the countless instances of man's inhumanity to man Judge Raymond Fellows was never a party. A living exponent of justice tempered with mercy and evidenced by a quality of kindness known and deeply appreciated by all who were privileged to know him."

Mr. Justice Weatherbee has this to say of his late friend and neighbor:

> "I believe that Chief Justice Fellows had, outside of his great love for his family, three passionate interests — the law (which is to say, justice), history, and his fellow man. He never considered either of these three as a separate study, and to think of law was to him to reflect upon many things of many times.
>
> "He understood the economic, social, moral and political forces that influenced our history, and he knew the men and women who had lived before his time as well as he knew his contemporaries. He appreciated the influence of the events of history and the personalities of people upon the development of the law, and he recognized the effect that the law had upon our history and the destinies of people. I think the characteristic smile that appeared on his face when he spoke of the law came from the pleasure of recognizing and considering the factors that had shaped the law.
>
> "Justice Fellows not only know what the law *was* — he also knew *why* it was as it was."

Mr. Justice Siddall adds these comments:

> "I have known the late Chief Justice Fellows for many years. I became particularly well acquainted with him during the time he served as a member of the Superior Court. The attorneys of York County always looked forward to his appearance there as the Presiding Justice of our Court. His gracious manner, his quiet dignity, and his friendly attitude toward counsel helped to make the trial of cases before him a pleasure."
>
> "After he became Chief Justice I often discussed with him many problems arising in the Superior Court with which I was from time to time plagued. He was never too busy to talk over these problems, and he was most helpful and courteous in assisting in their solution. Whenever the opportunity permitted, I dropped into his office for a chat, and always came away inspired by his words of wisdom."
>
> "He was unselfish in his devotion to duty, and his contribution to the high standard and prestige of the Courts of the State of Maine has been outstanding."

Mr. Justice Williams — makes these remarks:

> "It was soon after Justice Fellows was appointed to the Superior Court that I first met him. I well remember his kindly words of advice and encouragement at a time when my experience in court was very limited. He was appointed Chief Justice a few months after I began my duties as a Justice of the Superior Court. This gave me another chance to profit by his kindly help and encouragement. All who were associated with Chief Justice Fellows respected him as a Judge for his integrity and his knowledge of the law and loved him for his kindly, loving and friendly spirit."

In conclusion, I am sure the recollection of the rare qualities of Chief Justice Raymond Fellows—a devoted husband—an understanding father—a great public servant—will

forever remain as a hallowed memory in the hearts of us all.

ABRAHAM M. RUDMAN

HONORABLE EDWARD T. GIGNOUX,

United States District Judge for the District of Maine

Mr. Chief Justice Williamson and Honorable Justices of the Supreme Judicial Court:

It is an honor and a privilege for me, as United States District Judge for the District of Maine, to join with the Bench and the Bar of the State of Maine in this splendid tribute to the late Chief Justice Raymond Fellows, who retired from this Court on September 15, 1956 and died on September 3 of this year, after a distinguished career of almost fifty years as a member of the Bar of this State and twenty years on the Bench, including ten years as an Associate Justice and finally Chief Justice of this Court.

Others who have preceded me this afternoon have spoken fully of the personal warmth and humanity of Chief Justice Fellows, of his stature as a jurist, of his dedication to the service of his country and his state, and of his innumerable good deeds to his fellow men. As one of the younger members of the Bar who were privileged to appear before Chief Justice Fellows, I am happy personally to indorse the respect and affection with which he was regarded by all who knew him. A judge who studied the law and knew it thoroughly, a judge who was always patient and courteous to everyone and a judge whose judgments and decisions were fine and sound, Chief Justice Fellows certainly exemplified the best of those qualities of character and intellect which are to be found in a truly great jurist.

With the unveiling of the portrait which is to be presented to this Court this afternoon by the Penobscot County Bar Association, I know that we shall all feel again the warmth of the presence of Chief Justice Fellows with us in this Courtroom. And, as in the years ahead members of the Bar and the Bench of this State enter this Courtroom and view the portrait which will be thus displayed, it is comforting to know that, while the man can no longer be with us, the things which he has done in the exercise of his profession, in the service of his country and his state, and in the love of mankind will continue to live down through the ages.

And so, on behalf of your brethren on the Federal Bench, I am most happy to join in this tribute this afternoon.

HONORABLE EDWARD F. MERRILL,

Retired Chief Justice Supreme Judicial Court

May it please the Court:

It is indeed an honor and a privilege for me to take part in these Memorial Exercises, and to here record my tribute of affectionate respect to my former friend and associate upon the bench, the late Chief Justice Raymond Fellows.

Others have traced his career as a public spirited citizen, lawyer, Attorney-General, Justice of the Superior Court, Associate Justice and finally Chief Justice of the Supreme Judicial Court of the State of Maine.

I recognize the great service that he rendered the State of Maine in all of these positions of honor. The opinions which, speaking for the Court, he wrote, and which are found in Volumes 142 to 152 (both inclusive) of the Maine

Reports constitute a memorial to Chief Justice Fellows that will endure to the end of time. Sound in principle, graceful in expression, cogent in reasoning, and clear in meaning they cannot but serve, through the years to come, as helpful guides not only to the profession at large but also to his successors on the bench.

Those who have preceded me have well portrayed those phases of his life and service. With all that they have said I most heartily concur. However it is not of these things that I would speak. I would preferably on this occasion recall the warm friendly nature which was his, and the charm of his companionship. Cheerful and happy himself he radiated happiness on those about him.

The personal relationship existing between the Justices of the Supreme Judicial Court of this State is an intimate one. It is more akin to that of an harmonious family than any other relationship with which I am familiar.

Into this relationship our late Chief Justice entered wholeheartedly. His intimate acquaintance with the Justices of this Court long antedated his admission to the bar. His father's home and camp, like his own, were always open to members of the Bench and Bar. He grew up, matured and ripened in such an atmosphere and surroundings.

Of the twenty-two Chief Justices of the Supreme Judicial Court of this State, he was personally acquainted with all but six. His acquaintance with the Associate Justices was in proportion. He was steeped in the lore of the Court. His mind was a veritable storehouse of anecdotes concerning members of the bar and the Justices who had preceded him on the Bench. With this background, coupled with a broad knowledge of history and literature, Chief Justice Fellows was a most charming and delightful companion and conversationalist. Many of the humorous anecdotes relating to the bench and bar of Maine have been saved from oblivion due to the memory and keen sense of humor which he possessed.

All of these lovable qualities he brought with him to the judicial conference. His urbanity and good will served to ease situations that otherwise might have become tense. In all of my association with him I never knew him to lose his temper or speak the hasty or unkind word. His nature was gentle and his heart was great. His affection for his fellow members of the Court was equalled only by their affection for him.

His appointment to the Superior Court was acclaimed by all. His elevation to the Supreme Judicial Court was universally approved. His appointment as Chief Justice was richly deserved and in that office he found the culmination of his distinguished career as a public servant. His resignation, inevitable though we knew it to be, was regretted by Bench and Bar alike.

With his mental vigor neither dimmed by the years nor weakened by disease we hoped he would enjoy a "green old age" through many years to come. Fate decreed otherwise. The grim reaper came all too soon, our former friend and "Chief" is now at rest.

Maurice Maeterlinck, the Belgian author, in a delightful fantasy "The Blue Bird" advances the concept that what we know as death is but a peaceful sleep, from which those who have gone before awake whenever those who remain call them to mind. If that concept were true our departed "Chief" not only lives here today, but through the years to come will live again and again as we who are left, with kind remembrance, call him to mind.

In closing I will but repeat that which was said of Agricola by his biographer Tacitus.

"All that was amiable in him, all that was admirable, remains and will forever remain, being narrated in the annals of his country and embalmed in the remembrance of a grateful posterity."

BALLARD F. KEITH, ESQ.

May it please the Court:

We have all been deeply moved by the tributes paid this afternoon to our departed Brother and revered Chief Justice, Raymond Fellows. There is not one of us that does not have memories of personal contact with him for a longer or shorter period of years, and does not feel deep respect for his personal and professional accomplishments and revere him as a man. His legal work has been fruitful and his opinions printed in the Maine Reports are permanent landmarks to guide our profession in its endless search for a sound system of law and a just administration of it.

A formal recognition of our awareness of these things has been made here today, resolutions have been presented, biographical data assembled, and a permanent record made so far as spoken or written words can make it. There is, however, another kind of record which, if not made, those who have known the Chief Justice over a period of years will miss, and which it is possible to make, that is, a portrait showing him as he was in life and as we all knew him from day to day, and as we should like to remember him.

A fitting place for such a memorial would be in this Court Room where Ray Fellows spent so many hours in the practice of law at the Bar of the Court, and, after his elevation to the Bench, in presiding over it, as Justice and Chief Justice. When we should come here and see his kindly and familiar face above the Bench we should feel at home. We also believe that the future members of our profession would for years unnumbered be inspired by this representation of a great and kindly Judge.

For all these reasons and as an expression of the great esteem of the lawyers of this County, the Penobscot County Bar Association at a special meeting voted that the Associ-

ation procure a suitable oil painting of former Chief Justice Raymond Fellows and arrange for placing it in a suitable location at the Penobscot County Court House, preferably in this Superior Court Room. It was also suggested that the Memorial Services at Bangor before the Justices of our Supreme Judicial Court this December would be a suitable occasion for the unveiling of the portrait.

Therefore, may it please the Court, I am, at the request of the committee which was appointed by the Bar Association, now unveiling the portrait and do, on behalf of the Penobscot County Bar Association, present it as a permanent memorial.

CHIEF JUSTICE ROBERT B. WILLIAMSON

Responded for the Supreme Judicial Court

Members of the Bench and Bar:

We meet in accordance with ancient custom that Bench and Bar together may honor the memory of a beloved brother and companion. It is particularly appropriate that we gather for this purpose in the courtroom of Penobscot County, for within these walls our friend for years practiced at the Bar and sat upon this Bench.

There is an atmosphere pervading the proceedings this winter afternoon of deep emotion, of affection, and indeed of love. The bonds which tie us one to the other, both within and without our profession, have been made the stronger, the richer, the more lasting, by the words here spoken and the action taken.

The life and character of Chief Justice Fellows have been the proper subject for the remarks of the members of the Bar and of the Bench. We thank them for their participa-

tion in the service. The record of our friend has been feelingly set forth in every word.

Before us stands his portrait—giving to us the Chief as we knew him and giving to the Bench and Bar of the future the portrait of a man worthy of the office of lawyer and judge, an example to all who enter the Court of Justice.

In responding for the Court, I shall not attempt to review in detail the life of Chief Justice Fellows. I shall speak rather of our association with him, and of what this has meant to all who have shared with him in the administration of justice.

Chief Justice Fellows came to the Bench in 1939, well prepared by his experience at the Bar and as Attorney General and by temperament and character to perform his judicial duties with ability. The promise was borne out to the letter.

In nearly seven years upon the Superior Court he gave service of great and lasting value, not only to the Court, but as well to the people of Maine from one end of our great state to the other. This distinguished service continued as an Associate Justice, and later as Chief Justice, of the Supreme Judicial Court.

In 11 volumes of the Maine Reports—from the 142nd to the 152nd—may be found 111 opinions written by our friend, if my count is correct. A rapid survey of the opinions shows that he touched every field of law. Pick up any volume, read the opinions headed Fellows, J., or C. J. Note the clarity of expression, the logic of the argument, the clear cut reasoning, and the just results.

The lawyer and layman alike who read his opinions will understand plainly the meaning and intent. He wrote not only to make clear the reasons behind the decisions for the benefit of today's litigants, but as well for the guidance of the future.

He spoke for the Court in cases at once called "leading" and more will gain this worthy title in years to come.

He carried, as I have said, to the appellate court the sound training gained both at the Bar and on the Bench. His opinions reflect a sturdy common sense approach to the problems before the Court. The law to him was a living force. The opinions of a justice, however, form only the written record of his years on the court and they indicate, but neither show completely nor fully portray the character of a judge.

Chief Justice Fellows loved the profession of the law. His life from admission to the Bar until he laid down his office in 1956, and indeed until his death, was devoted to the law.

To the administration of justice he brought the intense desire to give justice between man and man—and between man and the state—that marks a judge worthy of his office.

Chief Justice Fellows had a rare ability to bring men's minds together. In part, this ability came from his knowledge and experience of the law, but more particularly, I think, was attributable to his personality and his knowledge of men. Time and again in conference—and it is in conference that much of our work is done—with a word here or a suggestion there, and perhaps only a change of a sentence in the draft of an opinion, he would as if by magic quietly bring agreement from disagreement.

Kindness, consideration for others, courtesy, patience, characterized his every relationship with the Bench and Bar, and indeed with every person of every age with whom he came in contact. I need not tell the Bench and Bar of how delightful a companion he was.

We of the Court saw him, in the past two years or more, insist upon working at a pace too demanding for his

strength. Devotion to the Court and to the proper administration of justice compelled this expenditure of effort.

Our Court has a history of 137 years. Our judicial system has proved its worth over hundreds of years in the development and protection of liberty and freedom. We do not know what the future holds, but we may with confidence anticipate that our institutions and our Courts will continue to grow in usefulness to our citizens.

Chief Justice Fellows served as a member of the Supreme Judicial Court for over 10 years of this long history of 137 years. Any student of perception, no matter how many years it may be in the future, will find, we are confident, in reviewing justice in Maine, that the Chief Justice whose memory we honor this afternoon ranks high among the men who have left their stamp thereon.

His sense of justice, his keenness of intellect, his ability to strike to the very heart of a case and to bring a problem "down to earth," his wit and his wisdom, his capacity for friendship, his gentleness in manner, his love for his family and his friends, his good citizenship, his honor and integrity are some, but not all to be sure, of the qualities which have endeared him to all whose lives he has touched ever so slightly.

We mourn his passing. We miss the word, the smile, the greeting, the living companionship, and yet we leave the courtroom this afternoon not sad, but with gratitude for there is left untouched the memory of his life to guide and to strengthen us. The world is a better place for his life and we willingly remain forever indebted to him.

The resolutions submitted by the committee of the Penobscot Bar Association of which he was a member are gratefully received by the Court and ordered spread upon its records.

As a further mark of our love and honor for Chief Justice Fellows, the Court will now adjourn.

IN MEMORIAM

Exercises at the unveiling of a portrait of the

HONORABLE WILLIAM BRIDGHAM NULTY

Former Associate Justice of the Supreme Judicial Court

before the Supreme Judicial Court on February 11, 1958
at Portland

SITTING: WILLIAMSON, C. J., WEBBER, BELIVEAU, TAPLEY, SULLIVAN AND DUBORD, JJ., AND FORMER CHIEF JUSTICE EDWARD F. MERRILL.

MR. DONALD W. PHILBRICK, President of the Cumberland County Bar Association:

Mr. Chief Justice, and Your Honors, Members of the Supreme Judicial Court of Maine, the Cumberland Bar Association is assembled here today to do honor to a former Associate of your on this Court, William B. Nulty. He was an outstanding lawyer, a fine Judge and a friend of all of us. Represented here today, besides the Bar, are representatives from Bowdoin College, Hebron Academy, and the Shrine, all of which shared, with us, in his benefactions.

The arrangements for this ceremony today have been in charge of a Committee consisting of Brother Paul Powers, as Chairman, Charles Allen and Sidney Thaxter. With the permission of the Court, I would like to ask Brother Powers to take charge from now on.

Remarks of Paul L. Powers, Esq., Chairman of the Portrait Committee.

PAUL L. POWERS, ESQ.: Mr. Chief Justice, Members of the Court, President Philbrick, Members of the Association, Fellow Attorneys and Friends:

In behalf of the special committee appointed by the Cumberland County Bar Association to procure a portrait of the late Mr. Justice William B. Nulty, it is with much pleasure that we welcome you here today in the Maine Supreme Judicial Court to join with us in the pleasant ceremony of unveiling and presenting that portrait. We feel it is most appropriate for this presentation to be made in the presence of our Chief Justice and the Associate Justices of our Supreme Judicial Court, of which Mr. Nulty was a member at the time of his decease, and in the presence of his personal and fraternal friends and his professional associates.

The directors of the Cumberland County Bar Association, as a token of its gratitude and appreciation of Judge Nulty's great generosity in making us one of the beneficiaries under his Will to the extent of many thousands of dollars, authorized this project in July of 1957 and appointed as a committee to procure and present the portrait Brother Sidney W. Thaxter, Brother Charles W. Allen and myself. At this point, I would like to present Mr. Thaxter and Mr. Allen and will they please stand and take a bow. Since none of the members of the committee had any particular artistic talents and no experience in a project of this type, our commission presented a real challenge to each of us but, in view of our affection, esteem and respect for and our gratitude to Judge Nulty, we approached the problem with much pleasure and anticipation.

As a result of several meetings and much correspondence, we contacted many portrait artists whose recommendations were very high but to Brother Allen of the committee goes the credit for producing Mr. Vivian Milner Akers, of Norway, Maine, as the artist whom we selected. This choice

was not difficult to make for many reasons, among the more important being the fact that Mr. Akers was a student at Hebron Academy during Judge Nulty's course of instruction at that institution and the fact that Mr. Akers had just completed an outstanding lifelike portrait of Mr. Chief Justice Earle Warren of the United States Supreme Court.

The fact that this must be a posthumous portrait and that we had not many photographs of Judge Nulty from which to work presented a further problem as the committee soon learned that not all artists have the talent and ability to produce a living quality in such a posthumous portrait. We are confident, however, that you will agree with us that Mr. Akers has accurately produced the living qualities in the fine facial features of Judge Nulty.

The committee authorized Mr. Akers to proceed with the project in September of 1957 and on November 17, 1957 we were invited to Mr. Akers' studio in Norway for our first viewing of the portrait which was then done in monochrome. The committee agreed, upon seeing the portrait for the first time, that the artist had produced the living qualities of kindness, brilliance, warm friendliness and character which Judge Nulty's face possessed and many of which were not apparent in the photographs which we had presented to Mr. Akers for his work.

In accordance with Mr. Akers' agreement, he delivered the portrait in a frame, beautifully hand carved by him, to the committee on December 31, 1957.

The committee has had the utmost cooperation from all concerned in carrying out this project. Mr. Akers, the artist, went far beyond the line of duty in producing his work as he took a very personal interest in the project and not only did he personally prepare the hand carved frame but he also produced the inscribed brass plate and a suitable electric light fixture for display. The County Commissioners

have been most helpful in making available an electric outlet for proper lighting of the portrait in the reception room of the County Law Library, the Library Committee has been very cooperative in making available the wall space requested by our committee and Mr. Morrissey, superintendent of this building, has prepared the display easel for the portrait and has arranged for the lighting. To all these people the committee expresses its gratitude and appreciation.

It was during the administration of our immediate past President, Mr. Israel Bernstein, that this prospect was organized and completed and the committee is most grateful to Brother Bernstein for his whole-hearted cooperation and for his able direction. We would like him to stand and take a bow at this time.

The committee feels this occasion should not be a time for the expression of grief or mourning in the passing of our late Judge and brother because those feelings were most fittingly expressed and set forth in an outstanding memorial presented in our Superior Court by Hon. William S. Linnell in December of 1953, a record of which may be found in our Maine Reports in Volume 152, Page 406. We hope, therefore, this occasion will be an expression of our affection for Judge Nulty and of our gratitude for his great generosity to this Association.

We hope this portrait will be a permanent reminder to us and a living portrait for those who come after us of the refinement, culture, human sympathy, genial companionship, sympathetic acquaintance and enlivening wit of one of the outstanding lawyers and judges of our time.

Following the close of this program, we invite everyone to step forward and make a close inspection of the portrait which will later be found in our County Law Library on the third floor of this building.

It is with much pleasure and pride that we unveil this portrait for your approval and pleasure.

It had been our plan to have present today the artist, but a relative of his called us and said he was confined by illness and could not be present. We are very sorry for his condition, and, also, for the fact that we could not hear him talk, because he is a most colorful, interesting individual.

At this time, we would like to present Mr. Charles O. Spear, Jr., Chairman of the Cumberland County Commissioners, who was almost a lifelong friend of Judge Nulty, and who will speak on behalf of the County at this time. Mr. Spear.

MR. CHARLES O. SPEAR, JR., Chairman, Board of Commissioners, Cumberland County:

I attended South Portland High School at South Portland Heights, and played football in the fall of 1911, and baseball the next spring. The South Portland games were played at the Old Pine Tree Park, which was on E Street. The fence was falling down, and the grandstand in a dilapidated condition. Members of the teams assembled their own uniforms, equipment, and at the beginning of the season, the players chipped in to buy a football, and later several baseballs. The football squad was composed of twelve men and the baseball teams of ten men. In playing teams in the vicinity, we generally paid one-half the expense of travel and the opposing team the other half. Travel was generally by electric cars. I cite these things mainly to bring out the trials and tribulations in conducting the athletic program in those days. Our coach was William B. Nulty, a very young man who had graduated from Bowdoin College in 1910, with honors, and came to South Portland High School that fall as an instructor in chemistry and physics. Bill was an outstanding athlete, having played as halfback on the football

team, a forward in basketball and in the field in baseball. In his coaching, he assumed the manner of a "tough guy;" to us, it was apparent that this was only a front, but we responded accordingly. When we gathered for football practice, his favorite expression was: "Come on, you guys, twice around the field and get that Mecca smoke out of you." Mecca was the common brand of cigarette at that time. He tried to be a strict disciplinarian, and one time he suspended a player for two weeks because he was smoking during practice. When we assembled for practice, or for playing, Bill was always the first one on the scene and the last one to leave. During the games, he would develop a sort of tenseness which he would hide by trying to appear calm and indifferent. He would give us the usual "pep" talks during the games and we would try to respond, because we knew that he was as much interested in winning as we were. Our football team was average and we probably won half our games, but in baseball we were generally in first or second place. Our spirits were high mainly because of the efforts of Bill Nulty.

When Bill resigned in 1912, the papers of June 3rd gave this account:

"First Assistant, William B. Nulty, did much for advancing the interests of South Portland High School in athletics. He made the boys get out and play in the different sports in which he coached them. He allowed no lagging in the field and kept the boys busy from the time he started until the practice stopped. He had en excellent manner of handling young high school men and while South Portland will lose a good teacher and athletic instructor, some school will be the lucky gainer."

Just recently, I met an old schoolmate and asked him if he remembered Bill Nulty. He replied: "I certainly do. He taught me in two subjects. Everybody liked Bill. He

was a swell guy." A homely phrase, but I am sure that is the way Bill would have liked to be remembered, "as a swell guy."

MR. POWERS: It is our happy privilege to bring to you today the man who was the senior member of the law firm of which Judge Nulty was a member before his appointment to the Bench. May I present the Honorable William S. Linnell.

WILLIAM S. LINNELL, ESQ.:

Mr. Chief Justice, Members of the Court, Fellow Members of the Bar, Ladies and Gentlemen: It is a privilege, indeed, to be permitted to represent, on this occasion, the law partnership of which, under successive, differing titles, Mr. Justice Nulty was, from 1922 to 1947, a period of twenty-five years, a member, and to view with you this remarkably faithful portrait which evidences the inspiration, as well as the skill, of the artist.

When a man of the stature of Judge Nulty has written his unblemished record in his conduct toward his associates of the Bench and Bar, with his clients and in his published judicial opinions and in the hearts of his friends, that record needs no reemphasis on an occasion such as this. Rather is this the time and place to record, in the case of the speaker, in his own behalf and on behalf of his partners, our appreciation of a happy association, to which Judge Nulty contributed so much.

Fortunately for us at this Bar, professional partnerships are never so large as to preclude that intimate relationship which is inherent in the close companionship of friends. By the same token the very existence of this close relationship puts upon each partner an obligation of accommodation and consideration. In our partnership relationship with Judge Nulty, he and we were bound together in a common concern

that the professional reputation of our predecessors, Mr. Justice George E. Bird and Hon. William M. Bradley, who, more than sixty years ago, established the firm as "Bird and Bradley," should never suffer derogation at our hands. In addition, ties of friendship, growing over the years into affection, through the mutual respect accorded one another as individuals, created a bond which only death could sever.

During the early years of the association of Judge Nulty and myself with our beloved elder partner, Mr. Bradley, to whom both he and I were deeply indebted for his kindly, almost affectionate, leadership and tutelage, Judge Nulty proved himself able and thorough. His conclusions could be relied upon. His action, when required, was always prompt and effective. He grew in professional stature with age and experience. He was a source of reliance and pride to all of us, his partners. In times of his absence he never left us bewildered concerning any of his pending matters.

Memories are not always solemn. Insignificant events which indicate character sometimes persist most permanently in our minds. Judge Nulty, in his practice, as in his everyday life, always tried to make the best of anything that didn't go quite right. He succeeded well in recovering from his disappointments. I remember playing golf with him. Frequently, when he became over-anxious to do well he would develop a terrible "hook" in his drive. Invariably, he would remark, as he saw the ball come to rest just short of the "rough": "That's just where I wanted to be." I have no doubt this attitude helped him recover well on his his next shot. He carried this same happy, forward-looking determination into his practice of the law.

Judge Nulty had another rather unusual characteristic. We have all read and known of persons whose somewhat sharp command on reproof lost its sting because of the twinkle in the speaker's eye. When Judge Nulty spoke in severity, his eyes were as cold as steel, but the slight twist

of his mouth gave him away. The lesson of his speech was, perhaps, the better remembered by the junior associate in leaving his presence with a grin, and service to him became devotion.

During his active practice of the law with our firm, Judge Nulty participated in many social and civic associations and enterprises, but never to the neglect of his clients or his partners. His law practice came first. His philosophy of "first things first" led him to dissuade some of the partners from seeking public office lest their law practice became of secondary importance. It is quite probable that his persuasiveness did not deprive the State of Maine of any too valuable service.

In the days when everybody connected with the profession really wanted to work and Saturday afternoon was the only breath-catching period of the week, it was a joy to match flights of imaginative idealism with his down-to-earth, common sense philosophy.

Perhaps the happiest years of the association of all of us, in the enlarged firm, with him, were the years just preceding his elevation to the Bench. He had assumed his share of the direction of the firm's activities and no member can look back upon those days without a feeling of deep appreciation for his unfailing consideration, his unflagging personal interest and his wise counsel. He had fine qualities of leadership, a well developed sense of organization. He never knowingly infringed upon the prerogatives of others occupying positions of seniority. He accorded to even the newest member of the organization the respect which recognizes human dignity. In firm conferences his opinions commanded respect. His voice was never raised above the conversational pitch, but his conclusions, never dogmatic but always positive, carried great weight.

It is not always that one member of a firm in a long succession of partners, associated under various names and

dating back so far in history, can so make his mark upon the record of the organization that his influence continues down through the years. With us, his former partners, to the revered names of Mr. Justice George E. Bird and Hon. William M. Bradley is added the equally honored name of Mr. Justice William B. Nulty. We join with our fellow members of the Bar in dedicating this portrait to the generations of lawyers yet to come to this Bar, as an especially commendable representation of one to whose eminence they may honorably aspire and whose example they may well emulate.

MR. POWERS: Thank you very much for those very appropriate remarks.

We are very happy to have as our next speaker the man who is Chairman of the Cumberland County Law Library Committee, and who was a close friend of Judge Nulty, the Honorable Clement F. Robinson of Brunswick.

CLEMENT F. ROBINSON, ESQ.:

Mr. Chairman, Mr. Chief Justice, Associate Justices, Members of the Bar, Ladies and Gentlemen, all friends of Bill Nulty: As stated in the annual report of the Library Committee, the thought of having a portrait of Judge Nulty originated with the late Judge Clifford of the U. S. District Court. He spoke of the matter to Judge Wernick, who was on the Library Committee. Judge Wernick brought it before the Committee. We canvassed the possibility, had a good many conferences with Judge Clifford, even got to the point of discussing who might be an appropriate painter, and Judge Clifford thought very kindly, indeed, of the painter who eventually was selected. We had no authority in the matter. We were merely laying the foundation on which, when the matter was reported to the standing committee, action was immediately taken. The Committee was

appointed with Brother Powers as Chairman, and now we have the portrait. I think everybody is going to be pleased with that portrait. It is a worthy picture of a distinguished Judge and lawyer, and a man whose benefactions to the Library make it particularly appropriate that the portrait should hang in the Library.

In accepting the picture for the Library Committee, there are many things I might say about Judge Nulty. I might say, of course, his public life is too well known for me to comment upon—merely to mention, to bring it to our minds—United States Assistant District Attorney for ten years, and for the last six years of his life, Judge, successively, of the Superior Court and Supreme Judicial Court, and his an unblemished record in all those official positions.

And he was always one to take his share of responsibility in other things, as his associate and partner has so ably told us. I have known of his work in this Cumberland Bar Association, in the Maine State Bar Association, in the American Bar Association. We have heard this afternoon of his work, at the very start, with athletic organizations. He was interested in so many organizations, I won't attempt to enumerate them. But I know personally of his interest in the Rotary Club, because I was Chairman of the nominating committee when the war clouds were lowering and we were to select a President, and that President was going to have a very difficult year. With considerable diffidence we approached Bill Nulty and with that charming graciousness of his, he accepted at once and he made an outstanding record in that difficult year, as he has in every other position in life he has taken.

His professional life as a practicing lawyer has been told to you by one who was closely associated with him from day to day. There are many of us right here who have been associated with him, not as a partner, and thus seen behind the curtain, but have been associated with him either as be-

ing on the same side with him in some case, or as being opposed to him. I have a very clear and vivid and pleasing recollection of the association in which we represented opposing interests during a reorganization of a corporation during the last years of his active practice. I noticed then what we notice with reference to the best lawyers. He could fight, and he knew when to fight; he could confer and he knew when to confer. I have sat in those conferences where lawyers have surrounded the table, lawyers of differing interests, different points of view, different personalities, participating, some of them assertive and some of them secretive and some of them just ready to cooperate, but not absolutely sure in just what way. Well, Bill Nulty would sit there and listen, saying very little, and after a conference had gone on for a reasonable length of time, he would speak. Everybody else kept silent. He would summarize the sense of the meeting in such a way that, after that, all that was necessary was just to tie up the loose details. I have no doubt that the Supreme Court Bench may have had similar experiences. I can visualize him sitting with those Justices, and not being the first to speak, but after he had spoken, I can imagine there wasn't much left for anyone else to say. Now, I am just guessing. That isn't in my prepared speech.

The way in which I like to think of him best, of course, is the personal relationships of man to man. He was my neighbor for many years and we both had dogs and we went out to walk on many evenings, taking our respective dogs, and while the dogs were attending to various important canine matters, we would settle the fate of whatever subject was occupying public attention at that time. It was on one of those walks one evening—and the only time—I ever saw Bill Nulty ruffled. He had a Boxer and I had a little, inoffensive Cocker, and as he came down the street, the Boxer didn't like the look of my Cocker and they started mixing it up. Bill went off the handle. Didn't he bawl out the Cocker, and then he turned and gave his dog merry hell. We walked

a great many times after that, and those two dogs always conducted themselves in the most proper canine manner.

He was a graduate of my own college, a member of my own fraternity, and you know what that means, the problems you talk over, the common points of interest you have. And that brings me to the last poignant memory I have of Bill Nulty. It was Commencement of 1953. He died in September of that year. It was after the Commencement Dinner in the gymnasium where he had been honored following his being given the degree of LL.D. at the Commencement in the church on the hill. We walked down that long corridor together to take our respective cars, and as we separated, Bill looked me in the eye and said: "Good luck to you." And I looked him in the eye and said: "Good luck to you." I have no doubt that Bill Nulty knew he would never see another commencement. There was no sentimentality in his eyes, but you could look right through those dark eyes, and looking through those eyes, I wondered. I could not imagine what was in Bill's soul, but I knew that he had achieved the height of his profession here in Maine, that he had every reason to look forward to continued usefulness, and he must have known that the time was come when his usefulness was at an end. I never saw him again, but that I will never forget.

The impression made by Mr. Justice Nulty of the Supreme Judicial Court will last as long as we have a Court system in this State. But the impression made by Bill Nulty on us, his friends, is something that to me, and to all of us, is much more immediate and personal.

MR. POWERS: Thank you very kindly for your personal and apt remarks. There are several people present whom we would like to have stand and be introduced, perhaps take a bow, who were very close to Judge Nulty. First, may I present his personal secretary, Mrs. Lena Crowe. (Mrs. Crowe stood.) Mrs. Crowe, we are very happy to have you with us

today. Representing Bowdoin College, we have the Vice President of the College, Mr. Bela W. Norton. (Mr. Norton stood.) Representing Hebron Academy, one of the Trustees, Mr. Charles Allen, and a member of our Committee. (Mr. Allen stands.) One of the fraternal and social activities of Judge Nulty which was very close to him from which he derived a lot of pleasure and relaxation was his position as Potentate, Kora Temple, A.A.O.N.M.S., and today as a token of their feeling for him, we have present Mr. Caroll McGilvery, present Potentate. Will you please stand. Mr. McGilvery stood.) And also we have several past potentates and several officers of the temple. At this time would they please stand. (At which point, seven men stood.)

As I said some moments ago, following these proceedings, anyone may feel at liberty to step forward and take a closer look at the portrait.

We are, indeed, happy, Mr. Chief Justice, to hear such remarks from you as you may see fit to give us at this time.

HON. ROBERT B. WILLIAMSON, *Chief Justice,* Supreme Judicial Court, spoke as follows:

The Bench is grateful to the Bar of Cumberland County for the gift of the portrait of Justice Nulty. One cannot enter this courtroom, let alone share in proceedings at the Bar or on the Bench, without a deep impression of the dignity of the law, and of its hopes and aspirations for justice for all.

Not a little of this dignity, and as well of an important and vital sense of continuity with the past, comes from the portraits about us. From the Bench we see the portraits of Chief Justice Wilson, Justice Haskell, Chief Justice Mellen and Justice Strout, and behind us are the portraits of Justice Bird and Chief Justice Sturgis. In their faces—and in the character captured by the artist in each instance—we

see the spirit of the law that encourages and steadies us in our work. We are indebted to the artists, and no less to Mr. Akers.

So, too, it will be with this likeness of Justice Nulty long after those of us who knew and loved him have left the scene. The portrait, we are told, will hang in the Cleaves Law Library, to which he made such a generous gift. The student, lawyer, and the judge, young and old alike, for years without number, will see in him an example worthy of emulation.

Justice Nulty brought to the Bench the fruits of a long and successful career at the Bar. Of more value than mere length and breadth of experience, it seems to me, were his sound common sense, and his ability to reach the heart of a problem quickly and to find the truth.

His ability as a counsellor and advocate was recognized early in his career throughout the State and beyond. For twelve years, while he was busily engaged in practice, he served with distinction as Assistant and later as Acting United States Attorney.

On September 18, 1947, he came upon the Superior Court, and eighteen months later, on March 16, 1949, was appointed a Justice of this Court. In a quick review of the reports, I find he wrote 38 opinions covering many fields of law. Among his notable contributions to our law are the opinions in *Reynolds* v. *Hinman Company,* a blasting case, and in *State* v. *Levesque* and *State* v. *Carleton,* in which he developed the law of corpus delicti.

The opinions drawn by a justice for an appelate court form only a part, and not necessarily the most important part, of his real record on the bench. From the written word we do not know, for example, of the invaluable contributions by Justice Nulty in discussions and conferences.

Nor do we read in the reports of the time and effort—and great skill—expended by him in the many equity cases brought before him.

It was my privilege and high honor to sit with Justice Nulty on this Court for four years. I learned much from him as did everyone whose life he touched. It was not in the bounds of our professional life, however, that I gained the most from our friend. The benefits came in broader fields of life. In him I saw a gentleman, kind, fun loving, with an unequalled capacity for friendship, meet grief and disease and death with calmness, with dignity, and with the courage that marked every effort of his life.

There are the memories of little incidents. I recall when at conference after conference for weeks on end I argued for a certain position until Justice Nulty with a smile said, "You fought nobly." I knew then that the possibility of conversion was over, and I gave my vote alone in dissent.

May I read a letter received from our friend Judge Gignoux of the United States District Court:

"I regret that I must be holding court in Bangor next week and shall be unable to be present at the exercises to be held in Portland in memory of the Honorable William B. Nulty, late justice of the Supreme Judicial Court of Maine.

"As a member of the Bar, I was privileged to appear before Justice Nulty on a number of occasions, and am most happy personally to endorse the respect and affection with which he was regarded by all who knew him. Justice Nulty exemplified the best of those qualities of humanity, character and intellect which are to be found in a truly great jurist.

"Since I shall be unable personally to be present, may I through the medium of this letter join with the Bench and

the Bar of the State of Maine in this splendid tribute to the memory of a distinguished public servant."

Justice Nulty's work as lawyer and judge, and as a citizen, was good and sound and will bear the test of time. He left us before we had reason to think his work was done. We will be forever thankful that it was given to the Bar and Bench of Maine to have William Bridgham Nulty as their Brother and friend.

Again we thank the Bar for their appreciation of the life and service of Justice Nulty. The proceedings this afternoon will be published in our Reports.

In respect for his memory, we do now adjourn.

INDEX

ACCORD AND SATISFACTION

See Settlement, *Larsen* v. *Zimmerman*, 116.

ACCOUNTING

See Equity, *Allen* v. *Kent*, 275.

ACCOUNTS

See Agency, *Poretta* v. *Superior Dowel Co.*, 308.

ADMINISTRATIVE LAW

See Utilities (Evidence), *P. U. C.* v. *Cole's Express*, 487.

AGENCY

In determining whether an "agency" relationship exists the court must consider, not only the contract itself, but also the course of dealings between the parties whether inside or outside the contract.

A referee is not required to make special findings of fact. (Rules of Court)

An undisclosed principal may be shown to the real party in a transaction in which the agent is the only ostensible person.

The agent or undisclosed principal is liable at the election of a creditor or a person to whom the agent has incurred liability acting within the scope of his authority.

The creditor has a right of action against the undisclosed principal, when discovered, even though he never learned of the existence of the latter until after the bargain was completed, if he can prove that the agent acted within the scope of his authority.

An undisclosed principal is discharged from liability to the other party to the contract, if he has paid or settled accounts with an agent reasonably relying upon conduct of the other party, not induced by the agent's misrepresentations, which indicates that the agent has paid or otherwise settled the accounts. (1 A. L. I Restatement of Agency, Sec. 208)

Poretta v. *Superior Dowel Co.*, 308.

APPEAL

See Taxation, *Morrill* v. *Johnson*, 460.

ATTORNEYS

See Contempt, *Stern* v. *Chandler*, 62.

BANKRUPTCY

Bankruptcy is not a bar to action against the maker of a promissory note where at the time of the delivery of the note the defendant intentionally and falsely misrepresented his financial status for the purpose of deceiving and inducing the plaintiff payee to consummate the transaction. (11 U.S.C.A., Sec. 35, Brankruptcy Act, Sec. 17(a)(2))

Where a note sued upon is given to a payee in part for the payment of a prior obligation and in part for "new money" so-called, the loss sustained by the fraud within the meaning of the Bankruptcy Act is

limited to the "new money" where the facts indicate that the prior obligation was not in default and the evidence fails to indicate any extension of time on the prior obligation.

Personal Finance v. *Moore,* 122.

BLOOD TEST

See *State* v. *Libby,* 1.

BONDS

See Maine Turnpike, *First National Bank of Boston* v. *Maine Turnpike,* 131.

BROKERS

A commission on a sale of real estate is earned only where the broker is the effective and producing cause of the sale, unless the broker is otherwise protected by the specific terms of his contract with the seller.

MacNeill v. *Madore,* 46.

CHECKS

See Settlement, *Larsen* v. *Zimmerman,* 116.

COMPLAINT AND WARRANT

Where a complaint occupies a top two thirds of a sheet of paper and the warrant the bottom one third of the same sheet, a seal at top of the sheet at the commencement of the complaint is a sufficient ensealing of the warrant under R. S., 1954, Chapter 146, Section 13.

State v. *Haines,* 465.

CONTRACTS

The evidence required to establish an *ante mortem* contract that results in a *post mortem* disposition of an estate must be clear and convincing.

Even though ordinarily the judgment of the court is not to be substituted for the findings of the jury, a verdict should be set aside where it appears that the parties have not had a fair trial.

Where there is manifest error in law in the judge's charge, and injustice results the matter may be examined on motion for a new trial, even though better practice would require that the point be raised in a bill of exceptions.

A pleader may state his case in as many ways as he sees fit in separate counts in order to meet any possible phase of the evidence and ordinarily he will not be required to elect.

Where a declaration contains a count in *quantum meruit,* as well as specific contract, the erroneous elimination of the *quantum meruit* count by the court may result in injustice to a defendant by forcing the jury to consider the case solely upon the specific contract.

Johnson v. *Parsons, Admr.,* 103.

Where the meaning of a written contract is plain and unambiguous parol evidence of its meaning is not admissible, so that the trial court properly excluded evidence as to the propriety and cost of "mulching" where the contract did not, by express terms, require "mulching."

Where a defendant is not harmed by a ruling of the presiding justice, an exception to the ruling is properly overruled.

In the absence of a provision in the contract providing otherwise, the "area" covered by a land grading and seeding contract must be determined by proof and not by a third party.

A new trial will not be granted unless the verdict is clearly wrong.
Young v. *Hornbrook, Inc.*, 412.

See Money Counts, *Sylvester* v. *Twaddle*, 40.
Parol Evidence, *Harmon* v. *Roessel*, 296.

CONSTITUTION CONSTRUED

Constitution of Maine, Art. I, Secs. 6, 16, 21,
State v. *McKinnon*, 15.

Constitution of Maine, Art. V, Part First, Sec. 11,
Baston v. *Robbins*, 128.

CONSTITUTIONAL LAW

See Maine Turnpike, *First National Bank of Boston* v. *Maine Turnpike*, 131.

See, *State* v. *McKinnon*, 15.

CONSTRUCTION CONTRACTS

See Sureties, *Newport Trust Co.* v. *Susi et al.*, 51.

CONTEMPT

The Superior Court has power to punish for contempt both under the common law and R. S., 1954, Chap. 106, Sec. 16.

Criminal contempts are those committed in the immediate view or presence of the court which interrupt the regular proceedings in court; such may and should be punished summarily.

Constructive criminal contempts are those which arise from matters not transpiring in open court; but the process and time for hearing are different from the summary process.

Disobedience to a court decree may be either civil or criminal, according to the purpose for which and the manner in which the court may deal with it. Where the power of the court is used *only* to secure an aggrieved party the benefit of the decree, the contempt is civil, otherwise it is deemed criminal.

Misconduct of an attorney which reflects improperly the dignity or authority of the court, or which obstructs or tends to obstruct, prevent or embarrass the due administration of justice, constitutes contempt.

The strict rule of the common law which denied review of contempts committed in the presence of the court has been relaxed so that the acts constituting the alleged contempt may be examined on habeas corpus to ascertain whether in law they constitute contempt, although the truth of the acts recited by the presiding justice may not be controverted; the statement filed by the judge as to matters occurring before him is usually regarded as importing absolute verity.

A mittimus need not specify the nature of the acts of contempt; a mittimus is only evidence of the officer's authority; the judgment is the real thing.

While Maine law is silent on the necessity of a certified statement of fact to support a judgment for contempt, the Law Court is of the opinion that the presiding judge should certify (1) that he saw and

heard the conduct constituting the contempt (2) that it was committed in the actual presence of the court (3) and the facts.

Cheney v. *Richards*, 130 Me. 288, 292 statement that finding of contempt is not reviewable is dicta and overruled.

Stern v. *Chandler*, 62.

CORAM NOBIS

See *Forma Pauperis*, *Brown* v. *State*, 512.

CORPORATIONS

See Maine Turnpike, *First National Bank of Boston* v. *Maine Turnpike*, 131.

COURTS

See Equity, *Allen* v. *Kent*, 275.
Divorce, *Dumais* v. *Dumais*, 24.
New Trial, *White* v. *Schofield*, 79.

COVENANTS

See Restrictive Covenants, *Leavitt et al.* v. *Davis et al.*, 279.

CRIMINAL LAW

See Complaint and Warrant, *State* v. *Haines*, 465.
Driving Under Influence, *State* v. *Croteau*, 126.
Hunting, *State* v. *McKinnon*, 15.
Indecent Liberties, *State* v. *Robinson*, 376.
Manslaughter, *State* v. *Libby*, 1.
State v. *Silva*, 89.
Rape, *State* v. *Henderson*, 364.

DAMAGES

Where the evidence on damages is insufficient for a jury verdict so that a jury cannot determine with reasonable certainty the fair market value of the property before and after the alleged trespass, a new trial must be ordered.

McKinnon et al. v. *Cianchette*, 43.

A verdict will not be set aside unless it appears to be clearly wrong. It is within the province of the jury to assess punitive damages in cases of criminal conversation and alienation of affections, if they believe the situation serious enough.

Adams v. *Artus*, 514.

See Bankruptcy, *Personal Finance Co.* v. *Moore*, 122.
Negligence, *McMann* v. *Reliable Furniture Co.*, 383.

DEATH OF JUDGE

See Equity, *Allen* v. *Kent*, 275.

DECEDENTS

See Contracts, *Johnson* v. *Parsons, Admr.*, 103.

DECLARATORY JUDGMENTS

See Maine Turnpike, *First National Bank of Boston* v. *Maine Turnpike*, 131.

DEEDS

See Restrictive Covenants, *Leavitt et al.* v. *Davis et al.*, 279.

DEMURRER

See Joinder, *Daigle* v. *Yesbec et al.*, 76.

DESCENT AND DISTRIBUTION

Where a testamentary trust provides a trust fund with income benefits to testator's surviving children with remainder at the death of the said beneficiary to be "paid to his legal heirs according to the law for descent of intestate estates," the words "legal heirs according to the law for descent" do not include a surviving widow of the beneficiary.

A reference to the "statutes of descent" does not create an enlargement of the phrase "legal heirs."

Technical terms are presumed to be employed in their technical sense with the meaning ascribed to them by usage and sanctioned by judicial decision unless something in the context or subject matter clearly indicates that the testator intended a different use.

Linnell et al. v. *Smith et al.*, 288.

DIVORCE

"Vacation" as referred to in R. S., c. 113, Sec. 39 means one, single, non-recurring period of time between the end of the Term (of Court) last adjourned and the beginning of the very next.

Jurisdiction in excess of that vested by statute cannot be conferred by consent.

The Legislature, in P. L., 1949, Chap. 311, Secs. 1 and 2, intended that the vacation jurisdiction of the Superior Court Justice, of any given divorce libel (whether that jurisdiction devolved upon him as presiding justice of the court last adjourned or was assumed by him during vacation) must be culminated by him by a decree rendered in the same vacation or forfeited totally to the next succeeding Term of Court, to be availed of by him entirely *de novo*, if at all, following the latter Term.

Dumais v. *Dumais*, 24.

DRIVING UNDER INFLUENCE

A charge that one operated a motor vehicle while under the influence of "drugs" is not demurrable on the ground of vagueness. (R. S., 1954, Chap. 22, Sec. 150)

State v. *Croteau*, 126.

See *State* v. *Libby*, 1.

EQUITY

Where an equity case is submitted by agreement to a sitting justice upon a written record because of the death of the judge who heard the case, the Law Court is free to find the facts without reference to the findings of the sitting justice.

Equity has jurisdiction over joint adventures where the parties are in a fiduciary relationship and the remedy sought and obtained is incidental to an accounting.

On the termination of a joint adventure each is entitled to the return of the property contributed by him.

Allen v. *Kent*, 275.

EXCEPTIONS

Where a bill of exceptions indicates only the question asked of a witness, but fails to indicate the answer to such question or the manner in which the objecting party is aggrieved—such exception is not strong enough to stand alone.

The incorporating by reference into a bill of exceptions of the evidence does not obviate the requirement that the exceptions disclose a succinct and summary statement of the specific grounds relied upon.

A bill of particulars in a criminal case is not allowed as a matter of right, nor may it be employed to compel the State to disclose all its material evidence; it should merely advise respondent of matters to be put in issue concerning which a defense should be prepared.

Mistrial is a matter of discretion to be ordered when the trial cannot proceed with the expectation of a fair result.

Where a respondent requests a blood sample to be taken, the failure of the arresting officers to advise him of his constitutional rights or that he is being charged with a crime does not violate his constitutional rights.

One need not be an expert witness to state an opinion whether another is intoxicated or under the influence. The weight to be given such testimony is for the jury under the proper instructions.

It is within the scope of the testimony of a properly qualified expert to state that any individual with .206% weight of alcohol in his blood is definitely under the influence.

An automobile mechanic may qualify as an expert on the mechanical condition of an auto.

It is not error to strike respondent's answer that he was at all times in control of his car where he has been given full opportunity to relate every essential fact from which the jury might determine the issue.

An instruction need not be given in the form requested.

Written accident reports as well as oral statements made in the course of and as a part of the preparation of such reports are inadmissible under R. S., 1954, Chap. 15, Sec. 7, as amended by P. L., 1955, Chap. 306, although police officers and others may give testimony concerning observations and conversations which are otherwise admissible under well established rules of law.

When an unlawful act is shown beyond a reasonable doubt to be the proximate cause of a homicide, the result is manslaughter.

State v. *Libby*, 1.

The certification that exceptions are allowed is conclusive unless the certificate or exceptions themselves show the contrary.

There is no error of law if the findings of fact by a presiding justice are supported by any credible evidence but a finding without evidence does not meet the test of law.

Ray v. *Lyford*, 408.

See New Trial, *White* v. *Schofield*, 79.
Rules of Court, *Gregory* v. *James*, 453.
Rules of Court, *Palleria* v. *Farrin Bros. and Smith*, 423.

EXECUTORS AND ADMINISTRATORS

See Descent and Distribution, *Linnell et al.* v. *Smith et al.*, 288.

EVIDENCE

See Damages, *McKinnon et al.* v. *Cianchette*, 43.
Manslaughter, *State* v. *Silva*, 89.
Money Counts, *Sylvester* v. *Twaddle*, 40.
Parol Evidence, *Harmon* v. *Roessel*, 296.
Rape, *State* v. *Henderson*, 364.
Utilities, *P. U. C.* v. *Cole's Express*, 487.
See *State* v. *Libby*, 1.

FIRE ESCAPES

See Negligence, *Kimball et al.* v. *Breton Ex'x.*, 476.

FISH AND GAME

See *State* v. *McKinnon*, 15.

FORMA PAUPERIS

That petitioner is a pauper within the intent of *in forma pauperis* proceedings is plainly a preliminary and indispensable fact.

Whether *in forma pauperis* available in *coram nobis* not decided.

Whether *coram nobis* available after sentence completed not decided.

Brown v. *State*, 512.

FRAUD

See Bankruptcy, *Personal Finance Co.* v. *Moore*, 122.

GOVERNOR AND COUNCIL

See Sentence, *Baston* v. *Robbins*, 128.

HABEAS CORPUS

See Sentence, *Baston* v. *Robbins*, 128.

HEARING

See Divorce, *Dumais* v. *Dumais*, 24.

HIGHWAYS

See *Babine* v. *Lane Constr. Co. et al.*, 339.
Sureties, *Newport Trust Co.* v. *Susi et al.*, 51.
Utilities, *Brunswick and Topsham Water Dist.* v. *Hinman Co.*, 173.

HUNTING

R. S., 1954, Chapter 37, Sections 148 and 149 as amended, creating a game preserve and prohibiting, except as provided, the carrying of firearms or hunting within the limits of a State game preserve are not unconstitutional as violating Sections 6, 16, 21 of Article I of the Constitution of Maine.

There is no individual ownership in wild animals; they are the property of sovereignty; their conservation, by the creation of a game preserve on an individual's land is not a "taking" of property without just compensation.

Where a respondent whose home is located upon a game preserve is charged with possession of firearms and it does not appear whether the possession was for the purpose of hunting or whether the possession was incidental to his constitutional right to bear arms, the facts are inadequate as a basis of decision.

Williamson, C. J., concurring specially on the ground that consideration of Article I, Section 16, Constitution of Maine, not necessary to a decision of the case.

State v. *McKinnon,* 15.

IMPUTED NEGLIGENCE

See Negligence, *York* v. *Day's, Inc.,* 441.

INDECENT LIBERTIES

A verdict of "guilty" cannot be sustained where the quality of the evidence is not such as to carry conviction to a reasoning mind.

When it becomes evident that a child witness possesses attributes of slyness and wilfulness, great care and caution must be exercised in order that a respondent may not be convicted on flimsy or insufficient evidence.

State v. *Robinson,* 376.

INSURANCE

See Negligence, *Deschaine* v. *Deschaine,* 401.

JOINDER

Persons who act separately and independently, each causing a separate and distinct injury, cannot be sued jointly, even though the injuries may have been precisely similar in character and inflicted at the same moment.

A declaration charging one defendant with negligent destruction of a building cannot be joined with a charge against another defendant for fraud.

A misjoinder appearing on the face of the record may be objected to by demurrer.

Daigle v. *Yesbec et al.,* 76.

JOINT VENTURE

See Equity, *Allen* v. *Kent,* 275.

JUDGMENTS

See Divorce, *Dumais* v. *Dumais,* 24.

LABOR DISPUTES

See Unemployment Compensation, *Bilodeau* v. *M. E. S. C.,* 254.

MAINE EMPLOYMENT SECURITY COMMISSION

See Unemployment Compensation, *Bilodeau* v. *M. E. S. C.,* 254.

MAINE TURNPIKE

Whatever hierarchy of privileges in utility installation there may be, the exigencies of public travel and the police power are unremittingly paramount.

Charters, franchises, statutory grants and permits affording the use of public ways to utility locations are subservient, expressly or by implication, in the exercise of governmental functions, to public travel and to the paramount police power and relocation of utility facilities in public streets or ways are at utility expense, a common law liability unless abrogated by the clear import of the language used in a particular instance.

Without express authority from the legislature, the state or municipality cannot pay to a utility its expense for relocating an installation in a public street or way.

There is no taking of private property but *damnum absque injuria* when the state invokes the police power obliging utilities to relocate, without compensation, by reasonable and not arbitrary regulation not violative of any constitutional limitation.

The police power cannot be surrendered or contracted away by the state.

The Maine Turnpike Authority is a creation of the legislature. The turnpike was manifestly to be a type of public highway and the Authority was, in legal conception, a governmental agency with police power plainly conferred.

Where the legislature by the Turnpike Enabling Act granted to the Authority leave to covenant as to bonds to be issued, it could not subsequently through its power to alter, amend, or repeal said Act, impair the obligations of contract and the covenants thus made. Article I, Sec. 10, Constitution of the United States. Constitution of Maine, Article I, Sec. 11.

The laws in force at the time of the making of the contract enter into its obligations with the same force as if expressly incorporated in its terms.

First Nat'l Bank of Boston v. Maine Turnpike, 131.

MANSLAUGHTER

Many crimes are committed in secret. In such case, the state must forge a chain of circumstances, each essential link proven beyond a reasonable doubt, and the whole pointing inexorably to guilt as the only rational hypothesis.

When accident is the alternative to guilt, circumstantial evidence must rule out accident as a rational or reasonable explanation of death.

The history of old injuries has probative value in determining whether or not accidental causation has been eliminated beyond a reasonable doubt.

Where a series of accidental injuries would be regarded abnormal, the likelihood of accidental causation of death diminishes to the vanishing point.

The concealment of past injuries to decedent may add force to the chain of circumstantial evidence which the jury is entitled to consider in determining guilt or innocence.

A statement made by respondent to a criminal investigator for the state that "if anybody would be responsible (for decedent's injuries), it would be me," was admissible to eliminate as suspect other people who had opportunity to injure decedent child.

The jury may consider the unexplained failure of a husband to corroborate his wife's testimony regarding treatment of decedent child.

State v. *Silva,* 89.

See, *State* v. *Libby,* 1.

MINORS

See Negligence, *York* v. *Day's, Inc.,* 441.

MISJOINDER

See Joinder, *Daigle* v. *Yesbec et al.,* 76.

MISTRIAL

See *State* v. *Libby*, 1.

MONEY COUNTS

The "money count" is a proper vehicle to carry a claim arising from an express contract, fully performed by the plaintiff, on which nothing remains to be done but the payment of money by the defendant.

Where a contract forms an essential part of plaintiff's case, it is properly admissible in evidence.

R. S., 1954, Chap. 113, Sec. 28 (relating to the sufficiency of pleadings based on contracts), was designed to aid, not trap the pleader. A declaration need not set forth the entire contract.

Sylvester v. *Twaddle*, 40.

MUNICIPAL CORPORATIONS

See Towns, *Harding* v. *Brown*, 331.

NEGLIGENCE

A pedestrian who walks along a gravel strip on the side of cement roadway in the same direction of automobile traffic is not guilty of contributory negligence, as a matter of law, not withstanding R. S., 1954, Chap. 22, Sec. 147, where the facts show that snow had fallen during the night and the sidewalks had not been plowed.

R. S., 1954, Chap. 22, Sec. 147 requires that *when practicable*, pedestrians use existing sidewalks and if there are none, walk along the left side of the highway, facing traffic.

Practicability is a question of fact.

Cameron v. *Stewart*, 47.

Where the declaration sets forth a case sounding in both (1) ordinary negligence and (2) wanton misconduct, but the case is tried solely on the theory of *wanton misconduct*, the propriety of a nonsuit will be governed by the standards governing a case of *wanton misconduct*.

There are no degrees of negligence under Maine law. Wanton misconduct differs from negligence in kind and degree; it is neither a wilful wrong in the sense of an intentional infliction of harm, nor negligence in the sense of a failure of due care.

A reckless disregard of danger to others is a characteristic of wanton misconduct.

In wanton misconduct the reckless act but not the infliction of injury is intended.

Contributory negligence does not bar recovery for wanton misconduct, although wanton misconduct of a plaintiff will bar his recovery. Restatement Torts, Sec. 482.

Where the evidences and all reasonable inferences to be drawn therefrom fall short of proof of nonsuit is properly directed.

Blanchard v. *Bass*, 354.

It is a general rule that plaintiffs having called defendant's driver as their witness are bound by his testimony and cannot question it; but this rule would not apply if contradicted by credible evidence of probative value.

Where there are questions of negligence for the jury, notwithstanding the uncontradicted evidence of a sudden failure of brakes, the verdict should not be disturbed.

"Here" and "there" testimony relating to chalk marks placed upon a blackboard is of no benefit to the Law Court, even though beneficial to the jury.

Sinclair v. *Cox et al.*, 372.

A plaintiff pedestrian has the burden of proving his own due care under the circumstance in which he found himself just prior to the injury; and after verdict for the plaintiff, a defendant must demonstrate (1) that the plaintiff did not exercise such care and (2) that reasonable minds could not differ in concluding that he did not.

A plaintiff crossing upon a cross walk is legally fortified with the assumption that all vehicles will obey the city ordinances and state statutes (requiring motor vehicles to yield to pedestrians—Art. VI, Sec. 66, City of Portland Traffic Ordinance; R. S., 1954, Chap. 22, Sec. 87), although such assumption is not intended by the law to be perverted by the plaintiff into false security or rash presumption.

Damage assessment is the sole province of the jury and the amount fixed must stand unless it can be demonstrated that the jury acted under some bias, prejudice or improper influence, or have made some mistake of fact or law.

A reviewing court will not interfere *merely* because the award is large.

In the instant case the admission or exclusion of evidence concerning the details of a surgical operation performed upon plaintiff's injured hip was for the sound discretion of the presiding justice; and it will be presumed that his rulings were right, unless the exception shows affirmatively it was wrong.

McMann v. *Reliable Furniture Co.*, 383.

Insurance in negligence cases is immaterial, prejudicial and not admissible; and the rule applies with equal force to arguments of counsel. This rule of exclusion is equally applicable to plaintiff and defendant.

If counsel in addressing the jury exceed the limits of legitimate argument, objection must be made at the time; if not so made it is considered as waived.

Where a plaintiff gives the court no reason to correct what he now claims after verdict against him is an error prejudicial to his case, his complaint comes too late.

Deschaine v. *Deschaine,* 401.

Contributory negligence of an eighteen year old minor who is driving his father's automobile upon a personal mission is not imputable to the father-owner so as to preclude the father's right to recovery for damages to his automobile, even though R. S., 1954, Chap. 22, Sec. 156 provides that "any person who gives or furnishes a motor vehicle to such minor, shall be jointly and severally liable with such minor for any damages caused by the negligence of such minor in operating such vehicle."

Statutes in derogation of the common law must be accorded strict interpretation.

In the interpretation of statutes the basal quest of the court is the expressed intention of the legislature.

The words "liable with such minor" connotes a legal accountability of the bailor with the bailee to third persons.

The word "any damages caused" pertains to damages to third persons.

Juvenile accident statistics might well counsel a legislative policy of deterring bailors by imputing the negligence, sole and contributory, of youthful bailees in the promotion of careful driving. But until such an intention is manifest it is the duty of the Law Court to interpret, not make the law.

York v. *Day's, Inc.*, 441.

It must, to justify a directed verdict, be discernible from the evidence with every justifiable inference—considered most favorably to the plaintiff, that reasonable persons could only conclude that the harm suffered was the result of contributory negligence or not caused by defendant's negligence.

The failure of a defendant to perform a duty imposed by R. S., 1954, Chap. 97, Sec. 49, for the benefit of tenants, which proximate results in harm or is the natural and probable result thereof, is, at least, evidence of actionable negligence to be submitted to the jury.

The violation of R. S., 1954, Chap. 97, Sec. 49, is prima facie evidence of negligence.

Whether the violation is the "proximate cause" of the harm is to be submitted to the jury under proper instructions, unless the court can say with judicial certainty that the injury is or is not the natural and probable consequence of the act complained of.

If a person is injured by the negligence of another, he may recover for the natural and probable consequences of such negligence, although the injury, in the precise form in which it resulted, was not foreseen.

Whether negligence is the proximate cause of injury depends upon reasonable foreseeability, not the intervening and contributing act of a third person. Each of two independent torts may be a substantial factor in producing injury.

A pure error in judgment is not of itself contributory negligence. If one uses that degree of care of an ordinary prudent person in the same emergency, it is not negligence.

Kimball et al. v. *Breton, Ex'x.*, 476.

See New Trial, *White* v. *Schofield,* 79.
Rules of Court, *Palleria* v. *Farrin Bros. and Smith,* 423.

NEW TRIAL

A motion for a new trial addressed to the Superior Court considered in termtime may be decided in termtime, during the ensuing vacation, or at the next term.

Under R. S., 1954, Chap. 113, Sec. 60 and Rule 17, a party has ten days after decision upon the motion for new trial within which to file a motion for new trial addressed to the Law Court. In such case a transcript of the evidence must be filed within thirty days after adjournment of the term at which the verdict was rendered or within thirty days after the filing of the motion, whichever is later, in any case where no special order for filing is made. During the alternative thirty-day period this time may be enlarged by special order of the

justice who presided over the trial as the "presiding justice" within the meaning of Rule 17.

The marking of cases with the entry "Law" upon the docket of the Superior Court (after filing of a motion for new trial and transcript) effectively terminates the authority of the Superior Court and the question of timely filing of the transcript must thereafter be determined by the Law Court.

Rules of court are not to be so interpreted as arbitrarily to destroy rights of appeal and review.

Failure of a motor vehicle operator to give any signal of his intention to make a left turn as required by R. S., 1954, Chap. 22, Secs. 123, 124 and 125 is prima facie negligence.

Uncorroborated oral testimony of an interested witness must yield to undisputed physical facts of universal application.

White v. *Schofield,* 79.

Where there is no error of law and the evidence supports the verdict, a new trial will not be granted.

McNally v. *Patterson,* 115.

See Damages, *McKinnon, et al.* v. *Cianchette,* 43.
Rules of Court, *Palleria* v. *Farrin Bros. and Smith,* 423.

NUISANCE

Rules of Court, *Palleria* v. *Farrin Bros. and Smith,* 423.

PAROL EVIDENCE

The construction of all written instruments belongs to the court.

Where a contract is to be construed by its terms alone, it is the duty of the court to interpret it.

Whether a contract, if so made, is a legal and binding contract, under the evidence in the case is a question of law which the Law Court must determine independently of the finding of fact by the jury.

Where negotiations between the parties fail to demonstrate a meeting of the minds there is no contract.

Where the deficiencies of the written evidence are not supplied by parol evidence, at least to the extent of providing some basis for a contract, a verdict for defendant is properly directed.

Harmon v. *Roessel,* 296.

PARTICULARS

See *State* v. *Libby,* 1.

PAUPERS

The pauper statute is one body of law and all its provisions must be read together in order to give proper consideration to the legislative intent.

The notice required by R. S., 1954, Chap. 94, Sec. 29, to break the continuity of the five year period necessary to acquire a new pauper settlement must be in writing.

Defects in a notice provided for in R. S., 1954, Chap. 94, Sec. 29, may be waived and this rule applies to the requirement of writing.

The written answer to notice as required by R. S., 1954, Chap. 94, Sec. 30, may be waived.

Waiver is question of fact and proof of payment in response an oral notice would carry great weight.

Amity v. *Orient,* 29.

PEDESTRIANS

See Negligence, *McMann* v. *Reliable Furniture Co.,* 383.

PLEADING

See Contracts, *Johnson* v. *Parsons Admr.,* 103.
Joinder, *Daigle* v. *Yesbec et al.,* 76.

POLICE POWER

See Maine Turnpike, *First National Bank of Boston* v. *Maine Turnpike,* 131.

PRACTICE

See Negligence, *Deschaine* v. *Deschaine,* 401.

PROCESS

See Complaint and Warrant, *State* v. *Haines,* 465.

PROXIMATE CAUSE

See Negligence, *Kimball et al.* v. *Breton, Ex'x.,* 476.

PUBLIC UTILITIES

See Utilities.

QUANTUM MERUIT

See Contracts, *Johnson* v. *Parsons Admr.,* 103.

RAPE

Prior acts of intercourse (to those alleged) between a respondent and prosecutrix are admissible for the purpose of demonstrating relationship between the parties, even though not set forth in the bill of particulars.

Where pregnancy of a complaining witness in a rape is brought into the case by the State, it is evidence of probative force against a respondent and tends to corroborate the testimony of the prosecutrix. In such case, it is proper for a defendant to attack it by being permitted to show that another than he was responsible for the prosecutrix's condition.

Where the fact of a birth of a child, or other corroborating circumstance, is first brought out by the accused, the rule is otherwise.

State v. *Henderson,* 364.

RATES

See Utilities, *Central Maine Power* v. *P. U. C.,* 228.
Utilities, *P. U. C.* v. *Cole's Express,* 487.

RELEASE

See Settlement, *Larsen* v. *Zimmerman,* 116.

RESTATEMENT

See Agency, *Poretta* v. *Superior Dowel Co.,* 308.
Negligence, *Blanchard* v. *Bass,* 354.
Negligence, *York* v. *Day's, Inc.,* 441.

RESTRICTIVE COVENANTS

A covenant in a deed reciting that the grantors "will erect or maintain no building or structure of such a character as to interrupt or interfere with the view over said parcel" reserved to the grantor does not preclude the grantor from using his land thus reserved for an automobile parking lot.

An automobile, bus or other vehicle is not a structure or building within the meaning of a restrictive covenant relating to buildings or structures.

Restrictive covenants ought not to be extended by construction beyond the fair meaning of the words.

Leavitt et al. v. *Davis et al.*, 279.

RULES OF COURT

The filing of a motion for a new trial with the presiding justice pursuant to Rule XVII does not result in a waiver of exceptions previously noted and otherwise preserved by order of the court providing for the time of filing the transcript and extended bill (R. S., 1954, Chap. 113, Sec. 60). If, however, it develops that the issues to be decided upon the exceptions and the motion are the same, manifestly a decision on one is sufficient; likewise an error in perfecting one is not fatal to the other.

R. S., 1903, Chap. 84, Sec. 53 (Chap. 87, Sec. 57, R. S., 1916), was superseded by Sec. 59, Chap. 113, R. S., 1954 and Rule XVII, and provides that a report of the evidence may be authenticated by an official reporter.

The allegation of existing duty and breach thereof constitute better pleading even though the duly claimed to have been breached may be supported by the averment of facts from which the law will imply a duty and breach thereof.

Contributory negligence is an appropriate defense to an action based on nuisance which is in fact grounded on negligence.

Palleria v. *Farrin Bros. and Smith*, 423.

Even though defendant's exceptions taken to an order of the presiding justice denying a new trial are a nullity under Rule XVII, such fact does not destroy the efficacy of an order entered in connection therewith extending the time for filing a transcript of testimony where defendant subsequently addressed a general motion for a new trial to Law Court. This is so even though the order relating to the filing of the transcript extends the time beyond that otherwise required by Rule XVII as it pertains to motions for a new trial addressed to the Law Court.

Rules of Court are not to be so interpreted as arbitrarily to destroy rights of appeal.

A new trial will not be granted unless the verdict is clearly wrong.

Gregory v. *James*, 453.

Rule V, Rules of Court (Record), 382.
Rule 6, *Morrill* v. *Johnson*, 460.
Rule 17, *White* v. *Schofield*, 79.

SALES

See Brokers, *MacNeill* v. *Madore*, 46.
Taxation, *Hinckley* v. *Johnson*, 517.
Unfair Sales Act, *Farmington Dowel Prod. Co.* v. *Forster's Mfg. Co.*, 265.

SALES TAX

Antibiotics and hormone preparations are not feeds within the meaning of R. S., 1954, Chap. 17, Sec. 10, Subsec. VII, exempting "feed" in agricultural production, since they function as catalysts to assist assimilation rather than as foods.

"Sawdust" purchased for use as litter is not "fertilizer" within the meaning of the exemption, even though when mixed with excretion and subsequently removed, it may be used as fertilizer.

NOTE: P. L., 1957, Chap. 402 amended exemptions to include "hormones, litter and medicines."

Lipman Poultry Co. v. *Johnson,* 347.

SENTENCE

Article V, Part First, Section 11 of the Constitution of Maine authorizes the Governor and Council to commute a sentence with such restrictions as may be deemed proper provided such restrictions are not illegal, immoral or impossible to perform.

A commutation is not affected because the Statutes do not permit courts in the first instance to fix such punishments. (An eight year sentence for rape was commuted to "not less than four nor more than eight.") R. S., 1954, Chap. 149, Sec. 12.

Baston v. *Robbins,* 128.

SETTLEMENT

The offer of money in settlement of a claim, whether liquidated or unliquidated, and the acceptance thereof in accord and satisfaction are ordinarily questions of fact. (See R. S., Chap. 113, Sec. 64.)

The tender and acceptance of a check bearing the words, "By endorsement this check is accepted in full payment of the following account," and "final" may be in itself sufficient to establish the intent requisite for a complete accord and satisfaction.

One may not accept a check with conditions attached and then seek to deny the force and effect of the condition.

Larsen v. *Zimmerman,* 116.

See Paupers, *Amity* v. *Orient,* 29.

STATUTES CONSTRUED

REVISED STATUTES

R. S., 1954, Chap. 15, Sec. 7,
State v. *Libby,* 1.

R. S., 1954, Chap. 17, Sec. 2,
Hinckley v. *Johnson,* 517.

R. S., 1954, Chap. 17, Sec. 10,
Lipman Co. et al. v. *Johnson,* 347.

R. S., 1954, Chap. 17, Sec. 20,
Morrill v. *Johnson,* 460.

R. S., 1954, Chap. 22, Sec. 87,
McMann v. *Reliable Furniture Co.,* 383.

R. S., 1954, Chap. 22, Sec. 147,
Cameron v. *Stewart,* 47.

R. S., 1954, Chap. 22, Sec. 150,
State v. *Croteau*, 126.

R. S., 1954, Chap. 22, Sec. 156,
York v. *Day's, Inc.*, 441.

R. S., 1954, Chap. 23, Secs. 19, 27, 38.
Brunswick and Topsham Water Dist. v. *Hinman Co.*, 173.

R. S., 1954, Chap. 23, Sec. 40,
Newport Trust Co. v. *Susi et al.*, 51.

R. S., 1954, Chap. 29, Sec. 15,
Bilodeau v. *M. E. S. C.*, 254.

R. S., 1954, Chap. 37, Secs. 148, 149,
State v. *McKinnon*, 15.

R. S., 1954, Chap. 44, Secs. 67, 69, 70,
P. U. C. v. *Cole's Express*, 487.

R. S., 1954, Chap. 90A, Sec. 36, Subsec. IV,
Harding v. *Brown*, 331.

R. S., 1954, Chap. 94, Secs. 29, 30,
Amity v. *Orient*, 29.

R. S., 1954, Chap. 97, Sec. 49,
Kimball et al. v. *Breton, Ex'x.*, 476.

R. S., 1954, Chap. 113, Sec. 28,
Sylvester v. *Twaddle*, 40.

R. S., 1954, Chap. 113, Sec. 39,
Dumais v. *Dumais*, 24.

R. S., 1954, Chap. 113, Sec. 64,
Larsen v. *Zimmerman*, 116.

R. S., 1954, Chap. 146, Sec. 13,
State v. *Haines*, 465.

R. S., 1954, Chap. 149, Sec. 12,
Baston v. *Robbins*, 128.

R. S., 1954, Chap. 184,
Farmington Dowel Prod. Co. v. *Forster Mfg. Co.*, 265.

PRIVATE AND SPECIAL LAWS

Private and Special Laws, 1903, Chap. 158,
Brunswick and Topsham Water Dist. v. *Hinman Co.*, 173.

PUBLIC LAWS

P. L., 1949, Chap. 311, Sec. 1, 2,
Dumais v. *Dumais*, 24.

P. L., 1955, Chap. 306,
State v. *Libby*, 1.

P. L., 1957, Chap. 402, Sec. 4,
Lipman Co. et al. v. *Johnson*, 347.

P. L., 1957, Chap. 405, Sec. 1,
Harding v. *Brown*, 331.

UNITED STATES STATUTES

Bankruptcy Act, 11 U. S. C. A., Sec. 17, 35,
Personal Finance Co. v. *Moore,* 122.

SUBROGATION

See Sureties, *Newport Trust Co.* v. *Susi et al.,* 51.

SURETIES

A surety on a state highway contractor's bond, who binds himself to the performance of a contract, and the satisfaction of all claims and demands incurred for the same and all bills for labor, materials, equipment and other things contracted for or used in connection with the work contemplated, is not liable to a bank which lends money to the contractor for the payment of wages of the contractor's employees where such loan was not within the contemplation of the parties at the time of the execution of the bond, and the employees gave no wage assignments to the lending bank.

A bond must be construed in the light of the contract which occasioned its necessity and the statutory requirements.

A lender by lending money to a contractor for use in the payment of contractor's employees' wages does not take part in the performance of the contract or in furnishing labor and materials for use in the work.

A bank does not by the mere act of loaning money to the contractor for the purpose of paying labor become subrogated to the rights of the laborer under R. S. 1954, Chap. 23, Sec. 40.

Newport Trust Co. v. *Susi et al.,* 51.

TAXATION

A bill of exchange must fail which does not include all that is necessary to enable the court to decide whether the rulings complained of are erroneous. (i.e., the evidence and reasons for appeal in instant case.)

A reason for appeal which refers to R. S., 1944, Chap. 14-A, Sec. 10 (a Subsection of P. L., 1951, Chap. 250), containing nineteen subparagraphs and does not apprise the court of the particular error complained of is vague, ambiguous and entirely inadequate.

Where no brief or argument is filed within the time prescribed (Rule 6 of Supreme Judicial Court), the case must be decided under the Rule "without argument."

Morrill v. *Johnson,* 460.

Where a contract for the construction of a yawl provides for the sale of materials supplied thereunder and title to the materials by the clear intendment of the contract passes to the buyer as they are appropriated to the job the State cannot levy a Sales and Use Tax upon the completed yawl under Sec. 2 relating to Conditional Sales and Installment Lease Sales. R. S., 1954, Chap. 17, Sec. 2.

Hinckley v. *Johnson,* 517.

See Sales Tax, *Lipman Co. et al.* v. *Johnson,* 347.

TORTS

See Joinder, *Daigle* v. *Yesbec et al.,* 76.
See Negligence, *Blanchard* v. *Bass,* 354.
Sinclair v. *Cox et al.,* 372.

TOWNS

P. L. 1957, Chap. 405, Sec. 1, provides an orderly process for the adoption or abandonment by towns of the "stagger" system, so called. R. S. 1954, Chap. 90A, Sec. 36, Subsec. IV.

Resignation of a public office may be implied. What acts constitute abandonment depend upon circumstances and controlling law.

To constitute abandonment there must be a voluntary and intentional relinquishment of office.

Harding v. *Brown*, 331.

TRESPASS

See Damages, *McKinnon et al.* v. *Cianchette*, 43.

TRUSTS

One of the essential elements of the doctrine of *res judicata* is the identity of the issue.

The doctrine of cy pres is the principle that equity will, when a charity is originally or later becomes impossible or impractical of fulfillment, substitute another charitable object which is believed to approach the original purpose as closely as possible.

The doctrine of cy pres does not apply to private trusts.

Private trusts are for the benefit of certain and designated individuals in which the cestui que trust is a known person or class of persons.

Public or charitable trusts are those created for the benefit of an unascertained, uncertain and sometimes fluctuating body of individuals in which the cestuis may be a portion or class of a public community.

Private trusts are subject to the limitations of a perpetuity while public trusts may continue for a permanent or indefinite time.

There are three prerequisites to the application of the cy pres doctrine (1) the court must find that the gift creates a valid charitable trust; (2) it must be established that it is to some degree impossible or impractical to carry out the specific purpose and (3) a general charitable intent.

Where the specific purpose of a public trust is to render assistance to "indigent seamen" of the class to which the testator belonged and it has become clear that the fund has become too large to permit its application to such class, the cy pres doctrine may be applied if otherwise appropriate.

A general charitable intention is a desire to give to charity generally, rather than to any one party, object or institution.

The purpose of a gift can not be changed by the cy pres doctrine. For example, a gift for "education" can not be changed to "religion," etc.

It is easier to find a more general charitable intent where the impossibility or impracticality of a particular purpose is due to a change of circumstances occurring subsequent to the giving of the trust property.

Where the purpose of a particular charitable trust is fully accomplished without exhausting the trust property and a general charitable intent is manifest, there will not be a resulting trust of the surplus

but the court will direct the application of the surplus to some charitable purpose within the general charitable intent of the settlor.

Pierce v. *How*, 180.

See Descent and Distribution, *Linnell et al.* v. *Smith et al.*, 288.

UNAVOIDABLE ACCIDENT

See Negligence, *Sinclair* v. *Cox et al.*, 372.

UNEMPLOYMENT COMPENSATION

Sec. 15, Subsec. IV of the Maine Employment Security Law provides that an individual is disqualified if his unemployment is due to a stoppage of work caused by a labor dispute where the individual was last employed, unless such individual was a non-participant and a non-member of the grade and class of employee involved in such dispute as described in Subsec. IV, A and B.

The term "stoppage of work" refers generally to a cessation of plant operations.

"Labor dispute" broadly includes any controversy concerning the terms or conditions of employment or arising out of the respective interests of employer and employee.

The work made vacant by a strike is not "new work" within the meaning of Sec. 15, Subsec. III, B, 1; the work made vacant by a strike is "new work" only to strangers to the strike.

The Legislature did not intend Subsec. III, B, 1 to operate in direct contradiction to Subsec. IV of Section 15.

The Maine Employment Security Law was never intended to lend itself as a medium through which financial aid would be provided for the prosecution and support of a labor dispute.

Bilodeau et al. v. *M. E. S. C. et al.*, 254.

UNFAIR SALES ACT

The "Unfair Sales Act" being in derogation of the common law, must be strictly construed. R. S. 1943, Chap. 184.

An offending merchant is entitled to be informed by the statute in explicit and unambiguous language what acts and conduct are prohibited.

Courts are generally agreed that to constitute an "unfair sale" two factors must coexist (a) wrongful intent and (b) a sale below cost.

Where the "Unfair Sales Statute" uses a cost definition which is manifestly applicable only to "distributors" of merchandise, that is a sufficient indication of the legislative intent not to apply it to manufacturers.

It is not necessary to pass upon the "good faith" cost rule.

Where one section of a statute refers to a retailer selling merchandise of "his or its own manufacture" with a certain markup to cover cost, the statute does not necessarily apply to manufacturers because the statute so applied is otherwise obscure and the "markup to cover cost" referred to is meaningless as applied to a producer or manufacturer.

Farmington Dowel Prod. Co. v. *Forster Mfg. Co.*, 265.

UTILITIES

The Brunswick and Topsham Water District is a body politic and corporate and a quasi municipal corporation created by a special, state, legislative act. (P. and S. L. 1903, Chap. 158.)

The State Highway Commission in the making and maintenance of roads is acting within the scope of the police power and as such may compel a quasi municipal utility to relocate its facilities without compensation. (R. S. 1954, Chap. 23, Secs. 19, 27, 38.)

A validly exercised police power can never be relinquished by the legislature.

Brunswick and Topsham Water Dist. v. *Hinman Co.*, 173.

The *income tax* chargeable to the utility business for rate making purposes should be no more than the total tax on the corporation so that the ratepayers (not the stockholders) should have the benefit of the reduction of income taxes obviously arising from the impact of a merchandising loss and contributions.

Additional *wage costs* resulting from a wage increase to employees after the effective date of the test period should be treated as an operating expense for rate making purposes, since such wage increase results from a firm contract with its employees known in the test year and effective thereafter.

Additional fuel costs above the costs of the test year were properly excluded by the Commission as an operating expense since no one can with certainty determine the fuel prices in the future and the Commission did no more than tie its estimates of income and expense to the test year.

Promotional expenses actually incurred during the test year should be treated as an expense for rate making purposes where such expenses are not excessive or unwarranted.

The creation of an income tax *deferred reserve* is properly disallowed by the Commission where under the circumstances it does not represent a tax saving in fact from offset of loss against income or an actual incurred expense but is, as the name indicates, an expense to be incurred in later years.

A utility company is entitled to a *fair return* and entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made. At the same time, in the same general locality, on investments in other business undertakings attended by corresponding risks and uncertainties.

Central Maine Power Co. v. *P. U. C.*, 228.

When rulings of the P. U. C. are based upon its findings of fact, the Law Court has no right to sustain exceptions on questions of fact, if there be any evidence to sustain the findings, yet it is a well recognized principle of law that whether on the record, any factual finding underlying order and requirement, is warranted by law, is a question of law, reviewable on exceptions.

Courts may properly take judicial notice of facts that may be regarded as forming part of the common knowledge of every person of ordinary understanding and intelligence.

Administrative bodies should make no use of relevant matters in their personal (supposed) knowledge, or in their official documents, without stating them and putting them into the record during the hearing. This principle applies to annual reports filed by other motor carriers, special tariff studies filed with the Commission or the I. C. C., cost sheets filed in other proceedings, and cost studies made by motor rate bureaus.

An administrative body exercising adjudicatory or quasi judicial functions must act solely on the basis of the evidence before it and may not act on the basis of personal knowledge or on matters dehors the record. However, the fact that the administrative body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result.

Exception filed under R. S., 1954, Chapter 44, Section 67 are a proper remedy for raising questions of law relative to decrees of the P. U. C. even though section 70 provides for petition for review and section 69 provides for a petition in equity.

P. U. C. v. *Cole's Express*, 487.

See Maine Turnpike, *First National Bank of Boston* v. *Maine Turnpike*, 131.

VACATION

See Divorce, *Dumais* v. *Dumais*, 24.

VERDICT

See (Special Verdict), *State* v. *Libby*, 1.

WILLS

See Descent and Distribution, *Linnell et al.* v. *Smith et al.*, 288.

WITNESSES

See *State* v. *Libby*, 1.

WORDS AND PHRASES

See Heirs, *Linnell et al.* v. *Smith et al.*, 288.
Labor Dispute, *Bilodeau* v. *M. E. S. C.*, 254.
Stoppage of Work, *Bilodeau* v. *M. E. S. C.*, 254.
"Vacation," see *Dumais* v. *Dumais*, 24.

WORKMEN'S COMPENSATION

Where it was common practice for an employee to use the turnpike, not yet open to the public, in going to and from work, a fact known to the company, employees injured by a collision while so traveling are injured "in the course of" and "arising out of" employment.

Where an accident which might have been anticipated did in fact occur, it occurred "in the course of" and "arose out of" employment and is compensable.

Getchell et al. v. *Lane Constr. Co. et al.*, 335.

A road construction worker injured while traveling upon a turnpike, not yet opened to the public, to his work assignment is "in the course" of employment where the employer had not issued orders nor promulgated rules prohibiting employees from using the turnpike area as a route to and from the place of work.

In matters of highway construction, the employer's premises are transitory and temporary, changing as the work proceeds from day to day or hour to hour and ordinarily includes *only* those portions of the highway on which construction is *actually* in progress.

To say that an injured employee might have entered the turnpike at a point closer to his work assignment and thereby have exposed him-

self to less of the risks of employment, is to say no more than that the "premises" were extensive.

Babine v. *Lane Constr. Co.*, 339.

The question whether an act of an employee arose out of and in the course of the employment depends ultimately upon the facts and circumstances of each case.

Findings of the Industrial Accident Commission upon questions of fact are final if supported by competent evidence.

Whether a deviation by a traveling employee from his usual or prescribed route, schedule, or mode of travel, constitutes such a departure from his scope or course of employment as to deprive him of the right to compensation for an injury sustained during or as the result of such deviation depends ordinarily upon the extent, purpose and effect thereof.

It is not every slight deviation that deprives an employee of benefits.

The Legislature has imposed a rule of liberal construction.

Larou v. *Table Talk Distr., Inc.*, 504.