MAINE REPORTS

154

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

APRIL 28, 1958 to FEBRUARY 17, 1959

MILTON A. NIXON

REPORTER

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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. FRANCIS W. SULLIVAN

HON. F. HAROLD DUBORD

[2]HON. CECIL J. SIDDALL

1 Retired March 26, 1958
2 Qualified as Justice of Supreme Court May 7, 1958

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

HON. HAROLD C. FULLER, *Clerk*

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

[5]HON. FREDERICK A. JOHNSON, *Clerk*

3 Died February 27, 1958
4 Appointed Clerk March 1, 1958
5 Qualified January 1959

ACTIVE RETIRED JUSTICES
OF THE
SUPREME JUDICIAL COURT

HON. EDWARD P. MURRAY

[6]HON. SIDNEY ST. FELIX THAXTER

6 Died June 30, 1958

JUSTICES OF THE SUPERIOR COURT

HON. HAROLD C. MARDEN

HON. RANDOLPH WEATHERBEE

[1]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.

[2]HON. JOHN P. CAREY

[3]HON. THOMAS E. DELAHANTY

1 Elevated to Supreme Judicial Court May 7, 1958
2 Qualified as Justice Superior Court May 7, 1958
Resigned December 10, 1958
3 Qualified December 31, 1958

Attorneys General

HON. FRANK F. HARDING

HON. FRANK E. HANCOCK

Reporter of Decisions

MILTON A. NIXON

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

ARTHUR P. GOOLDRUP
vs.
SCOTT PAPER COMPANY
HOLLINGSWORTH & WHITNEY DIVISION
AND
LIBERTY MUTUAL INSURANCE COMPANY

Kennebec. Opinion, April 28, 1958.

Workmen's Compensation.

A decision of a Commissioner of the Industrial Accident Commission on questions of fact is final in the absence of fraud, Chap. 31, Sec. 37, R. S. 1954.

ON APPEAL.

This is an appeal from a *pro forma* decree of the Superior Court suspending Compensation of an employee. Decree affirmed. Appeal dismissed.

Jerome G. Daviau, for plaintiff.

Forrest E. Richardson, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, JJ. BELIVEAU, J., sat at argument but retired before the opinion was adopted.

TAPLEY, J. On appeal. The proceedings before the Commission were on a petition for review filed by the employer under authority of Sec. 38, Chap. 31, R. S. 1954. The Commission found that compensation was properly suspended as of June 29, 1956. A Justice of the Superior Court by a *pro forma* ruling decreed that the compensation was properly suspended. The employee appealed from the decree, which brings the matter before this court.

Arthur P. Gooldrup was employed by the Hollingsworth & Whitney Division of the Scott Paper Company and while so employed suffered injury on April 20, 1956 by striking his head against a piece of metal which resulted in a cut on the top of his head. The employee on June 4, 1956 entered into an agreement for payment of compensation with his employer and the insurance carrier for payment of compensation at the rate of $30.00 per week "during present period of incapacity beginning 5-12-56." This agreement was approved by the Commissioner of Labor (Chap. 31, Sec. 32, R. S. 1954). The agreement recites the fact that the injury was sustained on April 20, 1956 and the nature of the injury causing disability was "cut top of head." On July 6, 1956 the employer petitioned the Industrial Accident Commission for a review of incapacity and compensation was suspended as of June 29, 1956. A hearing was had before the Industrial Accident Commission on the petition for review on November 5, 1956 with a continued hearing on May 14, 1957. The employee did not testify at either hearing. The Commission found:

> "After consideration of the evidence before us we conclude that complaints and symptoms existing when compensation ceased were not due to the accident and having so concluded it follows that if actual incapacity for work existed at that time it was not attributable to the accident and was not the responsibility of this employer.

> We find that compensation was properly suspended on June 29, 1956."

The evidence submitted for the Commission's consideration was wholly on the part of the petitioner and consisted of the evidence of two doctors. A decision of a Commissioner of the Industrial Accident Commission on questions of fact is final in the absence of fraud, Chap. 31, Sec. 37, R. S. 1954. *Prescott vs. Old Town Furniture Co.*, 151 Me. 11. Although the Commission is made the trier of facts and its findings are final, it must in arriving at its conclusions be guided by legal principles. *Robitaille's Case,* 140 Me. 121, at page 125:

> "The Commission, by the Act, is made the trier of facts and its findings thereof, whether for or against the claimant, are final; but in arriving at its conclusions it must be guided by legal principles. Failing in this it commits error of law and it is the function of the Court to correct such error. For this purpose the Court will examine the evidence set forth in the record.
>
> A finding for the moving party must be founded upon some competent evidence. Mailman's Case, 118 Me., 172, 106 A., 606. But it must be wholly upon such evidence. If the finding is founded in whole or in part upon incompetent or illegal evidence error has been committed and the finding will not be sustained. Gauthier's Case, 120 Me., 73, 113 A., 28; Hinckley's Case, 136 Me., 403, 11 A. (2d), 485. If there is any evidence in support of such finding it cannot be set aside. Simmons's Case, 117 Me., 175, 103 A., 68; Westman's Case, supra and Mailman's Case, supra. The sufficiency of the evidence will not be passed upon, but it must be competent and have probative force. Williams' Case, 122 Me. 477, 120 A., 620; Adams' Case, 124 Me., 295, 128 A., 191; * * *."

See *Mailman's Case,* 118 Me. 172.

It becomes necessary for a study and an analysis of the record to determine if the findings of the Commissioner

should be disturbed. The nature of the employee's injury which occasioned the disability is characterized as "cut top of head." The only testimony in the case was furnished by two doctors, one admittedly having the qualifications of a neurosurgeon and the other those of a practicing physician and surgeon. Dr. Bidwell, the neurosurgeon, examined the employee on June 6, 1956 about two months after the injury was sustained. The employee at that time was complaining of a headache and in the course of the doctor's examination and as a part of the case history he received some information regarding a head injury some five years previous. Many of the recited symptoms were of a subjective nature. Dr. Bidwell made such an examination of the employee as he felt was necessary upon which to base his opinion. His opinion is reported as follows:

"Q. Now then, your conclusion. Did you arrive at a conclusion as to whether he had any symptoms that could be due to any injury? A. I felt that there were not.

Q. No organic signs or symptoms of injury. What diagnosis did you make? A. Psychoneurosis."

Dr. Irwin, a practicing physician and surgeon, testified that he first examined the appellant on January 15, 1952 for an injury to the back of his head and again in February of 1952 concerning the same head injury. The employee was examined by Dr. Irwin in August of 1956 for the injury of April, 1956. The employee gave the doctor a history of the case and explained to him his physical feelings. Dr. Irwin made an examination of the employee and concluded the man was not incapacitated as a result of the injury. His findings appear in the record in the following phraseology:

"A. The neurologic examination was entirely normal. It was my impression at that time that there was no objective evidence of organic,

neurological disease. The following comment was entered in my record on the completion of this examination:

'I am unable to make out any objective evidence of organic neurological disease. I can find no reason for his alleged disability and have advised the patient to return to work. The question of hospitalization has come up but I do not believe that any additional information would be obtained by hospitalization. Actually, such hospitalization might be detrimental to the patient at the present time. I have no specific suggestions for his care.'

Q. You thought he was able to go to work at that time?

A. From the neurologic, organic standpoint, I could see no evidence of disability."

The testimony of the two doctors stands on the record uncontradicted. The witnesses were submitted to rigorous cross-examination by counsel for the employee with no effect on their conclusions that the employee was not suffering disability as a result of the injuries sustained April 20, 1956.

The parties saw fit to enter into an agreement as provided by Sec. 32 of Chap. 31 of R. S. 1954 and thereby established payment of compensation. The employer, on July 6, 1956, having considered that incapacity had ended, petitioned for a ruling to that effect. This was the proper procedure under Sec. 38 of the Act. *Newell's Case,* 121 Me. 504. The issue on the petition for review based on the agreement is whether since the execution and approval of the agreement the incapacity has increased, diminished or ended. *Crowley's Case,* 130 Me. 1.

The unrefuted and uncontradicted testimony of Drs. Bidwell and Irwin definitely establishes the fact that the incapacity of the employee as a result of the injury sustained on April 20, 1956 was at an end. The record discloses that

there was admissible and substantial evidence upon which the Commissioner based his findings of fact.

Appeal dismissed.

Decree affirmed.

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ALBION EARLE MORTON, PETR.
for Writ of Habeas Corpus
vs.
PERRY D. HAYDEN, SUPT.
REFORMATORY FOR MEN

Cumberland. Opinion, May 6, 1958.

Juvenile Delinquency. Crime. Sentence Reformatory. Statutory Construction.

A juvenile over sixteen years and under seventeen years of age guilty of "juvenile delinquency" may be legally sentenced and committed to the reformatory for men under R. S. 1954, Chap. 27, Sec. 66 as amended (P. L. 1955, Chap. 318, Sec. 1) which provides for reformatory sentences of males over sixteen years of age who have been convicted of "crime."

The legislature by plain implication made sentences of juveniles to the reformatory permissive when it eliminated from the previous law the prohibition against "reformatory" sentences. (P. L. 1951, Chap. 84, Sec. 4; R. S. 1954, Chap. 146, Secs. 2 and 6). This is so notwithstanding juvenile delinquency is not a crime and a delinquent child is not a criminal.

Statutes must not be construed by a meticulous interpretation thereof apart from laws *in pari materia.* The phrase "*statute in pari materia*" is applicable to private statutes or general laws made at different times, and in reference to the same subjects.

The reformatory act and the juvenile delinquency statute are complementary, not repugnant.

ON REPORT.

This is a petition for writ of habeas corpus before the Law Court upon report and agreed statement. Petition for habeas corpus dismissed. Writ discharged.

Walter G. Casey, for plaintiff.

Roger Putnam, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, JJ. BELIVEAU, J., sat at argument but retired before the opinion was adopted. WEBBER, J., concurs specially. DUBORD, J., dissents.

SULLIVAN, J. The petitioner applied for a writ of habeas corpus and it was issued. Following the return by the respondent the parties elected to report the case to this Court upon an agreed statement of facts and the certificate of the Justice. R. S., 1954, Chap. 103, Sec. 15.

The petitioner was born on December 17, A. D. 1940. On August 26, A. D. 1957 he was arraigned in the juvenile court for having feloniously uttered and published as true, a false, forged and counterfeit instrument on August 19, A. D. 1957. He was tried, found guilty of juvenile delinquency and committed to the reformatory for men. He charges that he is unlawfully deprived of his liberty.

The issue is whether a youth more than 16 years of age but less than 17 may be legally sentenced and committed, to the reformatory for men by a judge of a juvenile court for juvenile delinquency.

R. S. 1954 c. 27, § *66,* as amended by *P. L. 1955, c. 318,* § *1,* is, in pertinent part, as follows:

"The state shall maintain a reformatory in which all *males over the age of 16 years,* except as pro-

> vided in section 80, and under the age of 36 years *who have been convicted of or have pleaded guilty to crime* in the courts of this state or of the United States, and who have been duly sentenced and removed thereto, shall be imprisoned and detained in accordance with the sentences or orders of said courts and the rules and regulations of said reformatory. The provisions for the safekeeping or employment of such inmates shall be made for the purpose of teaching such inmates a useful trade or profession, and improving their mental and moral condition.- - - -" (italics supplied)

Save for the addition of the clauses, "and under the age of thirty-six years" and "except as provided in section 80," the statute quoted has existed quite as it was enacted in 1919. P. L. 1919, c. 182, § 1.

On August 26, A. D. 1957 this petitioner could not have been convicted of crime nor could he have pleaded guilty to crime. His youth precluded both possibilities in as much as the charge against him was not a crime the punishment for which may be imprisonment for life or for any term of years. R. S. 1954, c. 146, § 2, c. 133, § 1, P. L. 1955, c. 29; *Wade* v. *Warden,* 145 Me. 120.

R. S. 1954, c. 27, § 66, the statute authorizing the reformatory for men, as amended, taken from its context of statutes and read literally would appear to eliminate the possibility of legal commitment to, or confinement of the petitioner in, the reformatory. To ascertain the effects of the act, however, it is necessary to consider it with other existing and kindred laws. Of the latter there are several.

In 1919 the legislature placed boys between the ages of 8 and 16 years under a disability or incompetency to commit crime save for the gravest types.

> "Act of Juvenile Delinquency.
>
> When a boy *between the ages of eight and sixteen years* is convicted before any court or trial justice

> having jurisdiction of the offense, of an offense punishable by imprisonment in the state prison, not for life, or in the county jail, or in the house of correction, such court or justice may order his commitment to the state school for boys or sentence him to the punishment provided by law for the same offense - - - *The record in the event of conviction in all cases shall be that the accused was convicted of juvenile delinquency,* and the court shall have the power at the hearing of any such case to exclude the general public other than persons having a direct interest in the case. The records of any such case by order of the court may be withheld from indiscriminate public inspection, but such records shall be open to inspection by the parent or parents of such child or lawful guardian or attorney of the child involved." (italics supplied) P. L. 1919, c. 58.

The maximum age of the boy was advanced from 16 to 17 in 1921 (P. L. 1921, c. 129) and has remained at 17 to the present time. (P. L. 1955, c. 211, § 1) By this law a boy under 17 has been incapable of committing all crimes save murder or treason since 1921, and from 1935 to August 28, A. D. 1957 all crimes save murder, treason and kidnapping. Juvenile delinquency is not crime and a delinquent child is not a criminal. *Wade* v. *Warden,* 145 Me. 120, 125, 128.

In 1919 the same legislature which passed the "Act of Juvenile Delinquency" (P. L. 1919, c. 58) enacted the following law:

> "When a male *over the age of sixteen years is* convicted before any court or trial justice having jurisdiction of the offense, of an offense punishable by imprisonment in the state prison, or in any county jail, or in any house of correction, such court or trial justice *may order his commitment to the reformatory for men,* or sentence him to the punishment provided by law. - - -" (italics supplied) P. L. 1919, c. 182, § 7.

In 1923 an age limit of 36 years was imposed by amendment. (P. L. 1923, c. 58, § 2). Otherwise, for the purposes of our present analysis, the act (P. L. 1919, c. 182, § 7) has remained as it is presently. (R. S. 1954, c. 27, § 67, P. L. 1955, c. 318, § 2) And again we comment that from 1921 to 1935 (P. L. 1921, c. 129) a boy under 17 was incapable of committing any crime except murder or treason and from 1935 to August 28, A. D. 1957 any crime except murder, treason and kidnapping. The act just quoted above (P. L. 1919, c. 182, § 7) has never been altered to advance the minimum age to 17. Since 1921 there has been an overlapping of ages, between 16 and 17, in the juvenile delinquency age range and the minimum age in this reformatory sentence act. The above act speaks of "a conviction - - - of an offense" but includes offenses punishable by jail and house of correction confinement. In 1923 the legislature passed the following act:

> "If, in the opinion of the trustees of juvenile institutions, any boy, under the guardianship of the state school for boys or who may hereafter be committed thereto, *who has attained the age of sixteen years,* is incorrigible, they may certify the same on the original mittimus - - - *whereupon said boy shall be transferred from said state school for boys to the reformatory for men - - - It shall be the duty of the officers of the reformatory for men to receive any boy so transferred and the remainder of the original commitment shall be executed at the reformatory for men - - -*" (italics supplied) P. L. 1923, c. 28.

This statute without consequential change has continued as law and is now R. S. 1954, c. 27, § 87. It provides for the commitment of incorrigible 16 year old boys to the reformatory.

In the Revised Statutes of 1930 are two more acts treating of incorrigibles at the State School for Boys, R. S. 1930, c. 154, §§ 5 and 6.

> "Every boy committed to said school shall be there kept, disciplined, instructed, employed and governed, under the direction of the board of trustees, until the term of his commitment expires, or he is discharged as reformed, bound out by said trustees according to their by-laws, or remanded to some penal institution under the sentence of the court *or transferred to the reformatory for men as incorrigible,* upon the information - - -" (italics supplied) R. S. 1930, c. 154, § 5.

This act has remained in being except for amendments not affecting our present consideration. See R. S. 1954, c. 27, § 79, P. L. 1957, c. 387, § 15.

> "When a boy is ordered to be committed to said school and the trustees deem it inexpedient to receive him, or his continuance in the school is deemed injurious to its management and discipline, they shall certify the same upon the mittimus by which he is held, and the mittimus and boy shall be delivered to any proper officer who shall forthwith commit said boy to the jail, house of correction, or state prison, *or if he has attained the age of sixteen years, to the state reformatory for men according to his sentence* - - -" (italics supplied) R. S. 1930, c. 154, § 6.

This law, with amendments of no moment to our current study, has persisted until at present it reads:

> "- - - *or if he has attained the age of ~~16~~ 15 years, to the State Reformatory for Men according to his sentence.*" (italics supplied) R. S. 1954, c. 27, § 80, P. L. 1955, c. 318, § 3.

Thus we have a provision for committing 15 year old boys to the reformatory.

In 1931 the legislature by act conferred upon judges of municipal courts exclusive, original jurisdiction over all offenses committed *by children under the age of 15 years* with the following qualification:

> "*Unless the offense is aggravated or the child is of a vicious or unruly disposition* no court shall sentence or commit a child to jail, *reformatory,* or prison, or hold such child for the grand jury." (italics supplied) P. L. 1931, c. 241, § 4.

In 1933 the legislature, by amendment, raised the age of children subject to such exclusive, original jurisdiction to 17 years generally but at the same session it amended the sentence quoted immediately above to read thus:

> "*Unless the offense is aggravated or the child is of a vicious or unruly disposition* no court shall sentence or commit *a child under the age of 15 years* to jail, *reformatory,* or prison, or hold such child for the grand jury." (italics supplied) P. L. 1933, c. 18; c. 118, § 5.

In 1937 this same sentence was once more amended:

> "*Unless the offense is aggravated or the child is of a vicious or unruly disposition* no court shall sentence or commit a child under the age of ~~15~~ *17* years to jail, *reformatory,* or prison or hold such child for the grand jury." (italics supplied) P. L. 1937, c. 197.

In 1943 the legislature amended the law excepting capital or otherwise infamous crimes, providing for the holding of children for the grand jury, abolishing the sentence set out above as to vicious, unruly children and adopting these words:

> "- - - and no municipal court shall sentence a child under the age of *17* years to jail, *reformatory* or prison." (italics supplied) P. L. 1943, c. 322.

In 1947 there followed an amendment changing crimes excepted: "except for a crime the punishment for which may be imprisonment for life or for any term of years." P. L. 1947, c. 334, § 1.

In 1951 we have this change:

> "- - - and no municipal court shall sentence a child under the age of 17 years to jail, ~~reformatory~~ or prison; - - -" P. L. 1951, c. 84, § 4.

The law which was P. L. 1931, c. 241, with the amendments reviewed above and others not now memorable here, is R. S. 1954, c. 146, §§ 2 and 6. It will be discerned from this 1931 enactment as extended that from 1919 when juvenile delinquency was recognized until 1937 boys over 16 years of age could have been committed to the reformatory. From 1937 to 1943 vicious and unruly boys over the age of 16 years could have been so committed. From 1951 to the present such a commitment for all boys under 17 years down the range of the juvenile scale has been permissible, due to the above amendment of 1951.

Prior to that 1951 amendment to what is now R. S. (1954) c. 146, § 6, as amended, the statute (then R. S. (1944) c. 133, § 6; P. L. 1947, c. 334) read as follows:

> "A municipal court may - - - make such other disposition as may seem best for the interests of the child and for the protection of the community - - - and no municipal court shall sentence a child under the age of 17 years to jail, *reformatory* or prison; - - -" (emphasis supplied)

It is manifest that the power of the municipal court, above, was stated as quite plenary and then was restricted by prohibiting any sentence "to jail, reformatory or prison." When, therefore, the legislature by the amendment of 1951 (P. L. c. 84, § 4) struck out the word, "~~reformatory~~" the legislature intended to remove one prohibition then existing, to the foregoing and quite plenary power of the court and at least by plain implication made sentences to the reformatory permissive. It is further very pertinent to our inquiry to find that the legislature adopted the above amendment of 1951 (P. L. c. 84, § 4) as section 4 of an act entitled: "An Act to Clarify Certain Provisions of the Institutional Service Law" in which section 2 contained an amendment to what is now R. S. (1954) c. 27, § 67, as amended, the reformatory commitment statute. See P. L. 1951, c. 84. The Legislature by such 1951 amendments discovered it-

self as allocating and mindfully treating juvenile sentencing and reformatory commitment as kindred matters in one reform chapter or measure. Very arguably may it be urged that the act of 1951 (P. L. 1951, c. 84) by clear implication also amended the reformatory creation statute which is now being construed, R. S. (1954) c. 27, § 66, as amended.

This synopsis of statutes exposes shortcomings in the correlation of the acts. But such a defect is only of form. The legislature in 1919 established the reformatory for men seemingly for criminals if the creative act were to be read and considered literally and exclusively. The enactment does not state that the reformatory shall be maintained only for criminals but it must be conceded that a meticulous interpretation of it apart from laws in pari materia might fortify such an inference. However, in the prolongation of the law through a span of 38 years the legislature by various statutes hereinbefore reviewed and adopted during the same period of time has affirmatively provided for the commitment of juvenile delinquents, over 16 years and under 17 years, to the reformatory for men. Indeed, one act authorizes such commitments for 15 year old delinquents. There can be no doubt that the legislature acted in each instance with a full comprehension of its doings and it is the prerogative of the legislature alone to enact our laws.

Our court has on many occasions set forth the canons of sound statutory interpretation wisely decisive of any scruples one might be disposed to entertain here. We quote from 2 well known authorities:

> *State* v. *Koliche,* 143 Me. 281
>
> @ 283. "The fundamental rule in the construction of a statute is legislative intent. Craughwell V. Mousam River Trust Co., 113 Me. 531; 95 A. 221. It is also a recognized rule of construction that a penal statute is to be interpreted strictly in favor of the respondent. State V. Wallace, 102 Me. 229; 66 A. 476. Although 'Penal laws are to be

strictly construed, they are not to be construed so strictly as to defeat the obvious intent of the Legislature.' State V. Cavalluzzi, 113 Me. 41; 92 A. 937, 938; State V. Bass Co., 104 Me. 288, 71 A. 894; 20 L. R. A., N. S. 495. To arrive at legislative intent the statute must be construed as a whole, and different sections of the same statute may be read together to ascertain legislative purpose and intent. Rackliff V. Greenbush, 93 Me. 99; 44 A. 374; State V. Frederickson, 101 Me. 37; 63 A. 535; 6 L. R. A., N. S. 186; 115 Am. St. Rep. 295; 8 Am. Cas. 48."

State v. *Frederickson,* 101 Me. 37

@ 41. "But under the established rules of construction the two sections of the statutes should be construed together. Both sections are part of the same body of revised laws. We see no good reason why chapters of the same statute should not be construed with reference to each other as well as sections of the same chapter. Chief Justice Shaw in Com. V. Goding, 3 Met. 103, says: 'In construing the Revised Statutes, we are to bear in mind that the whole were enacted at one and the same time, and constitute one act; and then the rule applies, that in construing one part of a statute, we are to resort to every other part to ascertain the true meaning of the legislature in each particular provision. This rule is peculiarly applicable to the Revised Statutes in which, for the convenience of analysis, and classification of subjects, provisions are sometimes widely separated from each other in the code, which have so immediate a connection with each other, that it is quite necessary to consider the one, in order to arrive at the true exposition of the other.'

"The suggestion in the above quotation that 'the whole were passed at one and the same time' was not intended we apprehend to in any degree limit the rule of comparing statutes, whenever enacted, in pari materia, a principle well established by our own as well as other courts. Gould V. B. & P. R. R.,

82 Maine, 126; Cotton V. W. W. & F. R. R. Co., 98 Maine, 511; Com. V. Sylvester, 13 Allen, 247.

"Black on Interpretation of Laws, page 6, in discussing this principle says: 'The phrase 'statute in pari materia' is applicable to private statutes or general laws made at different times, and in reference to the same subjects.' . . . . ."

Since 1919 two of the noteworthy reforms adopted and developed by our lawmakers have been the moral and social regeneration of criminal malefactors, both adolescent and adult. The young are preserved from the disgrace of criminal record and devoted efforts are made to right their lives. *Wade* v. *Warden,* 145 Me. 120. The mature are rehabilitated, rather than punished, where there is deemed to be some hopeful promise and considerations of public weal at all permit. *Gosselin, Petitioner,* 141 Me. 412. For males in this noble uplift are two major public institutions, the state school for boys and the reformatory for men. It is a truism that the contemporary youth in this country generally is more sophisticated than were his forebears, due in large measure to the greater dissemination of information and goods, condensation of population and increase in travel. The line of demarcation between childhood and adulthood has receded. No two males are completely identical. The legislators and those who staff our institutions well know that some older "teenagers" feel undignified and are not so disposed to be receptive to reform when grouped with younger children. Older boys may be restive to be accepted as young men. Some are quite sociopathic and are subjects for resocialization in the more virile climate of the men's reformatory where, particularly, there is greater security provided. The intention of the legislature to bridge a transition between the school for boys phase of enlightenment, suasion and discipline and that of the senior reformatory for men is unmistakable and intelligible. The reformatory act and the juvenile delinquency statute under which the

petitioner was sentenced and committed are not repugnant but actually complementary.

The petitioner is not unlawfully deprived of his liberty. The mandate must be:

Petition for habeas corpus, dismissed, writ discharged.

WEBBER, J. (Concurring)

I fully concur with the opinion of the Court and the result reached therein. All agree that the statutory law relating to juvenile delinquency has developed by a process of fragmentary amendment which has produced an end product urgently requiring revision and correlation. Bewildering as this legislative morass may appear, I am satisfied that it is by no means impossible to discover underlying legislative intent. Reduced to simplest terms, a municipal court could, at the time this petitioner was before it, "make such other disposition as may seem best for the interests of the child and for the protection of the community," subject to the limitation that the juvenile delinquent under the age of 17 years could not be sent "to jail or prison." R. S. 1954, Chap. 146, Sec. 6. Here was a broad and inclusive power of disposition subject to a specific limitation. Prior to 1951 the limitation was broader and forbade also the sending of the juvenile delinquent to a "reformatory." When by P. L. 1951, Chap. 84, Sec. 4, the Legislature deleted the word "reformatory," it had a purpose in mind and did not intend a meaningless act. The only purpose it could possibly have had was to permit the disposition previously forbidden. I am satisfied that the effect of this amendment was also to amend by implication the statute which prescribes who may be received at the reformatory for men and which requires that they shall have been "convicted of or have pleaded

guilty to crime." R. S. 1954, Chap. 27, Sec. 66. The necessary implication would require the addition of the words "or juvenile delinquency" after the word "crime." This is an essential corollary if meaning and purpose are to be given to the act of the Legislature in deleting the word "reformatory."

In my view the Legislature did no more than recognize that times have changed. When the juvenile delinquency law was first conceived in this state, the term "juvenile delinquent" brought to the average mind a mental picture of a child playing truant, breaking windows, or stealing apples. Today we must reckon with the reality, so painfully apparent in large metropolitan areas, of adolescent hoodlums, organized in gangs, armed with dangerous weapons and bent on crimes of force and violence. Such a youthful offender, truculent and brazen, could easily undermine and destroy the efforts at reform in a state school which is primarily designed to meet the needs of more pliant and less sophisticated children. I am convinced that the Legislature fully intended by its amendments, express and implied, to enlarge the possibilities of disposition available to Municipal Courts in dealing with juvenile delinquents.

DUBORD, J. (Dissenting opinion.)

I am unable to agree with my associates. My opinion is that the petitioner was illegally sentenced and is entitled to be enlarged from his confinement in the reformatory for men.

The petitioner was between the ages of 16 and 17 years when he was arraigned in the municipal court, sitting as a juvenile court, upon the charge of having feloniously uttered and published as true a false, forged and counterfeit instrument. Upon trial, he was found guilty of juvenile

delinquency and committed to the reformatory for men. He filed a petition for a writ of habeas corpus alleging that he is unlawfully deprived of his liberty. The matter was referred to this Court upon an agreed statement of facts.

The issue is whether the petitioner, who is more than 16 years of age, but less than 17 years of age, may be legally sentenced and committed to the reformatory for men by a judge of a municipal court, for juvenile delinquency.

The pertinent parts of the statutes with which we are concerned are as follows:

Section 2, Chapter 146, R. S. 1954.

> "Judges of municipal courts within their respective jurisdictions shall have exclusive original jurisdiction over all offenses, except for a crime, the punishment for which may be imprisonment for life or for any term of years, committed by children under the age of 17 years, and when so exercising said jurisdiction shall be known as juvenile courts. *Any adjudication or judgment under the provisions of sections 4 to 7, inclusive, shall be that the child was guilty of juvenile delinquency, and no such adjudication or judgment shall be deemed to constitute a conviction for crime.*" (Emphasis supplied.)

Section 6, Chapter 146, R. S. 1954, as amended by Section 2, Chapter 211, P. L. 1955.

> "A municipal court may place children under the age of 17 years under the supervision, care and control of a probation officer or an agent of the department of health and welfare or may order the child to be placed in a suitable family home subject to the supervision of a probation officer or the department of health and welfare or may commit such child to the department of health and welfare or make such other disposition as may seem best for the interests of the child and for the protection of the community including holding such child for

the grand jury or commitment of such child to the Pownal State School upon certification of 2 physicians who are graduates of some legally organized medical college and have practiced 3 years in this state, that such child is mentally defective and that his or her mental age is not greater than ¾ of subject's life age nor under 3 years, or to the state school for boys or state school for girls; but no boy shall be committed to the state school for boys who is under the age of 11 years and no girl shall be committed to the state school for girls who is under the age of 9 years and no municipal court shall sentence a child under the age of 17 years to jail or prison; any child or his next friend or guardian may appeal to the superior court in the same county in the same manner as in criminal appeals, and the court may accept the personal recognizance of such child, next friend or guardian, and said superior court may either affirm such sentence or order of commitment or make such other disposition of the case as may be for the best interests of such child and for the peace and welfare of the community."

The 1955 amendment increased the minimum age for commitment to the state school for boys from nine to eleven years.

Section 66, Chapter 27, R. S. 1954, as amended by Section 1, Chapter 318, P. L. 1955.

"The state shall maintain a reformatory in which all males over the age of 16 years, except as provided in section 80, and under the age of 36 years *who have been convicted of or have pleaded guilty to crime in the courts of this state or of the United States,* and who have been duly sentenced and removed thereto, shall be imprisoned and detained in accordance with the sentences or orders of said courts and the rules and regulations of said reformatory." (Emphasis supplied.)

The 1955 amendment inserted the words "except as provided in section 80" in the first sentence.

Section 67, Chapter 27, R. S. 1954, as amended by Section 2, Chapter 318, P. L. 1955.

> "When a male over the age of 16 years, except as provided in section 80, and under the age of 36 years is convicted by any court or trial justice having jurisdiction of the offense, of an offense punishable by imprisonment in the state prison, or in any county jail or in any house of correction, such court or trial justice may order his commitment to the reformatory for men, or sentence him to any other punishment provided by law for the same offense; - - -. When a male is ordered committed to the reformatory for men, the court or trial justice ordering the commitment shall not prescribe the limit thereof, but no male committed to the reformatory as aforesaid shall be held for more than 3 years."

The 1955 amendment inserted the words "except as provided in section 80" near the beginning of the first sentence.

Section 77, Chapter 27, R. S. 1954, as amended by Section 1, Chapter 211, P. L. 1955. Section 77 was formerly Chapter 58, P. L. 1919.

> "When a boy between the ages of 9 and 17 years is convicted before any court having jurisdiction of an offense punishable by imprisonment in the state prison, not for life, or in the county jail or in the house of correction, such court may order his commitment to the state school for boys or sentence him to the punishment provided by law for the same offense. If to such school, the commitment shall be conditioned that if such boy is not received or kept there for the full term of his minority, unless sooner discharged by the department as provided in section 80, or released on probation as provided in section 82, he shall then suffer the punishment provided by law, as aforesaid, as ordered by the court; - - -. The record in the event of conviction in all such cases shall be that the accused was convicted of juvenile delinquency, - - -."

Section 80, Chapter 27, R. S. 1954, as amended by Section 3, Chapter 318, P. L. 1955.

> "When a boy is ordered to be committed to said school and the department deems it inexpedient to receive him, or his continuance in the school is deemed injurious to its management and discipline, it shall certify the same upon the mittimus by which he is held, and the mittimus and boy shall be delivered to any proper officer, who shall forthwith commit said boy to the jail, house of correction or state prison, or if he has attained the age of 15 years, to the state reformatory for men according to his sentence. The department may discharge any boy as reformed; and may authorize the superintendent, under such rules as it prescribes, to refuse to receive boys ordered to be committed to said school, and his certificate thereof shall be as effectual as its own."

Section 87, Chapter 27, R. S. 1954.

> "If, in the opinion of the department, any boy, under the guardianship of the state school for boys or who may hereafter be committed thereto, who has attained the age of 16 years, is incorrigible, the superintendent may certify the same on the original mittimus and have it signed by the commissioner or some official duly authorized by him; whereupon said boy shall be transferred from said state school for boys to the reformatory for men, together with the original mittimus and certificate thereon. It shall be the duty of the officers of the reformatory for men to receive any boy so transferred and the remainder of the original commitment shall be executed at the reformatory for men."

In my opinion all of the powers vested in the municipal court, sitting as a juvenile court, are to be found in Section 6, Chapter 146, R. S. 1954, as amended by Section 2, Chapter 211, P. L. 1955.

Now let us analyze what these powers are.

If a child under the age of 17 years appears before a municipal court and is found guilty of juvenile delinquency, what may a judge of the municipal court do? Section 6, gives him the following powers:

(1) He may place children under the age of 17 years under the supervision, care and control of a probation officer;

(2) He may place such child under the supervision, care and control of an agent of the department of health and welfare;

(3) He may order the child to be placed in a suitable family home, subject to the supervision of the probation officer, or the department of health and welfare;

(4) He may commit such child to the department of health and welfare.

Then follow additional powers set forth after the statement, "or make such other disposition as may seem best for the interests of the child and for the protection of the community including,"

(1) Holding such child for the grand jury, or

(2) Committing such child to Pownal State School (under certain requirements) or

(3) Committing such child to the state school for boys or state school for girls.

In the foregoing outline lie all of the powers reposed in the municipal court. The first four provisions, of course, are in the nature of probation and do not contemplate confinement in any institution. Assuming that the judge of the municipal court, upon trial of a juvenile, decides that these first four provisions should not be used, then he is given power to do certain things, listed in the statute, if he con-

cludes that the interests of the child and the protection of the community require some other procedure. Nowhere is there given power to commit to the reformatory for men.

I propose now to discuss the development of the laws relating to juveniles, but before doing so, I call particular attention to the provisions of Section 66, Chapter 27, R. S. 1954, to the effect that there can be imprisoned and detained in the reformatory for men only males over the age of 16 years and under the age of 36 years *who have been convicted of or pleaded guilty to crime.*

Section 2, Chapter 146, specifically provides that no adjudication that a child is guilty of juvenile delinquency shall be deemed to constitute a conviction for crime.

Consequently, it is my position that with the exception of a transfer of incorrigibles under the provisions of Section 87, Chapter 27, R. S. 1954, and possible confinement under the provisions of Section 80, Chapter 27, R. S. 1954, a person who has not been convicted of crime cannot be detained as a prisoner in the reformatory for men.

At this point it may be well to mention the fact that Section 87, Chapter 27, specifically provides that it shall be the duty of the officers of the reformatory for men to receive any child so transferred, as an incorrigible, the remainder of the original commitment to be executed at the reformatory for men. Moreover, Section 66, Chapter 27, R. S. 1954, was amended, as previously pointed out, in 1955, to provide for Section 80, Chapter 27, R. S. 1954. If it had been the intention of the legislature to authorize a commitment to the reformatory for men by a municipal court judge, under the provisions of Section 6, Chapter 146, it would have been easy for the legislature to say so, as it did in the matter of Section 80.

The majority opinion recognizes that Section 66, Chapter 27, on its face, prohibits the commitment of a juvenile found

guilty of juvenile delinquency to the reformatory for men, because such a juvenile has not been convicted of crime. Here is what the majority opinion says:

> "R. S. 1954, c. 27, § 66, the statute authorizing the reformatory for men, as amended, taken from its context of statutes and read literally would appear to eliminate the possibility of legal commitment to, or confinement of the petitioner in, the reformatory."

If I understand the majority opinion correctly, it is to the effect that when Section 6, Chapter 146, was amended in 1951, by striking out the word "reformatory" Section 66, Chapter 27, was amended by implication to provide for the detention of juveniles between the ages of 16 years and 17 years. Quoting from the majority opinion:

> "Very arguably may it be urged that the act of 1951 (P. L. 1951, c. 84) by clear implication also amended the reformatory creation statute which is now being construed."

In my opinion this is going far afield in the interpretation of a statute. This Court can interpret laws, but has no power to enact them. *Farris, Attorney General* v. *Goss,* 143 Me. 227, 230. More about this later.

A study of the history of our juvenile laws shows that they have grown in a confused sort of way. While Chapter 58, P. L. 1919 is entitled "Act of Juvenile Delinquency" and might give the impression that this was the first act having something to do with juveniles, the fact of the matter is that this section merely amended a prior statute which was Section 3, Chapter 144, R. S. 1916. Chapter 58, P. L. 1919 amended Section 3, Chapter 144, R. S. 1916, by adding a clause authorizing the exclusion of the general public from hearings and for the first time appears a clause providing that:

> "The record in the event of conviction in all such cases shall be that the accused was convicted of juvenile delinquency."

This provision to the effect that an adjudication or judgment in the juvenile court shall not be deemed to constitute a conviction for crime is found in § 2, Chapter 146, R. S. 1954.

The pertinent part of Chapter 58, P. L. 1919 insofar as any power to sentence is concerned, reads as follows:

> "When a boy between the ages of eight and sixteen years is convicted before any court or trial justice having jurisdiction of the offense, of an offense punishable by imprisonment in the state prison, not for life, or in the county jail, or in the house of correction, such court or justice may order his commitment to the state school for boys *or sentence him to the punishment provided by law for the same offense.*" (Emphasis supplied.)

The foregoing Chapter is the forerunner of Section 77, Chapter 27, R. S. 1954.

It appears that the first act giving municipal courts exclusive original jurisdiction of offenses committed by juveniles was enacted in 1931, and is Chapter 241, P. L. 1931. The pertinent section is Section 1, Chapter 241, P. L. 1931, now Section 2, Chapter 146, R. S. 1954, as amended.

In this Chapter 241, P. L. 1931, (forerunner of Section 6, Chapter 146) we find the powers of the municipal courts defined as follows:

> "Sec. 4. Powers of the court. The court may place children under the supervision, care and control of a probation officer or an agent of the state board of children's guardians or may order the child to be placed in a suitable family home subject to the supervisions of a probation officer or the state board of children's guardians or may commit such child to the state board of children's guard-

> ians or make such other disposition as may seem best for the interests of the child and for the protection of the community including commitment of such child to the state school for boys or state school for girls.
>
> "Unless the offense is aggravated or the child is of a vicious or unruly disposition no court shall sentence or commit a child to jail, reformatory, or prison, or hold such child for the grand jury."

This is the first time we find the paragraph:

> "Unless the offense is aggravated or the child is of a vicious or unruly disposition no court shall sentence or commit a child to jail, reformatory, or prison, or hold such child for the grand jury."

It is of importance to note that this is the first section in which some power is given after the expression:

> "Or make such other disposition as may seem best for the interests of the child and for the protection of the community."

The fact that there is a paragraph providing for commitment to jail, reformatory or prison, when the offense is aggravated or the child is of a vicious or unruly disposition would seem to indicate that the clause, "as may seem best for the interests of the child and the protection of the community" does not relate in any manner to the power to sentence a child to jail, reformatory or prison.

Apparently the foregoing section remained in force until changed by § 5b, Chapter 118, P. L. of 1933, which read as follows:

> "A municipal court may place children under the age of 15 years under the supervision, care and control of a probation officer or an agent of the department of health and welfare, or may order the child to be placed in a suitable family home, subject to the supervisions of the probation officer or the department of health and welfare, or may

> commit such child to the department of health and welfare, or make such other disposition as may seem best for the interests of the child and for the protection of the community, including commitment of such child to the state school for boys or state school for girls."

Then follows the next sentence:

> "Unless the offense is aggravated or the child is of a vicious or unruly disposition, no court shall sentence or commit a child under the age of 15 years to jail, reformatory, or prison, or hold such child for the grand jury."

That portion of the act giving exclusive jurisdiction to municipal courts was amended by Chapter 18, P. L. 1933, increasing the age to 17 years, but no change was made in § 5b, giving apparent power to sentence a child under the age of 15 years, when the offense was aggravated or the child was of a vicious or unruly disposition.

By Chapter 197, P. L. 1937, § 5b, was amended by increasing the age to 17 years both in relation to the general power of municipal courts and also in relation to the age cited in the last paragraph pertaining to aggravated offenses.

Again in this section we find the sentence permitting the sentencing of a child when he is vicious or unruly or when the offense is aggravated, as the last sentence in the section, and in no way related to the clause "make such other disposition as may seem best, etc."

This section remained in force until the amendment of 1941 which is § 2, Chapter 245, P. L. of 1941.

In this amendment the paragraph about power to sentence when the offense is aggravated and the child is of a vicious or unruly disposition remains, but after the clause "or make such other disposition as may seem best for the

interests of the child and for the protection of the community" are added the powers to commit to Pownal State School, and the power to commit to the state school for boys or state school for girls remains.

In 1943 by § 2, Chapter 322, P. L. 1943, the section was amended by striking out the paragraph relating to the power to sentence for aggravated offenses and when the child is vicious or unruly, and there was also added to the powers after the clause "or make such other disposition, etc." the power to hold for the grand jury. And for the first time we find the clause "no municipal court shall sentence a child under the age of 17 years to jail, reformatory, or prison."

It seems clear that from here on there is no power to commit to jail, reformatory, or prison and it is my opinion that this clause was put in merely to emphasize that juveniles should be dealt with other than sending them to jail, reformatory or prison. By this amendment of 1943 all power to sentence to any institutions except Pownal, or state school for boys or girls was eliminated entirely.

The next amendment was in 1945, Chapter 63, P. L. 1945, and is of no great importance.

In 1947 by § 6, Chapter 334, an amendment was added providing power to appeal.

In 1951, § 4, Chapter 84, the section was further amended by striking out the word "reformatory."

While it is now argued that the striking of this word gave implied power to sentence to the reformatory, my opinion is that all power was taken away by the 1943 amendment and never given back.

In 1955, § 66, Chapter 27, R. S. 1954, was amended by inserting the words "except as provided in § 80."

Section 80 is the one which purports to provide for the commitment of boys, who have attained the age of 15 years, to the reformatory for men, when it is considered inexpedient to receive such boys in the state school.

Section 80 contemplates a sentence in the alternative, apparently based on Section 77. I have cited these two sections viz., § 77 and § 80, not because they have any particular bearing on the issue before us, but to stress the fact that the legislature saw fit to amend § 67 by specific reference to § 80, and could have taken similar action, if it had been the legislative intent to provide for detention of juveniles in the reformatory for men; and also to point out the apparent contradiction in the authority relating to the sentencing of juveniles. Section 77 (formerly Chapter 58, P. L. 1919) after providing for commitments to the state school for boys, also authorizes "the punishment provided by law for the same offense."

The powers set forth in § 77 are contradictory to those in § 6, Chapter 146, under which Morton was committed. Section 6, Chapter 146 was first enacted in 1931 and is antedated by § 77. As a result, it may well be that § 77, as well as § 80, are repealed by implication.

The majority opinion recognizes that there was a hiatus between the years 1943 and 1951 when there was no power to sentence a juvenile to the reformatory for men. The majority opinion says:

> "From 1937 to 1943 vicious and unruly boys over the age of 16 years could have been so committed. From 1951 to the present such a commitment for all boys under 17 years down the range of the juvenile scale has been permissible."

It was in 1943, of course, that the legislature enacted a section to the effect that no child under the age of 17 years could be sentenced to jail, reformatory or prison; and in

1951 the statute was amended by striking out the word "reformatory."

What of the period between 1943 and 1951? If there was no power to commit between these years of 1943 to 1951, what law has been enacted to authorize such commitment since then?

The majority opinion says that § 66, Chapter 27, was amended by implication and would read into the section words equivalent to the following:

> "And juveniles over the age of 16 years found guilty of juvenile delinquency."

As previously stated, we interpret laws and do not enact them.

The cases cited in the majority opinion in support of its interpretation of the statute are not in point. As a matter of fact not one case upholds the premise intended to be supported.

The case of *State* v. *Koliche,* 143 Me. 281, involved a statute forbidding the sale of intoxicating liquor by a licensee to a minor under the age of 18 years. Respondent contended that criminal intent to sell to such a minor must be proven as a necessary element of the offense. The Court said the question presented was one of statutory construction and ruled that intent is not a necessary element of the offense.

The case of *Craughwell et als.* v. *Mousam River Trust Co.* 113 Me. 531, involves a statute relating to dissolution of corporations.

In *State* v. *Cavalluzzi,* 113 Me. 41, the state had failed to charge in the indictment that the respondent was a woman in accordance with the provisions of the pertinent statute. The Court ruled that the absence of the word "woman" was not fatal to the indictment.

In the case of *State* v. *J. P. Bass Company,* 104 Me. 288, the Court, in interpreting a statute ruled that the statute in question forbidding the publication of advertisements of the sale of intoxicating liquors included advertisements of intoxicating liquors sold without the state.

In *Rackliff* v. *Greenbush,* 93 Me. 99, the Court interpreted a statute involving the right to the recovery of burial expenses from towns.

In *State* v. *Frederickson,* 101 Me. 37, the Court ruled that cider, referred to in one section of a statute, was included in a list of intoxicating liquors described in another section.

The cases of *Gould* v. *Bangor & Piscataquis Railroad,* 82 Me. 122, and *Cotton* v. *Wiscasset, Waterville & Farmington Railroad Company,* 98 Me. 511, are concerned with the interpretation of statutes relating to statutory fences.

As a matter of fact, one of the cases cited supports the position taken in this opinion. In *State* v. *Wallace,* 102 Me. 229, 232, the Court said:

> "It is a recognized rule that a penal statute is to be construed strictly in favor of the rights of a respondent. A statutory offense cannot be created by inference or implication nor can the effect of a penal statute be extended beyond the plain meaning of the language used."

The following statement to be found in 128 Me. 298, seems to be quite applicable:

> "The current of authority at the present day is in favor of reading statutes according to the natural and most obvious import of the language without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation."

I lend my hearty approval to the sentiments expressed by my associates relating to the noteworthy reforms adopted

and developed since 1919 for the moral and social regeneration of criminal malefactors. However, I can see no connection between the theory of reformation and illegal confinement in a penal institution.

The majority opinion cites with approval the case of *Gosselin Petitioner,* 141 Me. 412. At the time Mrs. Gosselin was committed to the reformatory for women, § 53, Chapter 23, R. S. 1944 was in effect, and this section provided that "when a woman is sentenced to the reformatory for women, the court or trial justice imposing the sentence shall not fix the term of such confinement unless it be for a term of more than 3 years." This section went on to recite that the duration of the commitment including time spent on parole should not exceed 3 years except where the maximum term specified by law for the crime for which the offender was sentenced shall exceed that period. Presumably, the section speaks of sentences in excess of 3 years because women sentenced to definite terms for felonies serve their time in the reformatory for women.

At the time of the Gosselin Case, the section relating to the reformatory for men was Section 66, Chapter 23, R. S. 1944, which provided for an indeterminate sentence for various offenses, regardless of the length of the sentence, and this section provided that no male committed for a felony could be held for more than 5 years and in case of misdemeanors not more than 2 years.

Mrs. Gosselin brought a petition for habeas corpus on the ground that she was denied the equal protection of the law in that a woman could be deprived of her liberty for 3 years and a man could be deprived of his liberty for only 2 years for the same offense.

The issue upon which the action was brought was never decided by this Court, but an ingenuous solution was found by a ruling that confinement in a reformatory was not

strictly imprisonment; that a person sent to a reformatory was sent there to be reformed and rehabilitated, and that if in the judgment of the legislature, it took longer to reform a woman than a man, such was within its legislative prerogative.

See Page 421, *Gosselin Petitioner for Writ of Habeas Corpus, supra*:

> "Whether the members of this Court individually would have considered that less time would be required to accomplish the reform of male first offenders than would be requisite for other males or for females or that two years would be sufficient for more hardened males although the reform of women would require three years is not important. Our power and authority collectively is to decide no more than that legislative decision is reasonable or unreasonable."

In 1951, § 66, Chapter 23, was amended by Chapter 84, P. L. 1951 (now § 67, Chapter 27, R. S. 1954) which now provides in part:

> "When a male is ordered committed to the reformatory for men, the court or trial justice ordering the commitment shall not prescribe the limit thereof, *but no male committed to the reformatory as aforesaid shall be held for more than 3 years.*" (Emphasis supplied.)

It will be seen that by virtue of this amendment, this section was put in accord with the section relating to women, the difference between the two previous sections being the basis for the Gosselin claim. So, apparently, in 1951, the legislature in its wisdom, concluded that it would take just as long to reform a man as it would a woman.

The decision in the Gosselin case is to the effect that confinement in a reformatory, is for the purpose of reformation, and it is not to be deemed as imprisonment in the ordinary sense. Such a conclusion is without merit. A per-

son committed to a reformatory is deprived of his liberty, and no person, man, woman, or child can be incarcerated in a penal institution unless such imprisonment is authorized by law. In this case Morton has a right to demand that his sentence be based upon a properly enacted law and not upon an implication, which itself is vague and ambiguous. When the liberty of a person is at stake, no court should have to resort to mind reading to find out what the law is.

Another question relating to the legality of Morton's commitment is also raised as to the length of his term. How long can he be kept in the reformatory?

The old section for parole from the reformatory for men was Section 71, Chapter 27, R. S. 1954, and this section is specifically repealed by Section 11, Chapter 387, P. L. of 1957.

Section 13, Chapter 27A as enacted by Chapter 387, P. L. 1957, gives the provision regarding eligibility for parole from the reformatory for men.

This section provides that an inmate becomes eligible for parole when *all* of the following conditions are fulfilled:

I. After the expiration of 6 months, if convicted of a misdemeanor, and after the expiration of 1 year, if convicted of a felony.

II. Upon recommendation of the Superintendent to the Board of Parole when the conduct of the inmate justifies it, and,

III. When some suitable employment has been secured for him in advance.

Note that this contemplates that the inmate is serving a sentence for a misdemeanor or a felony, and nowhere is provision made for the parole of a juvenile delinquent.

Section 14, Chapter 27A, provides for the parole from a state school, but a juvenile held in a reformatory is not afforded the protection of any laws relating to parole.

Referring again to Section 87, Chapter 27, which relates to the transfer of incorrigibles, this section provides:

> "It shall be the duty of the officers of the reformatory for men to receive any boy so transferred and the remainder of the original commitment shall be executed at the reformatory for men."

That being true, a boy so transferred, although in the reformatory, would actually be serving a state school sentence, and presumably would be subject to the rules of the state school regarding parole.

The very last paragraph in the *Gosselin Case,* 141 Me. 422, is significant upon the question of parole. There the Court said:

> "The statute under which she is held carries appropriate provision for her parole, etc."

Another very serious and important objection arises to Morton's commitment.

Section 67, Chapter 27, is the only statute which authorizes commitment to the reformatory for men. It reads in part as follows:

> "When a male over the age of 16 years and under the age of 36 years is convicted by any court or trial justice having jurisdiction of the offense, of an offense punishable by imprisonment in the state prison, or in the county jail, or in any house of correction, such court or trial justice may order his commitment to the reformatory for men."

A sentence imposed under authority of the preceding section is an indeterminate one. It presupposes that the candidate for the reformatory stands convicted of an offense punishable in the state prison or in the county jail.

It will be recalled that it was in 1943 when the legislature struck out the paragraph relating to aggravated offenses by juveniles and provided that "no municipal court shall sentence a child under the age of 17 years to jail, reformatory or prison."

Now bearing in mind that a sentence to the reformatory is based on Section 67, Chapter 27, a respondent standing before a municipal court can be sent to the reformatory only if he is subject to a jail offense. However, since 1943, no child under the age of 17 years is subject to a sentence to jail or prison, so that the condition necessary, under § 67, for the imposition of an alternative or indeterminate sentence in the reformatory does not exist.

To repeat in different words, if a boy between the age of 16 and 17 years is not subject to the imposition of a jail sentence by the municipal court, he cannot be given an alternative or indeterminate sentence in the reformatory; and striking out the word "reformatory" in the statute involved, added nothing at all to the power of the municipal court.

This is another way of emphasizing the point, that the clause "or make such other disposition as may seem best for the interests of the child and for the protection of the community" has nothing to do with sentencing, other than to the state schools for boys or girls, because the same section which speaks of other dispositions is met by the sentence that no municipal court shall sentence a child under the age of 17 years to jail.

By the prohibition contained in § 6, Chapter 146, a boy between the ages of 16 and 17 cannot be sentenced to jail by a municipal court. It, therefore, follows that there is no power in the municipal court to impose an alternative sentence to the reformatory for men.

To briefly recapitulate, it is my opinion that powers of the municipal court in juvenile cases are derived solely from

Section 6, Chapter 146, and that nowhere in this section is authority granted to sentence Morton to the reformatory for men.

Moreover, in the reformatory can be detained only persons who have been convicted of a crime, and Morton, by force of the statute, was not convicted of a crime.

The only way Morton could be sent to the reformatory legally would be to first send him to the state school for boys, and then transfer him to the reformatory for men, as an incorrigible, assuming that he were in that category, under the provisions of § 87, Chapter 27, R. S. 1954.

My opinion is that the petitioner was illegally sentenced and committed; that his imprisonment is unlawful and that he should be discharged from custody.

PAUL E. MERRILL
vs.
MAINE PUBLIC UTILITIES COMMISSION

Kennebec. Opinion, May 9, 1958

Maine Public Utilities. Contract Carriers. Common Carriers. Exceptions.

The need for the particular service which may justify the contract carrier permit may be only that of an individual or firm or a group of individuals, or firms, who comprise the potential contractors for the proposed service, as contrasted with the "necessity and convenience" of the general public for common carriers.

The incorporating by reference of common carrier, Secs. 19 to 32 into the contract carrier, Sec. 23, for purposes of policy considerations, shows a legislative intent that contract carrier permits should not be granted in cases where the requested operations would be adverse to the public interest and the maintenance of a sound and

effective motor and rail transportation system. R. S. 1954, Chap. 48, Sec. 23. P. L. 1957, Chap. 222.

The proposed operations of a contract carrier applicant must *serve a real need.*

Exceptions do not lie to reasons given for a ruling but only to the ruling itself. If the decision is correct it must be affirmed even though upon a wrong ground.

ON EXCEPTIONS.

This is an application for a contract carrier permit. The case is before the Law Court upon exceptions to a decree of the P.U.C. denying the petition. Exceptions overruled.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, JJ. BELIVEAU, J., sat at argument but retired before the opinion was adopted.

Frank P. Preti, for plaintiff.

Milton A. Beverage, for Cole's Express.

William M. Houston, for B. & A. R. R. Aroostook Valley R. R. and Canadian Pacific R. R.

Scott W. Scully, for Maine Central R. R.

Douglas M. Morrill, for the Commission.

WEBBER, J. The petitioner is a motor contract carrier operating under a permit issued by the Public Utilities Commission to transport for hire certain types of freight. He specializes in the transportation of bulk petroleum products in tank equipment. His petition applied for further authority to transport petroleum products in bulk in tank trucks and semi-trailer tanks for Socony Mobil Oil Company, Inc. from Bangor, Brewer, Hampden and Searsport to its customers at Limestone, North Linden, Perham and Presque Isle. Several common carriers were heard in opposition to the granting of the additional authority. One of these, Cole's Express, as specifically found by the Commis-

sion, "is presently and has been for some time performing the transportation for which authority is here sought, apparently without dissatisfaction on the part of the shipper or the receivers." The Commission denied the petition and petitioner's exceptions raise the issues for determination here.

The exceptions are five in number. The first is a general blanket exception which need not be here considered, especially in view of the fact that the matters actually complained of by the petitioner are fully covered by his second, third and fourth exceptions. The fifth exception raises an issue now moot and has been expressly waived by petitioner.

The second exception asserts that petitioner is aggrieved by the findings and decrees of the Commission "in that the Statutes do not require a contract carrier to assume the burden of proof that the proposed service is a necessity and convenience as is required of a common carrier." The portion of the Commission's decree which is complained of reads as follows:

> "Fifth: Finally, this Commission can authorize the proposed service only if it is justified by the evidence. We construe this to mean that the petitioner must assume the burden of proving that the proposed service is a necessity and convenience to at least a segment of the general public, the size of the segment depending upon the special circumstances in each case. To go a step further, when common carrier service is presently available it becomes imperative that the petitioner show why that service is insufficient. He has not done so in this case and in fact the common carrier authorized is presently and has been for some time performing the transportation for which authority is here sought, apparently without dissatisfaction on the part of the shipper or the receivers."

It is true, as petitioner contends, that the requirements imposed upon common carriers and contract carriers are not

identical. The common carrier must obtain from the Commission "a certificate declaring that public necessity and convenience require and permit such operation." R. S. 1954, Chap. 48, Sec. 20. The "public" there referred to is the general public as distinguished from any individual or groups of individuals. *Re: John M. Stanley,* 133 Me. 91; *Chapman, Re: Petition to Amend,* 151 Me. 68. On the other hand, the contract carrier must obtain, not the "certificate" applicable to common carriers, but a "permit" authorizing the operation and limiting its scope. The need for the particular service which may justify the contract carrier application may be only that of an individual or firm or a group of individuals or firms who comprise the potential contractors for the proposed service, as contrasted with the "necessity and convenience" of the general public. Nevertheless, as the law is written, the Commission may by no means ignore the interests of the public in motor carrier transportation in its determination as to whether or not the application of a contract carrier will be granted. R. S. 1954, Chap. 48, Sec. 23, Subsec. III, sets forth the requirements for contract carrier permits and may be paraphrased and summarized as follows:

1. The proposed operation must not be contrary to the declaration of policy set forth in Secs. 19 to 32 inclusive.
2. It must not impair the efficient public service of any authorized common carriers already serving the same territory over the same general routes.
3. It must not interfere with the use of the highways by the public.
4. Only such of the operations applied for shall be permitted as are *justified by the evidence.*
5. The applicant must be fit, willing and able properly to perform the service and to conform to the provisions of Secs. 19 to 32 inclu-

> sive and to the applicable rules and regulations of the Commission.

We think the two references to Secs. 19 to 32 inclusive, most of which deal with common carriers rather than contract carriers, incorporating those sections by reference into Sec. 23, are most significant as indicating the policy considerations which must govern the Commission's determination in contract carrier cases. Without doubt the Legislature thereby intended to make certain that contract carrier permits would not be granted in cases where the requested operations would be adverse to the public interest and to the maintenance of a sound and effective motor and rail transportation system. We note with interest that in 1957 the Legislature amended Subsec. III by inserting the words "or otherwise will not be consistent with the public interest." P. L. 1957, Chap. 222. We do not think that this added any new requirement to be met by contract carrier applicants but was inserted by the Legislature to emphasize and point up this very important feature of an already effective policy. Sec. 23 already contained a paragraph stating:

> "It is declared that the business of contract carriers * * * is affected with the public interest and that the safety and welfare of the public upon such highways, the preservation and maintenance of such highways and the proper regulation of common carriers using such highways require the regulation of contract carriers to the extent hereinafter provided:"

We are satisfied that the policy requirements of the Maine statutes fully accord with the statement and underlying reasons expressed by the writer of an article captioned Motor Carrier Certificates and Permits in Texas: Common Carrier Versus Contract Carrier, appearing in 20 Tex. L. Rev. 323. At page 349, it is stated: "No reason can be suggested for not requiring of the contract-carrier applicant satisfactory

proof that his proposed operations *will serve a real need.* Each additional burden on the highways is presumptively undesirable and is justified only by evidence that existing carriers are unable to render services which would be substantially the equivalent of that desired by the individual shipper or shippers for whom the applicant contracted to carry. But the statute should be drawn so as to leave no doubt that the proof required is not proof of *public* need or *public* convenience and necessity but simply proof that there is need for the services which the applicant proposes to render." (First emphasis supplied)

The finding of the Commission which is determinative here is in essence that the requested operation is not needed, even by an individual or a group of individuals. This finding is fully supported by the evidence. It is clearly not in the public interest and would be contrary to the over-all legislative policy to authorize contract carrier operations for which there is no demonstrable need. We do not construe the language above quoted from the Commission's decree as imposing upon the contract carrier the burden of proving that "*public* necessity and convenience" require and permit the operation. Rather has the Commission found, as upon this evidence it was compelled to find, that the suggested service was not needed or required by anyone, or as the Commission says, by "at least a segment of the general public." Without any evidence of need or of inadequacy or inefficiency of the common carrier service being furnished, the Commission could not have "justified by the evidence" the issuance of the requested permit.

Had there been some evidence of need for the contract carrier service, it would have been for the Commission to determine in the exercise of a sound discretion whether or not the satisfaction of that need would be consistent with the public interest and the public policy announced by the Legislature. *O'Donnell, Pet'r.*, 147 Me. 259, 264.

The Commission expressly found that issuance of the permit would not conflict with the declaration of policy set forth in Secs. 19 to 32 inclusive. With this conclusion we cannot agree for the reasons already stated. The petitioner, however, is not the one to complain if thereby the Commission erred in its reasoning. "Exceptions do not lie, however, to reasons given for a ruling, but only to the ruling itself. If the decision below is correct, it must be affirmed although the lower court relied upon a wrong ground or gave a wrong reason." *P.U.C.* v. *Congdon*, 137 Me. 216, 222.

We take this opportunity to comment upon *State of Maine* v. *Ballard*, 152 Me. 158, 161. The last paragraph of that opinion quotes the rule applicable in common carrier cases and tends to create the misapprehension that we were applying that rule in a contract carrier case. Ballard, upon its facts, merely holds as we do here that contract carrier permits are not to be issued when there is no evidence of need of the service and the operations of common carriers serving the same territory are entirely adequate and efficient. The quotation from a common carrier case was misleading and inappropriate.

For all of the foregoing reasons, the second exception must be overruled.

The third exception relates to a finding by the Commission alleged not to be supported by any evidence. The decree stated: "We also find no evidence that the present common carrier service is inefficient or inadequate." Upon a review of the record we find that the evidence fully supports the finding of the Commission. The suggestion that at some future time under changed conditions the services offered by common carriers might become inadequate will hardly suffice to compel a finding that they are presently inadequate. This exception is overruled.

The fourth exception rests upon the contention of the petitioner that there was no evidence that the common carrier, Cole's Express, had filed rates applicable to transportation between the points covered by petitioner's application. The petitioner argues that the common carrier was therefore not legally serving the territory here involved. We need only say that we find ample support in the evidence for the finding by the Commission and petitioner takes nothing by this exception.

The entry will be

Exceptions overruled.

DONALD F. WARD

vs.

PAUL E. MERRILL

D/B/A MERRILL TRANSPORT COMPANY

Cumberland. Opinion, May 14, 1958.

Negligence. Intersection Collision. Directed Verdict. Practice.

In testing the propriety of a directed verdict for defendant, the Court must determine whether the jury could have properly found for the plaintiff.

One approaching an intersection has the right to consider that others will observe the law as to stopping where the area is controlled by stop signals. One is not bound to anticipate another's negligence.

Driving against red or with a green light are acts to be considered in arriving at the question of negligence on the part of a motorist.

The reviewing Court is handicapped by references to "here," "there," point "X" and "B," "skid marks," etc. when the diagram to which reference is made is not reproduced.

ON EXCEPTIONS.

These are cross actions of negligence. The case is before the Law Court upon exceptions by the original plaintiff to an order by the Trial Court for a directed verdict for defendant. Exceptions sustained.

James E. Gagan,
Robinson, Richardson & Leddy, for plaintiff.

Verrill, Dana, Walker, Philbrick & Whitehouse,
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 to recover for injuries to the person and property of the plaintiff caused by an automobile collision and is based upon the alleged negligence of the operator of defendant's truck. A cross action between the same parties was tried at the same time. At the conclusion of the evidence, upon motions made in behalf of both parties, the presiding justice directed verdicts for the defendants in each case. The matter is before us on exceptions of the plaintiff, Donald F. Ward, to the direction of a verdict for the defendant, Paul E. Merrill.

The accident occurred at the intersection of Cottage Road and Broadway, two public highways in the City of South Portland. Cottage Road runs in a general northerly and southerly direction and intersects with Broadway which runs in a general easterly and westerly direction. Traffic at this intersection is controlled by a rather elaborate system of traffic lights. The plaintiff was travelling north on Cottage Road and approaching the intersection. Defendant's employee, admittedly within the scope of his employ-

ment, was operating defendant's trailer truck in an easterly direction on west Broadway and approaching the same intersection.

The plaintiff testified that when he was from 200 to 250 feet southerly of the intersection, he looked to his left and saw defendant's truck proceeding easterly on Broadway while the truck was between 300 and 400 feet from the intersection. From that point on, plaintiff did not see the defendant's truck again until the collision. Plaintiff testified that in the interim, his attention was given to school children out for a school recess in the vicinity. He also observed and took heed of pedestrians on the corner of the intersection. He also noted that there were cars stopped on his right ready to enter the intersection upon receiving a favorable light. The plaintiff, insisting that he had a green light, drove into and across the intersection, and said that he had proceeded "a little beyond half way through the intersection" when the left side of his vehicle was forcibly struck by the front end of defendant's truck.

At the conclusion of the evidence, upon motion for a directed verdict on the part of the defendant, the presiding justice made a statement to the effect that in his opinion it made no difference who had the green light and who had the red light. He expressed the opinion that both drivers were negligent and apparently upon the theory that there was a duty on the part of the plaintiff to constantly be on the lookout for defendant's truck, ruled that the plaintiff was guilty of negligence as a matter of law and ordered the verdict upon which these exceptions are based.

The issue before us, therefore, is whether or not the ruling of the presiding justice was warranted, bearing in mind that the evidence, with its inferences must be viewed in the light most favorable to the plaintiff.

> "Under the familiar rule we must determine whether reasonable persons taking the evidence

with its inferences in the light most favorable to the plaintiff could conclude that plaintiff was in the exercise of due care." *Crockett* v. *Staples,* 148 Me. 55, 56; 89 A. 2d. 737.

"The principle of law which controls the action of this Court, when exceptions are presented to test the propriety of a nonsuit or a directed verdict for the defendant in the Trial Court, is to determine only whether upon the evidence under proper rules of law 'the jury could properly have found for the plaintiff,' *Johnson et al* v. *New York, New Haven and Hartford Railroad et al.,* 111 Me. 263, 88 A. 988; and in determining that issue, the evidence must be considered in that light which is most favorable to the plaintiff, *Shackford* v. *New England Tel. and Tel. Co.,* 112 Me. 204, 91 A. 931." *Barrett* v. *Greenall,* 139 Me. 75, at 80; 27 A. 2d. 599.

The evidence, most favorable to the plaintiff indicates that he entered the intersection upon the invitation of a vertical green arrow which in the language of R. S. 1954, Chapter 22, § 87, Subsec. I, gave him permission to "go." There is some corroboration of plaintiff's testimony on this point in the record. At the same moment, the defendant's driver approaching from plaintiff's left, was faced by a red light which under the provisions of Subsec. III meant "Stop" and denied him permission to proceed straight through the intersection. He was also faced with two green arrows, both constantly alight, one pointing right and one left. These arrows permitted him to enter the intersection for the purpose of making a desired turn as long as he did so cautiously, yielding the right of way to traffic lawfully in the intersection, all as provided by Subsec. IV. The plaintiff, when he was 200 to 250 feet back from the intersection, observed the defendant's truck some 300 to 400 feet away from the intersection proceeding in a line of traffic. He did not see the truck again until just as it was about to strike the left side of his car. The contention of plaintiff

that he was a little beyond half way through the intersection has some corroboration in the evidence.

There was, of course, a duty on the part of the plaintiff to exercise care and vigilance. However, the children playing in the school yard, the pedestrians on the corner, the cars on his right, as well as the lights themselves, also demanded part of plaintiff's attention as did the traffic which was moving up on his left.

The law applicable to intersections controlled by stop signs has equal application here. In *Crockett* v. *Staples*, 148 Me. 55, 59, it was stated:

> "The plaintiff was not bound to anticipate defendant's negligence. He 'had a right to consider that the defendant would observe the law as to stopping.' * * * Putting the case differently, we have *first*, a period within which plaintiff could properly rely upon defendant's stopping at the stop sign and yielding the right of way to the plaintiff, and *second*, a period brief indeed within which plaintiff knew, or should have known, that the collision must occur unless he stopped or in some manner altered his course. Where were the plaintiff and the defendant when the first period ended? Did the plaintiff thereafter fail, as a matter of law, to exercise due care under the circumstances?
>
> We conclude that the question of contributory negligence was properly for the jury to answer."

The facts in the case of *Clark* v. *Philadelphia Housing Authority, et al.*, 161 Pa. Super. 542; 55 A. 2d. 435, are very similar to those in the instant case. The court said:

> "We think this is a plain case where plaintiff's contributory negligence could not be declared as a matter of law. Plaintiff was entitled to the protection afforded her by the fact she entered the intersection with the traffic lights in her favor."

Lights are installed for the purpose of regulating traffic. Driving against red or with a green light are acts to be

considered in arriving at the question of negligence on the part of a motorist.

Applying these rules to the evidence here most favorable to the plaintiff, it follows that when he entered the intersection, he could properly assume that the operator of defendant's truck would either stop for the red light or would make a left turn on his constant green left arrow for the purpose of travelling north on Cottage Road, or make a right turn on his constant green right arrow for the purpose of travelling south on Cottage Road. The mere fact that the truck was continuing in motion into the intersection would not in and of itself be an evident indication of danger, because of the possibility of a left or right turn, either of which could be made without interfering with the plaintiff's course of travel. It was only when it became obvious that the defendant's driver was not going either to stop or to make a left or right turn that the plaintiff could no longer assume that the truck driver would obey the law. It is apparent that from the time this occurred until the plaintiff was struck was less than a second.

In *Jordan* v. *Kennedy*, 180 Pa. Super. 593; 119 A. 2d. 679, the Court used language most appropriate to the facts before us. At page 681, the Court said:

> "Although one approaching a street intersection must always be vigilant, he cannot be held to the same high degree of care at an intersection with a traffic light giving him the right of way as at an intersection where there is nothing to regulate the right of way. He need not approach an intersection with a green traffic light quite so slowly, nor look so continuously for approaching traffic, first because he has a right to assume traffic on the intersecting street will stop for the red light and secondly because he must divide his attention between approaching traffic and the light.
>
> "It is our opinion that the learned lower court attempted to hold (plaintiff) to the exact degree of

> care that would have been required of him had there been no light in his favor at the intersection. This was error. To hold that there is the same degree of care imposed upon a motorist with a favorable light as one without any right of way would thwart the purpose of traffic lights to facilitate the flow of traffic."

In our opinion, the record indicates conflicting questions of fact, which should have been for the determination of the jury.

This Court, as a reviewing tribunal, has been greatly handicapped by the fact that much of the evidence centers about a diagram or "chalk" drawn on the blackboard not reproduced for us.

The transcript is replete with references to "skid marks," points "X" and "B" and the words "here" and "there."

By way of admonition to counsel who propose to bring causes before this Court, we refer to the following cases:

> "It is difficult from the printed record to say how the accident occurred. The 'here' and the 'there' of witnesses, in pointing to the plan of the scene of the accident, to supplement speech and to illustrate meaning, may have had significance not discernible to the seekings of the reviewing mind." *Fitts* v. *Marquis,* 127 Me. 75, 79; 140 A. 909.
>
> "Witnesses testified with reference to a crayon sketch, absence of which makes it difficult to understand the meaning intended by 'here' and 'there,' words of rather frequent recurrence in the printed transcript of the testimony." *Eaton* v. *Ambrose,* 133 Me. 458, 460; 180 A. 363.
>
> "Much of the evidence centered about a diagram or 'chalk' drawn on a blackboard by a police officer. There is testimony so often found of a 'street here,' and 'skid marks there.' The diagram was not introduced in evidence. The record of a trial with its transcript of testimony, exhibits and

photographs, cannot include the 'chalk,' not introduced in evidence, which ends with the use of an eraser. No more can the 'chalk' be restored by an appellate court on study of the record, assuming, which is not the case, a duty to attempt such a difficult and unnecessary task." *Stearns* v. *Smith,* 149 Me. 127, 129; 99 A. 2d. 340.

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

"On a second trial counsel should endeavor, particularly if either believes the case will again reach this court, to make a record that is complete and clear. References to a plan drawn upon the board, and to points 'here' and 'there' on the plan useful as they are to the fact-finders, are often of little or doubtful value to those who must rely upon the record. Care must be taken in the trial court to preserve the vital points in the record, to the end that the appellate court may fairly understand the meaning, intent, and value of the evidence. In brief, in presenting a 'live' case to a jury or court, counsel must keep in mind the necessity of a record for the Law Court." *McCaffrey et al* v. *Silk, Jr.,* 150 Me. 58, 61; 104 A. 2d. 436.

As was said in *Stearns* v. *Smith, supra,* "If the decision in the instant case rested upon consideration of the 'chalk' and the evidence of 'here' and 'there' the exceptions would necessarily be overruled."

However, as previously indicated, careful study of the record indicates to us that there were questions of fact

for the decision of the jury, and that the presiding justice erred in directing a verdict for the defendant.

The entry will be:

Exceptions sustained.

STATE OF MAINE
vs.
WALTER E. CHAPMAN, APLT.

York. Opinion, May 19, 1958.

Criminal Law. Warrant and Complaint. Amendments. Verification.

The amendment of a complaint and warrant as to a material matter must be supported by oath or affirmation under Article 1, Sec. 5 of the Constitution of Maine and R. S., Chap. 145, Sec. 14.

ON EXCEPTIONS.

This is a criminal action charging a violation of R. S. 1954, Chap. 37, Sec. 78. The case is before the Law Court upon exceptions to the allowance by the Superior Court of an amendment to the original complaint. Exceptions sustained.

Marcel R. Viger, Co. Atty., for State.

Charles W. Smith, 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 respondent was arrested upon a complaint and warrant. On arraignment before a Trial Justice he pleaded not guilty. After a hearing he was adjudged

guilty and appealed. Subsequently, in the Superior Court the State in writing moved to amend the complaint. The motion was subscribed by the original complainant but bore no verification by affidavit or affirmation.

The original complaint had charged that the respondent

> "- - - did then and there unlawfully have a pistol with one cartridge in the chamber and eight cartridges in the clip, in a certain motor Vehicle, to wit, an automobile, the said Walter E. Chapman then and there not being a law enforcement officer in line of duty - - -"

The motion to amend prayed that the complaint be changed to read as follows:

> "- - - did then and there unlawfully have a pistol *with a barrel length of over four (4) inches, to wit six and three quarter (6¾) inches,* with one cartridge in the chamber and eight cartridges in the clip, in a certain motor vehicle, to wit, an automobile, the said Walter E. Chapman then and there not being a law enforcement officer in line of duty." (Words added by amendment italicized.)

The Superior Court Justice presiding allowed the amendment. The respondent seasonably excepted and now prosecutes his exceptions. Amongst his stated grievances the respondent protests that the motion "does not show or set forth an examination under oath, or any verification thereof."

Mere inspection of the motion is sufficient to corroborate that additional data not recited in the initial complaint were asserted as facts in the renovated accusation.

The statute which it was purposed to accuse the respondent of violating, in its parts pertinent here, read as follows:

> "- - - It shall be unlawful for any person excepting a law enforcement officer while in the line of duty,

> or persons licensed as provided in section 19 of chapter 137 to have in or on a motor vehicle or trailer any firearm with a cartridge or shell in the chamber, magazine, clip or cylinder; provided further, that no person except a law enforcement officer in the line of duty may have in or on any motor vehicle or trailer any loaded pistol or revolver with a barrel length of over 4 inches. The word 'firearm' shall include all instruments used in the propulsion of shot, shell or bullets by the action of gunpowder exploded within it - - -" R. S. (1954) c. 37, § 78.

An offense against the foregoing statute is a misdemeanor. R. S. (1954) c. 37, § 139; P. L. 1957, c. 392, § 35; *Smith Petr.* v. *State,* 145 Me. 313, 326.

The statute authorizing amendments to criminal complaints is as follows:

> "- - - and any criminal process may be amended, in matters of form, at any time before final judgment. Any complaint, indictment or other criminal process for any offense, except for a felony, may be amended in matters of substance, provided the nature of the charge is not thereby changed." R. S. c. 145, § 14.

Article 1, Section 5 of the Declaration of Rights in the Constitution of Maine is as follows:

> "The people shall be secure in their persons, houses, papers, and possessions from all unreasonable searches and seizures; and *no warrant to* search any place, or *seize any person* or thing, shall issue without a special designation of the place to be searched, and the person or thing to be seized, nor without probable cause—*supported by oath or affirmation.*" (emphasis supplied)

In furtherance of such organic law we have this statutory provision:

> "When complaint is made to any municipal judge or trial justice charging a person with the com-

> mission of an offense, he shall carefully examine, *on oath,* the complainant, the witnesses by him produced and the circumstances and, when satisfied that the accused committed the offense, shall, on any day, Sundays and holidays not excepted, issue a warrant for his arrest, stating therein the substance of the charge. - - -" (emphasis supplied) R. S. (1954) c. 146, § 13.

In *State* v. *Haapanen* (1930) 129 Me. 28, 30, this Court said:

> "- - - Where criminal prosecutions originate, under a statute, on complaint, one under oath or affirmation is implied. Campbell v. Thompson, 16 Me. 117. On appeal, in usual course, the plea entered below stands, and trial is anew."

In *Beale: Criminal Pleading and Practice,* P. 9, we find:

> "The object of requiring the prosecution to be upon oath is to protect innocent men against frivolous and ill-considered charges of crime. - - -"

This Court stated in *State* v. *Smith,* (1866) 54 Me. 33, 38:

> "As a general rule, criminal processes cannot be amended except by consent of the party against whom it (sic) is issued. This is a rule existing from necessity; all criminal proceedings being required to be presented under the oath of the party presenting it. (sic) If a complaint duly sworn to should be changed after it was issued, it would no longer be the complaint of the party verified by his oath. - - - This rule applies only to such matters as are required to be stated under the oath of the party making the complaint or presentment; —as to all other matters, they are subject to such rules of practice as long experience has shown are calculated to promote justice."

The complaint in the case at bar was criminally innocuous in its context as it read when filed with the Trial Justice. The additionally alleged facts, supplied as novel matter by the amendment, were indispensable to constitute the grava-

men of an offense under the statute invoked. There can be no essential difference between accusations made in an original complaint and accusatory factual assertions later added by amendment to the complaint so far as the sanction of an oath required by our Constitution and our statute is concerned. The same inviolable right of the respondent is affected in the same manner by the latter and added charges as by the former. The deterring influence of the purgative of an oath upon a revised complaint is just as imperative to keep impregnable a respondent's rights as it is upon the original complaint.

> "In Moore v. State, 165 Ala. 107, 51 So. 357, the court said: 'We think it is not permissible for a solicitor to put into an affidavit made by another person, by way of amendment, without the consent of defendant, any matter that is material to its validity. There are but two ways of bringing a defendant before the court for trial. One is by the indictment of a grand jury upon the sworn evidence of witnesses before it, and the other is upon an affidavit made by some person before a proper officer and a warrant of arrest issued thereon. We think it contrary to law to inject material matter not sworn to into an affidavit, without the consent of defendant, for the reason that he will then be put to trial upon a charge that has not been sworn to by any one. We are of opinion that the court erred in allowing the affidavit to be amended without the consent of the defendant. The statute of limitations having perfected a bar, the defendant is discharged.'
>
> In the case of Dillard v. State, 137 Ala. 106, 34 So. 851, 852 the Supreme Court held that an amendment of an affidavit to meet a plea of misnomer upon which the defendant had judgment in his favor must be reverified.
>
> - - - - - - - - - - - -
>
> The effect of the holding of the court in the Dillard and in the Moore Cases, supra, is that no amendment of the affidavit, by the insertion of ma-

terial matter, may be made over the objection of the defendant, after the bar of the statute has run against the offense charged, and, where such an amendment is made before the bar of the statute, the affidavit must be verified." *Lemley* v. *State,* (1931) (Ala.) 136 So. 494.

"It follows, therefore, that the municipal court of the city of Mansfield, Ohio was without authority to change the language in the affidavit or to permit its change without the authority of the person making the affidavit, and was without authority to proceed with the hearing, in the absence of an oath administered to the affiant after the change . . ." *Diebler* v. *State* (1932) 43 Ohio App. 350, 183 N. E. 84, 85.

"The question presented is whether, in the trial of a criminal case, the court has authority to allow the affidavit charging the offense to be amended without verification by the individual preferring the charges. The question has been before the reviewing courts of Ohio on several occasions and the ruling is definitely established that courts have no such authority. - - -

- - - - - - - - - - - -

The court - - - has no authority to change a sworn statement contained in an affidavit made by an individual without verification by the affiant. In the instant case the defendant was tried upon an unsworn charge and it is a statutory requirement in a criminal action that the affidavit must be sworn to by the individual preferring the charges.

We, therefore, conclude that the Municipal Court was without authority to proceed to trial upon the unverified amended affidavit and we do not find it necessary to consider the record to determine whether or not the evidence is sufficient to establish the defendant's guilt - - -"

City of Ironton v. *Bundy,* (1954) (Ohio) 129 N. E. 2d 831.

The respondent in the case at bar reserved several exceptions. Because of our conviction that the exception already entertained and discussed is valid there is no necessity for this Court to express any opinion upon the concomitant exceptions.

The mandate must be:

Exceptions sustained.

GLOBE SLICING MACHINE CO., INC.
vs.
CASCO BANK AND TRUST CO.

Cumberland. Opinion, May 23, 1958.

Conditional Sales. Recording. Mortgages. Notice.

A conditional sales contract signed by the purchaser, "Gill's Self Service Mkt. *by Frank M. Gill*" and recorded and indexed under "Gill's Self Service Mkt." is not effectively recorded under R. S. 1954, Chap. 119, Sec. 9, so as to bind subsequent mortgagees of Frank M. Gill.

A conditional vendor who chooses to name a purchaser under his trade name gives no constructive notice to mortgagees of the reservation of his title under R. S. Chap. 119, supra. "Gill's Self Service Mkt." is not the equivalent of "Frank M. Gill" and there was no more reason for the recording officer to index the name "Frank M. Gill" than the name of a corporate vice president who signed for the corporation.

ON REPORT.

This is an action of trover before the Law Court upon Report and Agreed Statement. Judgment for defendant.

Berman, Berman & Wernick,
John J. Flaherty, for plaintiff.

Woodman, Skelton, Thompson & Chapman, Edward T. Richardson, Jr., for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, JJ. TAPLEY, J., dissents. BELIVEAU, J., sat at argument but retired before the opinion was adopted.

WILLIAMSON, C. J. This is an action in trover by a conditional vendor against a mortgagee from the purchaser to recover the agreed value of certain personal property. The case is reported to us on an agreed statement. The decision turns on the effectiveness of the recording of the conditional sale agreement.

On February 4, 1952, the plaintiff as seller executed a conditional sale agreement with "Gills Self Service Mkt" as the named purchaser signed "Gills Self Service Mkt, by Frank M. Gill," with the usual provisions for retention of title in the vendor until payment was made of the entire purchase price. The agreement was recorded on February 23, 1952, in the office of the City Clerk of Portland where Frank M. Gill resided. The following notation appears in the index:

"Mortgages 1943-1953
Gill's Self Service Mkt.
Globe Slicing Machine Co., Inc. Vol. 369, Page 163."

It is agreed that "the office of the City Clerk provides an indexing system designed to enable any member of the public to determine, by recourse to this index, whether a particular instrument has been recorded, in what volume, and on what page it is set forth."

In November 1953, Frank M. Gill executed a chattel mortgage to the defendant bank of "all merchandise and stock in trade in said store," including specifically the items enumerated in the conditional sale agreement. The mort-

gage was duly recorded in the office of the Portland City Clerk. Subsequently the defendant foreclosed and sold the property.

We are of the opinion the conditional sale agreement was not effectively recorded insofar as the mortgagee was concerned, and hence is not valid against its title. The statute reads:

> "No agreement that personal property bargained and delivered to another shall remain the property of the seller till paid for, is valid unless the same is in writing and signed by the person to be bound thereby; . . . it shall not be valid except as between the original parties thereto, unless it or a memorandum thereof is recorded in the office of the clerk of the city, . . . in which the purchaser resides at the time of the purchase; . . ." R. S. Chap. 119, § 9.

The agreement was without question valid between the plaintiff and Frank M. Gill. They were the original parties and there could be no objection to the use of a trade name by the defendant in his transactions with the plaintiff. The controversy arises when the interest of a third party is at stake. *Lipman et al* v. *Thomas,* 143 Me. 270, 272, 61 A. 2d. 130; *Bath Motor Mart* v. *Miller,* 122 Me. 29, 118 A. 715; *Skene* v. *Graham,* 116 Me. 202, 100 A. 938; 63 C.J., *Trade-Names* § 39; 87 C.J.S., *Trade-Names* § 8, p. 237, § 30, p. 264; 52 Am. Jur., *Tradename* § 3; 38 Am. Jur., *Name* § 13, p. 601; 2 Corbin, Contracts § 522; 1 Williston, Contracts § 300 (rev. ed.).

The fatal defect in the plaintiff's claim lies in the fact that it chose to name the purchaser under his trade name. Thus the record, in our construction of the statute, gave no constructive notice to the mortgagee of the reservation of title in the vendor. We are not, it must be noted, concerned with whether the mortgagee had actual notice that Frank M. Gill was doing business under the trade name of Gills

Self Service Mkt. See *Hayden* v. *Killman,* 119 Me. 38, 109 A. 485, and R. S. Chap. 178, § 1, on Mortgages of Personal Property and their recording. The same principles apply to conditional sales. It is proper recording, and the recording alone, that breathes validity against a third party into the retention of title in the vendor. *Mac Motor Sales, Inc.* v. *Pate,* 148 Me. 72, 90 A. 2d. 460; *Boscho, Inc.* v. *Knowles,* 147 Me. 8, 83 A. 2d. 122; *Beal* v. *Universal C.I.T.,* 146 Me. 437, 82 A. 2d. 412.

> "It has been declared also in decided cases that the burden of establishing that a personal property mortgage, or a conditional sale agreement, encumbers, or controls, the title of the property involved rests upon the party relying on it, *Horton* v. *Wright,* 113 Me. 439; 94 A. 883, and that nothing less than full compliance with all statutory requirements will satisfy that burden. *Gould* v. *Huff,* 130 Me. 226; 154 A. 574." *Tardiff* v. *M-A-C Plan of NE,* 144 Me. 208, 211, 67 A. 2d. 337.
>
> "Our recording statute as to conditional sales (R. S., (1930) c. 123, § 8) provides that no conditional sale shall be valid except as to the original parties thereto unless properly recorded. The record is necessary to establish its validity. The statute is for the benefit and protection of all persons who have any interest in examining the record title to property of which they may thereafter become owner, either in whole or in part, absolutely or otherwise." *Motor Finance Co.* v. *Noyes,* 139 Me. 159, 166, 28 A. 2d. 235.
>
> See also 45 Am. Jur. 489, *Records and Recording Laws,* § 123.

The trade name "Gills Self Service Mkt" is not the equivalent of the name "Frank M. Gill." There is no substantial identity in the names. *Dutton* v. *Simmons,* 65 Me. 583; IV American Law of Property § 18.30, Identity and Substantial Identity of Names. The vendor gains nothing from the fact the word "Gills" appears in the trade name. The

principle *idem sonans* plainly is not applicable. The trade name of Frank M. Gill for our purposes could as well have been "Jones Mkt" or "Cushnoc Mkt."

The case does not turn on error by the recording officer. The agreement was correctly recorded and indexed under the stated name of the purchaser, i.e., "Gills Self Service Mkt." The clerk did not err in failing to index the agreement under the name of Frank M. Gill. There was no more reason for indexing the name of "Frank M. Gill" as the purchaser than the name of the vice president who signed the corporate name of the plaintiff. The issue before us does not arise from an error in the records, but from the recording as effective constructive notice to third parties.

It is obvious that an agreement in the name of "Cushnoc Mkt," so recorded and indexed, would not come to the attention of one searching the records for mortgages or conditional sales against Frank M. Gill. Information linking the trade name and the individual would of necessity come from outside the records. Recording alone is not enough; it must be effective. *Gould* v. *Huff*, 130 Me. 226, 154 A. 574.

> "The purpose of the statute clearly is that all persons may have notice of the mortgage, of the property mortgaged, and of the character and extent of the incumbrance created. The mere record of a valid mortgage gives constructive notice to all. All are presumed to know its contents, for any one interested can obtain knowledge by examining the record. But a record is not constructive notice of more than the record itself discloses. Third persons are chargeable with notice of no more than they can ascertain from the record or from being put upon their inquiry by the record." *Thurlough* v. *Dresser*, 98 Me. 161, 163, 56 A. 654.

The index or entry book is not a part of the record, but must be maintained by the clerk under the statute. R. S. Chap. 178, § 2. It is, however, an essential tool in the search

for encumbrances. The principle that errors in the index are at the risk of one who relies on the record does not lessen the importance of an index, and thus the necessity of the disclosure of the names of parties in instruments such as conditional sales. See *Boscho, Inc.* v. *Knowles, supra; Monaghan* v. *Longfellow,* 81 Me. 298, 17 A. 74; 14 C.J.S., *Chattel Mortgages* § 159, § 162.

The vendor, it is important to recall, knew that it was taking the agreement in a trade name and that this was the trade name of Frank M. Gill. A trade name is not a person, corporation, or other entity, but a business sign. The vendor knew the person behind the sign and it was its obligation, if it chose to be protected by a record against claims under the purchaser, to cause the sale agreement to show the latter's name.

We need not discuss cases arising from the record of an instrument executed by the owner in a wrong or fictitious name. In the instant case there was no deception practiced on the vendor. Frank M. Gill at no time said that his name was, let us say, George Brown. The vendor could have readily insisted upon evidence of the name of the person with whom he dealt under a trade name. Indeed, he could have ascertained whether the record of business names in the city clerk's office disclosed the name of the person or persons involved. R. S. Chap. 181, § 13. See dictum in *Martin* v. *Green,* 117 Me. 138, 143, 102 A. 977, (purchase money mortgage in fictitious name) with comment in *Hayden* v. *Killman,* supra; 78 C.J.S., *Sales* § 586—purchase under fictitious or unauthorized name.

The purpose of a search of the records for conditional sale agreements and chattel mortgages is not to establish a chain of title as in a search of real estate records. Ownership of personal property ordinarily is not evidenced by recorded instruments. The searcher is interested only in

recorded encumbrances against the seller or mortgagor. If there are none, he is then satisfied that no one can claim title against him by virtue of a conditional sale or mortgage.

In *Griffith* v. *Douglass,* 73 Me. 532, we said, at p. 534:

> "The object to be attained by requiring the recording of mortgages of personal property is the same as that in providing for the registration of mortgages of real estate. The same general principles are alike applicable in each case. The design is to give notice to the public of all existing incumbrances upon real or personal estate by mortgage. Hence it is obvious that the property mortgaged, whether real or personal, the person mortgaging, to whom the mortgage is made and the debt or claim to be secured should be fully disclosed and made apparent of record."

The necessity that such instruments give fair notice of the parties to the one who deals on the faith of the record and who is chargeable only with notice from the record is apparent. This the plaintiff vendor failed to do and so the defendant mortgagee prevails.

Our attention has been directed to the Business Name Statute which is designed to protect those who deal with persons under their trade names.

The statute requiring the purchaser to file a certificate of his business name with the city clerk is of no moment in this case. R. S. Chap. 181, § 13.

In *Lipman et al* vs. *Thomas,* supra, we said of the statute, at p. 273:

> "The primary purpose of the statute was to enable persons dealing with individuals transacting business under a partnership or assumed name to know or be able to ascertain from a public record, the name or names of those with whom they are dealing and the nature of the business in which they are engaged. From this record an investiga-

> tion of the financial responsibility of the partnership and the individuals composing it may be made, and whether the particular business to be transacted is within the scope of the partnership. The statute sought to protect the public against fraud and deceit in extending credit. It was not intended to protect those who obtained credit from the partnership."

The purpose of the statute is not to enable one dealing with Frank M. Gill to ascertain from the records in what trade name or names he may be doing business.

The entry will be

Judgment for defendant.

DISSENTING OPINION.

TAPLEY, J. I find myself unable to agree with my associates and, therefore, I respectfully dissent.

The majority of the Court has determined the recording of the conditional sales contract is valid between the parties and with this, of course, I agree. I take issue, however, on the matter of constructive notice to the defendant. The line of analysis which I am taking involves the question of whether this defendant, according to the facts of the case, takes title as against the conditional vendor.

The instrument was recorded in its entirety and was indexed:

> "Mortgages 1943-1953
> Gill's Self Service Mkt.
> Globe Slicing Machine Co., Inc. Vol. 369, Page 163."

Defendant's mortgage, among other items of personal property, contained a slicer, chopper and scales, being the same articles as were identified in the conditional sales contract

by the same serial numbers as were used for identification in defendant's mortgage. The conditional sales contract shows at a position near the top of the instrument in print "print name of purchaser" and then there is supplied by personal printing "Gill's Self Service Mkt." At the bottom of the instrument there are to be found lines for signatures. The purchaser is instructed by the printed portion of the instrument to print the name under which the business is conducted, whether as individual, firm or corporation, and directly below these instructions is a line with the printed word "by" and underneath this line are the words "if signing for a corporation, show title after signature." According to the position of the signature, it is apparent that these lines were disregarded by the purchaser and he signed in longhand "Gill's Self Service Mkt." and underneath "Frank M. Gill." My interpretation in analyzing the instrument is that the purchaser was conducting a business under the name "Gill's Self Service Mkt." and his personal signature indicated his responsibility as one to be charged individually. We have as a premise a conditional sales contract which appears on its face to have been executed by a purchaser as an individual doing business under a trade or an assumed name, the business name containing the surname of the purchaser.

The majority opinion narrows the issue to the validity of the recording as to third parties. There appears to be no question that between the parties the agreement was valid, as was the recording. The majority opinion, in part, reads:

> "The fatal defect in the plaintiff's claim lies in the fact that it chose to name the purchaser under his trade name. Thus the record, in our construction of the statute, gave no constructive notice to the mortgagee of the reservation of title in the vendor.
>
> - - - It is proper recording, and the recording alone, that breathes validity against a third party into the retention of title in the vendor.

> "The issue before us does not arise from an error in the records, but from the recording as effective constructive notice to third parties."

There is no element of fraud on the part of the original vendee or any other party involved in this case.

The procedure by which a conditional vendor retains title against third parties is prescribed in *Sec. 9, Chap. 119, R. S. 1954.* The pertinent portion of this section reads:

> "No agreement that personal property bargained and delivered to another shall remain the property of the seller till paid for, *is valid unless the same is in writing and signed by the person to be bound thereby;* - - - it shall not be valid except as between the original parties thereto, unless it or a memorandum thereof is recorded in the office of the clerk of the city, - - - in which the purchaser resides at the time of the purchase; - - -." (emphasis mine).

Referring to the instrument, the name of the purchaser is not the trade name "Gill's Self Service Mkt." but is "Gill's Self Service Mkt., Frank M. Gill" as the signature of the purchaser shows on the contract. According to the record, Mr. Gill is using a trade name but he evidences his intention to be bound by the contract by signing his individual name along with the trade name he has adopted. The trade name is not a legal entity but is merely a designation under which the individual who uses it is conducting his business. The party responsible for carrying out the terms of the contract and to respond in damages for its breach would be the individual, Frank M. Gill, so to reiterate, we have an agreement in writing, signed by the person to be bound thereby and this instrument, which satisfies the statutory requirements, was properly recorded. In the customs and usages of the trade, it is not unreasonable to say that the execution of contracts in a trade name by an individual as owner is not an uncommon practice.

The next question to be determined is whether the defendant under all the circumstances had constructive notice. The majority opinion takes the position that there was no error in the indexing by the City Clerk. The matter of indexing is of no moment in this case as affecting constructive notice. There is no statutory provision in this State making the index an essential part of the record.

Teweles vs. *Clearance Holding Corporation,* 156 A. 447 (N. J.). The index in this case was in error. The Court said, on page 449:

> "It is therefore apparent that when a contract of this character has been prepared and filed in accordance with the statute, it will operate as constructive notice, and the fact that the county clerk failed to comply with the provisions of another section of the statute, which requires him to keep a proper index of such documents, cannot affect the validity or effect of the filing, although it may subject him to an action at the instance of a party who may suffer by his error. We therefore conclude that even if the contract in question was not indexed, it was properly filed, and would operate as a protection to the vendor."

See *Pavlick* vs. *Reginald Oliver Co., Inc., et al.,* 148 A. 624 (N. J.).

The indexing may be completely erroneous but this fact in and of itself does not invalidate an otherwise valid recording.

The majority of the Court decides "the fatal defect in the plaintiff's claim lies in the fact that it chose to name the purchaser under his trade name." I do not agree that the purchaser executed the contract under a trade name. He executed it as an individual doing business under a trade or business name. It is the execution of the instrument which prevails, not the so-called named purchaser.

The purpose of recording a conditional sales contract is to retain title in the conditional vendor against third parties through the medium of constructive notice. When a written agreement is executed by the conditional vendor and vendee containing a description of personal property, with the terms of the sale and bearing the signature of the person to be bound, the original parties have satisfied the statutory requirements for its recording.

It is obvious that had the vendee used his own name, not in conjunction with his trade name, there would be no problem. There have been considerable number of opinions written throughout the country on the requirements of satisfying the provisions of conditional sales statutes in drafting conditional sales agreements as to the necessity of following statutory direction in the formation of agreements in order to make such agreements acceptable to recording and, if they meet the requirements, the recording in turn becomes constructive notice to third parties.

Jennings v. *Schwartz,* 144 P. 39 (Wash.). This cited case involves a conditional sales contract. The statute, among other conditions, requires the agreement to be signed by the vendor and the vendee. Schwartz, doing business under the trade name of Alaska Junk Company, made a conditional sale of personal property to the Pacific Coast Glass Company. A memorandum of the conditions of the sale was recorded. In the agreement the vendor was named Alaska Junk Company in the opening clause of the agreement. The instrument was signed by the vendee at the ordinary place for the signature but "it was not signed by the vendor personally, either with his proper or trade name, on any part of the instrument." The Court held that the printed trade name in the opening clause of the agreement was not a sufficient signing by the vendor within the meaning of the statute and, therefore, failed to comply with the statutory provisions. The inference to be drawn by this

case is that had the instrument been "signed by the vendor personally, either with his proper or trade name," the recording would have been valid. See *Chattel Mortgages and Conditional Sales (Jones)* Vol. 3, Sec. 1062.

The conditional sales contract must be considered in its entirety in determining its validity for recording purposes. If the instrument satisfies the requirements of *Sec. 9, Chap. 119, R. S. 1954,* then the recording is valid, otherwise it is not. Some jurisdictions have similar statutes which are more specific in their requirements, such as the necessity of describing the property in detail; that the instruments must be signed by both vendor and vendee; or that it must contain a jurat. In so far as the agreement now under discussion is concerned, the Maine statute only requires that the instrument be "in writing and signed by the person to be bound thereby."

The instrument, of course, was in writing but was it signed by the person to be bound thereby? The instrument on its face shows the signature of the individual vendee written under the trade name, both trade name and personal signature appearing to be in the same handwriting. It is reasonable to deduct from the instrument as a whole that the vendee signed it intending to be bound by its terms. The signature of "Frank M. Gill" gives life to the contract, binds him to its terms and, conversely, without his signature, there is lacking a vendee. There is no legal entity in the trade name "Gill's Self Service Mkt." which would support a contractual relationship.

In re Brown, Black v. *Hobart Mfg. Co., et al.,* 88 F. Supp. 297. Under the Ohio law a conditional sales contract which is signed with a fictitious name is invalid against a subsequent lien. It appears that one Raymond A. Brown operated a meat department as a tenant of a partnership, the partnership being named "Food Center Super Market." He executed a conditional sales contract which was directed

to the Food Center Super Market. It was signed in the space provided at the end of the instrument as "Food Center Super Market by Raymond A. Brown." The Referee in Bankruptcy found the contract invalid as against third persons. The petitioner claimed that the bankrupt Brown did business under the name of Food Center Super Market. The Court said, on page 298:

> "The additional claim is made that bankrupt did business under the name of Food Center Super Market. If this were so a different result might have been reached. However, the Referee found that bankrupt did business in his own name, and there is nothing in the record to support a contrary finding."

In the instant case, Mr. Gill was doing business under his own trade name which he had a legal right to do.

I come to no other conclusion than the agreement was executed by an individual using a trade name who was legally bound as an individual to satisfy the conditions and terms of the agreement in so far as the vendee was concerned.

The terms, conditions and execution of the conditional sales contract satisfy the requirements of Sec. 9, Chap. 119, R. S. 1954 and therefore its recordation gave constructive notice to the world.

HERBERT W. TITTLE
vs.
RAYMOND R. RUMMEL

HERBERT W. TITTLE, JR.
vs.
RAYMOND R. RUMMEL

Hancock. Opinion, June 17, 1958.

Negligence. Counsel. Remarks. New Trial.

Motions for a new trial upon the alleged assertion that the verdict is against the law, the charge, the evidence, and the weight of evidence, will not be granted unless the verdict is manifestly wrong.

Motion for a new trial upon the alleged assertion that counsel made improper remarks to the jury will be *dismissed* where the complaining party gives the trial court no timely reason to correct the alleged errors and prefers to await the outcome of the case. Such complaint comes too late.

ON MOTION FOR NEW TRIAL.

These are cross action of negligence. The cases are before the Law Court upon general motions for new trial. Motions overruled as to the first three causes of error assigned. Motions dismissed as to the Fourth cause of error assigned.

Herbert T. Silsby II, for plaintiff.

Blaisdell & Blaisdell,
Charles Hurley, for defendant.

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

SULLIVAN, J. These tort actions tried together sought damages from the defendant for injuries and losses which

the plaintiffs declared to have resulted to them from the negligence of the defendant in causing an automobile collision. Following jury verdicts in favor of the defendant the plaintiffs presented to this Court identical motions for new trials with the following protestations:

1. Because each verdict was against law and the charge of the Justice.

2. Because each verdict was against evidence.

3. Because each verdict was manifestly against the weight of evidence.

4. "Because counsel for the defendant did knowingly make and utter in trial of said cause illegal, unauthorized, prejudicial, misleading, unwarranted and untrue comment in his said argument, to said court and jury and which was objected to by counsel for plaintiff - - -."

The record contains ample evidence contradictory to the liability of the defendant and to the reality of damages. That evidence afforded questions of fact to intelligent and conscientious persons which they resolved in defendant's verdicts. This Court cannot substitute its judgment for that of the jury. *Lange* v. *Goulet,* 144 Me. 16, 17; *Fotter* v. *Butler,* 145 Me. 266, 269. It is incumbent upon us in this proceeding to view the evidence in the light most favorable to the successful defendant. *Morneault* v. *Hampden,* 145 Me. 212; *Bragdon* v. *Shapiro,* 146 Me. 83, 84. The burden of demonstrating that the verdicts are manifestly wrong is upon the plaintiffs. *Eaton* v. *Marcelle,* 139 Me. 256, 257. No error is discoverable to sustain any of the first three complaints enumerated in plaintiffs' motions.

The fourth recital of error assigned in the motions is one accusing counsel for the defendant of improper, illicit comments in his argument to the jury. The record discloses that counsel for the plaintiffs on the occasion of the al-

leged transgression promptly interrupted his opponent by invoking the Court and that the presiding Justice at once entertained the matter with defendant's attorney who replied and proceeded with his address to the jurors without further, reported interruption. Plaintiffs' counsel then argued in rebuttal. No requests were lodged or exceptions claimed by plaintiffs' counsel at the time of the asserted infraction and no motions were made until after the verdicts.

This Court in a decision made upon a state of facts very analogous to those in the case at bar has very lately had occasion to review the principles decisive here and to dismiss a like motion. *Deschaine* v. *Deschaine,* 140, Atl. 2d 746. In that opinion this Court conforming with its own decided cases, adhered to the same procedure required by precedent and by orderly, efficient and impartial administration for such a special motion. Other references are *Rolfe* v. *Rumford,* 66 Me. 564; *Powers* v. *Mitchell,* 77 Me. 361, 368; *Sherman* v. *Maine Central R. R. Co.,* 86 Me. 422, 424.

We quote the following apt language from *Deschaine* v. *Deschaine*:

> "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 mandate must be:

Motions overruled as to the first 3 causes of error assigned.
Motions dismissed as to the 4th cause of error assigned.

STATE OF MAINE

vs.

FLOSSIE AND LIONEL HARNDEN, APPLTS.

Oxford. Opinion, June 30, 1958.

Criminal Law. Health and Welfare. Neglect. Minors. Appeal. Exceptions.

The rule "that in cases heard by a judge without the intervention of a jury, findings of fact are conclusive if supported by credible evidence" is applicable to appeals in child neglect cases heard by a single justice under R. S. 1954, Chap. 25, Sec. 249-250.

ON EXCEPTIONS.

This is an action upon complaint for child neglect. The case is before the Law Court upon exception to a decree committing the child to the State. Exceptions overruled.

George C. West, Frank W. Davis, for State.

William E. McCarthy, for defendant.

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

DUBORD, J. A complaint, under the provisions of Section 249, Chapter 25, R. S. 1954 was brought against the appellants in the Rumford Municipal Court on April 5, 1957, alleging that they had cruelly treated and willfully neglected a minor child belonging to the appellants. The case was heard in the aforesaid Municipal Court resulting in a decree committing the child to the Department of Health and Welfare. From this order an appeal to the Superior Court in and for the County of Oxford at the May 1957 Term was duly taken, under authority of Section 250, Chapter 25, R. S. 1954. At the aforesaid May Term, a hearing was held

before the sitting justice. The appellants were represented by counsel.

After a full hearing, the presiding justice of the Superior Court entered a decree to the effect that he found that the appellants, parents of the aforesaid minor child, had cruelly treated and willfully neglected the said minor child, and in accordance with the provisions of Section 249, Chapter 25, R. S. 1954, he ordered that the child be committed into the custody of the State Department of Health and Welfare. He further ordered the father of the child to pay to the State Department of Health and Welfare the sum of $10.00 per week towards the support of the child.

To this finding and decree, the appellants excepted and these exceptions are before us for our consideration.

The exceptions raise a question of law under the rule that "only when the justice finds facts without evidence or contrary to the only conclusion of law which may be drawn from the evidence is there any error of law." *Sanfacon* v. *Gagnon, et al.*, 132 Me. 111; 167 A. 695; *Northwestern Investment Co.* v. *Palmer et als.*, 113 Me. 395; 94 A. 481; *Dingley et al.* v. *Dostie,* 146 Me. 195, 196; 79 A. 2d. 169.

Through a long line of decisions, this Court has decided that in cases heard by a judge without the intervention of a jury, his findings of fact are conclusive, if supported by credible evidence. *Proctor, et al.* v. *Carey,* 142 Me. 226; 49 A. 2d. 323; *Bartley et al.* v. *Couture,* 143 Me. 69; 55 A. 2d. 438; *Dingley et al.* v. *Dostie, supra; Marie Paule D'Aoust, Applt.,* 146 Me. 443; 82 A. 2d. 409; *Ouelette* v. *Pageau, et al.,* 150 Me. 159, 167; 107 A. 2d. 500.

We have studied the rather extensive record with great care. We are of the opinion that there was sufficient evidence upon which the presiding justice could base his findings, that the child had been cruelly treated. We do not con-

sider it necessary nor advisable to cite any of the particular acts of cruelty of which the presiding justice could have found evidence in the record.

Section 249, Chapter 25, R. S. 1954 provides as follows:

> "If, after hearing, it appears that *any material allegations of said complaint are true* (emphasis supplied) the court may order said child committed into the custody of the department - - -."

The appellants take nothing by their exceptions. The entry will be

Exceptions overruled.

MARGARET C. WHITEHOUSE
vs.
WESLEY E. WHITEHOUSE

York. Opinion, June 30, 1958.

Divorce. Alimony. Payment.

A decree for the payment of a specific sum of money as alimony under R. S. 1954, Chap. 166, Sec. 63, is not defective because it suggests a method by which a libelee may discharge his liability thereunder (by conveying to Libelant his right, title and interest to certain real estate).

ON EXCEPTIONS.

This is an action for divorce. The case is before the Law Court upon exceptions to those portions of the decree relating to alimony. Exceptions overruled.

Titcomb, Fenderson & Titcomb, for plaintiff.

Simon Spill,
Willard and Hanscom, for defendant.

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

DUBORD, J. On July 9, 1954, the libelant, Margaret C. Whitehouse, instituted proceedings for divorce against the libelee, Wesley E. Whitehouse, by libel returnable to the October 1954 Term of the Superior Court within and for the County of York. At the May 1957 Term of the aforesaid Court, the presiding justice thereof, after hearing, entered a decree dissolving the marriage of the parties for the cause of "cruel and abusive treatment." Both parties were represented by counsel.

In the decree it is provided that:

> "Libellee to pay Libellant the sum of $8,000.00 as alimony on or before July 15, 1957. The payment of said sum may be satisfied in full by the execution and delivery of a good and sufficient deed between Libellee and Libellant of all his right, title and interest in and to a certain island located at Balch's pond so-called in said County of York."

This decree ordering the libelee to pay the specific sum of $8,000.00 as alimony was entered under authority of Section 63, Chapter 166, R. S. 1954, the pertinent portion of which section reads as follows:

> "The court may also decree to her reasonable alimony out of his estate, having regard to his ability, and sufficient money for her defense or prosecution of hearings affecting alimony; and, to effect the purposes aforesaid, may order so much of his real estate, or the rents and profits thereof, as is necessary, to be assigned and set out to her for life; or, instead of alimony, may decree a specific sum to be paid by him to her or payable in such manner and at such times as the court may direct; - - -."

The libelee contends through a bill of exceptions which is now before us, that the presiding justice was without authority to decree that the payment of the specific sum could be satisfied by the execution and delivery by the libelee to the libelant of his interest in certain real estate.

We are of the opinion there is no merit to the contention of the libelee. The order of the presiding justice for the payment by the libelee of a specific sum was in accordance with the provisions of the applicable statute. The only effect of the remaining part of the decree was to suggest a method by which the libelee could discharge his liability.

He was not aggrieved by that portion of the decree about which he now complains.

The entry will be:

Exceptions overruled.

STATE OF MAINE

RULES OF SUPREME JUDICIAL COURT AND SUPERIOR COURT.

NATURALIZATION

All of the Justices of the Supreme Judicial Court and Superior Court concurring, Rule 43 of the Supreme Judicial and Superior Courts relating to Naturalization (151 Me. 427) is hereby *Amended to read as follows:*

- 43 -

The stated days of the terms of the Court in the several Counties of the State on which final action may be had on petitions for naturalization as provided by Federal law are hereby fixed as the third day of the January, April and September terms, the second day of the March term, the first day of the November term and the first Tuesday following the third Monday of June in *Androscoggin County;* the second day in April, September and November terms in *Aroostook County;* the third day of the February and October terms and the first day of the May term in *Franklin County;* the third day of the February and second day of the October terms, the fourth day of the April term, and the first Wednesday after the third Monday of June in *Kennebec County;* the fourth day of the May and October terms in *Oxford County;* the third day of the January and May terms and the fourth day of the September term in *Somerset County;* the first day of the February and October terms in *Washington County.*

The time for the naturalization hearings to be held as hereinbefore provided shall be 2:30 o'clock in the afternoon except that those held on the third or fourth day of the terms shall be at 11:00 o'clock in the forenoon. The Justice presiding at the term in any County, at his discretion and

with the consent of the naturalization examiner, may for cause or convenience assign any pending case or cases for hearing on any other day or days during the term.

Provided, however, that petitions for naturalization pending on the effective date hereof in the Superior Courts in and for the Counties of Penobscot and Piscataquis shall be heard and determined in said Courts.

This Rule shall become effective July 1, 1958, and shall be recorded in the Maine Reports.

Dated this 23rd day of June, 1958.

Approved:

ROBERT B. WILLIAMSON
DONALD W. WEBBER
WALTER M. TAPLEY, JR.
FRANCIS W. SULLIVAN
F. HAROLD DUBORD
CECIL J. SIDDALL
Justices of
Supreme Judicial Court

Approved:

HAROLD C. MARDEN
RANDOLPH A. WEATHERBEE
LEONARD F. WILLIAMS
JAMES P. ARCHIBALD
CHARLES A. POMEROY
ABRAHAM M. RUDMAN
ARMAND A. DUFRESNE, JR.
JOHN P. CAREY
Justices of
Superior Court

FLORENCE C. HOOPER
Clerk, said Supreme Judicial Court.

OTTO M. DAVIS

vs.

GORHAM SAVINGS BANK

Cumberland. Opinion, July 2, 1958.

New Trial. Law Court. Jurisdiction. Jury Trial.

The Law Court is without statutory power to act upon a general motion for a new trial addressed to it after a case has been heard and decided by the court below without the aid of a jury.

ON MOTION FOR NEW TRIAL.

This case is before the Law Court upon general motion for new trial. Motion dismissed.

Julian G. Hubbard, for plaintiff.

Herbert H. Sawyer,
Fred W. Small, for defendant.

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

PER CURIAM.

This case was heard and decided by the court below without the aid of a jury. The defendant prevailed. Plaintiff now seeks review by means of a general motion for a new trial addressed to the Law Court. This method of review is available only in cases involving jury trials. The matter is jurisdictional and the Law Court is without statutory power to act. *Levee* v. *Mardin,* 126 Me. 133; *Espeargnette* v. *Merrill,* 107 Me. 304.

Motion dismissed.

EDDIE V. JACQUES

vs.

JAMES LASSITER, SHERIFF

Oxford. Opinion, July 3, 1958.

Divorce Decree. Alimony and Support. Enforcement. Capias. Habeas Corpus.

A capias execution issued by the Superior Court at Androscoggin County upon a support decree of that court is enforceable by commitment in any other county even though R. S., 1954, Chap. 166, Sec. 64, as amended by P. L., 1955, provides, "the county having jurisdiction of the process shall bear the expense of his support and commitment."

The jurisdiction of the Superior Court encompasses the 16 counties of the State and process issued shall be obeyed and executed throughout the State. The proceedings of habeas corpus are restricted and primarily concern the judgment of the court. If the court has jurisdiction of the cause and of the person habeas corpus does not lie.

ON EXCEPTIONS.

This is an application for a writ of habeas corpus before the Law Court upon exceptions to the denial thereof by the court. Exceptions overruled.

Merton E. Rawson, Jr., for plaintiff.

George C. West, for defendant.

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

TAPLEY, J. On exceptions. Application for writ of habeas corpus was presented to the justice below on an agreed statement of facts. The facts demonstrate that one Annette Jacques obtained a decree of divorce from the bonds

of matrimony from the petitioner, Eddie Jacques, at the March Term of the Superior Court, within and for the County of Androscoggin, and that the decree was issued March 11, 1948. Eddie Jacques, by the terms of the decree, was ordered to contribute financially to the care and support of his minor children. In April of 1956 Annette Jacques brought a petition for execution, complaining that her former husband was then in arrears in the sum of $343.50 and prayed that, after due notice and hearing on her petition, her former husband be adjudged in arrears and that execution should issue against him. On August 20, 1956 the presiding Justice of the Superior Court adjudged Eddie Jacques as being in arrears in the amount of $343.50 and ordered execution to issue in this amount, whereupon a capias execution was issued from the Androscoggin County Superior Court and after some renewals of this execution it was forwarded to the sheriff, within and for the County of Oxford, with indorsement to collect, secure or commit. Eddie Jacques, on December 9, 1957, by force and virtue of this capias execution, was arrested and imprisoned in the Oxford County jail. This incarceration was followed by a petition on the part of Eddie Jacques for a writ of habeas corpus addressed to a Justice of the Superior Court in vacation. A hearing was had on the application for a writ of habeas corpus, which resulted in a denial of the writ, to which exceptions were taken.

The gist of the petitioner's complaint is that he was committed to the Oxford County jail, being a jail not contained within the county from which the execution was issued and thereby he was illegally committed and restrained of his liberty. A further contention on the part of the petitioner is that the capias execution is not valid without the bounds of Androscoggin County where it was originally issued and, therefore, the arrest and subsequent confinement is unlawful. The manner and circumstances of the arrest or the authority of the arresting officer are not subjects of habeas

corpus. In this case the proceedings direct attention to the judgment of the court and the confinement based upon the judgment. *Wallace* v. *White,* 115 Me. 513. There is no contention that the capias execution was not properly issued on the judgment. The proceedings under which the judgment was obtained are to be found in Sec. 64 of Chap. 166, R. S., 1954, as amended by P. L., 1955. The pertinent portion of Sec. 64 reads:

> "At the time of making a final decree in any divorce action, the court may order that execution and such reasonable attorney's fee as the court shall order shall issue against the body of any party to the action charged with the payment of support of minor children or payments of alimony or a specific sum in lieu thereof, upon default of any payment, and the court shall order that the clerk of said court shall issue such execution. When the husband or father is committed to jail on execution issued upon decree of alimony, or for payment of money instead thereof, or for the support of his minor children, or for support pending libel, or for payment of counsel fees, the county having jurisdiction of the process shall bear the expense of his support and commitment - - - - -."

This section confers jurisdiction on the court and authorizes issuance of the capias execution based on the judgment. This jurisdiction of the Superior Court encompasses the 16 Counties of the State and the process issued shall be obeyed and executed throughout the State. Sec. 9, Chap. 106, R. S., 1954. See also *Belfast* v. *Bath,* 137 Me. 91.

The petitioner argues that he should be confined in the jail of the county of original jurisdiction and says that the Legislature so intended when Sec. 64, Chap. 166, R. S., 1954, as amended, was enacted. With this interpretation, we cannot agree. Sec. 64 contains the following provision:

> "When the husband or father is committed to jail on execution issued upon decree of alimony, or for

> payment of money instead thereof, or for the support of his minor children, or for support pending libel, or for payment of counsel fees, *the county having jurisdiction of the process shall bear the expense of his support and commitment - - - -.*" (Emphasis ours.)

This provision requiring the expenses of payment for support of one confined in jail under provisions of Sec. 64 by the county having jurisdiction of the process may reasonably be interpreted as indicating an intent on the part of the Legislature that any jail within the confines of the State could be used for the purpose of incarceration under provisions of the section.

The proceedings of habeas corpus are restricted and primarily concern the judgment of the court. If the court has jurisdiction of the cause and of the person, habeas corpus does not lie. In the instant case, the court had jurisdiction over the person and the cause.

> "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." *Wallace* v. *White, supra.*

The commitment and confinement of the petitioner are legal and valid.

Exceptions overruled.

ELVA T. WILLIAMS, ASSIGNEE OF OLIVER BAKER, APPELLANT FROM DECREE OF JUDGE OF PROBATE, VIRGIL N. THOMPSON, APPELLEE

Somerset. Opinion, July 23, 1958.

Adoption. Inheritance.

The law is settled in this state that the right to inherit property from or by an adopted person is determined by the law of descent in effect at the time of the death of the intestate.

R. S., 1954, Chap. 170, Sec. 1, Par. VI provides that when property descends to the next of kin in equal degree it passes to those claiming through the nearer ancestor.

In the instant case property was correctly ordered distributed to decedent's nephew through adopting parents rather than to a cousin through a natural parent.

ON EXCEPTIONS.

This case is before the Law Court on exceptions to a decree of the Supreme Court of Probate. Exceptions overruled.

Anthony J. Cirillo, for plaintiff.

Harry R. Coolidge, for defendant.

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

SIDDALL, J. This case is before the Law Court on exceptions to a decree of the Supreme Court of Probate, affirming a decree of the Judge of Probate of Somerset County.

The Judge of Probate ordered distribution of the balance of personal property in the hands of the administrator of the estate of an adopted person to Virgil N. Thompson who claimed the estate through an adopting parent of the decedent.

It appears from the record in the case that on the fifth day of November, 1884, Otis H. Thompson and Lois E. Thompson, husband and wife, adopted Mabel Nevins, the decedent, an illegitimate child of Annie Nevins. Mabel Nevins married George S. Williams and died intestate on October 12, 1954, leaving no issue. George S. Williams predeceased his wife, the adopted person, and all of the property possessed by her at the time of her death had been inherited from her said husband. None of such property came from her natural mother or from any member of her mother's family. Letters of administration were issued to Virgil N. Thompson, the Appellee in this case. Under date of April 7, 1956, a petition for distribution was filed, asking that the balance of property in the hands of the administrator be ordered distributed to said Virgil N. Thompson, named in the petition as a nephew. Otis H. Thompson and Lois E. Thompson, both of whom predeceased Mabel T. Williams, had one son who died prior to the death of Mabel T. Williams, leaving as his only child and heir, the said Virgil N. Thompson. On the eighth day of April, 1957, by decree of Probate Court, the administrator was ordered to distribute the balance in said estate to the said Virgil N. Thompson. An appeal to the Supreme Court of Probate was filed by Elva T. Williams, Assignee of Oliver Baker, claiming that Virgil N. Thompson was not a legal heir-at-law of the deceased and that Oliver Baker, a cousin of the deceased through her natural mother, was the sole legal heir of the deceased. The Justice in the Supreme Court of Probate affirmed the decree of the Probate Court and dismissed the appeal.

The issue in this case is whether the property of an adopted person dying intestate should be distributed in accordance with the law in effect at the time of the adoption or in accordance with the law in effect at the time of the death of the adopted person.

Legal adoption by one person of the offspring of another was unknown at common law and exists only by virtue of statute. See *Simmons, Appellant,* 121 Me. 97. The first Legislative Act providing for the adoption of children is set forth in P. L., 1855, Chap. 189.

In the instant case the adoption was authorized under the provisions of R. S., 1883, Chap. 67. Under the provisions of this legislation an adopted child had the right of inheritance from its adopting parents when not otherwise expressed in the decree of adoption. The order of adoption specifically excluded the right of inheritance on the part of the adopted child.

At the time of the adoption there was no statutory provision authorizing inheritance *from* an adopted person to an adopting parent or the kindred of an adopting parent.

R. S., 1954, Chap. 158, Sec. 40, the pertinent statute relating to the descent of property of an adopted person in force at the death of Mabel T. Williams, contains the following provision:

> "If the person adopted died intestate, his property acquired by himself or by devise, bequest, gift or otherwise before or after such adoption from his adopting parents or from the kindred of said adopting parents shall be distributed according to the provisions of chapter 170, the same as if born to said adopting parents in lawful wedlock; and property received by devise, bequest, gift or otherwise from his natural parents or kindred shall be distributed according to the provisions of said chapter 170, as if no act of adoption had taken place."

R. S., 1954, Chap. 170, Sec. 1, Par. VI, relating to the rules of descent of intestate property contains the following provision:

> "If no such issue, father, mother, brother, or sister, it descends to his next of kin in equal degree; when

> they claim through different ancestors, to those claiming through a nearer ancestor in preference to those claiming through an ancestor more remote."

The property owned by the decedent was not received in any manner from her natural mother or kindred. Such property for the purposes of this case was properly acquired by the decedent herself. This property passes to the kindred of the adopting parents, in this case Virgil N. Thompson, providing that the descent and distribution of the property is governed by the law in effect at the time of the death of the decedent.

The law is settled in this state that the right to inherit property from or by an adopted person is determined by the law of descent in effect at the time of the death of the intestate.

In *Appeal of Latham,* 124 Me. 120, the issue concerned the right of an adopted child to inherit from an adopting parent. The statute in operation at the time of the adoption gave no right of inheritance to a child from an adopting parent. At the death of the adopting parent the statute in force gave an adopted child the right of inheritance, with certain exceptions immaterial to the issues in the case. The court in that case said:

> "It is only too clear that the enactment of 1917, conferring upon certain adopted children an heritable status, not theretofore possessed by them, disturbed no existing right or obligation. The adoption itself was not thereby changed. No wedlock-born child was deprived of heirship, for he could not be an heir-at-law while his parent was yet living. The adopting father remained free to dispose of his estate by will, or in other manner, so far as children were concerned, if he would. The statute could find application only in intestacy afterward transpiring.

> Of course the law was intended to be retrospective, in the sense that it applied to adoptions decreed previously, but where an adoptive parent died intestate antecedent to the statute, then that statute was subservient to the other statute which had vested the estate at his death to the exclusion of the adopted child.
>
> The rights of descent flow from the legal status of the parties, and where the status is fixed, the law supplies the rules of descent, with reference to the situation as it existed at the death of the decedent."

In the case of *Gatchell et al.* v. *Curtis et al.*, 134 Me. 302, the decedent was an adopted son under decree dated April 20, 1895. The adopted son under the will of his adopting father, who died in 1910, received property which comprised the entire estate of the adopted son at the time of his death. The plaintiffs were legatees under the will of the adopted son. The adopted son died leaving no issue and no blood relatives, but was survived by a brother of his adopting mother and a sister of his adopting father. The widow of the adopted son waived the provisions of the will and claimed the entire estate because, according to her contention, the deceased was survived by no kindred. The real question to be decided was to whom would the estate have gone had the adopted son died intestate. If any part of it would have descended to the kindred of the adopting parents, the claim of the widow to the entire estate failed. Counsel for the widow argued that the term "kindred" as used in the statute providing for descent and distribution referred only to blood kindred. At the time of the adoption no right of inheritance *from* the adopted person existed. At the time of the death of the adopted person, the statute in force, P. L., 1917, Chap. 245, contained the exact language used in R. S., 1954, Chap. 158, Sec. 40, in providing that intestate property of an adopted person acquired by himself or by devise, bequest, gift, or otherwise before or after such

adoption from the adopting parents or from the kindred of such adopting parents should be distributed in accordance with the laws of descent and distribution, the same as if born to the adopting parents in lawful wedlock. In that case the court said:

> "Counsel for the widow contends, however, that such statute having been passed since the adoption does not control, that it is the act which was in effect at the time of the adoption which determines the rights of the parties.
>
> Such is not the law. The case of Latham, Appellant, 124 Me., 120, 126 A., 626, is a direct authority to the contrary. A decree of adoption entered in accordance with power conferred by statute fixes the status of the child; it divests the natural parents of control and establishes the rights and obligations of the foster parents. It does not settle for all time the child's right to inherit property. That remains as in the case of all persons subject to legislative regulation, until it becomes vested by the death of him whose estate may be subject to administration. The same principle of course applies to the rights of those who may inherit from the child. The rule is well set forth in Latham, Appellant, supra, at page 122, in the following language:
>
> > 'The rights of descent flow from the legal status of the parties, and where the status is fixed, the law supplies the rules of descent, with reference to the situation as it existed at the death of the decedent.'
>
> The following authorities support this same general doctrine. *In re Clarence E. Crowell's Estate,* 124 Me., 71, 126 A., 178; *Gilliam* v. *Guaranty Trust Company of New York,* 186 N.Y., 127, 78 N.E., 697; *Sorenson* v. *Rasmussen,* 114 Minn., 324, 131 N.W., 325; *The Brooks Bank & Trust Company* v. *Rorabacher,* 118 Conn., 202, 171 A., 655; 1 *Am. Jur.,* 659; 1 C.J., 1400."

The following cases may be added to those set forth above: *Gamble* v. *Cloud,* 263 Ala. 336, 82 So. (2nd) 526. (1955); *Wyman, Appellant,* 147 Me. 237, 86 A. (2nd) 88; *Re Fodor,* 202 Misc. 1100, 117 N. Y. S. (2nd) 331. (1952); *Staley* v. *Honeyman* (App.) 59 Ohio L. Abs. 203, 98 N. E. (2nd) 429, affd. 157 Ohio St. 61, 104 N. E. (2nd) 172. (1952); *McFadden* v. *McNorton,* 193 Va. 455, 69 S. E. (2nd) 445. (1952). See, also, annotation in 18 A. L. R. (2nd) 960, in which *Appeal of Latham,* and *Gatchell et al.* v. *Curtis et al., supra,* are cited.

The decree of the Justice of the Supreme Court of Probate was in accordance with the established law of this state.

Exceptions overruled.

ROBERT E. HUBERT

vs.

NATIONAL CASUALTY COMPANY

York. Opinion, July 28, 1958.

Insurance. Limitation of Actions. Standard Provisions. Public Policy. Pleading.

An action upon an "Accident and Sickness Insurance Policy" must be brought within the two year limitation of the Standard Provisions of the policy when such provisions are consonant with the statutes in force at the time the policy was issued and the loss occurred.

Standard provisions providing for a two year limitation are not contrary to public policy when they are in the same terms as the applicable statutes.

An amendment to the statute providing for a three year limitation is prospective and not retrospective. (P. L., 1953, c. 114, Sec. 111, Subsec. II - 11.) (R. S., 1954, Chap. 60, 118, Subsec. II-A 11.)

The usual six year statute of limitation is not applicable to statutory actions upon insurance policies where other applicable law applies. (R. S., 112, Sec. 90, Subsec. IV; R. S., 113, Sec. 40.)

Where a defendant pleads the limitations of the policy, no further plea of limitation is necessary.

It is immaterial that the wrong reason was given for the right result in the court below.

ON EXCEPTIONS.

This is an action under R. S., 1954, c. 113, Sec. 40, before the Law Court upon exceptions. Exceptions overruled.

Armstrong, Marshall, Melnick & Caron, for plaintiff.

Crowley & Nason, for defendant.

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

WILLIAMSON, C. J. On exceptions. This is an action brought under R. S., 1954, c. 113, § 40 to recover upon an insurance policy defined by statute as a "policy of accident and sickness insurance." R. S., 1944, c. 56, § 109, enacted P. L., 1949, c. 421, now R. S., 1954, c. 60, § 116.

The defendant pleaded the general issue with special matter of defense that the action is "barred by reason that the same was not brought within two years, as provided by the Standard Provisions of said Policy."

The issue in the case plainly appears from the stipulation of the parties and the ruling by the Justice of the Superior Court who heard the case without a jury and found for the defendant as follows:

> "It is stipulated by and between the parties that the last date a proof of claim could be filed was more than three years and twenty-one days from

> the date of the commencement of this action and less than six years and twenty-one days from the date of the commencement of this action. THE COURT: I rule as a matter of law that the action is barred by the statute of limitations, it having been specially pleaded, and that the applicable statute of limitations provides that the action must be commenced within three years of the date the cause of action arises."

The controlling limitation upon bringing the action is found in Section 14 of the insurance policy, which reads:

> "No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy."

The "twenty-one days" phrase in the stipulation was designed to eliminate from the case any question of the time of bringing the action arising from the twenty day period in Section 4 of the policy, reading:

> "Written notice of injury or of sickness on which claim may be based must be given to the Company within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness."

From the record it appears: The policy was issued November 28, 1951, for the period ending January 1, 1952, was then renewed in accordance with its terms, and was in effect at the time of the injury to the plaintiff's wife on July 22, 1952. The present action was brought on November 28, 1956.

The statute in force when the policy was issued, when renewed, and until amended in 1953 provided in part as follows:

"**Sec. III.**

I. No such policy shall be delivered or issued for delivery in this state unless:

* * * * * * * * *

II. . . each such policy shall contain in substance the following provisions or, at the option of the insurer, corresponding provisions which in the opinion of the commissioner are more favorable to the policyholder:

* * * * * * * * *

N. A standard provision limiting the time within which suit may be brought upon the policy as follows:

14. . ." (Identical with Sec. 14 of the policy quoted above). R. S., 1944, c. 56, § 109 et seq., enacted P. L., 1949, c. 421.

Clause N of the 1949 Act was amended in 1953 to extend the period of bringing action from 2 to 3 years. R. S., 1944, c. 56, § 111, subsection II-11, enacted P. L., 1953, c. 114, § 111, subsection II-11.

Without substantial change the provision now reads:

"No action at law or in equity shall be brought to recover on this policy prior to the expiration of 60 days after written proof of loss has been furnished in accordance with the requirements of this policy. No such action shall be brought after the expiration of 3 years after the time written proof of loss is required to be furnished."

R. S., 1954, c. 60, § 118, subsection II-A 11.

The 2-year limitation in the policy bound the plaintiff. It did not run counter to public policy, but on the contrary was written in the precise words of the standard provision stated in the 1949 statute. 29 Am. Jur., *Insurance* § 1394; 46 C. J. S., *Insurance* § 1256; 20 Appleman on Insurance

§ 11601. The policy, when it became effective on renewal for the period within which the loss occurred, was thus governed by the 1949 statute with the 2-year limitation on bringing actions.

In our view there is nothing in the present statute, first enacted in P. L., 1953, c. 114, that compels us to apply the 3-year limitation on actions then provided in the standard provision to policies which were lawfully issued and delivered under statutes providing otherwise. We are of the view the 1953 Act was prospective and not retrospective in its operation. In *Miller* v. *Fallon,* 134 Me. 145, 183 A. 416, we held that a statute shortening the period of limitation was prospective in operation. The same principle is applicable in the present situation.

The plaintiff gains nothing from the "general provisions" in the policy, as follows:

> "If any limitation of this policy with respect to the bringing of an action at law or in equity is less than that permitted by the law of the state in which the Insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law."

We construe this language to refer to the law in force at the time of the issuance of the policy, or, as here, when it became effective on renewal. It did no more than bring the policy to the minimum standard set by existing statute. The same result is reached by statute. R. S., 1944, c. 56, § 112, enacted P. L., 1949, c. 421, now R. S., 1954, c. 60, § 119.

The plaintiff fails in his argument that no statute of limitation was pleaded and that the usual 6-year statute is applicable to statutory actions upon insurance policies. R. S., c. 112, § 90, subsection IV; R. S., c. 113, § 40.

There was nothing more for the defendant to plead than that the action was barred by the effective 2-year limitation

in the policy. It is this provision that was made "standard" by the statute.

There is a suggestion in the brief of the plaintiff that the instant policy is a blanket or group policy to which the standard provision does not apply. The plaintiff is plainly in error in this view. The policy is a family policy covering a husband, wife, and two children, of whom the elder was about ten years of age. Such a policy is within the type of policy covered in the 1949 Act, now R. S., 1954, c. 60, § 118, subsection I-A 3.

We conclude therefore that the action was barred under the 2-year "standard provision" in the policy. That the decision in the Superior Court was based on a wrong reason is immaterial in view of the right result.

The entry will be

Exceptions overruled.

WILLIAM GARDNER

vs.

WILFRED PARADIS

Androscoggin. Opinion, July 28, 1958.

Negligence. Pedestrian. Damages.

A jury verdict of $2,500—for injuries to a 73 year old pedestrian who was struck while crossing the street is excessive where the evidence shows (1) medical and hospital expense—$308.50; (2) loss of wages —$300 (6 weeks @ $1.25 per hour—laborer); (3) pain and suffering from a broken rib with hospitalization from December 15th to December 31st and with some pain and discomfort from January to May.

In the instant case $1,000 is the highest amount a jury could properly assess for pain and suffering.

ON MOTION FOR NEW TRIAL.

This is a negligence action before the Law Court upon motion for a new trial. Motion for a new trial granted unless the plaintiff shall within 30 days from the filing of mandate remit all of the verdict over the amount of $1,608.50.

Platz & Scolnik, for plaintiff.

Frank W. Linnell, for defendant.

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

WILLIAMSON, C. J. This tort action arises from a collision between automobiles operated by the defendant and Mr. Arsenault in which the latter's automobile struck the plaintiff, a pedestrian. The case is before us on motion for new trial on issues both of liability and of excessive damages.

The accident occurred at the intersection of Canal and Chestnut Streets in the City of Lewiston on a December day. It was snowing and the streets were icy and slippery or "greasy," to use the expressive word of one witness. The defendant was proceeding westerly on Chestnut Street and Arsenault southerly on Canal Street. Arsenault failed to stop at a stop sign marking the intersection. The defendant was unable to stop in time to avoid a collision within the intersection. The Arsenault car was pushed by the force of the collision against the plaintiff who was crossing from the east to the west side of Canal Street on the crosswalk on the southerly side of the street. The plaintiff was within a step of the sidewalk at the southwest corner of the intersection when struck and injured.

No question of negligence on the part of the plaintiff arises. The issues are whether the jury was entitled to find

that the defendant was negligent and to assess damages at $2,500.

No useful purpose will be served from rehearsing the evidence on liability. It was clearly a jury question whether the defendant as he approached and entered the intersection played the part of a reasonably prudent man under the circumstances. We cannot say that the jury was "clearly wrong" in finding him negligent in failing to avoid collision with the Arsenault car with the resulting injury to the plaintiff. *Bowie* v. *Landry,* 150 Me. 239, 108 A. (2nd) 314; *Stinson* v. *Bridges, Admr.,* 152 Me. 306, 129 A. (2nd) 203. See also *Ward* v. *Merrill Transport Co.,* 154 Me. 45, 141 A. (2nd) 438.

We agree with the defendant that the damages found by the jury were excessive. The plaintiff aged 73 years suffered a broken rib, was hospitalized from December 15 to December 31, was seen by his personal physician four times thereafter and was discharged from further care. The physician testified that no residual effects remained from the accident. A second physician, who treated the plaintiff from February to May after the accident, said in substance that complaints of pain by the plaintiff were consistent with the injuries complained of.

While there may have been some pain and discomfort for a period after January 25, when the plaintiff was discharged as cured by his own physician, we are satisfied that the discomfort must have been small and of little consequence.

The plaintiff also sought to recover for loss of earning capacity. Precisely the length of his claimed loss is not clear. The plaintiff, who had been a laborer in the woods, was not in fact employed at the time of the accident. Giving to the plaintiff every advantage of the evidence, it is plain that the plaintiff failed to show that he was unable to work for more than six weeks as a result of the accident.

The only evidence of earning power was $1.25 per hour received some years prior to the accident. Accepting this figure, the loss of wages could not have amounted to over $300. The medical and hospital expenses were $308.50.

There is no mathematical rule to measure the assessment of damages by a jury, or by a court sitting at *nisi prius,* or on appeal. Pain and suffering, however, must be translated into dollars for it is in dollars that the damages must be paid.

The jury in returning a verdict for $2,500, placed the damages for loss of earning power and pain and suffering at approximately $2,200. In our opinion $1,000 would be the highest amount that a jury could properly assess for pain and suffering. To this amount we add the other items of damage amounting to $608.50. See *Nutting* v. *Wing,* 151 Me. 435, 120 A. (2nd) 563; *Candage* v. *Belanger et al.,* 143 Me. 165, 57 A. (2nd) 145.

The entry will be

Motion for new trial granted unless the plaintiff shall within 30 days from filing of mandate remit all of the verdict over the amount of $1,608.50.

STATE OF MAINE

vs.

RICHARD B. WOODS

Sagadahoc. Opinion, July 25, 1958.

Criminal Law. Juries. Separation.

The ordering of a mistrial is within the sound discretion of a presiding justice.

In this State, in capital cases, a jury may not be permitted to separate during the trial and before the case is submitted to them for deliberation.

It is not every withdrawal of one or more jurors from their fellows that constitutes a "separation" in the legal sense. (i.e. temporary separations during emergencies where precautions are taken.)

Supervision rules must be practical and realistic.

There is no "separation" in the legal sense where no juror was shown to be more than momentarily out of the sight of the jury officer and then under circumstances that negative any reasonable likelihood of communication or influence.

Whether conclusive presumption of prejudice from "separation" not decided.

ON EXCEPTIONS.

This is a criminal action by indictment for murder before the Law Court upon exceptions to the refusal of the presiding justice to grant a mistrial. Exceptions overruled.

George M. Carlton, Jr., for plaintiff.

Harold J. Rubin, for defendant.

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

WEBBER, J. The respondent here was convicted of murder. The evidence of homicide during an act of robbery which was offered by the State was conclusive as to guilt and no defense was offered or attempted.

During the trial the respondent moved for a mistrial. His motion was denied by the presiding justice and an exception to that ruling presents the only issue for determination here.

The facts which give rise to the motion are not in dispute. On the evening of the sixth day of trial the respondent's

attorney entered the hotel where the jury was quartered. He observed a woman whom he recognized as a member of the panel proceeding unaccompanied down the main stairway to a public water cooler where she stopped for a drink of water. On the same occasion he observed four members of the jury on the porch of the hotel in the company of an attending officer. On the following morning he addressed his motion to the presiding justice and informed him as to the observations made the previous evening. The learned justice then proceeded forthwith with the most commendable care and caution to examine into the methods which had been and were being employed to protect the jury from outside communication or influence. To this end he personally examined each of the jury officers and each member of the jury separately. The testimony of each juror and officer was given under oath and under such circumstances that no member of the jury heard the testimony of any other member or knew the purpose or nature of the examination until in his turn he was summoned into the presence of the court. Full opportunity was afforded counsel for both the State and the respondent to examine further the officers and jurors.

The presiding justice could properly conclude from the evidence thus adduced that the members of the jury, comprising both men and women, were quartered on the second and third floors of the hotel; that they were in the custody of two officers, a man and a woman, and were almost constantly in the company and under the surveillance of one or the other of these officers except when lodged in their bedrooms or when momentarily out of sight of both officers while traversing a short distance within the hotel from one group of jurors to another; that in no instance had there occurred any communication whatever with the public or any third party except as unavoidably caused by the necessity of ordering meals in the dining room and the like; that the member of the jury observed at the water cooler was,

with the permission of the attending officer, passing from her room to the porch to join the other officer and the group of jurors there assembled; that the time which elapsed while she was out of sight of both officers was very brief; that during that short interval she had no communication with anyone; and finally that the occupancy by a third party of one room on the third floor had resulted in contact with only one member of the jury who had passed the third party once in the corridor but without any communication. In the exercise of a sound discretion, the presiding justice took immediate steps to isolate the jury from further contact with the third party resident on the third floor, but declined to order a mistrial.

The ordering of a mistrial is within the sound discretion of the presiding justice and exceptions will lie only to a clear abuse of that discretion. *State* v. *Norton,* 151 Me. 178; *State* v. *Hamilton,* 149 Me. 218; *State* v. *Rheaume,* 131 Me. 260. "Mistrial is ordered only in those rare cases where the trial cannot proceed further with the expectation of a fair result." *State* v. *Libby,* 153 Me. 1, 5. Was there here a clear abuse of discretion?

Although there is a split of authority even among the so-called common law states as to whether or not in capital cases a jury may properly be permitted to separate during the trial and before the case is submitted to them for their deliberation, it has long been recognized that in Maine no such separation is permitted. In *State* v. *Howard,* 117 Me. 69, a case involving a charge of rape, the court said by way of dictum at page 72: "The procedure in such (capital) cases is not regulated by statute here as it is in some other States, but so far as we know it has been the universal practice in this State in capital cases * * * to keep the jury together until a verdict is rendered or a disagreement is accepted." This dictum correctly states the common law rule as it has been understood and interpreted in this jurisdic-

tion. It may be further noted that the accepted practice has been to place jurors in capital cases in the custody of attending court officers from the moment they are accepted and sworn. That was the procedure followed in the case at bar and it was obviously not intended by either the presiding justice or the officers in charge that any improper or prejudicial separation of the jury should take place during the progress of the trial.

In our view the decision here is controlled by our determination as to what constitutes an unauthorized "separation" which the law will notice. It is not every withdrawal of one or more jurors from their fellows that constitutes a "separation" in the legal sense. Logic and reason support the rule found in 53 Am. Jur. 635, Sec. 876: "The rule against separation of jurors without authorization by the court does not mean that they must not physically part from one another, or that they must all be kept within the narrow compass of the jury box. Not every separation of a juror from his fellows constitutes an unlawful separation, or is such a separation as the law will notice. The rule against separation does not go to the length of prohibiting necessary temporary separations, such as those occurring in emergencies, where precautions are taken against abuses." The cases dealing with this and related issues are assembled in three annotations found in 34 A. L. R. 1102, 79 A. L. R. 821, and 21 A. L. R. (2nd) 1088. The rules governing the supervision of a jury during the often protracted trials of capital cases must be realistic and practical while at the same time eliminating insofar as possible any reasonable opportunity for communication, outside influence and prejudice. Both the State and the respondent are entitled to a verdict which is the product of minds which are influenced only by the law and the evidence properly submitted to them during the trial and the jurors themselves are entitled to be protected from even the appearance of improper influence in order to be assured of public confidence in their verdicts.

We are satisfied that the presiding justice was entirely justified in concluding on the evidence here presented that this jury did not "separate" in any legal sense. No juror was shown to be more than momentarily out of the sight of at least one of the officers in attendance and then under circumstances that negative any reasonable likelihood of communication or influence. The single instance of contact with a third party in the hotel corridor under the circumstances disclosed held no greater risk of prejudice than would arise from contact with waitresses in the hotel dining room or common passage along the public streets. In the language above quoted, this was not such a separation "as the law will notice." The separation shown was merely technical and not real.

In view of the foregoing, we do not reach the issue as to whether prejudice will be conclusively presumed from an unlawful separation, or will be presumed until rebutted by the State, or whether prejudice must in all cases be affirmatively shown by the respondent. On this subject the authorities are not in accord as disclosed by the cited annotations *(supra)*. Suffice it to say that the presiding justice below with painstaking thoroughness demonstrated beyond any doubt not only the lack of reasonable opportunity for communication or influence in this case, but the complete absence of prejudice as well.

Exceptions overruled.

GEORGE POWERS

vs.

DURGIN-SNOW PUBLISHING CO., INC.

GEORGE POWERS

vs.

CLIFFORD N. OLESEN

Cumberland. Opinion, August 7, 1958.

Libel. Jest. Libel per se.

It is well established law that an article must be read as a whole in order to determine its natural and probable impact upon the minds of newspaper readers.

A declaration is sufficient if the printed word naturally tends to expose the plaintiff to public hatred *or* contempt, *or* ridicule, or deprive him of the benefit of public confidence and social intercourse.

Jest is not a defense when the joke goes too far and causes harm not laughter.

Where the written words have a natural tendency to expose the plaintiff to ridicule that is more than trivial, it is libelous *per se.*

ON EXCEPTIONS.

This is an action for defamation before the Law Court upon exceptions to the overruling of a demurrer. Exceptions overruled.

Jacobson & Jacobson, for plaintiff.

Arthur A. Peabody, for defendant.

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

WILLIAMSON, C. J. These two actions of libel arise from the publication of an article written by defendant Olesen

in the weekly newspaper owned and published by defendant Durgin-Snow Publishing Co., Inc. The cases are before us on exceptions in each instance to the overruling of defendant's demurrer and present identical issues. For convenience we will refer only to the case against the publisher.

The declaration reads in part:

". . . the defendant . . . with intent to injure, degrade and disgrace the Plaintiff and bring him into hatred, contempt, ridicule and distrust and to deprive him of the benefit of public confidence, and subject him to the scoffs and sneers of society, did maliciously, willfully, recklessly and falsely write, compose, print, publish, circulate and sell in said Westbrook American the following false, scandalous and defamatory article appearing on Page Six (6) thereof under the heading: "MILLING AROUND" by Sunny Olesen:

"George Powers, Coating Department, is a fellow who believes in looking ahead. He's also a classic example of typical Yankee thrift. Take his idea on caskets now - - George says, ' "Why spend a lot of money for a casket when, for $15 or $20 you can build one, yourself. After all, your family can always use the money you've saved in that one item, alone." '

"Suiting the action to the word, George is now busily sawing and hammering away on his own tailored-to-fit coffin. And, as a sort of package deal, he's making plans to dig the space for it next.

"From all outward appearances, this thrifty, if slightly ghoulish gent can take his time on his project, because. . .

"He turned (approximately) 35 on his last birthday." (Innuendoes omitted)

* * * * * * * * *

"And the Plaintiff avers that by writing, printing, publishing, circulating and selling the papers containing the above false, malicious, defamatory and scandalous article as aforesaid, the defendant

> has greatly injured the Plaintiff in his good name and reputation, has deprived him of public confidence, and exposed him and his family to public hatred, contempt and ridicule, and the Plaintiff has suffered great pain and distress of body and mind, has been shunned by many of his former acquaintances, and in his general reputation has been otherwise greatly injured and prejudiced, . ."

The first ground or reason for the exception stated below is without merit.

> "1. The declaration on its face shows the article to be part of a column entitled "Milling Around". The declaration on its face indicates that said column is not a standard news item. Therefore the defendant claims that the declaration should set forth the entire column in order that the court can determine the nature of the words alleged to be libellous in their relation to the whole column."

It is well established law "that the article must be read as a whole, taking into account its wording, the nature and use of headlines, and any other methods employed to give special emphasis in order to determine its natural and probable impact upon the minds of newspaper readers." *Cross* v. *Guy Gannett Pub. Co.*, 151 Me. 491, 494, 121 A. (2nd) 355; *Thompson* v. *Sun Pub. Co.*, 91 Me. 203, 39 A. 556; *Macurda* v. *Lewiston Journal*, 109 Me. 53, 57, 82 A. 438; *Bearce* v. *Bass*, 88 Me. 521, 544, 34 A. 411; *Tillson* v. *Robbins*, 68 Me. 295.

The declaration meets the test and is not demurrable. On its face indeed the article in question is stated at length. No loose ends are apparent which make it difficult to understand the precise nature of plaintiff's complaint. The defendant should have raised the issue not by demurrer but by a motion for specifications or further particulars. The court below would then have determined whether or not there was need to include the entire column for an intelligent

understanding of the pleadings. Illustrative cases are: *Niehoff* v. *Sahagian,* 149 Me. 396, 103 A. (2nd) 211; *Sinclair* v. *Gannett Publisher, et al.,* 148 Me. 229, 91 A. (2nd) 551; *Brown* v. *Rouillard,* 117 Me. 55, 102 A. 701. See also 53 C. J. S., *Libel and Slander* § 184; 33 Am. Jur., *Libel and Slander* § 251.

The rules governing the remaining issues on the demurrer are stated in *Brown* v. *Guy Gannett Publishing Co.,* 147 Me. 3, 4, 82 A. (2nd) 797:

> "By its demurrer the defendant has admitted the truth of each and every one of the foregoing allegations."
>
> * * * * * * * * * *
>
> "It is not necessary in order for printed words to be libelous that they naturally tend to expose plaintiff to public hatred *and* contempt *and* ridicule, *and* deprive him of the benefit of public confidence and social intercourse. *It is sufficient if they naturally tend to bring about any one of the foregoing consequences.* The governing principle of law is stated in the alternative or disjunctive, *not* in the conjunctive."

In our view the article naturally tended to expose the plaintiff to laughter tinged with contempt, or in other words to ridicule. "Ridicule" has been defined as follows: "The act or practice of exciting laughter at a person or thing by means of jesting words, caricature, mocking, etc.; remarks, etc. intended to show one in an amusing or absurd light; slightly contemptuous banter; as, an object of ridicule; to suffer from ridicule; cutting ridicule." Webster's New International Dictionary (2d ed.) Unabridged.

The reader is given the impression that the plaintiff is at best an odd or unusual character acting in a manner far removed from the ordinary standards of the day. The man who builds his own coffin and is planning to dig his own grave is described as a "thrifty, if slightly ghoulish gent."

The reader may well laugh with the writer at the victim with a laughter mixed with contempt.

The defendant does not escape liability on the ground the article was written in jest, if such was the fact. The joke that goes too far and causes harm, not laughter, is within our common experience.

> "Of course, the mere fact that the print was a jest does not put the defendant out of peril. Ridicule may ruin a reputation or a business." *Lamberti* v. *Sun Printing & Publishing Ass'n.*, 97 N.Y.S. 694, 695.

In *Triggs* v. *Sun Printing & Publishing Ass'n.*, 71 N. E. 739, at p. 742, 103 Am. St. Rep. 841, 66 L. R. A. 612, the New York Court said:

> "It is likewise claimed by the respondent that these articles were written in jest, and hence that it is not liable to the plaintiff for the injury he has sustained. It is, perhaps, possible that the defendant published the articles in question as a jest, yet they do not disclose that, but are a scathing denunciation, ridiculing the plaintiff. If, however, they can be regarded as having been published as a jest, then it should be said that, however desirable it may be that the readers of, and the writers for, the public prints shall be amused, it is manifest that neither such readers nor writers should be furnished such amusement at the expense of the reputation or business of another. In the language of Joy, C. B.: 'The principle is clear that a person shall not be allowed to murder another's reputation in jest;' or, in the words of Smith, B., in the same case: 'If a man in jest conveys a serious imputation, he jests at his peril.' Donoghue v. Hayes (1831), Hayes Irish Exchequer, 265, 266. We are of the opinion that one assaulting the reputation or business of another in a public newspaper cannot justify it upon the ground that it was a mere jest, unless it is perfectly manifest from the language employed that it could in no respect be re-

> garded as an attack upon the reputation or business of the person to whom it related."

See also Harper and James on Torts (1956 ed.) § 5.2.

The defendant calls attention to *Cohen* v. *New York Times Co.*, 138 N. Y. S. 206, holding a false death notice was not libelous *per se* and sustaining a demurrer to the complaint. In *Cohen* there was a "bare item of news in a newspaper." Here we have not a news item, but an article directing our attention to the peculiarities of the plaintiff.

Of course not every jest is a libel. We must not be too sensitive. In the words of Judge Learned Hand, in *Burton* v. *Crowell Pub. Co.*, CCA Second Circuit, 82 F. (2nd) 154, "A man must not be too thin-skinned or a self-important prig." We cannot, however, say that the article "could in no respect be regarded as an attack upon the reputation" of the plaintiff. *Triggs* v. *Sun Printing & Publishing Ass'n.*, *supra.*

We hold, the article, if believed, has a natural tendency to expose the plaintiff to ridicule that is more than trivial. It thus is libelous *per se* and no allegation of special damages is necessary to sustain the action. *Tillson* v. *Robbins, supra.* The declaration is sufficient. The attack by demurrer fails.

The entry in each case will be

Exceptions overruled.

STATE OF MAINE
vs.
FRANK POTTS, HATTIE POTTS
AND
THOMAS J. POTTS
(Two cases)

Oxford. Opinion, August 12, 1958.

Subornation of Perjury. Indictments.

The form of indictment for subornation of perjury may be set forth as the procurement to commit perjury as described in the statutory form relating to perjury. (R. S., 1954, Chap. 135, Sec. 4.)

An allegation in the indictment that the suborner knew that the testimony when given would be "corruptly and willfully false and untrue" sufficiently alleges that the suborner had knowledge that the witness knew the testimony was false.

It is immaterial whether a proceeding is pending when the procurement, in distinction from the perjury, takes place. The evil readied by the statute is the procurement of perjury at a future time.

False testimony given to furnish respondent with an alibi is material.

An indictment which plainly states the limitation upon the false testimony so that the basis for separation of the false from the true is certain and clear is valid even though the indictment alleged that all the quoted testimony was false and then excepted some as true.

ON EXCEPTIONS.

This is an indictment for subornation of perjury before the Law Court upon exception is the overruling of a demurrer. Exceptions overruled.

David R. Hastings, for plaintiff.

Berman & Berman, for defendants.

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

WILLIAMSON, C. J. The validity of an indictment for subornation of perjury is here tested on exceptions to the overruling of the demurrer of respondents Frank and Hattie Potts. By agreement of the parties, of which we approve, our decision in the instant case will govern a second case against the same respondents raising identical issues on an indictment substantially like that in the record before us except for the name of the suborned witness.

The pertinent statutes found in R. S., c. 135 read:

> "**Sec. 1. Perjury; subornation of perjury, definitions.**—Whoever, when required to tell the truth on oath or affirmation lawfully administered, willfully and corruptly swears or affirms falsely to a material matter, in a proceeding before any court, tribunal or officer created by law, or in relation to which an oath or affirmation is authorized by law, is guilty of perjury; and whoever procures another to commit perjury is guilty of subornation of perjury; and shall be punished. . ."
>
> "**Sec. 2. Attempted subornation of perjury.**—Whoever willfully and corruptly endeavors to incite or procure another to commit perjury, although it is not committed, shall be punished. . ."
>
> "**Sec. 4. Indictment.**—Indictments against persons for committing perjury before any court or tribunal drawn substantially as hereinafter provided are sufficient in law, viz.: '. . . that A.B. . . appeared as a witness in a proceeding in which C.D. and E.F. were parties, then and there being heard before a tribunal of competent jurisdiction, and committed the crime of perjury, by testifying as follows:' (here set out the matter sworn to and alleged to be false,) 'which said testimony was material to the issue then and there pending in said proceeding, .'."

The respondents place their objections to the indictment on five grounds.

FIRST: In the indictment the perjury of the suborned witness, an element essential to the offense, is set forth sub-

stantially in the language of the statutory form of an indictment for perjury under Section 4. The respondents urge that all of the elements of common law perjury must appear in the indictment and that the language of Section 4 is insufficient.

The statutory form of indictment was originally authorized in Laws of 1865, c. 324, § 1 (now Sec. 4 *supra*). Present Sections 1 and 2 were then in effect. (R. S., 1857, c. 122, §§ 1 and 2.) In 1871 the court upheld the validity of the statutory form of indictment and well stated the underlying reasons for the 1865 law as follows:

> "The respondent demurs to the indictment against him for perjury. It is very clear that the indictment is bad in many particulars, if considered under the old rules of the common law, or of our former practice and decisions. Indeed, the criminal pleader found great difficulty in so framing an indictment for perjury, that it could stand the searching examination and technical objections thereupon raised by astute counsel." *State* v. *Corson,* 59 Me. 137, 139.

The position of the respondents is that, although A may be indicted for perjury on the statutory form, nevertheless B may not be indicted for procuring A to commit the same perjury unless the perjury is described in a manner discarded since 1865.

Section 4 is not in our opinion so limited in operation to the cause of perjury alone. The purpose of the 1865 law was to simplify criminal procedure. Every reason for legislative action to bring about such a desirable result in perjury applied with equal force in subornation of perjury. The Legislature did not intend such a niggardly reform as is suggested by the respondents. We hold the commission of perjury by the suborned witness is sufficiently set forth in the indictment.

SECOND: The second point of the respondents is that the indictment fails to allege the respondents knew that the suborned witness knew the testimony was false. The rule is stated in *Niehoff* v. *Sahagian,* 149 Me. 396, 398, 103 A. (2nd) 211:

> "In order to constitute subornation of perjury 'Both the suborner and the suborned must, as elements of the offense, know the testimony to be false, and the former must be aware that the latter so knows it, otherwise there is not the needful corruption.' 2 Bishop's New Criminal Law, 690, Sec. 1197, a.2."

The indictment reads in part:

> ". . . that. . . on the said twenty-ninth day of April, A.D. 1957, at said Paris, the said Frank Potts and the said Hattie Potts, and the said Thomas J. Potts, and the said Louise Turner, and each of them, in truth and in fact, well knew that the matters to be given in evidence by the said Louise Turner, of the substance and to the effect aforesaid, were false and untrue, and *that said matters when given in evidence would be corruptly and willfully false and untrue.*" (Emphasis supplied.)

The indictment clearly charges that both the suborners and the suborned knew the testimony to be false, "but (say the respondents in their brief) there is no direct averment that the defendants, Potts, knew that the witness, Louise Turner, knew that the testimony was false."

The answer to the problem is found in the words "corruptly and willfully false and untrue." The respondents and the witness knew (1) that the testimony would be false, and (2) that when given in evidence by the witness it would be "corruptly and willfully false and untrue." "Corruptly and willfully" refer to and establish the knowledge and intent of the witness. Unless the witness had knowledge of the falsity of the testimony, it would not be given "corruptly and willfully." In other words, a witness who will corruptly

and willfully give false and untrue testimony necessarily knows that the evidence is false and untrue.

It follows that the respondents, who had knowledge that the testimony would be "corruptly and willfully false and untrue," thereby had knowledge that the witness knew the testimony would be false.

THIRD: The third error charged is that "the indictment fails to properly allege that *a* proceedings were pending and the jurisdiction of the Court."

It sufficiently appears in the indictment that the procurement took place on April 29, 1957, after Thomas Potts was "bound over" on a complaint of rape in the Norway Municipal Court, and before he was indicted therefor in the Oxford Superior Court; and that the false testimony was given at the trial of Thomas Potts in the Superior Court for the alleged rape, plainly a proceeding in court within the meaning of Section 1.

The respondents assert, however, that there was no proceeding pending in the Superior Court on April 29th, and hence the offense of subornation of perjury is not stated in the indictment. In other words, the respondents say that the proceeding in which the perjury is committed must be pending when the acts of procurement occur. With this view we do not agree.

The proceeding in which perjury is committed must be a pending proceeding. This indeed is saying no more than that the testimony must be given in a proceeding described in Section 1. Without such testimony so given there can be neither perjury nor subornation.

In our view it is immaterial whether *State* v. *Thomas Potts* was a proceeding pending in the Superior Court when the procurement, in distinction from the perjury, took place. The evil reached by the statute is the procurement of per-

jury at a future time. To adopt the theory urged by the respondents would place an unwarranted premium on the completion of the process of procurement before the commencement of the proceeding in which the perjury occurs.

State v. *Joaquin,* 69 Me. 218, relied upon heavily by the respondents, does not meet the issue. The indictment in *Joaquin* it must be noted was not for subornation, but for attempted subornation under Section 2 (then R. S., 1871, c. 122, § 2). The court said, in sustaining a demurrer, at p. 219:

> "This indictment alleges that the respondent endeavored to procure another to commit perjury. The substance of the matter alleged is, that the respondent intended to commence a suit, or institute a proceeding, in which the perjury was to be committed.
>
> "We think the case is not reached by the statute on which the indictment is founded. The true rendering of the statute is, that a person shall be liable who endeavors to procure a person to swear falsely 'in a proceeding before any court, tribunal or officer created by law, or in relation to which an oath or affirmation is by law authorized.' The objection is that the suit or proceeding was not pending. It might never be commenced. Therefore it was an instigation to commit an offense upon a condition or contingency that might never happen. This was rather an ideal than a real offense, morally reprehensible no doubt, but not such as the law sees fit to notice."

In subornation, procurement by X is followed by perjury of Y. In attempted subornation, the endeavor of X to incite or procure the intended perjury by Y fails.

The elements of perjury must be charged and proved with reference to the committed perjury or the intended perjury as the case may be. In subornation no difficulty arises in charging perjury in a pending proceeding. In attempted

subornation, however, the proceedings in which the perjury is intended may or may not be pending. It is to this last situation that *Joaquin* is directed. For necessity of pendency of proceedings in attempted subornation of perjury see also 17 Am. and Eng. Anno. Cases 1182, commenting on the *Joaquin* case; *State* v. *Howard* (Mo.) 38 S. W. 908; 70 C. J. S., *Perjury* § 84; 41 Am. Jur., *Perjury* § 74.

In this view of the case it is unnecessary to consider whether *State* v. *Thomas Potts* was pending on April 29 when the procurement took place. The case was a pending proceeding when the perjury was committed, and thus Section 1 of the statute is satisfied.

FOURTH: The fourth claim is that the indictment fails for lack of proper allegation of the materiality of the false testimony.

The indictment reads:

> "Which said testimony was material to the issue then and there pending in said proceedings in that the aforesaid testimony was inconsistent with the presence of the said Thomas J. Potts at the time and place at which according to the theory of the State of Maine, as set forth during the said trial, the alleged crime of rape took place."

In the words, "which said testimony was material to the issue then and there pending in said proceedings . . .," the indictment follows the language of the statutory form of indictment for perjury under Section 4.

In FIRST, *supra,* we pointed out that the element of perjury may thus be properly set forth in an indictment for subornation. The important question is whether the remainder of the allegation shows that the testimony was not material.

In passing upon counts for perjury following the form in Section 4, our court stated the rule in *State* v. *Ela,* 91 Me. 309, 314, 39 A. 1001, as follows:

> "To constitute perjury the testimony must be material to the issue. While the statute requires only the allegation of materiality, yet if the recited testimony is clearly not material, the indictment defeats itself. It alleges a thing to be material, and shows on its face that it is not material. The allegation of materiality, though in the words of the statute, in such a case cannot save the indictment. This count is therefore bad."

See also 2 Wharton's Criminal Procedure (10th ed.) § 1096.

The allegation of the materiality of the false testimony was indeed strengthened, not weakened, by the words in explanation of the general statement. It is apparent from the indictment that the false testimony was given to furnish the respondent in the rape case with the comfort of an alibi. The materiality of an alibi cannot seriously be questioned.

FIFTH: The respondents contend, in the words of their brief, "This indictment is faulty because the state, having in the indictment alleged that all the quoted testimony was false and then excepting some of such testimony as true has failed to properly apprise the defendant of exactly what testimony is false and what is true."

In the indictment are allegations: (1) that the suborned witness committed "the crime of perjury by testifying as follows:" (setting forth the content of the testimony); (2) that "All of which the said Louise Turner then and there well knew to be false and untrue in that in truth and in fact the said Louise Turner was not in the company of the said Thomas J. Potts during any of the times and places and events described in the aforesaid testimony, and in that in truth and in fact the said Watson McAllister was not in

the company of said Thomas J. Potts during any of the times and places and events described in the aforesaid testimony save for such times and places and events described in the aforesaid testimony as took place prior to the time said Thomas J. Potts departed from the said home of the said Watson McAllister at approximately forty-five minutes after eleven o'clock of said evening, . ."

The indictment leaves no confusion between what is allegedly true or false testimony. *State* v. *Mahoney,* 115 Me. 251, 98 A. 750, in which the allegation of false testimony covered all of the testimony both true and false, differs from the instant case. Here the limitation upon the extent of the false testimony is plainly stated, and the basis for separation of the false testimony from the true is made clear and certain.

We come to the conclusion that the indictment is valid and the demurrer was properly overruled. In accordance with the agreement the entry in each case will be

Exceptions overruled.

PAUL W. WARDWELL
vs.
INHABITANTS OF THE TOWN OF CASTINE
(2 Cases)

Hancock. Opinion, September 5, 1958.

Towns. Road Commissioners. Abandonment.

Proof of abandonment of office must show a voluntary and intentional relinquishment of office.

Where a road commissioner refused to perform only non-statutory duties, the jury could properly find that he never voluntarily and intentionally abandoned the office.

A town may not take action to prevent an official from performing his duties and then charge that his failure amounts to abandonment of office.

Salary follows the title to the office.

ON EXCEPTIONS.

This is an action for the unpaid salary of a road commissioner. After jury verdict for plaintiff defendant brings the case to the Law Court upon exceptions. Exceptions overruled.

Nicholas P. Brountas,
Vafiades & Brountas, for plaintiff.

Silsby & Silsby, for defendant.

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

WEBBER, J. On March 19, 1956 at a town meeting of the defendant Town of Castine, the plaintiff was duly elected to the office of road commissioner. He duly qualified by tak-

ing oath and furnished bond and entered upon the discharge of the duties of his office. This election was in compliance with the mandatory requirements of R. S., 1954, Chap. 91, Sec. 20, the pertinent portion of which provides:

> "Each town shall hereafter, at its annual meeting, elect by majority vote a road commissioner, who shall hold his office for the term of 1 year from the date of his election;"

At the same meeting an appropriation of $2300 was voted for the salary of the road commissioner for one year.

The duties of the office are statutory and relate to the repair and maintenance of highways and bridges within the town and such matters as snow removal, elimination of highway defects and obstacles to travel, and the like. Applicable statutory provisions dealing with the responsibility of road commissioners may be found in R. S., 1954, Chap. 96, Secs. 70, 72, 74, 75, 77, 82, 83, 84 and 85.

The essential facts are not in dispute. It appears that for several years it had been customary for the person elected road commissioner to perform certain other duties under the direction of the selectmen. These included the collection and disposition of garbage, care of the public swimming pool and maintenance of the public wharf and common. Plaintiff was supplied by the town with a truck which he used in the performance of all of these duties, statutory and otherwise. No additional salary or compensation was authorized or paid for the performance of duties unrelated to the office of road commissioner.

In July of 1956 a dispute arose between the selectmen and the plaintiff as to the method of garbage collection. The plaintiff refused to carry out an express order of the selectmen, apparently because he felt that it involved showing favoritism to one property owner over all others in the town. The selectmen then promptly removed the truck from

the possession of the plaintiff and on July 21, 1956 sent him the following letter:

"Office of the Selectmen

Castine, Maine

July 21, 1956

Mr. Paul Wardwell
Castine, Maine

Dear Paul:

This is to confirm our action of July 21, 1956. You are relieved of your duties for the Town accept (sic) as road commissioner. Please be informed that there is no money available for roads.

Sincerely yours,

(Signed) James G. Sawyer
(Signed) Alfred Langlois, Jr.
(Signed) George W. Dunbar

SELECTMEN OF CASTINE"

The plaintiff informed the selectmen that they would have to pay him his salary as road commissioner or "stand a law suit." Subsequently the plaintiff wrote to the selectmen offering to go back to work if they would reinstate him and return the truck. He performed no duties after July 21, 1956. The plaintiff seasonably brought suit for the unpaid portion of his official salary. The demands in two writs, taken together, cover the entire period from July 21, 1956 to the end of the official year. The two cases were tried together. At the close of the evidence the defendant moved for directed verdicts. These motions were denied and exceptions thereto raise the issue here. Jury verdicts were returned for the plaintiff in both cases.

It is not contended that the plaintiff ever formally resigned as road commissioner. Nor was he removed from that office. The method of removal for cause is provided by R. S., 1954, Chap. 91, Sec. 20, which states in part:

> "Upon written complaint made against any road commissioner by 10 taxable inhabitants of the town, the county commissioners, after notice to such road commissioner, shall hold a public hearing thereon within 10 days from the filing of the complaint, and if the charges are sustained remove said road commissioner forthwith."

No such proceeding took place. In fact, the selectmen did not purport to remove the plaintiff from his elective office, illegally or otherwise. They expressly disclaimed any such intention in their letter as above quoted. The only issue then is whether or not the plaintiff abandoned the office of road commissioner. Proof of abandonment of office must show a voluntary and intentional relinquishment of office. Such intention may be actual or imputed and is a question of fact. It may be inferred from the party's acts. *State* v. *Harmon,* 115 Me. 268; *Harding, Attorney General, et al.* v. *Brown,* 153 Me. 331.

In each of the cited cases, the conduct of the plaintiff conclusively demonstrated an intention to vacate the office. In the instant case, however, the plaintiff refused only to perform non-statutory duties imposed upon him by custom and which he performed without compensation. These duties were legally unrelated to the office of road commissioner. The jury could and did find upon all the evidence that the plaintiff never voluntarily and intentionally abandoned the office to which he had been elected but, on the contrary, stood ready to perform the duties imposed upon him by law whenever equipment and necessary funds should become available for that purpose. If he thus retained the office but

discharged the obligations thereof in such a manner as to give cause for removal, resort should have been had to the statutory process as above set forth. A town may not take action to prevent an official from performing the duties of his office and thereafter charge that his resulting failure to perform is tantamount to voluntary and intentional abandonment of that office.

If the plaintiff retained his office, he was entitled to the salary for the entire term. "His salary was fixed by law. The legal right to the office carried with it the right to the salary or emoluments of the office. The salary follows the legal title." *Andrews* v. *Portland,* 79 Me. 484, 490.

The presiding justice properly refused to direct verdicts for the defendant. The entry will be

Exceptions overruled.

UNITED INTERCHANGE, INC., OF MASSACHUSETTS
UNIVERSAL INTERCHANGE, INC.
ANTHONY GUARRAIA
AND
OLIVER R. STEVENS
vs.
FRANK F. HARDING
ATTORNEY GENERAL FOR THE STATE OF MAINE
AND
HAROLD LABBE
C. HALL BAKER
AND
RALPH B. CHENEY
AS INDIVIDUALS AND AS THE MEMBERS
OF THE
MAINE REAL ESTATE COMMISSION

Cumberland. Opinion, September 13, 1958.

Real Estate Law. Broker. Constitutional Law. Police Power. Free Speech.

The Legislature may not regulate the lawful business of advertising by arbitrarily and unreasonably defining that business as something that it is not; accordingly, P. L., 1957, Chap. 32 of the Maine Real Estate Brokers License Law may not embrace as a "broker" one who "promotes the sale of real estate through listing (of property) in a publication x x x."

The police power may be employed to prevent fraud when the facts warrant it but the methods employed to accomplish that lawful purpose may not be unreasonable or unnecessarily arbitrary or discriminatory.

The protection of the freedom of the press is intended to safeguard the public in its right to the circulation of information. Art. I, Sec. 4, Constitution of Maine.

The freedom of the press relates to "previous restraints" before publication as well as to protection from penalties for publishing what is harmless to the public welfare.

ON REPORT.

This is a petition for declaratory judgment before the Law Court upon report. Case remanded to the court below for a decree in accordance with this opinion.

Linnell, Perkins, Thompson & Thaxter, for plaintiffs.

Roger A. Putnam, for defendants.

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

WEBBER, J. On report. This was a petition for a declaratory judgment sounding in equity and designed to test the constitutionality of the provisions of R. S., 1954, Chap. 84, as amended by P. L., 1957, Chap. 32, as applied to the business activities of the petitioners.

Prior to the 1957 amendment, Subsec. I of Sec. 2 of Chap. 84 as amended by P. L., 1955, Chap. 299, Sec. 2 read as follows:

> "**Sec. 2. Definitions and exceptions.**
>
> **I.** A 'real estate broker' is any person, firm, partnership, association or corporation who for a compensation or valuable consideration sells or offers for sale, buys or offers to buy, or negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, or rents or offers for rent, or lists or offers to list for sale, lease or rent, any real estate or the improvements thereon for others, as a whole or partial vocation."

In 1957 a new class or group to be embraced within the definition of "real estate broker" was added by the following language:

> "A 'real estate broker' shall also include any person, firm, partnership, association or corporation

> who engages in the business, for a fee, in connection with any contract whereby he undertakes to promote the sale of real estate through the listing of such property in a publication, issued primarily for such purpose or for referral of information concerning properties to licensed real estate brokers, or both." (P. L., 1957, Chap. 32)

The petitioner, United Interchange, Inc., of Massachusetts, a Massachusetts corporation, is engaged primarily in the business of selling specialized magazine advertising. It has a contractual relationship with petitioner, Universal Interchange, Inc., a California corporation, which publishes among others two publications known respectively as the "Buyers Digest" and the "Brokers Bulletin." The petitioners Guarraia and Stevens are sales representatives for United. The respondents are the Attorney General as the chief enforcement officer for the State and the Maine Real Estate Commission as the licensing and supervisory authority.

The Buyers Digest is a magazine published monthly and containing advertising of business and income producing properties for sale, lease or exchange. It also includes editorial comment and news of the trade. It is sent free of charge to libraries, Chambers of Commerce and the like. The Brokers Bulletin is a pamphlet published at regular intervals at least six times a month. It is in the nature of an advance sheet designed to keep the subscribers informed as to properties currently available. Both publications are distributed without charge to subscribers on a limited and controlled circulation basis. Both depend entirely upon advertising for revenue.

The sales methods of United employ both mail solicitation and personal interviews. In the first instance the owner of a business or income producing property may receive a

solicitation by mail setting forth the nature of the services offered by United and enclosing a reply card on which the potential advertiser may indicate his further interest. Upon receipt of a completed reply card, United sends a salesman to interview the customer. If the salesman is successful, the customer signs a contract to purchase advertising space in the Buyers Digest. The salesman also compiles an advertising data sheet which will guide the composition of the advertisement. The contract is then sent for approval and credit screening to the home office of United. If the contract is accepted, the advertiser is notified by mail. The advertisement is then published in the Brokers Bulletin and in succeeding issues of the Buyers Digest. The customer is entitled to five successive publications of his advertisement unless the property is sooner sold. The contract price is computed upon the amount of space purchased and is in no way contingent upon a sale of the property. United has been doing a substantial and steadily increasing business in Maine.

The activities described obviously fall within the meaning of the statutory language "to promote the sale of real estate through the listing of such property in a publication, issued primarily for such purpose or for referral of information concerning properties to licensed real estate brokers, or both." Thus, if the law be constitutional, the petitioners are not merely engaged in the sale and publication of magazine advertising but by operation of the law have been suddenly transformed into real estate brokers and salesmen.

It seems significant to note that prior to the 1957 amendment, the above quoted definition of a "real estate broker," taken alone, had no more application to the activities of the petitioners than it would have to the advertising operations of a daily newspaper. Yet this definition as it stood prior to 1957 seems quite fully to describe all the factors that we commonly associate with real estate brokerage or salesman-

ship. In short, it never would have occurred to anyone that the purveyor of advertising space was in reality a real estate broker or salesman until by arbitrary legislative definition he was made so.

If the petitioners are subject to the law as now written, what are the practical results? They must satisfy every requirement of R. S., 1954, Chap. 84 before they can lawfully engage in their business of selling and publishing advertisements. They must each procure a license from the Real Estate Commission as required by Sec. 3. They must offer proof which satisfies the Commission that they are trustworthy and competent to transact the business of a real estate broker or salesman as required by Sec. 4. They must submit to a written or oral examination by the Commission as to their qualifications to act as a broker or salesman of real estate and must pay an examination fee, all as required by Sec. 5. They must pay initial and annual renewal license fees as required by Sec. 7. The nonresident broker must appoint the Secretary of the Commission his agent for service of process as required by Sec. 10.

We are greatly aided in our decision by the very recent opinion of the Connecticut court in *United Interchange* v. *Spellacy* (1957), 144 Conn. 647, 136 A. (2nd) 801. The plaintiffs there were engaged in the identical business now being conducted by the petitioners here. Exactly the same methods were employed. The same publications were involved. The court was therefore called upon to decide the same issues of law on the same facts as are presented here. The opinion therefore has unusual relevancy. In 1955 the General Assembly had amended a definition of "real estate business" (and by reference the definitions of broker and salesman) to include "engaging in the business, for a fee, in connection with any contract whereby any person undertakes to promote the sale of real estate through the listing of such property in a publication issued primarily for such

purpose or for referral of information concerning properties to licensed real estate brokers or both." It may be noted that this language was adopted practically verbatim by the Maine Legislature in the amendment to our statute enacted in 1957. For that reason everything said by the Connecticut court in discussing the constitutionality of the amended law has direct application in the instant case.

The court in *Spellacy* pointed out that the legislature may not regulate the lawful business of advertising by arbitrarily and unreasonably defining that business as something it is not. The court used what seems to us an apt illustration at page 805 (of 136 A. (2nd)) when it said: "To take an extreme case, it is questionable whether a legislature could, by defining as a dog an animal having the components of a horse, subject the owner of a horse to the dog licensing statute." The court went on to state that the exercise of the police power is entirely proper to prevent fraud when the facts warrant it, but the method employed to accomplish that lawful purpose may not be unreasonable or unnecessarily arbitrary or discriminatory. The court finally held that the provisions of the amended law "which embrace the plaintiffs' activities within the definition of what constitutes 'engaging in the real estate business' and the activities of a 'real estate broker' or a 'real estate salesman' violate the constitutional rights of the plaintiffs and are null and void."

We are unable to distinguish the situation which was presented to the Connecticut court from that now before us. Minor variations in either the facts or the wording of the legislation in the two states in no way distinguish the cases. We find the reasoning in *Spellacy* persuasive and compelling and are disposed to reach the same result. It is manifestly unfair to demand that a purveyor of advertising space successfully pass an examination in which he must demonstrate special knowledge of and skill in the real estate

business in order that he may continue the business of selling and publishing advertising. As well might legislation require that the advertising salesman for a daily newspaper who sells space to automobile dealers demonstrate the special skill and knowledge of a first class mechanic. The requirement, viewed in proper perspective, is at once seen to be unrealistic and arbitrary. The fact that it may have as a secondary effect the creation of some sort of monopoly for the benefit of licensed real estate brokers and salesmen in no way aids it in this test of its constitutionality.

What is the mischief which the legislation is supposed to prevent? The State presented in this connection the testimony of several disgruntled customers of the petitioners. Some of them had been delinquent in payment of their accounts for the space which they purchased. Each was obviously disappointed because the advertising produced no sale of his property. Only one admits having read the written contract before signing it. The contention that the salesman had represented that payment was conditioned upon a successful sale of the property advertised must yield to the clear and concise terms of the signed contract in accordance with the parol evidence rule. The following sample contract leaves no doubt that advertising was purchased for an agreed sum:

"Date _____

To United Interchange, Inc. of Massachusetts
80 Boylston Street
Boston 18, Massachusetts
Trade Name or
Type of Property _____ Phone ____
Street Address
or Location _____ City _____ State ____

I authorize you to advertise for sale the above business or property and for that purpose reserve space as follows:

You are to advertise the sales information on my business or property to hundreds of brokers by

publication in the next issue of the U. I. Brokers Bulletin. I understand that the United Interchange is not itself a broker.

You are also to advertise the sale of my business or property directly to potential buyers throughout the nation by publication of a ¼ page advertisement in the next issue of the U. I. Buyers Digest.

For this reserved space, I will pay you the sum of $_____ at Boston, Massachusetts, three (3) months from the date of your acceptance of this advertising agreement, unless I enter into an agreement to sell my business or property prior to that time, in which event this sum shall become immediately due and payable. If I default in payment and you commence legal action for collection, I agree to pay reasonable attorney's fees and court costs in such action.

All the terms of this agreement are specifically set forth herein. Please use the information furnished by me on the accompanying data sheet in preparing advertising for me.

This agreement shall become effective only when accepted by your office in Boston, Massachusetts. You shall notify me of such acceptance by letter.

_____
(Advertiser)

I acknowledge receipt of a copy of this advertising agreement _____
(Advertiser)

Advertising Agreement Accepted at Boston, Massachusetts

_____ 19__

For: United Interchange, Inc. of Massachusetts

By _____"

In no case was there any suggestion that the advertisement contracted for was not properly published and circulated

in accordance with contract. No doubt the salesmanship was of the so-called "high powered" variety but if this be the true mischief as we strongly suspect, there is no reason to believe it would be cured by transforming advertising salesmen into licensed real estate brokers. In no instance was there credible or satisfactory evidence that any of the petitioners performed acts which could only properly be performed by licensed brokers or salesmen as they were defined before the 1957 amendment. If they had done so, the penalties were applicable and no doubt adequate and might have been enforced. (Secs. 3 and 12.)

The Connecticut court rested its decision entirely upon the improper exercise of the police power and deemed it unnecessary to discuss the possible invasion of freedom of the press although it recognized the issue. We might properly do the same but are prompted to comment on this issue because of the far reaching consequences of any encroachment on that freedom. Since the advertising activities of the daily newspaper and the family magazine differ from those of the petitioners only in the fact that the advertising accepted by the latter is restricted to the field of income producing real estate, the decision in the instant case is of vital concern to the whole press. The protection of the freedom of the press is intended primarily to safeguard the *public* in its right to the circulation of information. This freedom is protected within this state by the fourteenth amendment to the Constitution of the United States and by the Constitution of Maine. The latter document is specific and concise in this respect. Art. I, Sec. 4 provides in part: "* * * no laws shall be passed regulating or restraining the freedom of the press." Historically, the struggle for the freedom of the press was primarily directed against the power of the licensor and was addressed to obtaining liberty to publish "without a license what formerly could be published only with one." *Lovell* v. *City of Griffin,* 303 U. S.

444, 58 S. Ct. 666. The liberty of the press is not of course license to libel or to print the scandalous or the immoral. Rather does the freedom relate to "*previous* restraints" before publication as well as to protection from penalties for publishing what is harmless to the public welfare. The meaning of and recognized exceptions to these basic rules are reviewed in *Near* v. *Minnesota,* 283 U. S. 697, 51 S. Ct. 625, 630. Efforts to undermine this freedom by the device of requiring license or imposing a discriminatory tax have been steadfastly resisted. *Grosjean* v. *American Press Co.,* 297 U. S. 233, 56 S. Ct. 444. The evidence discloses that petitioners support by advertising sales, publish and circulate a magazine which contains information, opinion and advertising. We are not here concerned with any abuse of liberty. No one would seriously contend that the publication of advertisements for the sale of real estate is a proper subject for any "previous restraint." The press can be deprived of its liberty as quickly by previous restraints which destroy its sources of revenue as by a rigid censorship. If by an artificial licensing device, the business of these petitioners can be curtailed or terminated, we see no obstacle to further encroachment on freedom of the press by restrictive legislative device aimed at specific media or even at the whole industry. As was said in *Grosjean* v. *American Press Co., supra,* at page 449 (of 56 S. Ct.) : "* * * and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. * * * To allow it to be fettered is to fetter ourselves." We cannot sanction any breach in the wall of protection.

For these reasons so much of R. S., 1954, Chap. 84 as was enacted by the amendment contained in P. L., 1957, Chap. 32 must be held unconstitutional and null and void as ap-

plied to the activities of these petitioners. The petitioners are entitled to a single bill of costs. The entry will be

Remanded to the court below for a decree in accordance with this opinion. So ordered.

ELIZABETH WALKER
vs.
MERLE P. WEYMOUTH AND
A. J. WEYMOUTH, D/B/A
SUNSET LODGE ON GREEN LAKE

GEORGE A. WALKER
vs.
MERLE P. WEYMOUTH, ET AL.
(Two Cases)

Hancock. Opinion, September 13, 1958.

Negligence. Due Care. Exceptions. Invitees.

The duty of the operator of tourist or overnight camps to paying guests or invitees is to use reasonable, ordinary, or due care to keep the premises upon which the guests are expressly or impliedly invited in a reasonably safe condition for their use.

The rules of due care are the same in all cases but the proof required to establish a lack of due care varies with the circumstances of each case.

Where the evidence viewed most favorably to plaintiff will not justify a finding of a lack of due care on defendant's part, a directed verdict for defendant is proper.

ON EXCEPTIONS.

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

Milton Beverage, for plaintiff

Silsby & Silsby,
Herbert T. Silsby, for defendant.

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

SIDDALL, J. These cases were tried together before a jury. One case was instituted by Elizabeth Walker to recover damages for injuries suffered by her; the other by her husband to recover the expenses incident to his wife's injuries, and for loss of consortium. At the conclusion of the evidence counsel for the defendants in each case moved for a directed verdict. The motions were granted and verdicts were directed. The cases come before this court on plaintiffs' exceptions to the directed verdicts.

The writs charge that the plaintiffs were paid guests occupying a cabin owned and operated by the defendants d/b/a Sunset Lodge on Green Lake, and that the plaintiff, Elizabeth Walker, was injured by slipping or tripping over a hidden rock on the premises. We believe that a fair analysis of the allegations in the writs indicates that the plaintiffs claim the defendants were negligent in one or more of the following respects, viz.: (1) that the defendants allowed the grass in the area in which the injuries occurred to be uncut for a period of time so that said grass grew to a height to cover dangerous rocks lying on said grassed area; (2) that the defendants failed to keep loose rocks removed from the premises; (3) that the plaintiff, Elizabeth Walker, fell on a rock which the defendants allowed to remain in a grassed area and allowed the grass in said area to grow high enough to hide the rock.

The record fails to show that the defendant A. J. Weymouth owned or operated the property, had possession

thereof, or exercised any control whatever over the premises. Under these circumstances, we find that no liability can be imposed upon him.

We now consider the cases against the remaining defendant, Merle P. Weymouth.

The testimony bearing upon liability in the cases was brief and undisputed. No evidence was offered by the defendants. The evidence indicates that the plaintiffs on the 27th day of July, 1956, were paying guests at certain overnight or tourist cabins, so called, operated by the defendant Merle P. Weymouth. Said plaintiffs had been guests at these cabins at some period of time during each year for some 13 years. Elizabeth Walker had been to the ladies' room on the day of the accident and had started to walk toward her husband's car. She felt something under her foot and fell. The area where she fell was grassed and some of it was cut and some not cut. Some was long and some short. She fell at a point about 25 or 30 ft. in front of one of the cabins and approximately midway between the cabin and a driveway. The accident happened at about 1:30 o'clock in the afternoon, and the plaintiff, George A. Walker, who came to his wife's relief after the fall, noticed a stone "in between where her body was lying, right near her elbow." During the evening of the same day Mr. Walker in the presence of the defendant Merle P. Weymouth found at the place where Mrs. Walker fell a white colored and jagged stone about the size of a hen's egg or small tennis ball. Mr. Walker testified that the stone found was the one he saw after his wife's fall. He further testified that the area in which his wife was injured was more like a hayfield and that the grass had been cut by a machine which "slung all that stuff around like bales of hay." He also testified that "there was a lot of bunches of newly-mown hay," and that "it wasn't a grass patch like it is now, more of a hay patch before then." As a result of her fall, Elizabeth

Walker suffered painful injuries, including a dislocated elbow, a fracture of the radius at the elbow joint and other injuries.

The evidence viewed in a manner most favorable to the plaintiffs is sufficient to establish that the plaintiffs' legal status at the time of the injury to Elizabeth Walker was that of invitees as to that part of the premises of the defendant where Mrs. Walker's injuries occurred.

As the operator of overnight or tourist camps, the defendant's duty to the plaintiffs was the same as that of the owner of a business toward his patrons on the premises by invitation of such owner. The defendant was not an insurer of the safety of the plaintiffs. His duty was to use reasonable, ordinary, or due care to keep the premises upon which the plaintiffs were expressly or impliedly invited in a reasonably safe condition for their use. In the instant cases the issue is not whether the premises were reasonably safe, but rather whether the defendant failed to use reasonable, ordinary, or due care to keep the premises reasonably safe under the particular circumstances of the cases as disclosed by the evidence.

In the case of *Lander* v. *Sears, Roebuck & Co.*, 141 Me. 422, 424; 44 A. (2nd) 886, a case involving injuries sustained in a fall by a customer in the defendant's store, the law relating to the duties of the owner is well defined in the following language:

> "The applicable law is established. It is stated with great clarity in an annotation covering more than 50 pages commencing at 100 A.L.R., 710, at page 711:
>
> > 'The proprietor of a store or shop owes a duty to his invitees to exercise reasonable, ordinary, or due care to keep his premises reasonably safe for their use.'

> This is consistent with the statement of the rule set forth in 38 Am. Jur. 754, Par. 96, and with many decided cases cited in the annotation aforesaid and in a footnote to that text. It has been declared the law in this jurisdiction. *Thornton v. Maine State Agricultural Society,* 97 Me., 108, 53 A., 979, 94 Am. St. Rep., 488; *Graffam v. Saco Grange Patrons of Husbandry,* 112 Me., 508, 92 A., 649, L.R.A., 1915 C632. A storekeeper is not held to insure his patrons against injury while on his premises. *S. S. Kresge Co. v. Fader,* 116 Oh. St. 718, 158 N.E., 174, 58 A.L.R., 132; *Bader v. Great Atlantic & Pacific Tea Co.,* 112 N.J.L., 241, 169 A., 687. The distinction between his duty and that of an insurer was well drawn by Mr. Justice Farrington in *Charpentier v. Great Atlantic & Pacific Tea Co.,* 130 Me., 423, 157 A., 238, when he said, in speaking of the duty of a railroad to its employees:
>
> > 'It does not undertake to provide a reasonably safe place . . ., but it does undertake to use due care to do so, and that is the measure of its duty.' "

See also *Buck* v. *Maine Central Trans. Co.,* 151 Me. 280, 282; 118 A. (2nd) 330 (dictum); 65 C. J. S. 521; 162 A. L. R. 949.

The same rule of duty has been applied to cases involving invitees of the owner of premises other than storekeepers or shopkeepers.

> "Plaintiff's status as an invitee on defendant's premises is not questioned. The defendant owed a duty to plaintiff to exercise due care to have its premises in a reasonably safe condition and to give warning of latent or concealed perils." *Temple v. Congress Sq. Garage, Inc.,* 145 Me., 274, 276; 75 A. 2d, 459. (invitee on premises of landlord)

> "A duty such as the plaintiff contends was owed to the child here would arise only if she were on the sawdust pile by express or implied invitation of

> defendant. *Patten v. Bartlett,* 111 Me. 409. The duty then would be to use reasonable, ordinary, or due care to keep the premises in a reasonably safe condition for her use. The owner would not in any event be held to insure the safety of the invitee while on his premises." *Lewis* v. *Mains,* 150 Me., 75, 76; 104 A. 2d, 432. (child of employee of defendant)

It perhaps should be noted that under some circumstances the owner of a business has the duty to warn an invitee of the unsafe condition of land which is known to the owner and not to the invitee. In the case of *Shaw* v. *Piel,* 139 Me. 57, 61; 27 A. (2nd) 137, in discussing this type of duty, the court says:

> "The opinion in *Carleton v. Franconia Co.,* 99 Mass., 216, puts it thus:
>
> > 'The owner or occupant of land is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the land or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist and has given them no notice of.'
>
> This statement of principle is quoted with approval by our own Court in *Moore v. Stetson,* 96 Me., 197, 203, 52 A., 767."

See also *Temple* v. *Congress Sq. Garage, Inc., supra.*

Under the pleadings and proof in these cases, however, this issue is not involved.

The tourist camp business in this state is a product of the automobile age. It is well known that tourist camp enterprises vary from rough camps constructed on unimproved or wooded land to elaborate camps and camp sites. The grounds of some are allowed to remain in their natural

condition. In others, extensive and well-maintained grounds are available for the use of patrons. Some maintain well-kept lawn areas upon which, by the very nature of their upkeep, patrons are invited to travel. In others, grounds in various conditions of improvement are maintained for the use of patrons. The rules of due care are the same in all cases, but the proof required to establish a lack of due care varies with the circumstances of each case. In actions involving injuries to invitees, facts which might be sufficient evidence of negligence as to an injury happening in what obviously is a lawn area might not be sufficient evidence of negligence as to an injury occurring in an area obviously maintained as a hayfield, although both areas may have been within the permitted range of the invitation.

The record in the instant cases discloses very little concerning the nature, extent, or use of the grounds connected with the defendant's business, particularly with reference to the maintenance and use of the grounds where the fall occurred. The jury had before it no evidence upon which it could reasonably determine how long the rock had been on the premises, or whether the defendant knew or should have known of the existence of the rock on the premises at the time of the fall. Resolving the testimony in a manner most favorable to the plaintiffs, a jury might have found that the plaintiff, Elizabeth Walker, fell or slipped on a jagged rock of the size of a large hen's egg, which was covered by recently cut grass or hay. The evidence in the case viewed thus favorably would not, however, have justified a jury in finding that the defendant had not exercised "reasonable, ordinary, or due care to keep his premises reasonably safe" for the use of the plaintiffs.

The circumstances under which a motion for a directed verdict may or may not be granted have been enunciated many times by this court.

> "The principle of law which controls the action of this Court, when exceptions are presented to test the propriety of a nonsuit or a directed verdict for the defendant in the Trial Court, is to determine only whether upon the evidence under proper rules of law 'the jury could properly have found for the plaintiff,' *Johnson et al. v. New York, New Haven and Hartford Railroad et al.*, 111 Me., 263, 88 A., 988; and in determining that issue, the evidence must be considered in that light which is most favorable to the plaintiff, *Shackford v. New England Tel and Tel Co.*, 112 Me., 204, 91 A., 931." *Barrett* v. *Greenall,* 139 Me., 75, 80; 27 A. 2d, 599.

Viewing the testimony in these cases in a light most favorable to the plaintiffs, a jury could not properly have found for the plaintiffs, and the action of the presiding justice in ordering directed verdicts was proper.

In view of the above conclusions, it will not be necessary to discuss the question of whether the plaintiff Elizabeth Walker was guilty of contributory negligence.

The entry in each case will be

Exceptions overruled.

WILLIAM M. GRIGSON, HENRY P. JOHNSON AND ALBERT J. STEARNS, TRUSTEES UNDER THE WILL OF MINNE S. STEPHENS

vs.

FRANK F. HARDING, ATTORNEY GENERAL OF THE STATE OF MAINE

MILAN ROBERT BENNETT, EVA HILL, LESLIE M. BARROWS AND STEPHENS MEMORIAL HOSPITAL ASSOCIATION

Oxford. Opinion, September 17, 1958.

Wills. Trusts. Charity. Resulting Trusts. Cy Pres.

A liberal interpretation must be employed in construing charitable trusts but courts are not justified in making over wills and turning private gifts into charitable ones.

Heirs at law are not to be disinherited by conjecture.

A trust for charitable purposes will not fail merely because the selection of the particular charitable beneficiaries is entrusted to the discretion of trustees; but if the discretion is so broad that it permits the selection among non-charitable purposes the trust will fail and a resulting trust in favor of the heirs at law exists because (a) the trust violates the rule against perpetuities; (b) there is no one to enforce it; (c) the testator's intended purpose is too indefinite and uncertain; (d) it is against public policy to permit the testator to delegate his testamentary power.

Restatement on Trusts, Sec. 417 (b).

The doctrine of cy pres has no application where there is no general charitable intent.

ON REPORT.

This is a bill in equity for the construction of a will and instructions. Remanded to the Supreme Judicial Court in Equity for a decree in accordance with this opinion. Costs and reasonable counsel fees to be fixed by the sitting Justice, paid by the personal representatives and charged in their probate account.

Hutchinson, Pierce, Atwood & Allen, for plaintiff.

R. T. Smith (for Milan Bennett),
Linnell & Choate (for Eva Hill),
Robert T. Smith (for Stephens' Memorial Library),
Frank Linnell (for Leslie Barrows),
Ralph Farris (for Frank F. Harding, Atty. Gen.),
for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, JJ. BELIVEAU, J., sat during argument but retired prior to the opinion.

WEBBER, J. On report. Plaintiff trustees bring this bill in equity seeking instructions and an interpretation of the will of the late Minne S. Stephens. It must be said at the outset that the will, although dispositive of a substantial estate, is so ineptly and inexpertly drawn and is couched in language so confusing and obscure that it tends effectively to conceal rather than to reveal what may have been the wish and intent of the testatrix.

After making certain specific bequests unrelated to any issues presented here, the testatrix undertook to dispose of the residuum in the sixth clause of the will, the pertinent portions of which read as follows:

> "Sixth: All the rest and residue of the estate of which I shall die possessed or seized, whether real, personal or mixed, of whatever nature or wherever found, I give, devise and bequeath to the trustees hereinafter named, with full authority to convey and give good title to the same, but in trust for the following purposes only:
>
> In the event that I predecease my mother, it is my expectation that she will continue to live at the Laboratory, if it has not been sold, as we have lived, and I direct that my trustees hereinafter named use the income from my entire estate for

the care and upkeep of the Laboratory, as I have been doing, and for the care and support of my mother so long as she shall live. It is my request that she confer with my trustees in regard to the investment of her property and use of the income therefrom to be used, together with my income, for her support and the upkeep of the Laboratory. So long as he is willing to continue in the same way and in doing the same work at the Laboratory, and at the same wage, I direct that Milan Robert Bennett shall continue as caretaker and perform in general the same work that he has been performing. I direct that the Laboratory shall not be sold while my mother is living. * * * I direct that the income from all of my property other than the Laboratory, if the same has not been sold, shall be used for the care and upkeep of the same until such time as the Laboratory can be disposed of by my trustees in such manner and for such purpose as my trustees believe would nearly as possible fulfill the wishes and desires I have verbally expressed to them as to its ultimate disposition. It would be my wish that the library, the furniture and furnishings remain in the Laboratory when finally disposed of, provided the use of the Laboratory will be such that the books and furniture can be advantageously left there, and any not so desirable should be sold. After the disposition of the Laboratory by my trustees, I direct that my other estate shall be turned over to the trustees, organization or persons having the care of the Laboratory, and the income used to aid in its upkeep and maintenance. In addition to the verbal instructions I have given to my trustees and the expression of my desires, I would suggest as a possible use to which the Laboratory could be put, if it had not been sold, would be for a hospital or a community house for the use of the inhabitants of Norway and vicinity. It may well be that some other similar use will be discovered by my trustees, and it is to allow them to use their discretion that I am leaving the property to them. I direct that my trustees shall make no disposition of the Labora-

> tory except to such organization, corporation or association as will accept a conveyance of the same, subject to the agreement that so long as he shall desire said Milan Robert Bennett shall be retained as caretaker of the Laboratory building and grounds at a salary of one thousand dollars annually, and at such time as he retires voluntarily, I direct that as a first charge upon said income, he shall be paid annually the sum of three hundred and sixty-five dollars, payable in equal monthly installments so long as he shall live."

Later by codicil the testatrix made this further provision:

> "Item 2. When the real estate known as the Laboratory is finally disposed of by my trustees in accordance with my verbal wishes to them and as set forth in said will, I direct that they shall see to it that proper steps are taken so that it shall be known as the 'C. A. and M. S. Stephens Memorial.' "

The testatrix was survived by her mother who is now deceased. The residuum of the mother's estate was by testamentary provision made to follow the will of the daughter so that no problem arises by reason of the mother's survival.

The Laboratory was a very large, rambling wooden building which the trustees, after investigation, very reasonably concluded was unsuited to adaptation either to a modern public hospital or to a community house. The site is somewhat remote from the built-up section of Norway and is not served by either public water or sewer facilities. It appears that defendant Stephens Memorial Hospital Association has established a public charitable hospital in Norway which is in operation and which has received generous public support. After some negotiations, the details of which are not important here, the trustees sold the Laboratory and lot to a philanthropic citizen who in turn made a gift of the entire property to the defendant Hos-

pital. The Laboratory was thereafter torn down and demolished. It is now proposed in these proceedings that the entire residuum of the estate be given to the Stephens Memorial Hospital Association, either under a discretionary power alleged to be conferred upon the Trustees by the will, or under an application of the doctrine of cy pres. The Hospital has already memorialized the Stephens name and is prepared to provide for the defendant Bennett in accordance with the directions of the testatrix. The defendants who are heirs and next of kin of the testatrix oppose the suggested disposition and claim a resulting trust to themselves.

The proposed disposition to the Hospital can be justified, if at all, only by a demonstration that the will established trusts for charitable purposes. Our court in common with others has often employed language indicating a sympathetic interest in charitable bequests. "* * * it is liberal interpretation which must be employed in construing charitable trusts. They are favorites of the court in equity. This was the policy announced in the earlier cases * * * and that policy has been constantly and consistently maintained." *Prime* v. *Harmon,* 120 Me. 299, 303. It was never intended, however, that such expressions should be interpreted to mean that a benevolent spirit of the court would compensate for a lack of charitable intention on the part of testators. Bogert on Trusts and Trustees, Vol. 2A, Page 62, Chap. 19, Sec. 369 states the rule — "But, naturally, this friendly attitude cannot go so far as to create a charity out of a gift which lacks essential elements. The courts are not justified in making over wills and deeds and turning private gifts into charitable ones." Because charitable trusts are "favorites of the courts" and the "language should be liberally construed" does not mean that one party to litigation will be favored to the detriment of the other party, or that the court will adopt partisanship or antagonism in place of

even-handed justice. " 'There is no authority for holding a charitable tendency to be a charitable use; in other words, that a gift to a person for his own benefit, whereby consequential charity may arise, is not a charitable use.' " *In Re Kline's Est.* (1934) 138 Cal. App. 514, 32 P. (2nd) 677, 680; *Matter of Frasch's Will,* 245 N. Y. 174, 156 N. E. 656, 658; *In Re Hayward's Est.* (1947) 65 Ariz. 228, 178 P. (2nd) 547, 549. When it appears that a most worthy and deserving object of charity can be made the recipient of a testator's bounty only if the court is disposed to make a new will for him, the court is without power to act. "It is not the duty of the court to be 'curious and subtle' in devising schemes to aid testators in disinheriting their next of kin under circumstances like these." *Brooks* v. *Belfast,* 90 Me. 318, 332; *First Universalist Soc., Bath* v. *Swett, et al.,* 148 Me. 142, 151. "The heirs at law are not to be disinherited by conjecture, but only by express words, or necessary implication." *Howard* v. *The American Peace Society,* 49 Me. 288, 291. This then is the framework within which the court will act. It will construe the language of the testator liberally to permit his charitable intentions to shine through. It will not invent such an intention where none exists.

It has long been held in this and many other jurisdictions that a trust for charitable purposes will not fail merely because the selection of the particular charitable beneficiaries is entrusted to the discretion of the trustees. The will, however, must manifest the testator's intention to limit the choice to charitable objects. *Simpson* v. *Welcome,* 72 Me. 496; *Howard* v. *American Peace Society, supra; Everett* v. *Carr,* 59 Me. 325; *Fox* v. *Gibbs,* 86 Me. 87; *Prime* v. *Harmon, supra;* Page on Wills, Vol. 3, Page 588, Sec. 1232; *Peirce* v. *Atty. Gen.* (1920), 234 Mass. 389; 125 N. E. 609; *Thorp* v. *Lund,* 227 Mass. 474, 116 N. E. 946.

On the other hand when the discretion given to the trustees is so broad that it permits a selection among private

and noncharitable purposes, the trust will fail. Under such circumstances, a residuary estate would pass by way of a resulting trust to the heirs at law or next of kin. Scott on Trusts, Vol. II, Page 856, Sec. 123 furnishes several of the reasons underlying such a result. (a) Such a trust may violate the rule against perpetuities. (b) There is no one who can enforce it. (c) The testator's intended purpose is too indefinite and uncertain. (d) It is against public policy to permit the testator to delegate his testamentary power in this manner. For one or more of the foregoing reasons, the vast majority of American courts have rigidly adhered to the rule.

In *Buzzell* v. *Fogg,* 120 Me. 158, the estate passed to the trustee "to be disposed of as (the trustee) directs from time to time and as (the trustee) thinks will be in accordance with my wishes." The court held that there was a resulting trust for the heirs.

In *Haskell* v. *Staples,* 116 Me. 103, the provision was to the trustee "to be by him distributed and disposed of as he pleases." This trust failed "for uncertainty and indefiniteness."

In *Fitzsimmons* v. *Harmon,* 108 Me. 456, where the gift was to the trustee "to divide as seems to her best as I have told her my wishes in the matter," the trust failed and the estate passed by implication of law to the heirs.

"The discretion of the trustees must, in any event, be limited to a distribution for charitable purposes. If, in his discretion, it may include noncharitable purposes, the gift is not charitable." Page on Wills, *supra,* page 593. The beneficiaries of a private trust must be definitely ascertained at the time of the creation of the trust or definitely ascertainable within the period of the rule against perpetuities. "* * * it has been held in England and quite generally in the United States that where property is left in trust for

purposes which are not limited to charity, although they may be broad enough to include charity, the intended trust fails altogether." Scott on Trusts, Vol. IV, Page 2820, Sec. 398.2.

In *Green* v. *Allen et al.*, 132 Me. 256, an estate was left to four named persons "to be distributed by them in accordance with their wishes and desires. Inasmuch as (A — one of the four) is familiar with my wishes to a considerable extent, his suggestions may be helpful in the distribution." Because of uncertainty and indefiniteness, the property passed by resulting trust.

"The purposes for which such bequest can be used must be charitable only. If the intention of the testator was that the gift could be used for other than charitable uses, it is fatal to the validity of the bequest. If a part may be so otherwise used, all of it may be." *Bates* v. *Schillinger*, 128 Me. 14, 20.

"A trust which by its terms may be applied to objects which are not charitable in the legal sense, and to persons not defined, by name or by class, is too indefinite to be carried out." *Murdock* v. *Bridges*, 91 Me. 124, 133.

In *Olliffe* v. *Wells*, 130 Mass. 221, the gift was to the trustee "to distribute the same in such manner as in his discretion shall appear best calculated to carry out wishes which I have expressed to him or may express to him." Here again the trust failed for indefiniteness and uncertainty.

In *Smith* v. *Heyward*, 115 S. C. 145, 105 S. E. 275, provision was made for keeping up the homestead, house and garden where was located also the family tomb. The court pointed out that there was no charitable purpose because there was no public benefit. It was held that the trust must fail as being too vague and indefinite and as violative of the rule against perpetuities.

The recent case of *Goetz* v. *Old Nat. Bank of Martinsburg* (1954), 84 S. E. (2nd) (W. Va.) 759, clearly illustrates the necessity for the will to limit the discretion vested in trustees to charitable purposes only. Here the will disposed of property to the trustee "to distribute and pay over the same unto such religious, charitable, scientific, literary, educational, or fraternal corporations and associations as they may, in their discretion, select and determine, it being my request, however, that they shall select only such institutions as are located within the United States." The court recognized that the testatrix intended to create a charitable trust in part. "But the language used in attempting to do so," said the court at page 769, "is so general and indefinite that the executors and trustees may use part of the property in establishing a charitable trust. *Likewise, such trustees, under the wide and uncontrolled discretion accorded them, may create a private trust.* * * * Such mixed trust cannot be sustained." (Emphasis supplied) The court went on to demonstrate how such a "mixed trust" violates the rule against perpetuities and concluded that the residuary clause was not really the will of the testatrix but in the last analysis amounted only to a written direction to her executors to make a will for her. The property was held to pass by resulting trust to the next of kin.

Although it is not required that the testator use such explicit terms as "charitable" or "charitable purposes" in limiting the discretionary selection to be made by trustees, appropriate and equivalent language must be used to evidence such an intention. Where numerous purposes are listed commencing with the word "charitable," it has been held that a dominant and overriding charitable intention was thereby disclosed. *Gossett* v. *Swinney* (1931), 53 F. (2nd) 772. On the contrary some courts have been quite exacting in requiring that the language of the will foreclose any possibility that the trustee might be empowered to

select a private noncharitable purpose. *In Re Kline's Est., supra,* illustrates this position. In that case the trustee was to disburse property "to such persons, charitable organizations and/or corporations situated in (Los Angeles), organized for the purpose of aiding and for the betterment of crippled children, the persons, charities or organizations that shall receive the benefit of this charitable trust to be selected by (the trustee) in its absolute and uncontrolled discretion." In spite of the reference to this as a "charitable trust," the court said the words "persons" and "corporations" were not modified by the word "charitable" as written, and the discretion was broad enough to permit the selection of noncharitable purposes. The court reasoned that the language was not ambiguous and was therefore not explained by reference to the words "charitable trust." We do not suggest that we would necessarily reach the same result upon the same testamentary language, but we cite the case as illustrating and vigorously supporting the rule that the will must clearly evince an intention to limit the discretion of trustees to a selection among charitable purposes only. This we conceive to be the law in Maine as in most other jurisdictions.

With these rules in mind, let us see what the testatrix said in the will now before us. Her first concern was for the use of the Laboratory during the life of her mother. By clear implication her trustees were directed to permit her mother to make her home there. They were further commanded to use the income from her "entire estate" first for the care and upkeep of the Laboratory and second for the care and support of her mother. Her next concern related to the use her mother might make of her own estate and was expressed in the form of a request that her mother should use at least a portion of her own income for the "upkeep of the Laboratory." This primary interest in the "care and upkeep of the Laboratory" extended then to the person

who had been her faithful caretaker and expressed itself in a direction for his continued employment as long as he should be willing and able to do the work. The next important provision was obviously intended to provide for the situation which would arise after the death of her mother and again her concern for the "care and upkeep of the Laboratory" was reemphasized by her use of the language: "I direct that the income from all of my property other than the Laboratory, if the same has not been sold, shall be used for the care and upkeep of the same until such time as the Laboratory can be disposed of by my trustees in such manner and for such purpose as my trustees believe would nearly as possible fulfill the wishes and desires I have verbally expressed to them as to its ultimate disposition." This was followed by a "wish" which may properly be interpreted as a direction to the trustees to retain certain personal property in the Laboratory if suited to its use, otherwise to sell the same. The testatrix then gave the *only* directive as to the ultimate disposition of the balance of her estate in these words: "After the disposition of the Laboratory by my trustees, I direct that my other estate shall be turned over to the trustees, organization or persons *having the care of the Laboratory,* and the income used to aid in *its upkeep and maintenance.*" (Emphasis supplied)

Up to this point it is entirely clear that the testatrix had not disclosed any interest in or concern for any charitable purpose whatever. Uppermost in her mind, quite obviously, was the mental picture of the beloved Laboratory as a continuing physical entity to be preserved, maintained, cared for and kept up with as little deviation from the established pattern of the past as possible. Four times she gave direction for the "care and upkeep," or "upkeep" or "upkeep and maintenance" of the Laboratory. When she reached the point of final disposition, her wishes became obscure and her intention veiled. That the estate is to follow the Laboratory is clear. But where within the four corners of the will

can it be ascertained to whom the trustees are empowered to transfer the Laboratory and estate? That the selected beneficiaries may be "persons" as well as other "trustees" or an "organization" is provided by the language of the will itself. The only distinguishing characteristic afforded by the testatrix as a means of identifying these "trustees, organization or persons" as the intended beneficiaries of the estate is that they are the ones "having the care of the Laboratory." As that obligation in turn rests upon their being selected by the trustees for that purpose, it is apparent that in reality the trustees were given an absolute discretion to choose beneficiaries, either for private or charitable purposes, and in effect to make a will for the testatrix. Such an attempted trust provision must fail under the well established rules of law already discussed.

The only question left to be resolved is whether or not the remaining provision of the will so limited the selection of the trustees to charitable purposes as to avoid the defects fatal to a trust for private purposes. The petitioners here necessarily rest their entire hopes upon such a construction of the language used. The testatrix employed the following phraseology: "In addition to the verbal instructions I have given to my trustees and the expression of my desires, I would *suggest* as a *possible* use to which the Laboratory *could* be put, if it had not been sold, would be for a hospital or a community house for the use of the inhabitants of Norway and vicinity. It may well be that some other similar use will be discovered by my trustees, and it is to allow them *to use their discretion* that I am leaving the property to them." (Emphasis supplied.) At the outset it must be noted that the testatrix used precatory words. She did no more than to suggest a "possible use" of the Laboratory whereas when she made her provision for its care and upkeep and for the support of her mother, in each instance she did not hesitate to "direct" the intended action.

Although words of suggestion and recommendation may, when read in context, be interpreted as directory and mandatory if such be the manifest intention of the testator, they will ordinarily be given their usual and accepted meaning. "The intention of the testator must be found from the whole will." *Clifford* v. *Stewart*, 95 Me. 38, 46. That the precatory words here used were fully intended to do no more than suggest or recommend, as they purported to do, seems fully substantiated by the contents of the will. Her repeated and consistent use of the word "direct" whenever she intended a positive disposition is in direct contrast to her use of the word "suggest" in this single instance. Moreover, she emphasized the broad discretion she had bestowed upon her trustees and indicated quite clearly that by suggesting a "possible use" for the Laboratory, she did not intend to limit or diminish the scope of that discretion or to tie the hands of her trustees. To construe these precatory words as imposing on the trustees a clearcut mandate to select only charitable purposes would be far fetched indeed.

The provisions of the will, thus interpreted, fall into the category illustrated by the Restatement of the Law of Trusts, *supra*, page 1291, Sec. 417 (b): "1. A bequeaths $10,000 to B in trust to dispose of it to such objects of benevolence and liberality, charitable or otherwise, as B in his discretion shall most approve of. B holds the money upon a resulting trust for the next of kin of A * * *." The controlling rule of law is set forth by the Restatement at page 1200, Sec. 398, Comment on Subsection (1) in these words: "If property is transferred to a person upon an intended trust for indefinite or general purposes, which include *but are not limited to* charitable purposes, and there is no definite or definitely ascertainable beneficiary designated, the intended trust fails." (Emphasis supplied.) *In Re Peabody's Est.* (1937), 21 Cal. App. (2nd) 690; 70 P. (2nd) 249 at 250, the court said: "The will contains no limi-

tation on the power of selection by the trustee that would require him to select a charitable institution as beneficiary. * * * We cannot rewrite her will. We must construe it as she wrote it. The conclusion that the testatrix had in mind either a charitable institution or one organized for private profit would be based on conjecture and not on anything written in the will. In order to avoid intestacy, either partial or complete, we are not permitted to place on the will any construction not expressed in it and which is based on supposition as to the intention of the testatrix in the disposition of her estate." Cases decided upon the same principles of law are *Matter of Shattuck* (1908), 193 N. Y. 446, 86 N. E. 455; *Est. of Sutro* (1909), 155 Cal. 727, 102 P. 920; *Nichols* v. *Allen* (1881), 130 Mass. 211; *Wilcox* v. *Atty. Gen.* (1910), 207 Mass. 198. The applicable law inexorably compels us to declare a resulting trust to the next of kin.

Although the result reached for the reasons above stated effectively removes from this case the issue as to the application of the doctrine of cy pres, the matter has been so thoroughly briefed and vigorously argued that a brief comment on the applicable rules of law may not be amiss. Even if the trustees had been limited by the will to a selection among charitable uses for the Laboratory, it would by no means follow that a diversion of the estate to the defendant Stephens Memorial Hospital Association could have been permitted. There would still have been lacking in this case that *general* charitable intent which is essential to any application of cy pres. *Pierce* v. *How,* 153 Me. 180, 191. When the testator's charitable intent does not extend beyond a specific purpose or object and, as here, is narrowly and indissolubly linked to the family homestead, the doctrine of cy pres cannot be successfully invoked. Had we reached this issue, we would have found ourselves unable to distinguish the situation presented by the concentrated interest of this

testatrix in preserving and memorializing the Laboratory and that presented in the case of *Gilman* v. *Burnett,* 116 Me. 382. Language employed by the court at page 387 would have equal application here. "We search in vain in the will in the pending case for evidence of any general charitable intent on the part of the testatrix. The words in every portion preclude such an inference. * * * There is nothing to indicate that the testatrix intended to make any provision for the recipients of her bounty unless they could be provided for in her old home, the spot that she loved and thought so beautiful. Her charitable purpose was linked with the particular farm which constituted the subject of her bounty. The exact location provided for in the will was the paramount consideration in her thought, and a general provision for the beneficiaries would seem to be quite beyond her contemplation." So also in the will before us the testatrix disclosed a paramount intention to preserve and memorialize her beloved Laboratory in some suitable and appropriate manner. If her intention was charitable and extended beyond these narrow limits, she failed to use language which directly or by implication would serve to evidence that intention. Cf. *Shoemaker* v. *American Security & Trust Co.* (1947), 163 F (2nd) 585, in which the general charitable intent was dominant and the suggested site subordinate and incidental. See also *Belfast, In Eq.* v. *Goodwill Farm, et al.,* 150 Me. 17; *First Universalist Soc., Bath* v. *Swett, et al., supra; Edwards* v. *Packard,* 129 Me. 74. In *Bancroft* v. *Sanatorium Assn.,* 119 Me. 56 at 71, the court said, "Every paragraph of the declaration is consistent with the intent of a particular charitable gift and inconsistent with any general purpose to make this benefaction to the general cause of anti-tuberculosis. * * * It is difficult to conceive of a situation where the personal element in the gift stands out in a stronger light than it does here, and it is impossible to escape the conclusion that the cy pres doc-

trine has no application. To attempt to apply it would be to defeat rather than to further the donor's design."

Thus it may be seen that the trust fails in the first instance because the will attempted to confer upon trustees a discretion broad enough to permit them to put the Laboratory to private as well as charitable uses; but even if this obstacle had been avoided, the concentrated interest of the testatrix in the Laboratory as the place where her charitable purpose should be carried out would have effectively prevented the application of the doctrine of cy pres.

The testatrix made casual references to the possibility that the Laboratory might be sold either by herself or her trustees. She made no provision for disposition of her estate in event of this contingency. We can only construe the absence of such a provision as evincing a willingness on her part to have her residuary estate pass by intestacy in event no appropriate use could be found for the Laboratory. Her attempted disposition was predicated on the assumption that the Laboratory would be preserved as a family memorial and would be used.

It appears that the entire estate is now composed of personal property. As such, the assets pass to the personal representatives to be administered and distributed by them under the direction of the Probate Court as intestate property belonging to the estate. *First Universalist Soc., Bath* v. *Swett, et al., supra.* The justice who sat below having since retired, the entry will be

Remanded to the Supreme Judicial Court, in Equity for a decree in accordance with this opinion. Costs and reasonable counsel fees to be fixed by the sitting justice, paid by the personal representatives and charged in their probate account.

STATE OF MAINE

vs.

CARL SEABURG

Oxford. Opinion September 18, 1958.

Criminal Law. Indecent Liberties. Evidence.

Prior and subsequent relationship, including evidence of particular acts between complainant and respondent are relevant matters for the jury to consider; this is so whether the crime charged is adultery, bigamy, fornication, criminal conversation, sodomy, indecent liberties or incest.

Prior acts between the parties, even though not similar to the act charged, may be admissible on the matter of relationship where the difference is not of kind but of degree in the logic of the subject considered. (Strip poker game prior to alleged indecent liberties.)

Requested instructions need not be given in *eisdem verbis*.

ON EXCEPTIONS AND APPEAL.

This is a criminal action by indictment for indecent liberties. The case is before the Law Court upon exceptions and appeal. Exceptions overruled. Appeal dismissed. Judgment for the State.

David R. Hastings, for plaintiff.

Berman & Berman,
Dow & Dow, for defendant.

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

SULLIVAN, J. A jury found the respondent guilty of taking indecent liberties with a male person of the age of 15 years. R. S. (1954), c. 134, § 6. During the trial exceptions were taken to the admission of testimony and to the refusal

of the presiding justice to instruct the jury as requested. After verdict a motion was made to have the verdict set aside and a new trial granted. Upon the denial of such motion the respondent appealed. He now prosecutes his exceptions and appeal.

EXCEPTION 1.

The complaining witness in direct examination over the objection of the defense was asked by the prosecuting attorney the following question concerning indecent liberties by the respondent and was permitted to make the ensuing reply:

"Q. At this time in November, was this the first time that Mr. Seaburg committed acts of this kind with you?

A. Yes, it was."

The testimony was offered and admitted by the court as relevant for any significance it might afford in characterizing any relationship between the respondent and the complainant.

There was no error. The situation here, the question, the ground assigned to justify it and the ruling of the court are patterned almost identically from the decided case and precedent of this court in *State* v. *Norton* (1955), 151 Me. 178, 180.

The respondent protests that "the County Attorney must be presumed to have known what the answer would have been and if he knew that the answer was going to be" yes, "then the only purpose of asking the question was to lay the foundation of the building up of prejudice in the minds of the jury against the respondent."

The question was proper and the answer proved to be favorable rather than detrimental to the respondent.

EXCEPTION 2.

With the defense opposing, the witness was then interrogated by the State as to any indecent liberties practiced upon him by the respondent subsequent to those precisely charged in the indictment and in the specifications supplied thereunder and was permitted to recite that there had been some three more of such defilements over the period of time extending from November to the next January. Such evidence was received as pertinent to the topic of relationship between the respondent and the witness.

The challenged testimony was not admitted nor was it admissible in proof of the particular offense of which the respondent was accused here.

> "It is an elementary principle in the law of evidence that when a respondent stands charged with the commission of a particular criminal act, evidence that he did a similar thing at some other time is generally deemed irrelevant and inadmissible. The considerations of justice underlying this rule are sufficiently obvious. The admission of such collateral facts in evidence would tend to place the defendant's whole life in issue on the charge of a single act, and oppress him with irrelevant matter of which he had received no notice and which he could not be prepared to meet. Proof of numerous other crimes similar to that charged may indeed have a tendency to show the accused to be devoid of all moral restraint and 'fatally bent on mischief' and thus, in a moral sense, increase the probability of his guilt with respect to the particular offense set out in the indictment, but such evidence does not for that reason become legally admissible when there is no question in regard to the nature of the act charged. Evidence that the defendant's general reputation is bad with respect to that element of character involved in the crime charged, or bad generally as a man of moral worth, might also tend in some degree to lay the foundation for

> a presumption of guilt; but the rule is firmly established and unquestioned that such evidence cannot be received until the accused has opened the door by introducing evidence of his good reputation." *State* v. *Acheson* (1898), 91 Me. 240, 243.
>
> See Wigmore on Evidence, 3d ed., Vol. 1, § 194, P. 646.

The testimony was entertained for a carefully discriminated, refined and relevant purpose.

> "- - - to prove the mutual disposition of the parties, and to illustrate the nature of the intimacy shown by their conduct on the occasion in question; - - -"
>
> *State* v. *Acheson,* 91 Me. 240, 244.

State v. *Witham* (1881), 72 Me. 531, was a trial upon an indictment for adultery. This court said:

P. 535.

> "It is objected that this mode of trial involved the admission of evidence of acts of adultery happening both before and after the principal act complained of. Formerly, the criticism might have been regarded favorably in many courts. Latterly, however, courts and text-writers are rapidly falling in with the view, that acts prior and also subsequent to the act charged in the indictment, when indicating a continuousness of illicit intercourse, are admissible in evidence as showing the relation and mutual disposition of the parties; the reception of such evidence to be largely controlled by the judge who tries the cause, and the evidence to be submitted to the jury with proper explanation of its purpose and effect. We think this doctrine is most in accordance with the logic of the law and with the authorities. - - - - -"

In *State* v. *Williams* (1884), 76 Me. 480, 481, also upon the issue of adultery, we find:

> "Evidence tending to show illicit intercourse by the defendant with the same person charged in the in-

> dictment, both before and after the day laid, is competent to prove the relation and mutual disposition of the parties. State v. Witham, 72 Maine, 531."

State v. *Witham* and *State* v. *Williams, supra,* were cases of contested accusation of adultery while the case at bar is one of a charge of indecent liberties. Yet, that accidental distinction notwithstanding, the evidentiary determinations of this court in the Witham and Williams precedents are soundly applicable to the problem of admissibility of the evidence which comprises the subject matter of respondent's EXCEPTION 2. The same decisive rationale serves equally well to demonstrate the competency, relevance and fairness of the controverted evidence in each of the three cases. The rules for attaining pertinent truth without prejudicial harm are constant and uniform in all three cases.

State v. *Kornegger* (1953), 363 Mo. 968, 255 S. W. (2nd) 765 was a trial for indecent liberties with a female child of 7 years. Evidence of such a transgression subsequent in time to the specific or principal offense described in the indictment was admitted. The court, in holding the evidence proper, said:

P. 768.

> "- - - But we think that under the above stated exceptions, and under the instant circumstances, the above stated events which subsequently occurred on April 19 were clearly admissible to establish not only the identity of the defendant and a common scheme and plan as to this prosecutrix but also as 'corroborative evidence to show a disposition upon the part of the accused and as tending to support the specific offense' for which defendant was on trial - - - -"

State v. *Mitchell* (1948), 253 Wis. 626, 34 N. W. (2nd) 661 was a trial for indecent liberties with a 14 year old girl.

P. 662.

> "Defendant also contends that there was error on the trial by the introduction of Shirley's testimony as to similar acts of such unlawful misconduct by defendant in relation to her at other times.
>
> "The admission of that testimony did not constitute error. Evidence as to such other acts of indecent familiarity between defendant and Shirley was clearly admissible. - - - -"

In *People* v. *LaMantain* (1949), 89 Cal. App. (2nd) 699, 201 P. (2nd) 598, the defendant had been convicted of committing lewd and lascivious acts upon the body of a female child under the age of 7 years. Evidence of 2 such offenses, one on a Friday in February and another on the following Tuesday, had been introduced by the State. The law of California held the State to an election by the very act of the prosecution in presenting evidence of the offense of the earlier date. The court held that the following instruction was without reproach:

P. 599.

> "Although evidence was offered for the purpose of showing that on more than one occasion the defendant committed lewd or lascivious acts upon or with the body of Nancy Jane Spohn, you are not permitted to deliver a verdict of guilt in this case unless you find that the defendant committed the specific offense which, the prosecution alleges, was committed on or about March 2, 1948. That alleged offense and no other is the one of which the defendant now stands accused under the information. You may not, for the purpose of finding against the defendant distinct offenses or continued criminality, consider any evidence which tends to show other instances of lewd or lascivious conduct by the defendant with said child, but you may consider such evidence as tending to show, if you decide that it does tend to show, a lewd and lascivious disposition on his part toward said child and hence

> as bearing on the question of intent and inclination at the time of the alleged specific crime, in respect to the charge of which your verdict must be given. As to such limited purpose for which such evidence may be considered, you will weigh it as you do all other."

State v. *Sebastian* (1908), 81 Conn. 1, was a prosecution upon an indictment for carnally knowing and abusing a female child of less than 15 years. There were 2 counts for two separate violations, one committed on April 9, 1907 and the other, between April 1 and August 12, 1907. The State elected to rely totally upon the first count. Testimony was introduced by the prosecutor of sexual intercourse on April 8th or 9th and of such intercourse in the following June or July. The court decided:

Page 3.

> "Remote evidence, however, is not necessarily incompetent. Under the circumstances attending the case at bar, we are of the opinion that it cannot be said, as matter of law, that there was error in the admission of the testimony of this witness as to acts of sexual intercourse in June and July, whether received before or after the making of the election. It went to show the existence of relations between her and the defendant which tended to make the commission of the act of a similar nature, which was the subject of the charge, more probable, and so to confirm her previous testimony. That the accused was under the influence of a sexual passion in respect to this girl in July, which led him then to take advantage of her youth in order to gratify it, was logically relevant to the question whether he gave rein in the same manner to such a passion in respect to her, three months before. Thayer v. Thayer, 101 Mass. 111. One fact is relevant to another fact whenever, according to the common course of events, the existence of the one, taken alone or in connection with other facts, renders the existence of the other either certain or

more probable. State v. Blake, 69 Conn. 64, 76, 36 Atl. 1019."

Wigmore on Evidence, 3d. Ed., Vol. 11, §§ 395, 398, 399, comprehensively rationalizes and dispels the problem presented by respondent's EXCEPTION 2 and both *a priori* and by numerous cited authorities vindicates the doctrine of admissibility of the kind of evidence here disputed when such testimony is accepted for the same principles espoused by the presiding justice, whether the evidence be of acts committed before or after the principal or specific offense and whether the case involves adultery, bigamy, fornication, criminal conversation, sodomy, indecent liberties or incest.

§ 398.

"- - - - The circumstances that the prior or subsequent conduct exhibiting the passion is criminal does not alter the case nor affect the admissibility of the evidence - - - -"

(Quoted with approval in *State* v. *Desilets,* 1950, 96 N. H. 245, 247, 73 A. (2nd) 800, 802, unnatural and lascivious acts committed on 14 year old boy).

§ 399.

"- - - - The limits of time over which the evidence may range must depend largely on the circumstances of each case, and should be left to the discretion of the trial Court.

"A subsequent existence of the desire (sexual) is equally relevant with a prior one - - - -

"(c) The kind of conduct receivable to prove this desire at such prior or subsequent time is whatever would naturally be interpretable as the expression of sexual desire: - - - -

"Sexual intercourse is the typical sort of such conduct, but indecent or otherwise improper familiarities are equally significant. That the intercourse is also itself criminal is no objection."

The presiding justice gave the following heedful and admonitory instruction to the jury:

> "There are some phases of the evidence that I want to briefly discuss with you. In the first place there was testimony in this case, against the objection of counsel for the respondent, of acts of indecent liberties upon Mr. Skinner by the respondent after the offense relied upon by the State. Now I will say to the jury at this time that this evidence, if you should find it to be true—it is denied by the respondent—but if you should find it to be true, that has no bearing upon the commission of the offense charged, except to show the relationship between the parties. The respondent is not on trial here for any of these acts which were charged by the State to have been performed after the main act, and because he may have committed another act later—of course the respondent denies he did—but if this jury should find he did commit another later act, it does not show he committed the prior act any more than if I went out and stole your automobile last night, and your father who lives over in the other end of town; you say that I stole his automobile on the night before because he missed his automobile the night before. In other words, if a man commits one offense it is no reason for determining that he has committed another. This particular testimony was only admitted for the purpose of showing the relationship between the two parties involved."

We must conclude that EXCEPTION 2 is without merit.

EXCEPTIONS 3, 4 and 5.

The testimony of the complaining witness had dated the specific offense charged in the indictment as having occurred at a time in November. Against the objection of the respondent the complainant and another boy were permitted by the presiding justice to narrate that on an occasion during the previous August the respondent at his residence

had taught them how to play strip poker and that the respondent, the complainant, the other young witness and a third lad had thereupon engaged in such a contest in the fortunes of which the complainant and the companion witness had become wholly denuded. The justice admitted such evidence as relevant to explain the relation between the respondent and the complainant. The respondent protests that the court thus acted erroneously to the irreparable prejudice of the respondent.

This court has held that in an indecent liberties prosecution proof of prior acts of a nature similar to the principal offense charged in the indictment is admissible.

> "The respondent complains as to the admission of testimony that the female minor named in the indictment was permitted, over objection, to testify to acts of earlier happening between the parties, similar to the offense charged, and relies upon State v. Acheson, 91 Me., 240, 39 A., 570. The principle declared in that case is not applicable to the present. - - - In the instant case we have no exception to the charge nor could one have been taken, since the testimony was admitted only for the purpose of showing the relationship between the parties, for which it was entirely proper. State v. Witham, 72 Me., (adultery); State v. Williams, 76 Me., 480 (adultery); State v. Bennett, 117 Me., 113, 102 A., 974 (indecent exposure); State v. Buckwald, 117 Me., 344, 104 A., 520 (accepting money from prostitute); State v. Morin, 126 Me., 136, 136 A., 808 (permitting tenement to be used for prostitution). In point of fact the danger of misapprehension was eliminated by a special instruction given to the jury after consultation with counsel to the effect that respondent was not being tried 'upon what occurred before the offense complained of' in the indictment."
>
> *State* v. *Berube* (1942), 139 Me. 11, 13.

The evidence contested by these exceptions would not suffice, to be sure, to prove the equivalent of a prior act similar to the offense specified in the indictment. There is considerable gradation separating the loathsomeness of taking indecent liberties and the reprehensibility of playing strip poker even as described in this case. Yet the difference is not of kind but of degree in the logic of the subject now considered. The controverted evidence purported to attest that the respondent instructed the youths how to play the game and that the game was suffered by the respondent to progress beyond the limits of masculine and virile decency. The episode was not droll as recounted. Of the available recreations to have been fostered for the diversion of youth this became a sordid selection as related. The narrative told was not that of the behavior of a normal man. There is no question of intent involved in the crime of indecent liberties. The evidence here considered was offered as an instance of the prior conduct of the respondent to indicate emotion or lust in the respondent toward the complainant and as proof of undue familiarity. If such evidence was conceded credence by the fact finding jury, that body could understandably and within the bounds of right reason have considered it significant in deciding upon a verdict.

§ 398.

> "The prior or subsequent existence of a sexual passion in A for B is relevant, - - - - to show its existence at the time in issue - - - -

§ 399.

> "- - - - (a) That, in general, a sexual desire of A for B is relevant to show the probability of A's doing that which will realize this desire cannot be and is not questioned; and no evidential difficulties arise at this point:
>
> - - - - - - - - - - -
>
> "1878, Wheeler, J., in State v. Bridgman, 49 Vt. 210: 'The offense charged in this case (adultery) cannot ordinarily be committed till the restraints

> of natural modesty and the safeguards of common deportment and conventionality have been overcome by gradual approaches and the relations of the parties have been changed from those usually existing between the sexes to the most intimate - - - Thus it appears that the true relation of the parties to each other in this respect is very material and proper to be shown.'
>
> - - - - - - - - - - -
>
> "(b) That this desire at a prior or subsequent time is relevant to show the probable existence of the same desire at the time in issue is equally clear.
>
> - - - - - - - - - - -
>
> "Sexual intercourse is the typical sort of such conduct but indecent or otherwise improper familiarities are equally significant - - - -"
>
> Wigmore on Evidence, 3d Ed., Vol. 11.

The presiding justice very properly and fairly in his instructions delivered the following caveat to the jury:

> "Now there was some evidence in regard to a strip poker game, and that testimony was only permitted for the purpose of showing that relationship between the parties. Now it is not a crime to play strip poker, if they did play strip poker. That has not bearing upon the guilt or innocence of the respondent for the crime with which he is charged, except that it does show to the jury, if you did find it to be true, the relationship between the parties, and you may only take into consideration in connecting that particular testimony up with the guilt of the respondent or the innocence of the respondent the bearing it has in so far as the relationship of the parties is concerned. - - -"

The evidence at issue in EXCEPTIONS 3, 4 and 5 was relevant and was submitted to the jury with every fit precaution.

EXCEPTION 8.

Seasonably at the close of the charge of the presiding justice the respondent requested in writing this instruction:

"An accusation of this nature is easily made but difficult of refutation except by the denial of the accused."

The court declined to render the instruction *in eisdem verbis* and this exception was duly taken.

The presiding justice had already reviewed the subject matter with the jury in this context:

"- - - Your role in this case will be to determine what did happen there; whether Mr. Skinner is telling you the truth or whether the respondent is telling you the truth. The State's case in this particular prosecution stands or falls upon the testimony of Mr. Skinner. I think counsel on both sides have suggested that same thing to the jury. Unless you are satisfied of the true version of Mr. Skinner's story, you reach the end of this case and you must find the respondent not guilty.

Now there has been some argument about corroborative testimony. The State says that we have some corroboration to this extent, that we had one witness who went there to the house with Mr. Skinner, but as to the main event charged, as to whether or not there were indecent liberties taken of the private parts of the young man there is no corroboration as to that particular event. I am going to instruct this jury as a matter of law that it is not necessary in cases of this kind that there be corroboration by what has been termed the corroborating witness. It is not necessary that there be corroboration of the testimony of Mr. Skinner by any other witness. Crimes of this sort, if a crime were committed, are not ordinarily committed in the presence of witnesses. If witnesses had to be obtained to show that indecent liberties were performed, probably there would be very few convictions in indecent liberties cases, because those are crimes that do not ordinarily take place in the presence of the public. I will say to you, however, that you should of course in cases such as this closely scrutinize the testimony of Mr.

Skinner as to his probative value. Now what his probative value may be in the final analysis is a question for this jury to determine. You are to determine whether it has or whether it has not that probative value which, taken together with the other circumstances in the case, convinces you of the guilt of the respondent beyond a reasonable doubt. That is the role which this jury will have to play in the solution of this case. Was the story of this young man Skinner, was it a trumped up story? Was it a figment of his imagination, as was argued I believe by one counsel, or at least suggested? Was it a mirage of his mind as we sometimes say? Was it perjured testimony or was it the truth? If it wasn't the truth, why wasn't it? That is always a good question to ask in determining whether a person is telling the truth or not. Ask yourself, if this particular witness is not telling the truth, why isn't he telling the truth. Was the witness biased? Was he biased against the respondent? Does that account for his story? Did he have an ax to grind against somebody, as we used to say in the old days? We used to use an ax more than we do today. Did he have an ax to grind against the respondent? Did he have the sort of mind that was prone to wander into the realm of fantasy, which was suggested by one of the counsel, or was what he said the truth? You apply the same yardstick to the testimony of all the witnesses in this case. You apply the same yardstick to the testimony of the respondent that you do to the testimony of Mr. Skinner and the other witnesses for the State. You take into consideration, in determining the value of their testimony, their demeanor on the stand. What impression did the witnesses in this case make upon this jury as they respectively testified? Did the witnesses appear to be telling the truth, the whole truth and nothing but the truth, or was there some evasiveness about the answers of the witnesses? Did the witnesses meet the questions that were asked of them on direct and cross-examination head-on, or did they kind of slide and slip around

a bit in making their answers? What about the reasonableness of the story of the witnesses in this case—the reasonableness of the story of the witnesses in and of itself or the reasonableness of the story in connection with facts in the case which this jury finds to be the facts? Was Mr. Skinner—there has been argument on both sides about this—was he biased against this respondent? Is that the reason why he told this story on the witness stand? If he was biased, why was he biased? You will have to analyze the testimony relating to Mr. Skinner playing hooky from school. You will have to determine what the facts are with reference to what happened after that; the punishment, if there was a punishment. You will have to determine whether he is biased or not; what sort of feeling he had toward the respondent in the light of the testimony in regard to this playing hooky incident. What about the failing mark he received in school? What is the story on that? Did he receive a failing mark? Who was responsible for it? Did the young man take offence at it? If he did take offence, from your observations of the young man, taking into consideration all of these questions, was he biased and did that bias affect his testimony? Was it the motivating cause for his coming here and testifying as he did testify? Was he testifying as to what happened or what he says happened up there in the room that night truthfully and honestly, or was he testifying falsely because he had a gripe against the respondent in this case? That is one of the questions you may wish to ask yourselves when you retire to your jury room to deliberate on this case."

The justice's charge contained all the fundamental requisites as to the State's burden of proof beyond a reasonable doubt, the presumption of the respondent's innocence and so forth.

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

State v. Cox, 138 Me. 151; State v. McKracken, 141 Me. 194; State v. Bean, 146 Me. 328."

State v. *Whitehead* (1955), 151 Me. 135, 143.

"The - - - exception, therefore, has reference to the refusal of the presiding judge to give the - - - instruction requested by the defendant. But upon review of the charge, we are satisfied that while the language of this request was not adopted, its substance, so far as material to the issue was clearly embraced in the rulings given."

Foye v. *Southard* (1873), 64 Me. 389, 398.

"- - - The right of counsel to call for instructions in matters of law does not comprehend a right to have his arguments repeated and endorsed by the presiding Judge, but only to have the question upon which the jury are to pass, correctly presented to them - - - - -"

Hovey v. *Hobson* (1867), 55 Me. 256, 277.

"- - - - The instructions given are full and comprehensive upon the part of the case to which the exceptions relate. They gave the jury clearly to understand that it was their duty to weigh all the evidence and give the defendant the benefit of all reasonable doubt; no further or more explicit instruction was required. The defendant had no right to have an instruction given in such phraseology as he saw fit to ask, provided sufficient instruction was given, touching the matter requested, to clearly lay before the jury their duty in the premises. - - -"

State v. *Williams* (1884), 76 Me. 480, 481.

The instructions of the presiding justice were conscientious, fair and fulsome and, as for the requested but declined statement, "so far as material to the issue it was clearly embraced in the rulings given." *Foye* v. *Southard, supra.*

APPEAL.

Respondent complains that the justice did not define the word "relationship" for the jury. We cannot concede that his failure so to expatiate upon that commonplace term could have resulted in any real void. The law is, therefore, clear.

> "- - - - Yet an attorney has a duty in connection with such trials and ordinarily he cannot take advantage of such an omission unless before the jury retires he calls the attention of the Court to it. He cannot sit by, remain silent, and secure an advantage, when as an officer of the Court, he should call the Court's attention to such omission.
>
> 'If either party thinks any material matter has been misstated, or over-stated, *or omitted,* he should ask for proper corrections before the jury are finally sent out. He ought not to be silent then, when corrections can be made, and complain afterwards, when corrections cannot be made.' Murchie v. Gates, 78 Me., 300, 306, 4 A., 691, 701 (Italics ours)."
>
> *State* v. *Smith* (1944), 140 Me. 225, 284.

Compare, also, Rule of Court 18, 147 Me. 471.

The appeal must be dismissed. *State* v. *Smith, supra,* aptly states our conclusions:

> "- - - - On the appeal the only question before us is whether in view of all the testimony the jury was warranted in believing beyond a reasonable doubt that the respondent was guilty. - - - A careful and painstaking study of the record convinces us that the jury was so warranted."
>
> *State* v. *Smith,* 140 Me. 286.

The mandate must be:

Exceptions overruled.
Appeal dismissed.
Judgment for the State.

PAUL N. DWYER, PETR.
vs.
STATE OF MAINE

Oxford. Opinion, September 22, 1958.

Coram Nobis. Evidence. Witnesses. Corroboration. Previous Statements.

The proper object of the rules of evidence is truth and its establishment with due acknowledgment and satisfaction of the rights of the parties. Unless the rules are adapted to those ends, they fail of their purpose and become rote.

A transcript of the previous testimony of petitioner's deceased attorney as a State's witness against one Carroll is admissible in evidence against the State in *coram nobis* proceedings, even though privity in a legal sense is lacking since the very issues now raised for resolution preempts any just claim of the State now to oppose the admission of such evidence because of any lack of opportunity to examine or cross-examine.

One cannot complain that he has not had the opportunity for cross-examination where the transcript of former testimony was that of his *own* witness and he has had the substantial equivalent.

The permissive corroboration of a witness by his previous consistent statements is not ordinarily permissible but there is an exception where the testimony is given (1) under a bias or (2) under influence arising from some late occurrence subsequent to the main event or (3) is a recent contrivance or (4) that the facts described in the previous testimony have been concealed under conditions which warrant the belief that, if they were true, the witness would have been likely to have revealed them.

ON EXCEPTIONS.

This is application for a Writ of Error *Coram Nobis* before the Law Court upon exceptions to the denial thereof. Exceptions sustained.

Merton E. Rawson, for plaintiff.

Frank F. Harding,
Roger A. Putnam, for defendant.

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

SULLIVAN, J. On December 2, A. D. 1937 the petitioner, then on trial for the murder of Dr. James G. Littlefield, retracted his recorded plea of not guilty, pleaded guilty and was adjudged guilty. He was sentenced to life imprisonment and has been continuously confined in execution of that sentence.

On April 8, A.D. 1957 the petitioner sought a writ of error *coram nobis* and in May, 1957 such a writ was issued. He alleged that his plea of guilty had been wrung from him by the duress and intimidation of Francis M. Carroll, a deputy sheriff, that legal counsel assigned to him by court appointment for his murder trial had been incompetent and that during his detention and trial he had been held incommunicado in derogation of his constitutional rights. A hearing before a justice has been had upon the writ and the petitioner then offered testimony which at the objection of the State was excluded. The petitioner excepted to such a ruling and now after a decision upon the writ affirming the court judgment of December 2, A.D. 1937 prosecutes his exceptions.

After the conviction of the petitioner in 1937, Francis M. Carroll, the deputy sheriff accused by the petitioner of having terrorized and quite reduced the latter to a status of automaton, was in 1938 indicted, tried and convicted of the murder of the same Dr. James G. Littlefield. At the trial of *State* v. *Carroll,* E. Walker Abbott, an attorney who had represented the petitioner in his trial for Littlefield's murder in 1937, was called by the State as its witness. Abbott died in March, 1953 long prior to the hearing in the present controversy. A transcript of his testimony on direct and cross-examination in the Carroll trial was the evidence offered by the petitioner at his hearing on the writ of error

coram nobis and excluded by the court. The content of Abbott's testimony was such as to make it, if admissible, rationally pertinent to all three of the petitioner's charges in the instant case. Before the offer of such evidence the petitioner in this proceeding had testified extensively in support of his charges. He had been cross-examined and much testimony, documentary and real evidence of contradictory and impeaching potential had been introduced by the State. The testimony of Abbott was offered by the petitioner as proper to his position that the issues of coercion of Dwyer by Carroll and of the isolation of Dwyer were waged alike both in the trial of *State* v. *Dwyer* and in that of *State* v. *Carroll.* The Abbott testimony was opposed by the State for the stated reasons that neither the parties nor the issues were the same in the trials of *State* v. *Dwyer* and *State* v. *Carroll.* Before ruling the justice admitted the record of all the evidence in the case of *State* v. *Carroll* on behalf of the petitioner here for the strictly contained purpose of ascertaining the veritable issues entertained in the Carroll trial. The court thereafter upheld the State's objection and excluded Abbott's testimony.

The record reveals that quite at the outset of the trial of *State* v. *Carroll* the State called the present petitioner as its witness. Dwyer at the very time stood convicted of the murder of Dr. James G. Littlefield by a judgment of record in the very tribunal which was then trying Carroll for the same crime. It has never been doubted or disputed that the court had jurisdiction of the respondent and of the crime in the cast of *State* v. *Dwyer.* Yet, at the Carroll trial the State attorney conducting the prosecution, with little ado and summarily, asked the following abrupt questions and, without interference, elicited the following responses:

"Q. Your name is Paul N. Dwyer?

A. Yes, sir.

Q. You are now an inmate of the State of Maine Prison at Thomaston?
A. Yes, sir.

Q. Did you murder (sic) Dr. Littlefield?
A. No, sir, I did not.

Q. Did you see him murdered (sic)?
A. Yes, sir.

Q. Do you know who murdered (sic) him?
A. Yes, sir.

Q. Who did?
A. Francis Carroll.

Q. The respondent at the bar here?
A. Yes, sir."

Prescinding from the form of certain of the foregoing interrogatories and from the propriety of a collateral attack upon an abiding judgment of that same court we may say that the record of the Carroll trial conclusively demonstrates that issues injected by the State and persistently entertained by the court were the innocence or guilt of Dwyer, the duress or spontaneity of his guilty plea made at his own trial some nine months before and the undue sequestration of Dwyer after his arrest. The State assumed and appropriated the dual burden of exculpating Dwyer for the nonce while convicting Carroll and the former effort was logically and correlatively necessary to the latter because of the extraordinary nature of the trial. The testimony of Abbott supplied by the State at the Carroll trial related to avowed coercion and duress by Carroll upon Dwyer from the killing of Dr. Littlefield to the pleading of Dwyer, to the asserted isolation of Dwyer pending trial and to a professed consistency of statements by Dwyer as to his domination by Carroll to the time of Dwyer's plea. There can be no doubt that the foregoing issues tolerated in the

Carroll trial are the matters now in controversy in the case at bar.

The parties arrayed against each other in the current hearing of *Dwyer* v. *State* and those of the trial of *State* v. *Carroll* are not the same. Nothing could be more obvious. Nor was there any privity in the legal sense between Carroll and Dwyer. However, the State was and is a party in both cases. The State presented E. Walker Abbott as its witness in the Carroll trial and was accorded and exercised a plenary function of direct examination. The State regarded the demonstration of a complete mental ascendancy by Carroll over Dwyer and the impugning of the previously adjudicated guilt of Dwyer as necessary premises to be proved as part of its case against Carroll. We are concerned here with the rules of evidence. The proper object of such a science is truth and its establishment with due acknowledgment and satisfaction of the rights of all parties. Unless the rules are adapted to those ends they fail of their purpose and become rote. The transcript of the testimony given at the Carroll trial by the deceased E. Walker Abbott at the behest of the State was offered by this petitioner in this case. In so far as the fair quest of truth is the objective, the exercise by the State in the *Carroll* case of its rights of direct examination of Abbott upon the very issues now raised for resolution in this case preempts any just claim of the State now to oppose the admission of such evidence because of any lack of opportunity to examine or cross-examine. The petitioner does not protest the unavailability of cross-examination and the State cannot with justification contend that it is at all prejudiced. Although the parties in the case at bar and in the *Carroll* case are not identical such a difference does not affect the admissibility of the evidence under discussion.

> "- - - - If the party against whom the evidence is offered, examined the witness on the former trial,

it is immaterial whether the examination was direct or cross-examination."

31 *Corpus Juris Secundum,* Evidence, § 390, P. 1197.

"Since defendant examined the witness on the (former) trial, it is immaterial whether it was direct or cross, so far as this question is concerned."

Louisville & N. R. Co. v. *Scott* (1935), (Ala.), 167 So. 572, 576.

Wigmore on Evidence, 3rd ed., Volume V, § 1389, P. 105, rationalizes the topic thus:

"Finally, the whole notion of cross-examination refers to one's right to probe the statements of an opponent's witness, *not one's own witness;* thus, if A has taken X's deposition or called X to the stand, and B has cross-examined, it is not for A to object that he has not had the benefit of cross-examination; *that benefit was not for him nor needed by him;* it was intended only to protect against an opponent's witness, who would be otherwise unexamined by A; and *if A has had the benefit of examining a witness called on his own behalf, he has had all that he needs,* and the right to probe by cross-examination is B's, not A's." (Emphasis supplied.)

The Wisconsin Court in construing its statute upon this subject held that, not only by reason of the statute, but "as well as under well recognized principles" the following is the correct doctrine:

"- - - - Though such statute provides that in certain situations the testimony of a deceased witness or one absent from the state may be admitted in retrials or subsequent proceedings where the issue is substantially the same and where the party against whom it is offered shall have had an opportunity to cross-examine, yet here the present offer is as against those who, when the depositions

were taken, *had the opportunity of direct examination — a substantial equivalent.*" (Emphasis supplied.)

Roberts v. *Gerber* (1925), 187 Wis. 282, 290; 202 N. W. 701, 704.

State v. *Brinkley* (1945), (Mo.), 189 S. W. (2nd) 314 was a prosecution for perjury. The respondent on his trial offered in evidence a deposition of an absent witness, taken by the respondents in a manslaughter case in which the respondent, Brinkley, had not been a party but upon an issue presenting the same questions of fact upon the same evidence in both the manslaughter and perjury cases. The State had been afforded the opportunity to cross-examine the deponent. The deposition was ruled admissible. The court said:

P. 329.

"The conclusion reached in this Brown case (State v. Brown, 331 Mo. 556, 559, 56 S. W. 2d 405, 407) was that 'precise nominal identity of all the parties' and 'precise technical identity of the charge' are unnecessary; but that the issue—the offense charged—must be substantially the same in both cases, so that the challenged testimony is admissible in both; the testimony must have been under oath; and the adverse party must have had an opportunity to cross-examine."

Nor is the generality of a principle of *State* v. *Budge* (1928), 127 Me. 234, 240, impinged by our conclusions here. Attendant factors in this case were absent in *State* v. *Budge* and their presence here dissipate the mischiefs which necessitated the application of the normal rule in *State* v. *Budge* requiring an identity of parties in both the case where testimony of a witness later deceased was taken and in any other where it is sought to be used.

Because of our conclusions founded upon the foregoing facts, reasoning and authorities we hold that the presiding

justice in this case, in a complex cause beset with perplexing difficulties not hitherto fully resolved in this jurisdiction erred in the reasons recited by him to vindicate his exclusion of the Abbott testimony. The error was one of law. *Edgeley* v. *Appleyard* (1913), 110 Me. 337, 339; *Chase* v. *Springvale Mills Co.* (1883), 75 Me. 156, 160.

The rejected testimony contained unlike components. A part was supplied from the witness's personal observation and experience. Abbott related that the respondent, Carroll, during Abbott's interview with Dwyer concerning Dwyer's imminent guilty plea hovered as guard about Dwyer. Abbott in response to the inquiry of the justice presiding at the Carroll trial conceded to the latter that he, Abbott, attorney for Dwyer at Dwyer's trial, did not inform the justice presiding at Dwyer's trial of Dwyer's voiced motivation to plead guilty because of Carroll's threats. Such evidence was at least germane to Dwyer's current claims of having been inordinately restricted and of having been afforded incompetent counsel.

A portion of Abbott's unaccepted testimony constituted a repetition by Abbott of communications which, he swore, had been made to him in his office of trial counsel at Dwyer's trial and before plea, by Dwyer expressing Dwyer's determination to plead guilty and which essayed to afford a consistency to Dwyer's insistence upon the abject fear to which Carroll had subjected him from the time of Dr. Littlefield's violent death to Dwyer's plea. In the instant case it is Dwyer's contention that he was never guilty of the crime which he acknowledged and that his plea was not in fact voluntary. Contradictory statements and cross-examination have challenged his direct testimony here. These communications to Abbott are purported consistent statements of Dwyer whose credibility has been attacked by evidence that he has made several statements inconsistent with his testimony in this case.

There are few subjects in the law of evidence more difficult of analysis, comprehension or reconciliation than that of permissive corroboration of a witness by his consistent statements. Annotation, 140 A. L. R., pp. 21 to 186. Our own court has decided several cases involving the topic.

In *Ware* v. *Ware* (1831), 8 Me. 42, 55, we find:

> "- - - The authorities cited clearly establish the principle that an impeached or contradicted witness cannot be supported by the party who called him, by proof of his declarations made at other times and to other persons, coinciding with his testimony. Such being the case, we do not in the present instance, *see any reasons for considering it as removed from the influence of the general principle.* Indeed it would seem objectionable on another ground, namely, that such declarations were mere expressions of the opinions of those witnesses as medical men; all which kind of evidence was excluded on the trial when offered to prove insanity, excepting the opinions of the subscribing witnesses to the will as before mentioned." (Italics supplied.)

Scott v. *Blood* (1839), 16 Me. 192, was a case concerned with proof of partnership declarations and admissions of a person acting as partner to prove the partnership. At page 198, the court said by way of dictum:

> "We think a more correct view of this subject was taken by this Court, in the case of Ware v. Ware, 8 Greenl. 42, - - - and the Court considered the principle clearly established, that an impeached or contradicted witness cannot be supported by the party who called him, by proof of his declarations made at other times, and to other parties, coinciding with his testimony."

In *Smith* v. *Morgan* (1853), 38 Me. 468, 471, it is said:

> "The disclosure of Hyde was offered by the plaintiff, to prove what Hyde did say concerning the note, at

> the time of the disclosure, and all he said about it, but it was held inadmissible. The only effect, which this disclosure could have had, so far as we can perceive, was to corroborate the testimony of Hyde given in his deposition. The only corroboration which it would afford was, that on a former occasion he made statements, not inconsistent with those made in his deposition and by the plaintiff in this case. On no principle is such evidence for such a purpose admissible."

State v. *Reed* (1874), 62 Me. 129 was the third trial of the same murder indictment. This court considered the testimony of 2 witnesses for the State at the last trial of the cause.

P. 131.

> "At the former trials Mrs. Ray had denied all knowledge of how her husband had come to his death, but she was now called as a witness by the prosecution, and stated that the prisoner came to her door in the evening of the twentieth of September, 1870, and said to her, 'I have committed a horrible deed to-night;' and, on her asking what he had done, said he had got into a fight with her husband, and had killed him; and that if she told, the body would be put where it would cause the murder to be laid to her; that he was driving their cow out of his field, when he met Ray coming after her, upon the flat down under the hill; that they had some words, and then got into a smart fight, and he (Reed) struck him (Ray) with a club, and killed him.
>
> "The defence introduced her testimony given at the first trial, when she swore to her husband's passing Tuesday night (the twentieth) in the house, and her knowing nothing of him after he went out early Wednesday morning, the twenty-first day of September, 1870. The government recalled her, and against the objection of the defendant, she was allowed to explain her conduct by saying that she was afraid to testify to the truth at the first trial,

and was advised not to do so by a gentleman then acting as counsel for Reed; the State's attorney also proposed to show the advice given and a threat that, if she stated the truth, Reed would turn State's evidence against her; and that she was persuaded to go blueberrying at the time of the second trial, so as to avoid being summoned by the State; but the court would not admit this testimony. Another witness, a boy who testified to seeing Reed down on the shore, under the bank opposite Ray's house, on the Tuesday night that Ray disappeared, was contradicted by the minutes of his statement at the first trial, that it was another night; he was allowed to explain by saying that the prisoner's sister told him that he did not see Eldridge (the respondent) down there that night, and if he said he did, she would get right up and stave his story all to pieces.

P. 146.

"VII. It is objected that Mrs. Ray and John R. Boynton were permitted 'to testify what their reasons were for committing perjury on a former trial of the prisoner.' It seems that for the purpose of impeaching these two witnesses, the defence had put in their testimony given on a former trial of the respondent, which was somewhat contradictory to that now given. To meet this phase of the case, the witnesses were permitted to explain the circumstances under which their former testimony was given. A statement contradictory to that given by the witness upon the stand, may of course be shown as impeaching testimony. But its force must depend very materially upon the circumstances under which it was made, and the influences at the time bearing upon the witness. It would therefore seem to be self-evident that witnesses so situated, should be permitted to make such explanation as might be in their power. The first impulse of the mind in such case, is to inquire how this happened; what reason can be given, and more especially what can the party implicated say in excuse or extenuation. To refuse

the opportunity to explain, would be in effect to condemn a party without a hearing, and without that information, which in many cases, would be material to a correct judgment. So clear is this proposition that we do not find any case in which the question seems to have been raised, but many in which it is assumed as an undeniable proposition. 1 Greenl. on Ev., § 462; Commonwealth v. Hawkins, 3 Gray, 465; Gould v. Norfolk Lead Co., 9 Cuah., 347.

"VIII. Mrs. Ray was permitted to testify that she told the counsel for the prisoner that she 'had no hand in the deed; no hand in the act of killing;' subject to objection. This as the case shows, was a part of the explanation referred to under the last objection, and as such, was clearly admissible. It is true, a part of this explanation was excluded, which if admitted, as it should have been, would have rendered the whole more intelligible and useful for the purpose intended. But as the part was excluded in consequence of the persistent objection of respondent's counsel, it gives him no cause of complaint.

"Upon another ground, independent of its connection with the explanation, it is admissible. The testimony now objected to, is an affirmation of that given upon the stand at this trial. After the attempt to impeach her, on re-examination she gives the answer objected to, showing that at or about the time of the homicide her statement as to her own participation in the affair, was the same as at the trial. This brings it within the decision in Commonwealth v. Wilson, 1 Gray, 340."

State v. *Reed* in the same year was followed by *Powers* v. *Cary* (1874), 64 Me. 9, containing this pronouncement:

P. 18.

"VII. The plaintiff introduced the declarations of Annie G. Cornelison, contradicting what was stated in her affidavit, and that she did not know what was contained therein.

"The defendant offered to prove her declarations at the time in accordance with her affidavit, and that the affidavit was read to her and assented to by her as true. The evidence was excluded.

"It is well settled that a witness who is impeached cannot be corroborated by proof that at other times he has made statements in accordance with his present testimony. The discredit arising from contradictory statements still remains. Com. v. Jenkins, 10 Gray, 485."

We shall take occasion hereinafter to advert to *Com.* v. *Jenkins,* cited in *Powers* v. *Cary.*

Sidelinger v. *Bucklin* (1875), 64 Me. 371 was a bastardy action in which the complainant's mother was permitted to testify that the complainant told her in May who was the child's father. The complaint was formally made in June. The mother was asked: "Since the making of her accusation in writing, whom has she accused of being the father of the child?" and was permitted to answer: "Moses R. Bucklin." The witness then told that her daughter had always accused the respondent of being the father of the child, whenever she discussed the subject with her. The court decided:

P. 372.

"- - - Such declarations are not admissible to prove that 'she has continued constant in such accusation' as they have no tendency to do so. They are entirely consistent with any number of different accusations.

"Nor are they competent to sustain her credibility as a witness, the purpose for which they seem to have been used; for if her statements under oath are of doubtful credit, they would be no less so without that sanction. Nor could they be strengthened by any number of repetitions. 1 Greenl. on Ev., § 469, and cases cited in the note to that section.

> "Nothing appears in the case *to make them an exception to the general rule* excluding declarations of parties in their own behalf, or of witnesses generally, made out of court." (Italics supplied.)

We call attention to the words in the last paragraph above, "nothing appears in the case to make them *an exception to the general rule.*"

Hurd v. Fire Insurance Co. (1942), 139 Me. 103, was an action to recover on a policy. We quote from Page 117 of the opinion:

> "The letter Campbell (agent of defendant) wrote to the defendant and enclosed with the application, unknown to the plaintiff, and questions asked Campbell with reference thereto, were properly excluded. Letters written by a contradicted witness to his employer, unknown to the other interested party, and offered in evidence by the employer who called the witness to testify, are not admissible although they coincide with the testimony of the witness at the trial. Pulsifer v. Crowell, 63 Me., 22.
>
> "In such circumstances, the contents of the letters are but the declarations of the witness himself, and are inadmissible to bolster up his own testimony. They are entitled to no greater respect than his oral declarations to others at other times and places, which are clearly inadmissible. Ware v. Ware, 8 Me., 42; Scott v. Blood, 16 Me., 192, 198; Powers v. Carey, 64 Me., 9, 19."

Pulsifer v. *Crowell,* cited by the court in *Hurd* v. *Fire Ins. Co.,* above, was decided upon the holding that the evidence rejected was *res inter alios acta* and the language as to the inadmissibility of a witness' own statements in corroboration of his testimony was dictum. The other authorities cited in the *Hurd* case we have reviewed and will consider further.

In *State* v. *Reed, supra,* two of the State witnesses were allowed upon redirect examination, after their cross-examination had quite clearly discovered former contradictory statements by each witness, "to testify what their reasons were for committing perjury on a former trial of the prisoner." "The witnesses were permitted to explain the circumstances under which their former testimony was given." One witness "was allowed to explain her conduct by saying that she was afraid to testify to the truth at the first trial, and was advised not to do so by a gentleman then acting as counsel for Reed." The other witness was "allowed to explain by saying that the prisoner's sister told him that he did not see Eldridge (respondent) down there that night, and if he said he did, she would get right up and stave his story all to pieces."

In the instant case Dwyer testified that he was innocent. He was confronted on cross-examination as well as by other independent evidence, with contradictory statements made by him. By the Abbott testimony he seeks to prove that, within a few weeks of the homicide and before his guilty plea, he told his counsel of his fear of Carroll and of his compulsion to plead because of it alone. Dwyer was permitted the opportunity to explain his contradictory statements as were the witnesses in *State* v. *Reed* and further seeks to utilize the testimony of Abbott in corroboration.

Powers v. *Cary, supra,* decided in the same year (1874), as *State* v. *Reed* and holding that a witness who is impeached cannot be corroborated by proof that at other times he has made statements in accordance with his present direct testimony cites *Commonwealth* v. *Jenkins,* 10 Gray, 485. In that often quoted and cited Massachusetts case the prosecution sought to corroborate the direct testimony of its witness who upon a preliminary examination in the police court had given testimony at variance with his direct testimony at the trial on the indictment and had been cross-

examined about it. The State offered earlier statements of the witness to third persons concerning the transactions he had testified about in direct examination. The court opinion excludes the corroborative statements but then proceeds to advise:

P. 489.

> "The decision of the point raised in this case is not to be understood as conflicting with a class of cases, in which a witness is sought to be impeached, by cross-examination or by independent evidence, tending to show that at the time of giving his evidence he is under a strong bias or in such a situation as to put him under a sort of moral duress to testify in a particular way. In such case, it is competent to rebut this ground of impeachment and to support the credit of the witnesses (sic) by showing that, when he was under no such bias, or when he was free from any influence or pressure, he made statements similar to those which he has given at the trial. Another similar class of decisions, resting on a like principle, is also to be distinguished from the case at bar, namely, when an attempt is made to impeach the credit of a witness by showing that he formerly withheld or concealed the facts to which he has now testified. In such cases, it is competent to show that the witness, at an early day, as soon as a disclosure could reasonably have been made, did declare the facts to which he has testified. Such in substance was the case of Commonwealth v. Wilson, 1 Gray, 340. The statement in the exceptions, of the circumstances under which the evidence objected to in this case was admitted, carefully excludes all facts which would bring it within either of the above classes of decisions."

In *Sidelinger* v. *Bucklin, supra,* our court in excluding the testimony offered said:

> "Nothing appears in the case *to make them an exception to the general rule* excluding declarations of parties in their own behalf, or of witnesses generally, made out of court." (Emphasis supplied.)

Commonwealth v. *Retkovitz* (1915), 222 Mass. 245:

P. 249.

"The mere fact that a witness has made statements on other occasions at variance with testimony given in court does not warrant the introducing of confirmatory evidence to the effect that he has given an account of the transaction at still other times in harmony with his sworn testimony. A party may, for the purpose of discrediting an opponent's witness, show that he has given two inconsistent narrations of the same affair, one of which was necessarily untrue. As is pointed out with clearness by Bigelow, J., in Commonwealth v. Jenkins, 10 Gray, 485, 488, when this is the state of the evidence it by no means relieves the witness of the distrust thus cast upon him to prove that the story last told was similar to an earlier version given by the witness. The two inconsistent statements still remain. Hence, under these circumstances, such corroborating evidence is inadmissible. *This is the general rule.* But there is an *exception where the contention is made that the testimony of a witness is given under a bias or under influence arising from some late occurrence subsequent to the main event, is a recent contrivance or that the facts described in testimony previously have been concealed under conditions which warrant the belief that, if they were true, the witness would have been likely to have revealed them.* In such a situation, evidence that the witness at earlier times before the intervention of these pernicious impulses had made statements like those given in court has a legitimate tendency to impugn the existence of these factors as operating causes to produce the testimony and thus to fortify his testimony, and therefore should be admitted. The exception to the general rule is a narrow one and is not to be extended; but, when the contentions of the parties give rise to its application, it is well established. Griffin v. Boston, 188 Mass. 475. Brown v. Brown, 208 Mass. 290. See for a full discussion of all the principles, Com-

monwealth v. Tucker, 189 Mass. 457, 479 to 485." (Emphasis supplied.)

Wilson v. *Jeffrey* (1951), 328 Mass. 192, states the rule as to such evidence and the exceptions as follows:

P. 194.

"- - - The general rule with certain exceptions is well established that a witness whose testimony is contradicted is not entitled to bolster up his testimony and enhance his credibility by showing that he had previously made statements consistent with his testimony. Deshon v. Merchants' Ins. Co., 11 Met. 199, 209. McDonald v. New York Central & Hudson River Railroad, 186, Mass. 474, 478. Commonwealth v. Tucker, 189 Mass. 457, 479-485. The exceptions to the rule were stated in Walsh v. Wyman Lunch Co. 244 Mass. 407, 409, as follows: 'where it is claimed that the testimony is a recent invention or fabrication, or was given under bias or undue influence, or that the facts described in the previous testimony have been concealed under conditions which warrant the belief that, if true, the witness would have stated them.' Commonwealth v. Jenkins, 10 Gray, 485, 488. Griffin v. Boston, 188 Mass. 475. Smith v. Plant, 216 Mass. 91, 102-103. Ananian v. Melkon, 230 Mass. 322, 326. Commonwealth v. Corcoran, 252 Mass. 465, 487. Kelley v. Boston, 296 Mass, 463, 465."

There is a division of authority generally but the weight of authority supports the *general* rule of exclusion. 140 A. L. R. 49 and cases cited.

As to the *exceptions* to the general rule:

"When a witness has been impeached by an earnest and sustained attack upon his credibility, tending to show that his testimony is a fabrication of recent date, or is colored, distorted, and falsified through the influence of some strong personal motive, interest in the litigation, or relation to the litigant, it is now nowhere seriously disputed but

> that such witness may be corroborated by rebutting evidence of his statements consonant in substance with his testimony, made on occasions so near to the event involved, and so long anterior to the litigation, that the effect of his speech could not have been foreseen, when his remarks were made at times clearly anterior to the existence of the compromising bias alleged to impair his credibility." 140 A. L. R. 184.

In the instant case some of the principal evidence for the contradiction of the petitioner was offered by the State and admitted by the court upon the State's theory that such evidence, if given credence, would impeach the credibility of Dwyer, would be inconsistent with his testimony, would be consistent with his guilty plea and negate coercion and would manifest a "pattern of conduct on the part of the petitioner from the time he was arrested until he pleaded guilty in this court room." The conditions, happenings and transactions of which Dwyer testifies here occurred, if at all, some score of years ago. He contends that, in spite of contradictory statements made by him and of compromising acts done by him, years ago, his present representations are not afterthoughts or recent contrivances but that from the time of the homicide and for some weeks thereafter until his plea of guilty he was continuously victimized by Carroll and reacted resourcelessly to that enthrallment yet protested his innocence at given opportunities. Evidence is to be found in the record of this case to the effect that initially upon his apprehension in New Jersey Dwyer told the police he was not guilty and later voiced his apprehension at flying back to Maine in a 'plane with Carroll. Dwyer was 18 years old at that time. The testimony of Dwyer and of the witnesses, Aldrich, Verrill and Burns, upon the record tells of Dwyer's protestations of innocence and of fear before and immediately after the guilty plea. The Abbott testimony in part would seem to qualify as an exception to the general rule to the end of demonstrating, if it does,

that before his final plea Dwyer, consistently with his present position, asserted his innocence and plight to his trial counsel. We are confined and restricted to a consideration of the admissibility of the evidence. We conclude that it is admissible.

We express no opinion and have striven to give occasion for no intentional implication as to the weight or credibility or trustworthiness of the evidence which was excluded or of any of the evidence. Such appraisals and evaluation are for the trier of facts.

Exceptions sustained.

STATE OF MAINE
vs.
JOSEPH JUTRAS

Cumberland. Opinion, September 22, 1958.

Criminal Law. Witnesses. Credibility. Interest. Cross-Examination. Larceny. Ownership.

While the matter of the scope of cross-examination is ordinarily a matter of discretion for the presiding justice, it is error to limit the cross-examination of a witness to the inquiry whether the witness was *convicted* of crime since being detained or charged with the crime under consideration or even some other offense might indicate that his testimony is affected by fear or bias.

While the mere charge of a crime disconnected with the subject matter under investigation does not affect the credibility of a witness, the fact that the witness knows himself to be officially accused of the crime which his evidence tends to fasten upon another person cannot be overlooked in considering whether he is free from every influence that might lead to falsehood.

Every fact or circumstance tending to show the jury the witness' relation to the case or the parties is admissible to the end of determining the weight to be given to his evidence.

It is the essence of a fair trial to place a witness in his proper setting and reasonable latitude should be given the examiner even though he is unable to state to the court what facts might develop. Cross-examination is necessarily exploratory.

R. S., 1954, Chap. 113, Sec. 114 provides that the interest of a person may be shown to affect his credibility.

Proof of bailment is evidence of ownership under R. S., Chap. 145, Sec. 12.

ON EXCEPTIONS.

This is a criminal action before the Law Court upon exceptions to the exclusion of testimony. Exceptions sustained.

Arthur Chapman,
Clement Richardson, for plaintiff.

Theodore Barris,
Douglas P. MacVane, for defendant.

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

SULLIVAN, J. The respondent was tried before a jury upon a complaint charging him with the buying and receiving of stolen property of a value less than $100. R. S. (1954), c. 132, § 11. During the trial the respondent excepted to the exclusion of some testimony and to an instruction by the court. The verdict was guilty and the respondent prosecutes his exceptions.

The State called as a witness one of the purloiners of the chattel who testified as to the theft of the article from Mid-Central Fish Company and as to the sale of the property to the respondent who had been advised before purchase, according to the witness, that the object had been stolen.

We reproduce the significant portion of the cross-examination of that witness:

"Q. Were you charged with breaking and entering into the Mid-Central fish?

(State's counsel) "I object.

"The Court: He has already testified to his convictions.

(Defense counsel) "I am asking, Your Honor, whether or not he was charged with breaking and entering the Mid-Central Fish.

(State's counsel) "I object.

"The Court: Excluded.

"Q. Were you charged with larceny of this particular torch?

(State's counsel) "I object.

"The Court: Excluded.

(Defense counsel) "May I have an exception please?

"The Court: May I talk with the counsel?"

"(Bench Conference)

"The Court: I will instruct the jury that this reference to charges is improper. The only thing that can be considered, as the Court told you the other day, would be records of convictions and then only with reference to credibility."

In *State* v. *Turner* (1927), 126 Me. 376, 377, this court held:

"- - - In order to avail himself of the right to have his objections to the exclusion or admission of evidence reviewed by this court, the party whose objections have been overruled at nisi prius must state, for the record, the grounds for his objection. McKown v. Powers, 86 Me. 296 - - - - -"

From the portion of the record of the cross-examination quoted above it will be noted that defense counsel for the court's reflection distinguished his questioning about a charge from an interrogatory concerning a conviction. The colloquy was broken by the "Bench Conference." We are deprived of any further interlocution. The bench conference was proposed by the court without solicitation from defense counsel. Forthwith after the muffled parley came the ruling that the references to charges were improper and that records of convictions and those only with reference to credibility could be considered by the jury. The ruling as stated verbatim above following, as it did, defense counsel's distinction would imply that during the bench conference the topic of charges had been entertained and rejected to the exclusion of all inquiries save as to convictions. In strict propriety defense counsel should have thereupon formally injected the specific grounds of his objection into the record. But we are satisfied that the respondent because of the special circumstances is in fairness entitled to urge his exception and that the court yielded to a like conviction in allowing the exception.

R. S. (1954), c. 113, § 114 reads as follows:

> "No person is excused or excluded from testifying in any civil suit or proceeding at law or in equity by reason of his interest in the event thereof as party or otherwise, except as hereinafter provided, *but such interest may be shown to affect his credibility,* and the husband or wife or either party may be a witness." (Italics supplied.)

In *State* v. *Curcio* (1957), 23 N. J. 521, 129 A. (2nd) 871 the court quoted with approval from the earlier case of *State* v. *Spruill,* 16 N. J. 73, 78, 106 A. (2nd) 278, 281 (1954), as follows:

P. 873.

> " 'The basic question is one of interest. Interest is no longer a disqualification; but it is a circum-

stance that may be used to impeach the witness. The interest of a party or a witness in the event of the cause is a factor to be considered in assessing his credibility. At common law a witness was rendered incompetent to testify by reason of interest in the outcome of the action; and, while the incompetency has been removed the bias that such interest would occasion is still to be reckoned with in determining the probative force of the testimony. Every fact or circumstance tending to show the jury the witness' relation to the case or the parties is admissible to the end of determining the weight to be given to his evidence. Trinity County Lumber Co. v. Denham, 88 Tex. 203, 30 S. W. 856 (Sup. Ct. 1895); Wigmore on Evidence (3d ed.) sections 526, 966.' "

In *Page* v. *Hemingway Bros. Interstate Trucking Co.* (1955), 150 Me. 423, 427, this court said:

"Interest signifies the specific inclination which is apt to be produced by the relation between the witness and cause at issue in the litigation. Wigmore on Evidence, 3rd Ed. Vol. 111, Sec. 945.

"Any motive which the witness may have, the manner in which the witness testifies and the temptation he might have to color his testimony should be taken into consideration by the jury. The jury has the right in both civil and criminal cases to consider the interest which the witness may have in the result of the litigation in which he is testifying. It is within the province of the jury to pass upon the weight of the testimony given by an interested witness. 58 Am. Jur. 495, Sec. 866.

"The interest of a witness, and its extent, may always be shown on cross-examination, and the limit of such inquiry is within the discretion of the court. Vermont Farm-Mach. Co. v. Batchelder, 35 A. 378 (Vt.).

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"Beyond showing that the ruling of the presiding justice was clearly erroneous and an abuse of dis-

cretion, defendant must also demonstrate that such ruling was prejudicial to it. Pitcher v. Webber, 104 Me. 401, 71 A. 103; State v. Ouellette, 107 Me. 92, 77 A. 544."

In Wigmore on Evidence, 3d ed., the author states:

§ 966.

"- - - There is no doubt that the interest of a party or of a witness in the event of the cause is a circumstance available to impeach him: - - - -"

§ 967.

"It bears against a witness' credibility that he is an accomplice in the crime charged and testifies for the prosecution; and the pendency of any indictment against the witness indicates indirectly a similar possibility of his currying favor by testifying for the State."

In a footnote (1) to the first clause of the above § 967, Professor Wigmore says:

"This is unquestioned; - - - - -"

In the instant case the witness under cross-examination was a self-confessed accomplice of the respondent in the full sense of that term.

State v. *Rosa* (1904), 71 N. J. L. 316, was a trial for murder and the following excerpts set forth the issue and the court ruling:

P. 318.

"One of the state's witnesses, named Conti, testified that while in the jail where the defendant was confined he overheard the latter telling two other prisoners that he, the defendant, had shot Benedetto and Demetrio. On cross-examination of this witness by Mr. Stagg, the defendant's counsel, the record presents the following:

"Q. You were arrested at the same time that Jerry was arrested, were you not, on this charge?

"The Court—What has that got to do with it, Mr. Stagg?

"Mr. Stagg—The question was asked in the other case.

"The Court—A charge of crime does not affect the credibility of the witness. There is no law for it and no common sense for it; the fact that he has been accused of crime does not affect his credibility.

"Mr. Stagg—He is charged with the same crime, and it seems to me that it affects his credibility.

"The Court—You might accuse him of this crime, but that does not affect his credibility in any proper sense and ought not to be taken into consideration in showing how he came to be in jail.

"To which ruling of the court the defendant's counsel prays an exception, - - - - -"

P. 319.

"We think this exception was well taken. It appears by the record that Conti was confined in the county jail for some undisclosed reason from the day after the shooting until his examination at this trial, and if in answering the question above quoted he had admitted that he had been arrested on a charge of the very crime for which the defendant was being tried, a motive might have been found for his fabrication of testimony to convict the defendant and thus to exonerate himself. While, of course, a mere charge of crime, disconnected with the subject under investigation, does not affect the credibility of a witness, the fact that a witness knows himself to be officially accused of the crime which his evidence tends to fasten upon another person cannot be overlooked in considering whether he is free from every influence that might lead to falsehood. The conviction of this defendant for a murder perpetrated by a single shot would be likely to end all search for the murderer, while his acquittal might revive and stimulate investigation of other

suspected persons, and the defendant had the legal right to put in evidence the grounds on which it could be argued before the jury that this thought in the mind of the witness impaired his credibility.

"The reason for allowing the question was sufficiently, although in general terms, presented by counsel, and its exclusion was injurious to the defendant upon the merits of the case."

In *Alford* v. *U. S.* (1930), 282 U. S. 687, the petitioner had been convicted of using the mails to defraud. A witness had testified against him. The witness was serving a federal sentence. On cross-examination questions seeking to elicit the witness' place of residence were excluded on the government's objection that such inquiries were immaterial and not proper for cross-examination. The witness was the first one called by the government from whom it had not ascertained the address. The Supreme Court of the United States held:

P. 691.

"Cross-examination of a witness is a matter of right. The Ottawa, 3 Wall. 268, 271. Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood, cf. Khan v. Zemansky, 59 Cal. App. 324, 327 ff.; 3 Wigmore, Evidence (2d ed) § 1368 I. (1) (b); that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment, Kirschner v. State, 9 Wis. 140; Wilbur v. Flood, 16 Mich. 40; Hollingsworth v. State, 53 Ark. 387; People v. White, 251 Ill. 67, 72 ff.; Wallace v. State, 41 Fla. 547, 574 ff.; and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased. Tla - Koo - Yel - Lee v. United States, 167 U. S. 274; King v. United States, 112 Fed. 988; Farkas v. United States, 2 F. (2d) 644; see Furlong v. United States, 10 F. (2d) 492, 494.

"Counsel often can not know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general apply. Knapp v. Wing, 72 Vt. 334, 340; Martin v. Elden, 32 Ohio St. 282, 289. It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. Tla-Koo-Yel-Lee v. United States, supra; King v. United States, supra; People v. Moore, 96 App. Div. 56, affirmed without opinion, 181 N. Y. 524; cf. People v. Becker, 210 N. Y. 274. To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. Nailor v. Williams, 8 Wall. 107, 109; see People v. Stevenson, 103 Cal. App. 82; cf. Brasfield v. United States, 272 U. S. 448. In this respect a summary denial of the right of cross-examination is distinguishable from the erroneous admission of harmless testimony. Nailor v. Williams, supra."

P. 693.

"But counsel for the defense went further, and in the ensuing colloquy with the court urged, as an additional reason why the question should be allowed, not a substitute reason, as the court below assumed, that he was informed that the witness was then in court in custody of the federal authorities, and that that fact could be brought out on cross-examination to show whatever bias or prejudice the witness might have. The purpose obviously was not, as the trial court seemed to think, to discredit the witness by showing that he

was charged with crime, but to show by such facts as proper cross-examination might develop, that his testimony was biased because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution. King v. United States, supra; Farkas v. United States, supra, and cases cited; People v. Becker, supra; State v. Ritz, 65 Mont. 180, and cases cited on p. 188; Rex v. Watson, 32 How. St. Tr. 284. Nor is it material, as the Court of Appeals said whether the witness was in custody because of his participation in the transactions for which petitioner was indicted. Even if the witness were charged with some other offense by the prosecuting authorities, petitioner was entitled to show by cross-examination that his testimony was affected by fear or favor growing out of his detention. See Farkas v. United States, supra; People v. Dillwood, 39 Pac. (Cal.) 438.

"The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted. Storm v. United States, 94 U. S. 76, 85; Rea v. Missouri, 17 Wall. 532, 542-543; Blitz v. United States, 153 U. S. 308, 312. But no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self-incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him. Great Western Turnpike Co. v. Loomis, 32 N. Y. 127, 132; Wallace v. State, supra; 5 Jones, Evidence (2d ed.) § 2316. But no such case is presented here. The trial court cut off in limine all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-

examination. This was an abuse of discretion and prejudicial error. - - - -"

Compare, also, *People v. Dillwood* (1895), (Cal.), 39 Pac. 438, 439; *State* v. *Bailey* (1956), (Ore.), 300 P (2nd) 975; *State* v. *Curcio* (1957), 23 N. J. 521, 129 A. (2nd) 871.

We must conclude that the presiding justice in the instant case erred in excluding the testimony which is the subject of the respondent's exception and that the mistake was prejudicial.

In view of our decision there is no requirement that we entertain the companion exception but suffice it to say that a reading of R. S. (1954), c. 145, § 12 — the statute rendering proof of bailment sufficient evidence of ownership in this case — will demonstrate that the presiding justice was correct in his instruction to the jury.

Exceptions sustained.

ORRIS L. COUSINS
vs.
JAMES L. ENTWISTLE

Washington. Opinion, October 1, 1958.

Contracts. New Trial.

Where the issues are factual and no issues of law are presented a motion for new trial will be denied.

ON MOTION.

This is an action of assumpsit before the Law Court upon motion for new trial. Motion for new trial overruled.

Elbridge B. Davis, for plaintiff.

Garth J. Sprague, for defendant.

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

PER CURIAM.

This was a suit to collect unpaid wages claimed by the plaintiff for services as guide and as caretaker of the defendant's private hunting and fishing lodge. The issues were factual and of the type appropriately left to a jury. If there are issues of law, they have escaped the attention of both counsel and the court. The record discloses credible evidence of a contract, performed by the plaintiff and broken by the defendant. A Washington County jury has announced by its verdict that the plaintiff should be paid. So be it!

Motion for new trial overruled.

STATE OF MAINE
vs.
CARL SEABURG

Oxford. Opinion, October 7, 1958.

Criminal Law. Statutory Construction. Commercialized Vice.

R. S., 1954, Chap. 134, Sec. 13 is not limited to commercialized vice; neither is more than one isolated act necessary for conviction.

In construing a penal statute the court should first ascertain the legislative intent and the evil sought to be corrected, and secondly whether its intention is sufficiently expressed.

The rule of strict construction of penal statutes is subordinate to the rule of reasonable construction having in view legislative intent.

ON EXCEPTIONS.

This is a criminal action for the violation of R. S., 1954, Chap. 134, Sec. 12. The case is before the Law Court upon exceptions to the overruling of a demurrer. Rights to plead anew were reserved. Exceptions overruled. Respondent may plead anew.

David R. Hastings, for plaintiff.

Berman & Berman,
Dow & Dow, for defendant.

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

SULLIVAN, J. The respondent was indicted for alleged violations of R. S. (1954), c. 134, § 12. He demurred with accorded right to plead anew. His demurrer was overruled and he excepts.

The indictment contains eight counts encompassing, overall, accusations that the respondent had resided in, occupied and remained in, a certain house for the purpose of lewd-

ness, i.e., in the main, the taking of indecent liberties with male persons, and had engaged in such lewdness.

In support of his exceptions the respondent phrases his contentions in these words:

> "This indictment is bad because the acts alleged as being criminal were not intended by the Legislature to make criminal private acts of alleged lewdness. The purpose and intention of the Legislature was to protect the public health by the elimination of commercialized vice."

Respondent maintains that R. S. (1954), c. 134, § 12 was originally enacted as P. L., 1919, c. 112 with an emergency preamble which manifests that the statute was health legislation adopted as a war measure against commercialized vice. He cites *State* v. *Morin,* 126 Me. 136, which says:

> "In order to decrease the spread of so-called sexual diseases, Chapter 112 of the Public Laws of 1919 enacted that it should be unlawful for any person to permit any place, structure, building or conveyance owned by him or under his control to be used for the purpose of prostitution, lewdness or assignation with knowledge or reasonable cause to know that the same is, or is to be used for such purpose."

The defense urges that the statute here to be interpreted does not hold in its purview acts of "private" vice committed in his residence by a malefactor. Respondent avers that other statutory laws punish individuals for their "private" offenses against sexual continency and decency and that to consider c. 134, § 12 as affecting the respondent in this case would be to conclude that the Legislature had thus made dual crimes of every possible illegal sexual act and in some instances felonies of misdemeanors. He argues that, when an alleged criminal act is contrary to the intention of the Legislature and the very spirit of an act, there is no crime though the express words of the act seem to indicate that

there is. He directs attention to the severity of the punishment imposed by the statute as excessive for some crimes enumerated and as indicative that the Legislature contemplated only a deterrent against commercial or professional vice. He cites *State* v. *Day* (1933), 132 Me. 38, construing what is now R. S. (1954), c. 134, § 20. He invokes a strict interpretation of this penal act involved here and counsels that, if the State considers the respondent guilty of the crime of having resorted to indecent liberties, it indict him for each, detached offense rather than subject him to this massive prosecution only because all the acts alleged were conceivably performed in one place of committal.

There is no gainsaying that R. S. (1954), c. 134, § 12 was occasioned by vigilance in 1919 as to social diseases and health in the immediate wake of the active hostilities of a war. *State* v. *Morin* (1927), 126 Me. 136 *(supra)*. Nevertheless, the Legislature can be motivated by plural objectives in promulgating a law. The expressed intent of the lawmaking body is controlling. Neither the text nor the meaning of R. S. (1954), c. 134, § 12 limits the impact of the law to commercialized vice. Nor does sexual vice require commercialization to become a menace to public health in the communication or spread of venereal disease. By the inclusion of lewdness in its prohibitions and by its definition of lewdness "as any indecent or obscene act," R. S. (1954), c. 134, § 13, it is indicated that the Legislature was also comprehensively attempting to deter vice itself. It would be a drastic constriction of the purport of the language employed to conclude that the Legislature was singly dedicated to the prevention or containment of physical disease. There is nothing in the statute to indicate that the carrying on of commercialized vice upon the premises is an essential to the guilt of the respondent nor does the act require that for the conviction of the respondent more than an isolated act shall

have been alleged and committed. Compare *Rhodes* v. *State* (1945), (Ark.), 189 S. W. (2nd) 379, 380.

In *State* v. *Munsey* (1916), 114 Me. 408, 410, this court supplied the rule of construction:

> "From the foregoing rules, well supported by authorities, it is safe to say that in deciding upon a demurrer to a complaint or warrant charging a statutory offense, it is the first duty of the court to carefully examine the statute under which the complaint or indictment is drawn, with a view of ascertaining the intention of the Legislature and the evil which that body desired to correct. The next consideration is whether the Legislature expressed its intention in language sufficiently full, certain, and precise, so that the person of average intelligence who may be subject to the inhibition pronounced by the statute may understand and obey. If, when tested by the court, both examinations result affirmatively, and the complaint or warrant follows the language of such a statute, it should not be held defective upon captious or hypercritical grounds. The expressed will of the Legislature should be a chart to guide - - - - -"

In *Jenness* v. *State* (1949), 144 Me. 40, 46, this court quoted a norm for construing a penal statute:

> " 'The rule of strict construction of a penal law is subordinate to the rule of reasonable, sensible construction, having in view effectuation of the legislative purpose, and is not to be so unreasonably applied as to defeat the true intent and meaning of the enactment.' Violette v. Macomber, 125 Me. 432, 434; 134 A. 561, 562."

By R. S. (1954), c. 134, § 12 an added category of distinct criminal offenses was listed and created for the fundamental and accredited purposes of deterrence and punishment with rehabilitation where hopefully indicated and not only for

the selective and refined object of providing a health safeguard against commercialized vice.

The mandate must be:
Exceptions overruled.
Respondent may plead anew.

HELEN GOLDTHWAITE
vs.
SHERATON RESTAURANT
AND
UTICA MUTUAL INSURANCE CO.

Androscoggin. Opinion, October 20, 1958.

Workmen's Compensation. Evidence. Hearsay. Medical Treatises. Consent. Stipulation.

A decree of the Industrial Accident Commission must be supported by evidence—even though slender, not speculation, surmise, or conjecture.

The applicable rule in Maine forbids the admission of learned medical treatises over objection, except when offered to impeach a medical witness who relies at least in part upon medical authority for the opinion he has expressed; but such evidence may nevertheless be properly received by consent.

Evidence admitted without objection or motion to strike is "consent evidence."

Hearsay admitted by consent may be given corroborative effect but taken alone will not support a verdict or finding.

The mere stipulation into evidence of medical treatises does not change their character as hearsay, unless the stipulation asserts that the absent witness (or author), if present, would state certain specified facts and opinions.

ON APPEAL.

This is an appeal from a *pro forma* decree of the Superior Court implementing a decision of the Industrial Accident Commission. Appeal denied. Decree affirmed. Allowance of $250 ordered to petitioner for expenses of appeal.

Berman & Berman, for plaintiffff.

Verrill, Dana, Walker,
Philbrick & Whitehouse,
John A. Mitchell, for defendant.

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

WEBBER, J. This was an appeal from a *pro forma* decree of the Superior Court implementing a decision of the Industrial Accident Commission. It is not disputed that on June 1, 1956 the petitioner, while at work, fell the length of the cellar stairs in her employer's place of business. Prior to the accident she had apparently enjoyed good health and had regularly performed hard physical work. The immediate noticeable effects of the fall were slight but she experienced pain in her lower back and on June 7th, at the request of her employer, consulted her physician, Dr. Haas. Although she continued work for some time, her condition steadily deteriorated until she was forced to cease work altogether on September 1st. Although an accurate diagnosis was not at first possible on the basis of the symptoms manifested, it has now been determined that the petitioner is suffering from progressive muscular atrophy, a disease the exact cause of and cure for which remain unknown.

The evidence presented a marked conflict in medical testimony. Dr. Haas, an experienced general practitioner, felt that he could express an opinion "within reasonable medical

certainty" that a trauma causing a general concussion of the whole spine could damage the motor neuron cells and produce atrophy of the muscles. It was his opinion that all the symptoms noted, and especially the complete change in health which occurred shortly after her fall, were consistent with the view that petitioner's disability was caused by the accident.

On the other hand, Dr. Bidwell, a qualified neurosurgeon, stated very positively that trauma could never cause nor accelerate progressive muscular atrophy. It was his opinion that it was a mere coincidence that the first symptoms of muscular atrophy appeared shortly after the accident. In substance this was also the opinion of Dr. John P. Greene, an orthopedic surgeon, whose written report was received in evidence in lieu of his oral testimony.

During the *direct* examination of Dr. Bidwell, the following questions and answers were received:

"Q. Doctor, you say that physical trauma has been discarded as a possible causative factor of this disease?

A. That is correct.

Q. Do you have any medical authority for that answer?

A. I do. The three-volume textbook of neurology, Kinnier Wilson, edited by Bruce, has for a good many years stood as the recognized reference textbook of neuro-medical diseases. Its most recent issue is, I believe, less than two years old and there is no other book in the field of neurology that can stand in such relationship to the field as does Kinnier Wilson."

After some colloquy, counsel entered into the following stipulation:

"The Commissioner: It is agreed and stipulated that attorneys for both parties will submit to the

> Commission quotations or abstracts from certain medical textbooks and authorities which before submission to the Commission will have the approval of each attorney."

Without objection, both counsel by examination pursued the matter of medical authority at great length. The opinion of the witness was solicited on cross examination as to whether certain writers of medical textbooks are recognized authorities in their field. On redirect examination the witness was permitted to criticise certain of these medical treatises as unrevised or elementary. At the close of the hearing, pursuant to their stipulation, counsel filed certain abstracts from medical treatises, not one of which professed to rule out trauma as a precipitating or accelerating cause of muscular atrophy. On the contrary, several of the authorities recognized trauma as a probable accelerating cause. Kinnier Wilson, specifically relied upon by Dr. Bidwell, stated: "Trauma is not always perhaps to be lightly dismissed." This statement was followed by a discussion of some of the evidence suggesting that trauma may in some instances be a precipitant.

In an exhaustive opinion, the Commissioner, after carefully and accurately analyzing all the evidence, concluded that the petitioner's disability was so related to the accident as to be fully compensable. In reaching this result, the Commissioner gave weight to (1) the excellent health of the petitioner up to the time of her fall, (2) the rapid onset of symptoms of muscular atrophy after the accident and the steady deterioration of her condition thereafter, (3) the medical opinion of Dr. Haas, and (4) the medical authorities submitted by counsel which tended to support the opinion of Dr. Haas and to contradict in part the opinion of Dr. Bidwell. The respondent contends that the opinion of Dr. Haas was at best conjectural and that in adopting it, the Commission has based a decision on speculation and

guesswork. The respondent also asserts that the medical treatises were hearsay evidence and entitled to no weight whatever. In short, the respondent maintains that there was no legally competent evidence to support the decision.

If the accidental fall suffered by the petitioner "lighted up," accelerated or precipitated the disabling effects of a disease hitherto quiescent, the resulting disability was compensable. *Eleanora Gagnon's Case,* 144 Me. 131. As was said in *Mailman's Case,* 118 Me. 172 at 179: "It is sufficient, however (assuming other elements proved), if by weakening resistance or otherwise an accident so influences the progress of an existing disease as to cause death or disablement."

Does the decision here rest upon something more substantial than mere conjecture and speculation? We think that it does. The nature and severity of the accidental fall are not disputed. That painful injuries to the back resulted which required medical attention is not questioned. The marked change in the petitioner's health commencing shortly after the accident is some evidence of accidental causation of the later disability. *Mamie Taylor's Case,* 127 Me. 207, 212; *Larrabee's Case,* 120 Me. 242; *Ballou's Case,* 121 Me. 283; although it would not suffice if it were the *only* evidence, *Shaw's Case,* 126 Me. 572. The opinion of a qualified medical expert that the injuries accidentally inflicted could and did produce the aggravated manifestations of the symptoms of muscular atrophy, even though disputed by other medical experts, was competent legal evidence to be considered by the Commission. In *Mamie Taylor's Case, supra,* the decedent employee engaged in some heavy lifting such as might induce strain. However, he made no complaint and there was no other indication of accident at the time of the occurrence. Shortly after, however, he began to suffer pain in the chest and shortness of breath. About ten days later he suddenly died. The attending physician

gave it as his opinion that it was probable that the decedent died of pulmonary embolism and that lifting was a material factor in producing it. A finding by the Commission that there was some causal connection between the heavy lifting and the death was deemed to have the support of competent evidence and reasonable and rational inferences drawn therefrom. We are satisfied that in the instant case the decree is supported by competent evidence and satisfies the rule that "it may be slender but it must be evidence, not speculation, surmise, or conjecture." *Mamie Taylor's Case, supra,* at page 208.

We turn now to consideration of the abstracts from medical treatises which were admitted by stipulation and agreement and which influenced to some extent the result reached by the Commission. These obviously constituted hearsay evidence and were subject to the rules of law imposing limitation on the use thereof.

"The general rule, supported by many cases and recognized apparently in all states in which the question has arisen, except in Alabama, is that medical books or treatises are not admissible to prove the truth of the statements therein contained. (The rule assumes that the books or treatises are properly identified and authenticated, and applies notwithstanding the fact that it is shown that they are recognized as standard authorities on the subject to which they relate)." 65 A. L. R. 1102; 20 Am. Jur. 816, Sec. 968. It appears to be quite generally held that when a medical expert assumes to base his opinion, partly at least, on authorities and not exclusively on his own experience, he may be cross examined with respect to the authorities for the purpose of disparaging or discrediting his testimony. Courts, however, hold very divergent views as to the right to resort to medical authority on cross examination in the instances when the expert does not base his opinion even in part upon the authorities. Anno. 82 A. L. R. 440; *Reilly* v.

Pinkus (1949), 338 U. S. 269, 70 S. Ct. 110; *Dolcin Corp.* v. *Fed. Trade Com.* (1954), 219 F. (2nd) 742. In determining what course was open to the Commission in the instant case, it is interesting to note that Dr. Bidwell, on *direct* examination made reference to Kinnier Wilson as a recognized authority supporting his opinion. It was thereafter open to counsel for petitioner to make proper use of recognized medical authorities for the limited purpose of impeachment of the medical witness. The respondent concedes all this but insists that the Commission failed to limit its use of the evidence to impeachment but rather gave weight to it as evidence of the truth of the matter asserted. The stipulation under which the evidence was admitted, however, contained no limitation upon the use or purpose for which the evidence might be considered.

Our own court has had few occasions to consider the subject of medical treatises. In *Ware* v. *Ware,* 8 Me. 42, 56, the medical texts were offered and excluded. It was contended that the exclusion was error. The court held that the texts were properly excluded as hearsay which lacked the sanction of an oath and precluded the opportunity for cross examination. However, the court recognized that such evidence may by proper means enter the case for consideration by the fact finder. At page 56, the court said: "They (the medical treatises) do not come into court, as all other evidence must, either *by consent* or under the sanction of an oath. Without *such consent* or sanction, their contents are mere declarations and hearsay." (Emphasis supplied)

In *Shaw's Case, supra,* the Commission resorted to medical texts which were not made part of the evidence or the record. The court was properly critical of the Commission for medical theorizing outside the evidence, but had no occasion to pass on questions either of admissibility or weight with reference to medical treatises. By way of dictum, however, the court called attention to the rule applicable in this

jurisdiction that "medical books (are) incompetent as evidence of any statement they contain." The court was then speaking with reference to admissibility rather than weight.

We conclude that the applicable rule in Maine forbids the admission of learned medical treatises over objection except when offered to impeach a medical witness who relies at least in part upon medical authority for the opinion he has expressed; but such evidence may nevertheless be properly received by consent. It has frequently been held by our court that when evidence is admitted without objection and no motion is made to strike it from the record, it becomes what has been designated as "consent evidence." *Moore* v. *Protection Ins. Co.*, 29 Me. 97; *Brown* v. *Moran,* 42 Me. 44; *Tomlinson* v. *Clement Bros.*, 130 Me. 189.

This brings us to a consideration of the weight which may be given to medical treatises admitted by consent and without limitation as to purpose. In this connection courts have expressed very divergent views. "Applying these general principles, most courts hold that hearsay evidence, where admitted without objection, may properly be considered and given its natural and logical probative effect, as if it were in law competent evidence." 20 Am. Jur. 1036, Sec. 1185. "While some authorities have held differently as to evidence admitted without objection, a number hold that incompetent evidence should be given no probative force and that the admission of such evidence cannot raise an issue or form the basis of a verdict, finding, or judgment." 32 C. J. S. 1077, Sec. 1034. Supporting the view that hearsay admitted by consent should be given weight are such authorities as *Mahoney* v. *Harley Private Hospital,* 279 Mass. 96, 180 N. E. 723; *Barlow* v. *Verrill,* 88 N. H. 25, 183 A. 857; *Derrick* v. *Bd. of Liquor Control,* 98 Ohio App. 97, 128 N. E. (2nd) 239, 241; *In Re Fagin's Est.*, 246 Iowa 496, 66 N. W. (2nd) 920. Some courts, while permitting some weight to be given such evidence, have taken the op-

portunity to warn of the "inherent weakness" of hearsay. "In such circumstances, it is a rule of law that such evidence has some probative value and may be considered along with the other testimony in the case. * * * But hearsay testimony so admitted (without objection) in evidence must be weighed with caution and in the light of its inherent weakness." *Shepard* v. *Purvine,* 196 Ore. 348, 248 P. (2nd) 352, 363. Because of this "inherent weakness," it could not be given "unwarranted and controlling effect on (a) vital issue." *Danahy* v. *Cuneo,* 130 Conn. 213, 33 A. (2nd) 132, 134. In some instances courts have taken the position that such evidence amounts to no more than a "scintilla" which will not substitute for substantial evidence. *United States* v. *Krumsiek* (1940), 111 F. (2nd) 74, 78 (citing *Edison Co.* v. *Labor Board,* 305 U. S. 197, 229, 59 S. Ct. 206, 217). 104 A. L. R. 1130 contains a covering annotation.

At least as pertains to *oral* hearsay, our court has heretofore referred to such evidence as having "no probative force." In *Shaw* v. *McKenzie,* 131 Me. 248, 250, a case in which a plaintiff's witness related statements allegedly made by the defendant which were hearsay, the court first pointed out that the statements could not qualify as admissions because defendant did not speak of his own knowledge; and then with reference to the weight to be given to such hearsay, the court said: "Since this evidence was admitted without objection and no motion was made to strike it from the record, it becomes what has been designated in some of our decisions as consent evidence. * * * But it is only to be given the weight to which it is entitled and must be weighed according to the rules established by law. * * * Hearsay evidence has *no probative force* and will not sustain a verdict lacking other support. * * * The admission of such evidence without objection does not add any weight to it if intrinsically it had none and should have been excluded upon objection." (Emphasis supplied). And in the recent case of

Burgess v. *Small* (1955), 151 Me. 271, 273, where there was an absence of direct or circumstantial evidence to prove identification of property in trover, but some oral hearsay was admitted without objection, we said: "A great deal of hearsay testimony was injected into the case which cannot be accorded any probative force in this analysis of the sufficiency of the plaintiff's evidence."

So also as to industrial accident claims. In *Mailman's Case, supra,* at page 176, the court said: "The commissioner permitted witnesses to rehearse the story of the accident as told by the deceased. This was hearsay testimony, plainly inadmissible. But the allowance of hearsay evidence by the commissioner does not require this court to reverse his decree *unless such decree was in whole, or in part, based upon such incompetent testimony.* * * * Were the court convinced that hearsay influenced the decree it would be required to sustain the appeal. We perceive, however, no sufficient reason for questioning the commissioner's statement that he made his finding of fact 'wholly disregarding the hearsay evidence.'" (Emphasis supplied.) The opinion does not make it clear whether the hearsay was admitted by consent or through error. In *Larrabee's Case, supra,* the Commissioner was silent as to whether or not he had based his findings in any part upon the oral hearsay which became part of the evidence. In this connection the court said at page 244: "In the last case *(Mailman's Case, supra),* the commissioner expressly stated he did not base his findings in any part on the incompetent testimony; but if no such statement is made in the findings of the commissioner, we do not think in this class of cases it is to be presumed that prejudice resulted from the receipt of inadmissible testimony, if there is sufficient competent evidence in the case on which his findings may rest." In the instant case the commissioner indicated that he *did* rest his findings in part upon the contents of the abstracts from learned medical treatises.

Now that we have had occasion to review the authorities with some care, we are satisfied that unqualified statements that hearsay evidence admitted by consent has "no probative force" do not accurately reflect what seems to be the better reasoned rule of law. In order to clarify the subject for the future in this jurisdiction, it may now be stated that such evidence may properly be considered and given its natural and logical probative effect. The factfinder must always, however, weigh such evidence with caution, mindful of its inherent weakness, the same weakness which leads to exclusion upon objection. It may properly be said that such evidence may properly be given weight as *corroborative* of other competent legal evidence, but will not *alone* support a verdict or finding.

Reverting once more to prior cases in which this court has employed the phrase "no probative force," we are convinced that the results in those cases would not have been otherwise if the rule had been recognized as we now state it. For example, in *Burgess* v. *Small, supra,* the hearsay evidence which crept into the case could not have been permitted to suffice as the *sole* support of a verdict. So also in *Shaw* v. *McKenzie, supra,* the court noted that the hearsay evidence was the *only* evidence proffered.

Without doubt, written hearsay tends usually to carry more conviction to the mind of the objective factfinder than does oral hearsay. The writing itself eliminates the necessity for dependence upon what may be the faulty memory of the relating witness. When oral hearsay is involved, even a witness who has no intention to mis-state the truth may nevertheless offer an incorrect or garbled or incomplete version of the statements of the absent third party. The writing, itself present in court, substitutes for the memory of the relating witness. Thus the hearsay becomes somewhat more trustworthy. A fortiori, when we are dealing with the written opinions and experiences of a recognized au-

thority in the medical field who has no motive for falsification, who is bound by the ethics of his profession and who is writing for the critical eye of other medical men, those opinions and experiences will often have very real and practical evidentiary value. There is obviously a great difference between the intrinsic probative worth of such evidence and that of oral hearsay of the type usually encountered in the trial of cases which ordinarily rises little if any higher than the level of gossip and rumor. The weight to be given to the learned medical treatise may of course be diminished, as the weight of any expert opinion may be, by a showing that the material is outdated, or disproved by later research, or contradicted by other reputable authority. The weakness of such evidence lies in the fact that the author is not present in court to be cross-examined and it cannot be known with certainty that his opinions, if tested by cross-examination, would prove now to be the same as those he expressed in former writings. The science of medicine is not exact and knowledge in the medical world changes from day to day.

It may be noted in passing that a mere stipulation into evidence of abstracts from medical treatises, as in the case before us, does not eliminate therefrom their hearsay characteristics. Such a stipulation does not express or imply an agreement that the medical writer, if present in court, would now assert without change or qualification that which appeared in his treatise. When, however, the stipulation is in more inclusive form and asserts that an absent witness, if present, would state certain specified facts and opinions, the hearsay characteristics are thereby removed and the parties are understood as agreeing that such would be the net effect of his testimony under oath and after cross-examination. The contents of such stipulations become competent legal evidence and stand on the same footing as the sworn testimony of witnesses present in court. It is ap-

parent therefore that the wording of stipulations where either absent witnesses or abstracts from learned treatises are concerned may well be important and even controlling.

Applying these rules to the case before us, we hold that even though these medical abstracts in the form in which they entered the case retained their hearsay characteristics, the commissioner committed no error in giving them *corroborative* weight. They tended to support the medical opinion of Dr. Haas which, taken with other legal evidence in the case, justified the ultimate finding that trauma "lighted up" and accelerated the disabling effects of muscular atrophy.

The entry will be

Appeal denied.
Decree affirmed.
Allowance of $250 ordered to petitioner for expenses on appeal.

GEORGE F. EATON
AND
MERCHANTS NATIONAL BANK OF BANGOR

CO-TRUSTEES U/W OF GEORGE E. TOWNSEND, DECEASED
vs.
EMMA TOWNSEND MacDONALD AND JOHN E. TOWNSEND

Penobscot. Opinion, October 21, 1958.

Executors and Administrators. Debts. Priorities. Contribution.

All of the assets of an estate are liable for its debts.

A devisee of specific unmortgaged property is not exempted from contributing to the payment of a debt secured by a mortgage of other specifically devised property.

The words "bequest" and "devise" are interchangeable and a bequest may apply to real estate and a devise to personal property.

Specific devises and bequests are not at the outset subject to the payment of debts—resort must be had to other classes of assets first under R. S., 1954, Chap. 169, Secs. 6 and 7.

The rule that debts are to be paid from the personal estate is subject to the rule that the will and intent of the testator governs.

Where no specific provision is made for the payment of debts, personal estate is the primary fund for their payment; if that is not sufficient, then the lapsed devise may be applied thereto; if debts still remain specific devisees must contribute *pro rata*.

ON APPEAL.

This is a bill in equity for instructions to testamentary trustees. The case is before the Law Court upon appeal. Appeal dismissed. Decree below affirmed. Case remanded to court below for such further proceedings as may be considered essential. Costs and expenses of all parties in the Law Court, including reasonable counsel fees, in addition to those previously to be fixed by the sitting justice after hearing, and paid by the executors.

Francis Finnegan, for plaintiff.

Pilot & Pilot,
Lawrence W. Jones, for defendants.

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

DUBORD, J. This is a bill in equity brought by the testamentary trustees of George E. Townsend for the construction of the will and for instructions relating to the administration of their trust.

The cause is before us upon the appeal of the defendant, Emma Townsend MacDonald.

On August 25, 1953, George E. Townsend executed his last will and testament.

The only clause relating to payment of debts is to be found at the very beginning of the will and reads as follows:

> "After the payment of my just debts, funeral charges and expenses of administration, I dispose of my estate as follows:"

Under the first paragraph of his will he bequeathed the sum of $100.00 to a brother. Under the provisions of the second paragraph he bequeathed and devised to his daughter, Emma Townsend MacDonald, his homestead property together with the furniture contained therein, with the exception of furniture purchased by John E. Townsend for the use and benefit of his parents. Under the provisions of the third paragraph he made a specific bequest of his automobile to his daughter, Emma Townsend MacDonald. Under the provisions of the fourth paragraph he bequeathed to John E. Townsend, the household furniture in the homestead which John E. Townsend had purchased. Under the provisions of the fifth and sixth paragraphs, he devised certain specific real estate to his son John E. Townsend.

Under the provisions of the seventh paragraph, he devised his summer cottage to John E. Townsend and bequeathed to him the furniture and furnishings contained therein. He also devised certain real estate in New York to his son John E. Townsend; and he bequeathed to him certain stock in Townsend's Food Shop, Inc. Under the provisions of the eighth paragraph, he bequeathed and devised all of the residue of his estate in equal shares to Emma Townsend MacDonald and John E. Townsend. He named the defendants and Merchants National Bank of Bangor as executors and provided that all taxes assessed against his estate be a charge against the residue.

It will be noted that all of the bequests and devises are specific with the exception of those provided for in the first and eighth paragraphs of the will.

On September 21, 1953, George E. Townsend executed a loan with the Merchants National Bank in the principal sum of $9,025.00 and he conveyed, as security therefor, by way of mortgage, the real estate specifically devised to his son, John E. Townsend under the fifth paragraph of his will. At the time of the death of George E. Townsend, this mortgage claim remained outstanding and unpaid.

On May 14, 1954, George E. Townsend executed a codicil to his will, by which codicil he ratified and confirmed his will with the exception that, excluding the furniture bequeathed to his son, John E. Townsend, under the provisions of the second paragraph of his will, he bequeathed and devised the property originally bequeathed and devised outright to his son, John E. Townsend, to the plaintiffs herein as trustees for the benefit of John E. Townsend. The trust was to continue for a period of ten years following the decease of the testator or until the decease of the son, John E. Townsend, whichever event occurred first; and upon termination of the trust, the balance remaining in the trust estate to be

distributed to the son, John E. Townsend, if he be living, otherwise to his daughter, Emma Townsend MacDonald; and in the event of her death prior to the end of the ten year period, then the trust was to be continued for the benefit of a grandson, until this grandson reached the age of twenty-one years, at which time, the trust should terminate and the assets be turned over to the grandson.

The codicil contains no further instructions relating to payment of the debts of the testator.

George E. Townsend died on October 12, 1954, and his will, together with the codicil were allowed as his last will and testament by the Probate Court within and for the County of Penobscot.

Although the Merchants National Bank is a co-executor as well as co-trustee, this plaintiff prosecutes the action only in its capacity as trustee.

The other plaintiff, George F. Eaton, died pending hearing upon the bill and the Merchants National Bank, in its capacity as sole surviving trustee has prosecuted the action.

The personal assets are insufficient to pay the debts of the testator.

It is alleged in the bill, that the executors of the will, upon proper petition addressed to the Probate Court within and for the County of Penobscot have been licensed to sell the real estate devised in trust for the benefit of John E. Townsend under the sixth paragraph of the will.

It is further alleged that unless a court of competent jurisdiction determines otherwise that virtually all of the burden of estate indebtedness and administration expenses will be borne solely by that portion of the George E. Townsend estate devised in trust for the benefit of John E. Townsend.

The plaintiffs allege that they are in doubt as to the mode of executing their trust and they are not certain whether their duty as such trustees requires them to take action to exonerate the trust estate from the indebtedness and other charges, to the end that some portion of said indebtedness and charges may be allocated ratably to all beneficiaries under the will.

The plaintiffs in their capacity as trustees ask for instructions upon the following questions:

"1. Does the provision in the will of the said George E. Townsend, deferring distribution of his estate until after payment of his just debts, require payment of the secured debt, as well as the unsecured debts of the decedent, before distribution is made?

"2. Do the petitioners in their capacity as trustees have a duty to take proceedings to relieve the trust estate from a ratable part of the indebtedness and charges of administration of said decedent to the end that the said indebtedness and charges may be equitably and proportionately charged against all beneficiaries under said Will?

"3. Do the petitioners as such trustees have the right or are they under any obligation to expend any part of the said trust estate, either principal or income, for any of the following purposes?

"(a) To reimburse the estate of George E. Townsend for estate obligations incurred for the sole benefit of John E. Townsend or for personal property heretofore delivered to the said John E. Townsend.

"(b) To pay all or any part of the mortgage debt owed to said Merchants National Bank of Bangor.

"(c) To pay all or any part of the remaining unsecured debt not incurred for the direct benefit of the said John E. Townsend."

The plaintiffs further pray that if they are found to have the duty of eliciting a contribution from the other beneficiaries that interlocutory proceedings in connection with their bill may intervene so as to consolidate in one cause of action proceedings to insure an equitable allocation of said indebtedness and charges of administration.

The issues are raised by the answers of the defendants, John E. Townsend and Emma Townsend MacDonald.

The defendant, John E. Townsend, by his answer contends that if there should be insufficient personal property, it is the duty of the executors to sell so much of the real estate of the deceased as may be necessary to pay his indebtedness and expenses of administration; and that if any real estate is taken from any beneficiary under the will for the purpose of sale to pay the debts and expenses of the deceased, that it is the duty of the executors to collect contributions from all beneficiaries; so that the beneficiary whose real estate has been sold shall share the loss *pro rata* with other beneficiaries in accordance with the bequest or devise under the will.

The defendant, Emma Townsend MacDonald, by her answer contends that the real estate devised to her under the will of George E. Townsend is not subject to the payment of debts of the estate.

The case was heard in equity by a Justice of the Superior Court, who found that all of the estate of George E. Townsend was liable to the payment of all of his debts, both secured and unsecured, and that to the extent it became necessary to resort to specifically devised real estate, a *pro rata* contribution towards payment of such debts should be made by the specific devisees and legatees.

It is from this finding that the defendant, Emma Townsend MacDonald appealed.

The real issue raised by this appeal is whether a devisee of specific unmortgaged property is exempted from contributing to the payment of a debt secured by a mortgage of other specifically devised property. This issue seems to be one of novel impression in this state.

We start out with the premise that all of the assets of an estate are liable for its debts; Section 7, Chapter 169, R. S., 1954; *Hill* v. *Treat,* 67 Me. 501; and that the personal estate is the primary fund for the payment of debts; *Morse* v. *Hayden,* 82 Me. 227.

Exhaustive search discloses very few decisions in other jurisdictions upon the point in issue. Moreover, the opinions in other jurisdictions concerning the question of what assets of an estate shall be used to satisfy the debts of the estate and the order of their application are confusing because many of the opinions are based upon especially applicable statutes.

In this state we have the following statutes which do not lend much light in the determination of the issue before us.

Section 6, Chapter 169, R. S., 1954.

> "When property is taken by execution from a devisee or legatee thereof, or is sold by order of court for payment of debts, all the other devisees, legatees and heirs shall pay him their proportion thereof, so as to make the loss fall equally on all, according to the value of the property received by each from the testator, except as provided in the following section."

Section 7, Chapter 169, R. S., 1954.

> "If the testator has made a specific bequest, so that by operation of law it is exempted from liability to contribute for payment of debts, or if he has required an application of his estate for that purpose different from the provisions of the preceding section, the estate shall be appropriated according

> to the will. No part of the estate can be exempted from liability for payment of debts if required therefor."

The history of these two sections is of interest. Section 6 dates back to the Public Laws of 1821.

The 1840 revision of the statutes added what is now our present Section 7, in the following language:

> "If, in such case, the devisor shall, by making a specific devise or bequest, have virtually exempted any devisee or legatee from his liability to contribute with the others, for the payment of the debts; or if he shall, by any provisions in his will, have prescribed or required any appropriation of his estate for the payment of his debts, different from that in the preceding section, the estate shall be appropriated in conformity to the will."

Our present Section 7 of Chapter 169 is found almost verbatim as Section 7, in the 1857 revision. It is rather interesting to note that in the 1840 revision reference is made to "specific devises or bequests," whereas beginning with the 1857 revision no reference is made to "specific devises" but the only reference is to "specific bequests."

An examination of the Public Laws enacted between 1840 and 1857 fails to disclose any legislative amendment. While a "bequest" is, strictly speaking a gift by will of personal property and while "devise" signifies a disposition of real estate by a will, the words are interchangeable and a bequest may apply to real estate and a devise apply to personal property. 69 C. J. § 2082, Page 916; § 2083, Page 918.

It appears that the import of Section 6 and Section 7, Chapter 169, R. S., 1954, is to the effect that specific devises and bequests are not at the outset subject to the payment of debts of the estate, and that resort must be had to other classes of assets first.

It now becomes of importance to consider the order of the application of the several funds liable to the payment of debts. These are given in Jarman's Treatise on Wills, Volume 3, Page 449, and are as follows:

"1. The general personal estate not expressly or by implication exempted.

"2. Lands expressly devised to pay debts, whether the inheritance, or a term carved out of it, be so limited.

"3. Estates which descend to the heir, whether acquired before or after the making of the will.

"4. Real or personal property devised or bequeathed, either to the heir or a stranger, charged with debts, and disposed of, subject to such charge.

"5. General pecuniary legacies *pro rata.*

"6. Specific legacies and real estate devised, whether in terms specific or residuary, are liable to contribute *pro rata.*

"7. Real and personal property which the testator has power to appoint and which he has appointed by his will."

The first question presented for answer is whether or not John E. Townsend is entitled to have his mortgage exonerated, that is paid out of the general assets of the estate. We answer this question in the affirmative and we find many opinions in other jurisdictions supporting this finding.

> "A specific devise of land, mortgaged by testator to secure his own debt, prima facie imports an intention that the debt shall be satisfied out of the general personal assets." *Turner* v. *Laird, et al,* 35 A. 1124 (Conn.) *Blansfield et al* v. *Bang,* 20 Conn. Sup. 269,; 131 A. (2nd) 841.

In *Jacobs* v. *Button et al.,* a Connecticut case reported in 65 A. 150, the testator directed his executor to pay the testator's just debts, and devised certain specified real estate

which was subject to mortgage liens without referring in any manner to such liens. It was held that the devise of the land should be construed as free from the liens, and it was the duty of the executor to satisfy the same out of testator's personal property.

In the case of *Higinbotham et al.* v. *Manchester,* a Connecticut case reported in 154 A. 242, it was held that absent contrary intent expressed in the will, the executor must pay debts secured by mortgage given by testator on land devised.

In *Brown* v. *Baron,* a Massachusetts case reported in 37 N. E. 772, it was held that an executor to whom the testator had devised land may, in the absence of any contrary provision in the will, pay a mortgage thereon out of the funds of the estate.

In the District of Columbia case of *Sheehy* v. *O'Donoghue,* 94 F. (2nd) 252, it was held that the common law rule of exoneration is in effect in that jurisdiction.

In the case of *Gould* v. *Winthrop,* 5 R. I. 319, it was held that the devisee of an estate mortgaged by the testator, whether before or after the making of the will, is entitled to have the land devised to him exonerated from the mortgage debt, out of the personal property of the testator not specifically given, as the primary fund for the payment of debts; unless there be a clear intention indicated by the will, that the devisee should take *cum onere.*

In the Maryland case of *Stieff* v. *Millikin,* 159 A. 599, it was held that in the absence of contrary intention, where testator devises mortgaged realty and mortgage debt is not a charge primarily affecting realty, that personalty is the primary fund for paying the debt as between devisee and residuary legatee.

> ". . . in the absence of controlling statutory provisions or the expression of any contrary intention

> on the part of the testator, a devisee is, at least as between himself and the residuary legatee, entitled to have such (mortgage) liens paid from the residuary estate in exoneration of the land devised." 57 Am. Jur. § 1474, Page 993.
>
> "The general principle seems well established that in case of the devise of an estate charged with a mortgage by the (devisor), that the devisee has a right as against the personal or real estate not specifically devised, to have the mortgage discharged, and that the assets of the estate will be so marshalled as to accomplish this result." *Drummond* v. *Drummond,* 40 Me. 35, at 41.

In *Norris* v. *Pellinger, et al.,* 133 N. J. Eq. 209; 31 A. (2nd) 398, it was held that at common law an heir and devisee was entitled to exoneration of realty inherited or devised from mortgage, by payment of mortgage out of personal estate.

The Virginia case of *Frasier et al.* v. *Littleton's Ex'rs,* 40 S. E. 108, is cited by counsel for the defendant, Emma Townsend MacDonald, as authority to the effect that the mortgage should not be exonerated. A careful study of this opinion, however, indicates that the decision was based on the interpretation of the intent of the testator. By inference, at least, this opinion supports the common law rule that in the absence of any contrary intention, or a charge upon the real estate, that a mortgage debt is entitled to exoneration as well as contribution. The court cites with approval a decision to the effect that where there was a mortgage on one of the manors devised, but testator had charged all of his lands with the payment of his debts, that contribution should be decreed against the devisee of the other manor. In the *Frazier* v. *Littleton* case, the facts appear to be that at the time of the execution of the will, the testator provided for the payment of his indebtedness out of the personal assets, which at that time, were ample for the purpose. However, before the testator died he mort-

gaged some of his land and when he died, his personal property had been exhausted. The court said:

> "A testator has a right to dispose of his property as he pleases. His will is ambulatory until his death, and speaks as of that time; and hence, if a testator puts a lien upon a part of his land, but by his will, the ultimate expression of his wishes, elects to charge the whole of his real estate with the payment of his debts, all, rather than the incumbered part, must bear the burden; otherwise his will would be thwarted. The case is different, however, where the will does not charge the real estate with the payment of debts, for in such case an incumbrance of a portion of the real estate previously devised is a declaration by the testator that the devisee is to take it cum onere."

Throughout all of the decisions which we have studied with care, the intention of the testator always appears to be paramount.

> "A testator may order his debts and the expenses of administration to be paid out of his personal, or out of his real estate, or out of both, or out of any particular piece or parcel. When he makes no distinct provision as to the specific kind of property, the general rule is understood to be that the debts shall be paid out of the personal property. But this rule is subject to the other well-established rule, that the will of the testator must govern, and that this will, or intention, may be gathered from the provisions of the whole testament, and may be inferred from the nature of the legacies, or devises, and the manifest object and purpose of the testator, and from all the circumstances of the case." *Quinby* v. *Frost,* 61 Me. 77, at 81.

> "It is hardly necessary to say that the controlling rule in the construction of wills, to which all others must yield, is that the intention of the testator is to be ascertained if possible and that such intention when so ascertained will prevail, provided

it is consistent with legal rules." *Holcomb* v. *Palmer,* 106 Me. 17, at 20; 75 A. 324.

"The cardinal rule for the interpretation of wills is that they shall be construed so as to give effect to the intention of the testator. It is the intention, however, gathered from the language used in the testament which governs. And it is the intention of the maker of the will at the time of its execution. Although a will speaks only from the maker's death, the language used in the testament must be construed as of the date of its execution and in the light of the then surrounding circumstances. Another and accurate statement of this rule is that a will is not operative until the death of the maker and then speaks his or her intention at the time of its execution." *Gorham* v. *Chadwick et al.,* 135 Me. 479, at 482; 200 A. 500.

We are satisfied that it was the intention of the testator in this case that all of his property should be subject to all of his debts, and that it was also his intention that the mortgage on the property now devised in trust for the benefit of John E. Townsend should be exonerated.

We pass now to consideration of the question of contribution.

"Where several distinct properties, subject to a common charge, are disposed of among several persons, recourse is had, by an obvious rule of justice, to the principle of contribution. Thus, if the testator, after subjecting his real estate to the payment of his debts or legacies, devise Blackacre to A and Whiteacre to B, and these estates in the administration of the assets become applicable, the charge will be thrown upon the devisees in proportion to the value of their respective portions of the property." Jarman's Treatise on Wills, Volume III, Page 458.

"And the rule is the same where the property charged is partly real and partly personal. Thus, if a testator, after commencing his will with a gen-

eral direction that his debts shall be paid, proceeds to dispose specifically of his real and personal estate among different persons; as the charge would, we have seen, affect the whole property so given, real as well as personal, the devisees and legatees will bear their respective shares of the burden pro rata." Jarman's Treatise on Wills, Volume III, Page 460.

"A beneficiary under the will who has borne the burden of a debt of the testator is entitled to contribution from other beneficiaries in the same class with himself and equally responsible for such debt, and accordingly a ratable contribution may, in a proper case, be enforced among specific legatees or devisees, . . ." 97 C. J. S. § 1326, Page 243.

". . . where property has been applied to the satisfaction of the claims of creditors, and the testator left other property of the same class with respect to its status in the order of liability of assets for the payment of debts, the legatee or devisee of the property so applied is entitled to contribution from the donees of such other property to the extent necessary to equalize the shares of their gifts needed in the payment of indebtedness, . ." 57 Am. Jur. § 1480, Page 998.

"The rule is well settled that if a legacy is specific, and is appropriated to the payment of debts, the legatee, (if the general or residuary legacies are not sufficient) is entitled to contribution from the holders of other specific legacies." *Tomlinson* v. *Bury,* 14 N. E. 137, at 140 (Mass.)

In the case of *Ganoe* v. *Swisher, et al.,* 294 N. W. 235 (Iowa), it was held that where testator, after making devises of specific parcels of property to each of children, later incumbered one parcel, and there was no personalty, no residuary devises, and no intention expressed in the will with reference thereto, child whose property was incumbered was entitled to have other children contribute toward payment of incumbrance.

In *Morse* v. *Hayden,* 82 Me. 227; 19 A. 443, a testator had devised real estate to his two daughters and two sons to be equally divided among them and one of the sons died in the lifetime of the testator. It was held that in the absence of any controlling provisions of the will, the share of the son who deceased is lapsed and became intestate property. The court went on to hold that where no specific provision is made for the payment of his debts by a testator, personal estate is the primary fund for their payment; if that is not sufficient, then the lapsed devise may be applied thereto; and if debts still remain, then specific devisees must contribute *pro rata.*

We, therefore, rule that the presiding justice was correct in finding that the trust estate of John E. Townsend was entitled to contribution.

The entry will be

Appeal Dismissed.
Decree Below Affirmed.
Case remanded to Court below for such further proceedings as may be considered essential. The costs and expenses of all parties in the Law Court, including reasonable counsel fees, in addition to those previously allowed, to be fixed by the sitting justice after hearing, and paid by the executors.

CHARLES D'ALFONSO ET AL.
vs.
THE CITY OF PORTLAND

Cumberland. Opinion, November 5, 1958.

Contracts. Referees. Variance. Evidence.

Where the evidence supports a referee's finding, exceptions will not lie.

The failure of a referee to make a finding upon an immaterial issue is not exceptionable.

One cannot properly complain about the non-compliance with a technical requirement of a contract when it is apparent that compliance would not have changed the result.

A variance requires a real difference between the allegation and proof; and no variance is material if the adverse party is not surprised or misled to his prejudice thereby.

An excepting party must show affirmatively that he was prejudiced by the exclusion of evidence technically admissible.

ON EXCEPTIONS.

This is an action of assumpsit before the Law Court upon exceptions to the overruling of objections to the referee's report. Exceptions overruled.

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

Israel Bernstein, for plaintiff.

Robert W. Donovan,
Barnett I. Shur, for defendant.

DUBORD, J. This case is before us on exceptions of the defendant to the acceptance of the report of a referee's finding for the plaintiffs.

The plaintiffs brought action against the City of Portland claiming a balance remaining due for labor and materials furnished under a contract for the construction of a sewer in certain public streets.

The case was heard with the right of exceptions reserved in matters of law, pursuant to the provisions of Rule 42 of the Rules of Court.

Under date of July 11, 1956, the City of Portland sent out notices to contractors inviting bids for the construction of the sewer in question. Included in this notice were estimates of quantities for earth excavation, sewer pipe and other materials, including gravel, pertaining to the proposed sewer.

On July 16, 1956, the plaintiffs submitted a bid based on unit prices totaling $43,347.69. By a letter dated July 16, 1956, and signed by the Commissioner of Public Works for the City of Portland, plaintiffs were notified that their bid was accepted and on July 17, 1956, the contract which was attached to the original "notice to contractors" was signed by the defendant and the plaintiffs.

It is admitted that the work was satisfactorily performed and the City of Portland paid the plaintiffs the amount of $35,947.86. Plaintiffs brought suit for $7,399.83, representing the difference between the amount paid to them and the total of the unit price bids.

The claim is based upon the contention that additional work and materials were furnished by the plaintiffs under four of the items listed in the estimate of quantities and included in the contract. For purposes of identification we will classify these items with the letters used in the estimate of quantities, the unit price bids and the items as listed in the contract, viz., A, R, S and U.

The first item (A) involves excavation which had been estimated at 3652 cubic yards. For this item, plaintiffs were paid for 2691.36 cubic yards and plaintiffs seek to recover for 960.64 cubic yards at $7.35 per cubic yard.

The second item (R) involves a claim on the part of the plaintiffs for 12 cubic yards of heavy run gravel at $1.90 per cubic yard.

The third item (S) involves a claim for 113.62 cubic yards of screened gravel at $4.10 per cubic yard.

The fourth item (U) involves 84 cubic yards of heavy gravel alleged to have been furnished by the plaintiffs at $1.90 per cubic yard.

These four items amount to $7,708.94.

In their writ, the plaintiffs had claimed as due them the amount of $7,399.83. The referee found for the plaintiffs on all four items and ruled that the defendant was indebted to the plaintiffs in the amount of $7,708.94. However, lacking an amendment relating to the amount claimed, the referee found for the plaintiffs in the amount of $7,399.83, plus interest, from the date of the writ in the amount of $362.59, or a total amount of $7,762.42.

In their writ, the plaintiffs declared upon a contract in the specific amount of $43,347.69 and to arrive at this figure they set forth in detail the estimates listed in the "notice to contractors" and multiplied these estimates by their unit bids. Addition of the products of this multiplication gives us the alleged amount of the contract.

The defendant pleaded the general issue and by way of brief statement alleged in substance that plaintiffs had been paid in full and that by the acceptance of the final payment, had released the defendant from any further claim. In the course of the hearing, the contentions set up by the brief statement were waived.

Pursuant to provisions of Rule 21 of the Rules of Court, after plaintiff had filed a motion that the report of the referee be accepted, the defendant filed seventeen objections to the acceptance of the report. The objections were overruled and the report was accepted. To this ruling, the defendant took exceptions and these exceptions are now before this court.

Objections 1 to 3, inclusive, allege in substance that there is no evidence to support the referee in his finding that the plaintiffs were entitled to be paid for additional excavation in the amount of 960.64 cubic yards of earth, under item A.

Objection 4, is based upon the contention that the referee erred in not making a finding that the plaintiffs had sheeted the trench at a point outside of the normal pay lines.

Objection 5, is a contention that the referee erred in not finding the distinction between "bracing" of the trench and "sheeting" of the trench as a determinant of the so-called pay lines.

Objection 6, alleges that there was no evidence that the Commissioner of Public Works had been given an opportunity to determine what work, if any, outside of the outside lines of the sewer structure, was necessary for sheeting and braces, pursuant to the provisions of Section 16, Article VII of the contract.

Objections 4 to 6, inclusive, relate to item A.

Objections 7 to 9, inclusive, relate to items R, S and U, and aver that there was no evidence to support the finding of the referee in relation to these items concerning the alleged furnishing of heavy bank-run gravel, screened gravel and heavy gravel.

Objection 10, contains a contention that there was no evidence to support the amount of damage found due.

Objection 11, alleges that because the plaintiff declared upon a lump sum contract and the contract was in fact based upon unit prices, that there was a fatal variance between the allegations and the proof.

Objections 12 to 15, inclusive, relate to the exclusion on the part of the referee of certain evidence offered by the defendant in sur-rebuttal.

Objections 16 and 17, are general allegations that there was no evidence to support the contentions of the plaintiffs and the findings of the referee.

The principal controversy revolves about item (A) under which the plaintiffs sought to recover for excavating 960.64 cubic yards.

During the course of the trial, much testimony was introduced about "pay lines," "sheeting," "open sheeting," "close sheeting," "sheathing," "open sheathing" and "close sheathing."

It appears that "pay lines" represent the outside vertical lines of a sewer trench and that a sewer contractor is entitled to use as one of the dimensions for which he is entitled to be paid for excavating, the distance between these two lines.

Apparently "sheeting" and "sheathing" are synonymous terms. This is indicated by the fact that in Section 16, Article VII of the contract, the word "sheeting" is used, and in the testimony, both the plaintiffs and representatives of the defendant used the word "sheathing" as meaning the same thing as "sheeting."

"Close sheeting" or "close sheathing" connotes the placing of boards or planks upright along the wall of the trench side by side, while "open sheeting" means the placing of boards upright at some distance apart. "Bracing" refers to the necessary supports for "sheeting" or "sheathing"

and also means the use of the necessary planks when the trench is built wider and on a slant.

Section 16, Article VII of the contract provides how earth excavation is to be computed and part of the section reads as follows:

> "In no case will the width of trench be taken as less than two (2) feet. If it is necessary to sheet the trench the width shall be such as to provide such necessary room for the sheeting and braces outside the outside lines of the sewer structure as shall be determined by the Commissioner."

It is contended by the plaintiffs that the nature of the soil in the location in question was such as to require either sheathing or bracing, and this point is admitted by the defendant. The plaintiffs claimed, and their evidence supported the claim, that instead of digging a trench with vertical walls, they secured permission from the inspecting official or officials of the defendant to build a wider trench with sloping sides, thus eliminating vertical sheathing, either close or open. As a result of digging this wide trench, it was their contention that they excavated as much as 5000 cubic yards of earth. However, they sought to recover, not for the entire amount of their excavation, but an amount representing the difference between the yardage for which they were paid and the cubic yardage contained in the original estimate. There is substantial evidence to support the finding of the referee that the plaintiffs did excavate this extra amount of earth.

Moreover, there is evidence to sustain the finding of the referee that permission was sought and obtained from the inspecting officials of the defendant to construct the sewer in the manner selected by the plaintiffs. It was also admitted by the inspecting engineer, and by the commissioner acting for the defendant, that when the estimate of the necessary amount of earth excavation, item (A), was made, it

was contemplated that the nature of the soil was such as would require a widening of the trench and the extension of the so-called pay lines, and that the estimate of excavation was increased by approximately 1000 cubic yards, to cover this anticipated widening. To put this in another way, the estimate under item (A) as contained in the notice to contractors was in the amount of 3652 cubic yards, but of this amount, approximately 1000 cubic yards had been added for widened pay lines due to the necessity of close sheathing.

There is substantial evidence to support a finding that there was no objection on the part of the supervising officials that the ditch be cut on a wide angle and ordinary bracing used instead of sheathing, either open or close. It was also testified by officials representing the defendant that the job could be performed satisfactorily either way.

The issue was, therefore, clearly joined and the evidence supports the finding of the referee.

Defendant, therefore, takes nothing by his objections 1 to 3.

As to objection 4, from the manner in which the case was tried and the issue joined, the matter upon which the defendant says a finding should have been made by the referee did not represent a material matter in issue.

In *Kennebec Housing Company* v. *Barton,* 122 Me. 374, 377, 120 A. 56; this court said:

> "We do not adopt the doctrine prevailing in some jurisdictions that the mere failure of a referee to find facts or law specifically takes away the discretion of the court at nisi prius to accept the report. Nothing appearing to the contrary it is presumed that the referee passed upon all issues submitted to him and no others."

See also *Bernstein* v. *Ins. Cos. and Maccabees,* 139 Me. 388, 34 A. (2nd) 682.

We rule that it was not necessary for the referee to make the special finding urged by the defendant.

The same reasoning applies to objection 5.

As to objection 6, it has already been pointed out that duly authorized officials of the defendant approved the method adopted by the plaintiffs for the digging of the trench in question. The commissioner testified in substance and effect that sheathing and consequent extra excavation did become necessary as the job developed and that this extra excavation did involve a quantity of at least 1,000 cubic yards as originally estimated. The only reasonable inference to be drawn from this and other evidence in the case is that if questions of necessity and quantity of extra excavation had been submitted to the commissioner in accordance with the technical requirements of Sec. 16, he would have been compelled in good faith by the conditions then existing to have determined that extra excavation in the amount of 1,000 cubic yards was actually required to permit necessary sheathing. The defendant here cannot successfully defend on the ground of non-compliance with a technical requirement of the contract when it is apparent that compliance would in no way have changed the end result.

As to objections 7 to 9, relating to items R, S and U, there was ample evidence to support the findings of the referee.

The same thing is true of the issues raised by objection 10.

Objection 11 raises the issue of variance between the allegations and the proof.

Upon the question of variance this court said in *Tuttle* v. *Howland, et al.*, 145 Me. 246, 249, 75 A. (2nd) 374.

> "A variance requires a real difference between allegation and proof. If the proof corresponds to the substance of the allegation, there is no variance,

> the test to be applied being the tendency of the evidence substantially to prove the allegation, not the literal identity of facts alleged and facts proven, 49 C. J., 807. 'It is not indispensable to recovery that a party should make good his allegations to the letter.' *Sposedo v. Merriman,* 111 Me., 530; and it is now held that no variance between pleading and proof will be deemed material if the adverse party is not surprised or misled to his prejudice in maintaining his action or defense upon the merits."

See also *Emery* v. *Wheeler, Admr.,* 129 Me. 428, 431, 152 A. 624.

To the same effect see *Peoples Savings Bank* v. *Chesley,* 138 Me. 353, 361, 26 A. (2nd) 632.

Upon this issue the referee in his report had this to say.

> "In the final analysis the amount to be paid for this excavation depends upon the quantities actually furnished under the terms of the contract. - - - - - I rule that the plaintiffs under the pleadings in this case may recover for the items in dispute provided they prove performance of the work involved under the terms of the contract, and within the limit of the amount claimed under their declaration."

We are of the opinion that this ruling was correct. It is of significance that upon every item except the four items in dispute, the plaintiffs, with very slight variations, were paid for work and materials exactly according to the estimates contained in the "notice to contractors." This is shown by plaintiffs exhibit No. 4, which was the engineer's estimate authorizing a total payment to the plaintiffs in the amount of $35,947.86.

As was said in *Bartlett* v. *Chisholm, et al.,* 146 Me. 206, 210, 79 A. (2nd) 167:

> "An action at law is not to be dismissed for mere defects in pleading that are amendable or may be

> cured by verdict if it appears that the court has jurisdiction and the plaintiff has stated a good cause of action."

See also *Jones* v. *Briggs,* 125 Me. 265, 132 A. 817.

In the instant case the defendant was not surprised or misled to its prejudice in its defense upon the merits.

Our court said in *Cyr* v. *Landry,* 114 Me. 188, 196, 95 A. 883:

> "This issue was tried out without objection. Under the rule laid down in *Cowen* v. *Bucksport,* 98 Maine, 305 and *Wyman v. American Shoe Refining Company,* 106 Maine, 263 that, where issues are so tried, the case may be considered as if the declaration had been amended to conform to the evidence, this second issue may be properly regarded as before the court."

We give consideration now to objections 12 to 15, inclusive, which relate to exceptions taken by the defendant to the exclusion by the referee of certain proffered evidence. After the plaintiffs had rested their case, permission was requested of the referee and granted that one of the plaintiffs, Charles D'Alfonso, be recalled for further cross-examination.

This witness was examined at length concerning conversations which took place at a meeting of the plaintiffs, officials of the defendant and their counsel, with particular reference to sheathing and bracing.

The witness testified that there was no discussion concerning the question of whether or not bracing was to be considered as a substitute for sheathing. Nothing in this subsequent examination changed the theory of the plaintiffs that they had dug a wide sloping trench, rather than dig a vertical trench with widened pay lines.

The evidence indicates that at no time did this witness contend that he had sheathed the trench and the division engineer for the defendant city had already testified that the witness, Charles D'Alfonso, had not mentioned bracing.

Two witnesses for the defendant were then put on in sur-rebuttal and were asked in substance whether there had been any mention of bracing at the conference in question; whether or not Charles D'Alfonso or his attorney had said anything about sheeting the trench; whether or not either of the plaintiffs had suggested that by bracing the trench they had in effect sheathed it. One of the witnesses, the Commissioner of Public Works, was asked to explain the distinction between bracing a trench and sheathing a trench. All of this evidence was excluded.

As previously pointed out, at no time during the course of the hearing had either of the plaintiffs or their witnesses contended that the trench in question had been sheeted or sheathed. Moreover, the evidence had already brought out the distinction between bracing and sheathing. An answer to any of the questions would have shed no light upon the issue. Without passing upon the question of whether or not this evidence was technically admissible, we are of the opinion its exclusion did not prejudice the defendant.

> "It is not enough for an excepting party to show that a question technically admissible was excluded; he must go farther and show affirmatively that he was prejudiced by such exclusion." *Selberg* v. *Bay of Naples, Inc.*, 130 Me. 492, 494, 157 A. 856.

As previously pointed out, plaintiffs based their claim upon the theory that they did not sheet the trench in question; that they dug a wide sloping ditch, which admittedly accomplished the result required in the construction of this sewer. Further testimony relating to sheathing or sheeting or bracing could add nothing to the case which could be of

any assistance in resolving the clear cut issue. Defendants were not prejudiced by these rulings and take nothing by their objections 12 to 15.

Neither do the plaintiffs take anything by their general objections 16 and 17.

We are satisfied that the evidence supports the findings of the referee.

> "The rule is too well established in our State to require more than passing mention that if there is any evidence to support the findings of fact by referees, exceptions will not lie." *Morneault* v. *B. & M. Railroad,* 144 Me. 300, 302, 68 A. (2nd) 260.
>
> "The controlling questions in this case were of fact and the decision of the referee thereon was supported by evidence of probative value. The exception to the ruling below cannot be sustained." *Pearl* v. *Cumberland Sand and Gravel Company, Inc.,* 139 Me. 411, 413, 31 A. (2nd) 413.
>
> "The report of the referee made under a rule of court, pursuant to the statute, is equivalent to a finding by a single justice with jury waived. It is prima facie correct. If there is any evidence of probative value to support the findings of fact made by a referee, such findings are conclusive." *Flood* v. *Earle, Jr.,* 145 Me. 24, 27, 71 A. (2nd) 55; *Bradford* v. *Davis,* 143 Me. 124, 56 A. (2nd) 68.

The entry will be

Exceptions overruled.

L. C. ANDREW
vs.
ERNEST A. DUBEAU
WILLIAM R. STANTON
AND
LUCY A. STANTON

Cumberland. Opinion, November 14, 1958.

Equity. Appeal. Liens. Materialmen. Consent.

In an equity appeal the cause in the appellate court is heard anew upon the record.

The findings of a presiding justice are to stand unless clearly erroneous.

Where materials under the Lien Law are not furnished under a contract with the owner, the plaintiff must show that they were furnished with the owner's consent and for the construction, alteration or repair of a particular building and not on open account for general use.

Where the evidence shows that some of the materials delivered to the defendant's property were for defendant's building and other materials were for general use, plaintiff is entitled to a lien for only those materials actually used in defendant's building.

ON APPEAL.

This is a bill in equity to enforce a materialman's lien, R. S., 1954, Chapter 178, Sec. 34. The case is before the Law Court upon appeal. Appeal sustained. Remanded for modification of decree in accordance with this opinion. Appellants to have costs on appeal.

Martial D. Maling, for plaintiff.

Devine & Devine,
James Desmond, for defendant.

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

DUBORD, J. This is a bill in equity brought to impress certain land and buildings owned by the defendants, William R. Stanton and Lucy A. Stanton, with a lien provided for by Section 34, Chapter 178, R. S., 1954.

It is alleged that certain materials sold by the plaintiffs to the other defendant, Ernest A. Dubeau, a building contractor, were used by Dubeau in repairs on the Stanton property.

The plaintiff sought to recover the amount of $564.29 for materials alleged to have been furnished between October 25, 1956 and November 16, 1956.

The defendant, Ernest A. Dubeau, filed no appearance and the bill was taken against him pro confesso. The other defendants contested the claim. The presiding justice found for the plaintiff in the amount of $361.01, plus interest and costs, and the Stanton property was ordered to be sold in satisfaction of the lien. There is nothing in the decree to indicate how the presiding justice arrived at the amount of his judgment. Manifestly, he allowed some of the items listed in plaintiff's bill and disallowed others, but there is nothing to show what items were allowed or disallowed.

From this finding, the defendants William R. Stanton and Lucy A. Stanton, appealed and the case is before us on this appeal.

Section 21, Chapter 107, R. S., 1954, provides that upon an appeal, this court may affirm, reverse or modify the decree of the court below or remand the cause for further proceedings as it deems proper.

In an equity appeal the cause in the appellate court is heard anew upon the record. *Trask* v. *Chase,* 107 Me. 137,

77 A. 698; *Doyle* v. *Williams,* 137 Me. 53, 15 A. (2nd) 65; *Woodsum* v. *Portland R. R.,* 144 Me. 74, 65 A. (2nd) 17; *Sears Roebuck & Company* v. *Portland,* 144 Me. 250, 68 A. (2nd) 12.

We have examined the evidence in this case very carefully, bearing in mind that the findings of the sitting justice are to stand unless shown to be clearly erroneous. *Trask* v. *Chase, supra; Wolf* v. *W. S. Jordan Company,* 146 Me. 374, 82 A. (2nd) 93.

One who seeks the benefit of the so-called lien statute, has a burden of establishing by probative evidence the fact that the materials for which he seeks a lien were furnished for one or more of the purposes set forth in the statute and that the materials were in fact so used.

Where the materials were not furnished under a contract with the owner, the plaintiff must show that they were furnished with the owner's consent; and it must also appear that they were furnished for the construction, alteration or repair of a particular building and were not sold on open account for general use. See *J. W. White Co.* v. *Griffith,* 127 Me. 516, 145 A. 134.

It is provided by Section 36 that where the contract to furnish labor and materials is not made directly with the owner of the property affected, the lien accorded by Section 34, shall be dissolved unless a true statement of the amount due the seller, with all just credits given, together with a description of the property intended to be covered by the lien sufficiently accurate to identify it, and the names of the owners, if known, shall be filed with the Registry of Deeds for the county in which the property is located, within 60 days after the seller has ceased to furnish materials.

In this case, the plaintiff filed such a statement on January 15, 1957, which is exactly 60 days from November 16,

1956, the date upon which it is claimed the last materials were furnished.

In order to prove his case, the plaintiff put on three witnesses. The first witness was his credit manager. This witness had no knowledge as to whether or not the materials for which the plaintiff is seeking compensation actually went into the Stanton building. His testimony, in large measure, was limited to an explanation of the method used by the plaintiff in keeping a record of the date of delivery of materials.

It is contended by the plaintiff that the last materials furnished were garage doors, delivered on November 16, 1956. If this date was the correct date, then the certificate filed in the Registry of Deeds was filed on time. If the date of delivery was earlier than November 16, then the filing was delinquent and upon this point the plaintiff's case would fail. There was a conflict of evidence upon this issue. One of the defendants testified that the garage doors in question were delivered on November 10, and not on the 16th. Two witnesses corroborated this testimony. However, this was a question of fact and a determination by the sitting justice based upon the credibility of the witnesses must stand.

We direct our attention, therefore, to whether or not there was evidence of probative value and strength to support a finding that the materials sold by the plaintiff to the defendant, Dubeau, and for which a lien is claimed, were actually sold by the plaintiff with an understanding on his part that they were to be used for repairing the Stanton building, and whether or not any or all of the materials were so used; and also whether or not the evidence supports a finding that the Stantons consented to the furnishing of the materials in question.

One of the other witnesses for the plaintiff was a truck driver who had delivered some of the materials to the site

of the Stanton property. His testimony was of no help in determining whether or not the materials were actually used in repairing the building.

It appears from the testimony of the plaintiff's credit manager that the plaintiff had been selling building materials to the defendant, Dubeau, for a substantial period of time and that the materials delivered at the Stanton property were sold to Dubeau upon open account. Dubeau testified that he was purchasing materials from the plaintiff and having them delivered at the Stanton property for his own convenience, some of them to be used in the Stanton property and some to be used elsewhere.

There is evidence in the record to support a finding on the part of the sitting justice that the Stantons knew that Dubeau was purchasing the materials for the repair of their building from the plaintiff. The circumstances lend validity to a decision that the materials were furnished with the consent of the Stantons.

It is indicated by the evidence that some of the materials delivered to the Stanton property, were intended for use in the Stanton building and that others were delivered to the defendant, Dubeau, for general use.

As to those materials sold to Dubeau on open account, and delivered to him for general use, there can be no lien.

Our task is to determine what materials were actually incorporated into the Stanton building. For this proof, the plaintiff had to rely upon the testimony of the defendant, Dubeau. The evidence elicited from this witness is replete with uncertainty and conjecture.

As a result of a painstaking review of his testimony, we have come to the conclusion that it supports proof that only the following materials were actually used for the repairs on the Stanton building: (1) materials listed in defendants'

exhibit B, in the amount of $33.53; (2) metal step rails billed at $16.00; and (3) garage doors billed at $142.80, for a total of $192.33.

We, therefore, rule that the plaintiff is entitled to a lien in the foregoing amount of $192.33, together with interest from the date of the bill in equity, plus taxable costs exclusive of the costs on this appeal.

The entry will be

Appeal sustained. Remanded for modification of decree in accordance with this opinion. Appellants to have costs on appeal.

EUGENE S. MARTIN
vs.
MAINE SAVINGS BANK ET AL.

Cumberland. Opinion, November 21, 1958.

Maine Industrial Building Authority Act.
P. L. 1957, Chap. 421, Sec. 1.
Statutory Construction Constitutional Law.

Chapter 430 of P. L. 1957 supplements the M. I. B. A. Enabling Act P. L. 1957, Chap. 421 in matters of detail and has no life or purpose apart from the Enabling Act.

The provision of the Maine Constitution (Sec. 14-A of Article IX) which provides that "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*" is not abridged by Sec. 5 VIII of the Enabling Act which limits the mortgagors "to local development Corporations."

The words of the Maine Constitution of Sec. 14-A, Article IX "*of such industrial and manufacturing enterprises*" does not require complete ownership of the real estate by the industry since the people by

the Constitution intended broad powers in the legislature to implement the policy permitted under Section 14-A.

An advisory opinion even though joined in by all justices is the advisory opinion of each justice acting individually.

Advisory opinions bind neither the justices who gave them nor the court when the same questions are raised in litigation.

Legislative acts are presumed to be constitutional; and the burden is upon him who claims an act is unconstitutional.

The "industrial building" contemplated by both the Constitution and the Statutes must be used by an industry or manufacturing enterprise, in order to qualify for an insured mortgage; construction merely suitable for or adapted to industrial purposes is not enough.

ON REPORT.

This is a bill in equity seeking a declaratory judgment. The bill is before the Law Court upon report by agreed statement. Case remanded for entry of a declaratory judgment decree in accordance with this opinion.

Arthur A. Peabody, for plaintiff.

George A. Wathen, for Maine Bldg. Industrial Authority.

Verrill, Dana, Walker,
Philbrick & Whitehouse, for Maine Savings Bank.

Linnell, Perkins, Thompson & Hinckley,
for Gorham Development Corp. and
Maine Metal Finishing Co.

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

WILLIAMSON, C. J. On report. The parties to this bill in equity join in seeking a declaratory judgment involving the constitutionality of the Maine Industrial Building Authority Act (hereinafter called the Enabling Act), P. L.,

1957, c. 421, § 1; R. S., c. 38-B. Uniform Declaratory Judgments Act, R. S., c. 107, § 38 et seq. The bill is reported by agreement of the parties for decision on bill, answers by all defendants, and an agreed statement of facts. R. S., c. 107, § 24.

The plaintiff is a depositor and corporator of the defendant Maine Savings Bank. The defendants are: the Maine Savings Bank (hereinafter called the Bank); the trustees of the Bank; the Maine Industrial Building Authority created by the Enabling Act (hereinafter called M.I.B.A.); the Gorham Development Corporation (hereinafter called Gorham), a local development corporation and an eligible mortgagor within the meaning of the Enabling Act; the Maine Metal Finishing Company (hereinafter called Maine Metal), a Maine corporation with "one of its principal purposes the manufacturing, processing or assembling of raw materials or manufactured products" and which admittedly, to quote from the bill, "has immediate need to expand its manufacturing facilities and has agreed to lease or conditionally purchase from Gorham, an industrial project to be erected by Gorham to the specifications of Maine Metal," and the Attorney General.

The agreed statement of facts reads in part:

> "1. That all the Parties hereto are proper Parties to this action and all of said Parties are properly designated in their respective capacities.
>
> "2. That Maine Metal Finishing Company has executed an Agreement to lease a certain building to be constructed by and on the property of Gorham Development Corporation . . .
>
> "3. That the estimated cost of the construction of the industrial building mentioned in Paragraph 2 will be approximately $50,000.
>
> "4. That Gorham Development Corporation and the Maine Savings Bank, acting through its trus-

tees, have mutually agreed that, upon the completion of the said industrial building, Maine Savings Bank will loan to Gorham Development Corporation the sum of $45,000, and Gorham Development Corporation will secure said loan by a first mortgage on the said land and industrial building; provided the Maine Industrial Building Authority will issue a contract or Certificate of Insurance to insure the payment of said mortgage loan to the Maine Savings Bank.

"5. That the Maine Savings Bank, acting by and through its trustees, on August 5, 1958, approved a loan to Gorham Development Corporation of $45,000 on the terms and conditions above expressed but that none of said money has been paid over or delivered to said Gorham Development Corporation or to any other person, firm or corporation for the use of said Gorham Development Corporation.

"6. That the Defendant, Maine Industrial Building Authority, has entered into a commitment to insure said mortgage payment in the amount of $45,000 when said industrial project is completed, and when said loan has been made, and said first mortgage has been executed and delivered; . . ."

The decisive issue in the case appears in paragraph 13 of the bill, denied by the defendants, reading:

"13. That the commitment to insure or guarantee issued by the Maine Industrial Building Authority and the actual contract to insure or guarantee to be issued by said authority to the Maine Savings Bank is not valid and not binding on said Maine Industrial Building Authority and affords no security to the Maine Savings Bank as the Enabling Act is not in conformity with Section 14-A of Article IX of the Constitution of the State of Maine. . . . Said Section 14-A of Article IX provides:

'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.'
>
> "The Enabling Act is in conflict with said Constitutional Amendment in that said Act provides that the mortgage on the industrial project may only be given by a local development corporation, while the Constitution provides that the mortgage must be on the real estate of an industrial or manufacturing enterprise, and thus such Enabling Act is void and of no force and effect."

Reference hereinafter to section 14 and section 14-A will mean to these sections in Article IX of the Constitution.

The plan adopted by the Legislature pursuant to section 14-A is simple and plain in outline. It is contained in two statutes passed at the special session of the 98th Legislature in October 1957; (1) the Enabling Act, enacted under the Emergency Clause and effective when approved on October 31, 1957, and (2) "An Act Relating to the Maine Industrial Building Authority" (P. L., 1957, c. 430) enacted without the Emergency Clause and effective January 30, 1958.

We summarize the Acts and set forth the portions in which we are particularly interested.

The Enabling 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 thus 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. . . .

* * * * * * *

There follow provisions for the membership and organization of the Authority with which we are not here concerned.

"**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:

* * * * * * *

"**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.

* * * * * * *

"**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.

* * * * * * *

"**VIII.** 'Mortgagor' shall mean the original borrower under a mortgage and his successors and assigns, and shall be limited to local development corporations.

* * * * * * *

"**Sec. 6. Powers of the Authority.** . . . .

"**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.**

* * * * * * *

"**Sec. 9. Insurance of mortgages.** The authority is authorized upon application of the proposed 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: . . .

* * * * * * *

"**Sec. 10. Mortgage insurance premiums** . . . Such premiums shall be payable by the mortgagees in such manner as shall be prescribed by the authority.

"**Sec. 11. Authority expenses.** . .

"**Sec. 12. Mortgages eligible for investment.** Mortgages insured by the authority of this chapter are made legal investments for all insurance companies, trust companies, banks, investment companies, savings banks, executors, trustees and other fiduciaries, pension or retirement funds.

"**Sec. 13. Records of account.** . . .

"**Sec. 14. Authority to provide funds.** . . . . The Governor and Council shall transfer (moneys to mortgage insurance fund) from the State contingent account or from the proceeds of bonds . . . The bonds so issued shall be deemed a pledge of the faith and credit of the State."

The Legislature in section 2 appropriated $500,000 for the establishment of the mortgage insurance fund.

"An Act Relating to the Maine Industrial Building Authority," P. L., 1957, c. 430, supplements the Enabling Act in matters of detail.

> "**Sec. 1. Powers.** The Maine Industrial Building Authority is authorized and empowered to enter into agreements with prospective mortgagees and mortgagors, for the purpose of planning, designing, constructing, acquiring, altering and financing industrial projects.
>
> "**Sec. 2. Additional power.** The Maine Industrial Building Authority is also authorized and empowered 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 An Act to Create the Maine Industrial Building Authority, heretofore passed by this Legislature."
>
> Sections 3 and 4 relate to acquisition and disposal of property and the crediting of certain proceeds to the mortgage insurance fund.
>
> Sec. 5 provides that any limitations as to the holding of real and personal property shall not apply to "local development corporations."

The general plan established by the Legislature in the Enabling Act is not altered by chapter 430. Of interest is section 1 spelling out the power of M.I.B.A. to "enter into agreements with prospective mortgagees and mortgagors." In the case at bar the M.I.B.A. made a commitment to insure a mortgage to be given in the future on fulfillment of certain conditions. It is clear that chapter 430 has no life or purpose apart from the Enabling Act. For convenience we will hereafter, unless otherwise indicated, include chapter 430 within the meaning of the term "Enabling Act."

There is no suggestion in the case that the parties have failed, or will fail, to comply with the Enabling Act and the

requirements of M.I.B.A. If the statute is valid the plaintiff has no complaint. In short, the validity of the statute, not compliance with the statute, is in issue.

The decisive issue remains as stated in paragraph 13 of the bill. Does the provision in the Enabling Act (Sec. 5, VIII) that the mortgagor "shall be limited to local development corporations," conflict with the provision of section 14-A, that "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," thus rendering the Enabling Act void and of no effect? We think not.

There are certain principles to be kept in mind in considering the exact point in issue.

First: The long standing policy of the State in section 14, that "The credit of the state shall not be directly or indirectly loaned in any case" was altered by the addition of the words "except as provided in section 14-A" and by the adoption of the new section 14-A, *supra.* For the history of section 14, see *Opinion of the Justices,* 146 Me. 183, 186, 79 A. (2nd) 753. We have no concern with the wisdom of the change in policy. Our obligation and duty is to declare what the law is, and to apply the law in the case before us.

Second: On October 29, 1957, the six Justices of the Supreme Judicial Court (one of whom has since retired) gave their opinions pursuant to their obligation under Sec. 3 of Art. VI of the state constitution to the Senate to the effect that the present chapter 421, then Legislative Document 1614, if enacted, would be constitutional. In an advisory opinion which, although all joined therein, is, under our practice, the advisory opinion of each justice acting individually, the justices said, in part:

> ". . . 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."
>
> *Opinion of the Justices,* 153 Me. 202, 215, 136 A. (2nd) 528.

It is familiar law that an advisory opinion binds neither the justice who gave the opinion nor the court when the same questions are raised in litigation. Justice Rufus Tapley, in *Opinion of the Justices,* 58 Me. at 615, stated the principle in apt language:

> "We can only proceed in the investigation upon the views of the law appertaining to the question, as they appear to us upon first presentation, and anticipate as well as we can the ground which may be urged for or against the proposition presented, never regarding the opinions thus formed as conclusive, but open to review upon every proper occasion."

Our duty is to consider the problem anew in light of the issues presented and with the aid and assistance of the research, briefs, and arguments of counsel. The defendants urge that the rule of *Cummings* v. *Eastman,* 126 Me. 147, 151, 136 A. 810, involving the validity of the removal of a sheriff is applicable. The court said:

> ". . . public policy, at least, requires that strong and compelling reasons be presented before the Court sitting *en banc* will hold an act by the Chief Executive of this nature invalid when taken in pursuance of a construction of the organic law given upon request under the constitution by a majority of the Court."

In the instant case there has been no final action taken under the Enabling Act. At most, the Legislature passed the Act in reliance upon the Opinion of the Justices as to its constitutionality. We need not consider what, if any, application the *Cummings* case would have had action final in nature been taken. See also *Laughlin* v. *City of Portland,*

111 Me. 486, 90 A. 318; *Commonwealth* v. *Welosky,* 276 Mass. 398, 177 N. E. 656; *Bowe* v. *Secretary of the Commonwealth,* 320 Mass. 230, 69 N. E. (2nd) 115; *Lincoln* v. *Secretary of Commonwealth,* 326 Mass. 313, 93 N. E. (2nd) 744.

Third: We approach the issue of constitutionality of the Enabling Act, having in mind the principles well stated for the court by Chief Justice Fellows in these words:

> "In passing upon the constitutionality of any act of the Legislature the court assumes that the Legislature acted with knowledge of constitutional restrictions, and that the Legislature honestly believed that it was acting within its rights, duties and powers. All acts of the Legislature are presumed to be constitutional and this is 'a presumption of great strength.' *State v. Pooler,* 105 Me. 224, 228; *Laughlin v. City of Portland,* 111 Me. 486; *Village Corporation v. Libby,* 126 Me. 537, 549. The burden is upon him who claims that the act is unconstitutional to show its unconstitutionality. *Warren v. Norwood,* 138 Me. 180. Whether the enactment of the law is wise or not, and whether it is the best means to achieve the desired result are matters for the Legislature and not for the Court. *Kelley v. School District,* 134 Me. 414; *Hamilton v. District,* 120 Me. 15, 20." *Baxter v. Waterville Sewerage District,* 146 Me. 211, 214, 79 A. (2nd) 585.

In *First National Bank of Boston* v. *Maine Turnpike Authority, et al.,* 153 Me. 131, 171, 136 A. (2nd) 699, we recently said:

> "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."

The basic objective of section 14-A and the Enabling Act is to foster, encourage and assist the industrial expansion

of the state through the use of the state's credit to a limited extent in financing the cost of needed new industrial buildings for the use of the industrial and manufacturing enterprises (which we may for convenience call "industries") mentioned in the Constitution. Only a bare outline of the purposes is found in section 14-A. They are set forth in more detail in the Enabling Act.

There is no controversy between the parties arising from any supposed conflict between the purposes and provisions of the Enabling Act or the terms and conditions prescribed by the M.I.B.A. in administering the program on the one hand, and section 14-A of the Constitution on the other, except from the "ownership issue" to be later discussed.

Passing for a moment the "ownership issue" it satisfactorily appears that the "industrial project" of the Enabling Act (Sec. 5-III) comes within the meaning of real estate eligible for an insured mortgage under section 14-A. In short, there is no conflict between Act and Constitution about the kind or type of property to be covered by such a mortgage. For convenience therefore we shall refer to the "real estate" in section 14-A as an "industrial project" or "project."

It is not enough in our view of section 14-A simply that an industrial building be constructed that is suitable for or adapted to industrial purposes. Under both the Constitution and the Enabling Act it seems plain that the industrial building must be used by an industry, that is to say, an industrial or manufacturing enterprise. Only with such use does the building become an industrial project eligible for an insured mortgage.

Thus an industry of necessity gains an intimate connection with the project. Such interest therein is not of course necessarily measured by complete ownership. Further, it is implicit in section 14-A and in the Enabling Act that the

income to pay the mortgage must come from the industry using the project. There is no other source of revenue.

In brief, under any plan devised to carry out the purpose of section 14-A we will find an industry with an interest in the project equal at least to that of a tenant. There is no industrial expansion without industry, and industry must ultimately pay the cost of the new industrial buildings.

We see the plan in operation in the case at bar. "Maine Metal, has immediate need to expand its manufacturing facilities and has agreed to lease or conditionally purchase from Gorham, an industrial project to be erected by Gorham to the specifications of Maine Metal."

The agreement or commitment relating to insuring the Gorham mortgage on completion of the project and upon meeting conditions imposed by statute or prescribed by the M.I.B.A. call among other things for a lease from Gorham to Maine Metal at a rental sufficient to pay the mortgage in full over the term of the lease. The lease is to be assigned to the Bank as additional security for the mortgage. The lease will also provide in substance that on payment of the mortgage and fulfillment of the terms of the lease either that Gorham shall convey the project to Maine Metal or that Maine Metal shall have an option to purchase for $1. For purposes of the case it is immaterial which provision may be included in the proposed lease.

The Legislature in the Enabling Act has chosen to place the local development corporation between the industry on the one hand and the Bank or mortgagee on the other. The mortgage to be eligible for insurance may not exceed 90% of the cost of the project, with a ceiling of $1,000,000. In this manner the Legislature brings the locality directly benefited or developed by industrial expansion into the picture through the control to be exercised by the local development corporation "to whose members no profit shall

enure" and through the self-interest created by the necessity of raising 10% of the cost. The local development corporation, with its control of the project, seems also designed to lessen opportunity for speculation in industrial buildings or projects financed by insured mortgages. The wisdom of the policy is for the Legislature to determine and is not our concern. We may take note, however, that the means chosen are reasonably adapted to secure the desired end.

The decision hinges upon the meaning of the phrase in section 14-A, "real estate . . . of such industrial and manufacturing enterprises . . .," and even more narrowly turns upon the meaning of the word "of."

The position of the plaintiff is that the project to be eligible for an insured mortgage must be owned by the industry. "Of" to the plaintiff means complete ownership, and since to give a first mortgage the local development corporation must have a good title, there is, says the plaintiff, a conflict between the Act and section 14-A.

We are convinced, however, that the People intended to give the Legislature broad powers to implement the policy permitted under section 14-A, and had no intention of limiting the means of carrying out the policy in the manner urged by the plaintiff. In reaching our decision we take the words creating the controversy in the context of the Constitution and we have in mind the purpose of section 14-A.

We are satisfied that something less than complete ownership by the industry meets the standard of section 14-A. In particular we are of the opinion that the proposed lease in the instant case to Maine Metal carries with it a sufficient part of the total rights comprising ownership to bring the Gorham mortgage within the bounds of eligibility for insurance.

The phrase "real estate . . . of such industrial and manufacturing enterprises" carries an element of use and possession, but it does not necessarily mean complete ownership, or, for example, title in fee simple. Such a construction it seems to us fairly and reasonably gives effect to the intention of the People and prevents suffocation of the objective of section 14-A under the cloak of a narrow construction.

See in Webster's New International Dictionary (2nd ed.) within the definition of "of" the following: "Indicating the possessive relationship, otherwise expressed by the possessive case; belonging or pertaining to, or connected with (a place, time, person, or thing); . . ."

There is not the slightest doubt that the Legislature intended section 14-A to cover the plan adopted in the Enabling Act. In submitting section 14-A to the People by "Resolve Proposing an Amendment to the Constitution Pledging Credit of State for Guaranteed Loans for Industrial Purposes" (Resolves 1957, c. 159, effective August 28, 1957), the Legislature had before it for consideration a bill "An Act to Create the Maine Industrial Building Authority," Legislative Document 640, which all agree was substantially like the Enabling Act, and in particular contained the provision limiting mortgagors to local development corporations.

In light of the necessity of a constitutional amendment to permit the desired policy, Legislative Document 640 was withdrawn. It reappeared in new form but with changes of no consequence for our purposes, as chapter 421 in the special session of the 98th Legislature held after the adoption of section 14-A. It may be said indeed that section 14-A was designed by the Legislature to meet the very plan subsequently enacted.

No complaint of unconstitutionality other than the "ownership issue" has been made by the plaintiff. Surely

we need not seek for issues not reached by the research and argument of counsel. Our decision is based on the issue presented and none other.

We point out that we do not pass upon the sufficiency of the various drafts of agreements and leases prepared for use by the M.I.B.A. and offered in evidence. They are instruments drawn to accomplish what we hold are proper and lawful objectives under a constitutional Act. We cannot be expected, nor indeed have we in argument been requested, to examine the drafts in detail.

The plaintiff fails in his attempt to enjoin the Bank and its Trustees from making the loan. The Enabling Act (P. L., 1957, c. 421) is constitutional, and so also is the supplementary act (P. L., 1957, c. 430). Acts and agreements of the M.I.B.A. pursuant to authority of the Enabling Act (as supplemented) are of full force and effect. The proposed loan by the Bank to Gorham if made pursuant to the authority of the Enabling Act (as supplemented) does not violate any provision of the banking laws.

The entry will be

Case remanded for entry of a declaratory judgment decree in accordance with this opinion.

VERNE C. SWAN
vs.
CLYDE H. SWAN ET AL.

Oxford. Opinion, November 28, 1958.

Wills. Revocation. Cancellation.

The intention of a testator as expressed in a will must govern, unless it is inconsistent with legal rules.

The presumption against intestacy is partly a rule of policy but mainly calculated to carry into effect the presumed intent of the testator.

The cancellation of legacies by the testator after the execution of a will, where the acts of revocation were not induced by or concurrent with any plan to make a new will, may be accomplished without requiring the necessary formalities and attesting prescribed by the Statute of Wills. R. S., 1954, Chap. 169, Secs. 1, 31, P. L., 1957, Chap. 302. This is so even though such cancellations redound to the enlargement of the residuum.

ON REPORT.

This is a bill in equity for construction of a will certified to the Law Court from the Probate Court upon agreed statement. Case remanded to the Probate Court for the County of Oxford in Equity for the entry of a decree in accordance with this opinion.

Henry H. Hastings,
Theodore Gonya, for plaintiff.

Willard & Hanscom, for defendants.

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

SULLIVAN, J. This is a suit in equity for the construction of a will and has been certified to this Court from the Pro-

bate Court upon an agreed statement of facts. R. S. (1954), c. 107, § 4, Par. X; R. S. (1954), c. 153, §§ 2 and 32.

The will of John S. Burbank as probated reads in its relevant sections as follows:

"After the payment of my just debts, funeral charges and expenses of administration, I dispose of my estate as follows:

"~~First~~: ~~I give, devise and bequeath to Blanche L. Smith of Bethel in the County of Oxford and State of Maine the house and all land owned by me on Chapman Street in Bethel Village in said Bethel and all of the contents of said house excepting those items which are hereinafter otherwise disposed of.~~

First Void J S Burbank

"Second: I give and bequeath to my cousin, Verne C. Swan of Keene, New Hampshire, the oil painting of my grandfather Burbank, the old Revolutionary War sword, the Mexican War platter and any of the other paintings situated in my house which he may desire to have, said articles to go to the heirs of the said Verne C. Swan in the event that the said Verne C. Swan should not survive me.

"~~Third~~: ~~I give and bequeath to the said Blanche L. Smith the sum of Six Thousand Dollars ($6,000.00) in cash.~~ Third Void John *S* Burbank

"Fourth: I give and bequeath the sum of one dollar ($1.00) each to the following: my cousin, Clyde Swan of Barre, Massachusetts; my cousin, Mary Bemis of Chesham, New Hampshire; my cousin, Julia Abbott of Prince Ruppert, British Columbia, Canada; Reginald Swan and Priscilla Swan, children of my late cousin, Cleon Swan.

"Fifth: All the rest, residue and remainder of the property which I shall own at my decease I give, devise and bequeath to the said Verne C. Swan, if he shall survive me. If the said Verne C. Swan shall not survive me then and in that event I give, devise and bequeath the said rest, residue

and remainder of my estate to the heirs of the said Verne C. Swan. Included in this paragraph is any and all money which I shall have received or which shall be due to me at the time of my decease as beneficiary under the will of E. Frances Burbank, late of Winchester, New Hampshire.

\- - - - - - - - - - -

"Seventh: I nominate and appoint my said cousin, Verne C. Swan to be the executor of this last will and testament ~~with bond~~."

Subsequent to the probate of the foregoing will, the Probate Court, upon petition of the executor, Verne C. Swan, after hearing and with the written consent of Blanche L. Smith, decreed that:

"- - - - the revocation of the first clause of said will is effective and operates as a revocation of that clause; - - - - - the revocation of the third clause in said will is effective and operates as a revocation of that clause; - - - - - the said Blanche L. Smith has no interest as a devisee or legatee under said will."

Blanche L. Smith had thus elected to waive a contest of the partial revocations by her undersigned concurrence with the court's adjudication. No appeal was thereafter taken from such decree within the accorded statutory time limitation. R. S. (1954), c. 153, § 32. As it was said in *Merrill* v. *Winchester,* 120 Me. 203, 208:

"- - - But instead of making a codicil stating that fact he drew his pen through the several bequests so paid, *thereby making a practical physical revocation which has been accepted by all parties in interest.*" (Italics supplied)

The validity of the partial revocations by cancellation is premised and postulated by the litigants here.

The parties to the instant case are all first cousins of the testator, John S. Burbank, and comprise his total next of kin.

This court is invoked to determine whether the property which had been affected by the revoked clauses, First and Third, of the will and which belonged to the testator at the time of the execution of his will and until his death is dispensed by the residuary clause into the sole ownership of the complainant or devolves in succession to the next of kin of John S. Burbank as intestate property.

The office of interpreting a will is essentially, by dint of the literal meaning of that self-defining term, "will," the process of realizing to what expressed effect the testator exerted his "power of choosing and of acting in accordance with choice." Such has long been a legal maxim.

> "Our task is to find the intent of the testator and to give effect to his intention if possible. The governing principles were well stated by Chief Justice Pattangall in *Green v. Allen, et al., 132 Me. 256, 258, 170 A. 504, 505*:
>
> 'The controlling rule to be applied in construing the meaning and force of the provisions of a will is that the intention of the testator as expressed must govern, unless it is inconsistent with legal rules. Such intention may be determined by an examination of the whole instrument, including its general scope, logical implications and necessary inferences. Language may be changed or moulded to give effect to intent, Hopkins v. Keazer, 89 Me. 345, 36 A. 615, and intent will not be allowed to fail for want of apt phrase or conventional formula, Fuller v. Fuller, 84 Me. 475, 24 A. 946'."
>
> *Wing, Adm'x. C. T. A.* v. *Rogers* (1953), 149 Me. 340, 343.
>
> "What was the testator's intention? Are the terms of his will such that we can give effect to that intention consistently with the rules of law? These are the fundamental inquiries, upon the answers to which the rights and duties of the parties depend."
>
> *Fox* v. *Rumery,* 68 Me. 121, 123.

For the construction of wills reason supplies certain rebuttable presumptions and standards deducible from the very contemplation of the undertaking. By this process our court has compiled certain sensible tests variously paraphrased in the following precedents:

" 'The courts have for a long time inclined very decidedly against adopting any construction of wills which would result in partial intestacy, unless absolutely forced upon them. This has been done partly as a rule of policy, perhaps, but mainly as one calculated to carry into effect the presumed intention of the testator.' "

Fox v. *Rumery,* 68 Me. 121, 124.

"- - - there is a general presumption that when a man sets (sic) down to make his last will and testament, he intends to dispose of all his property by that will and leave nothing to the operation of the statute of descents. But this is merely a presumption of fact which may quickly disappear in any given case. - - -"

Young v. *Quimby,* 98 Me. 167, 169.

"We must also bear in mind the presumption against intestacy, Fox v. Rumery, 68 Me. 121; Davis v. Callahan, 78 Me. 313, 5 A. 73; Spear v. Stanley, 129 Me. 55, 149 A. 603."

Wing, Adm'x. C. T. A. v. *Rogers* (1953), 149 Me. 340, 344.

"- - - Such a construction would not only be contrary to the express language of the residuary clause, and would uphold only a portion instead of the whole will, but would result in partial intestacy, a result which courts in this country and in England have for a long time sought to avoid unless absolutely forced upon them. It would also be contrary to the introductory words of the will by which the testator at the outset professes to dispose of all his worldly estate in the manner which he indicates - - - -"

Davis v. *Callahan,* 78 Me. 313, 318.

"A will is to be construed as of the date of its execution, even though it does not become operative until the death of the maker. Cook v. Stevens, 125 Me. 380; Torrey v. Peabody, supra." (97 Me. 104.) *Spear* v. *Stanley* (1930), 129 Me. 55, 60.

"Intention is to be ascertained from examination of the whole instrument. It is the intention of the maker of the will at the time of its execution. Gorham v. Chadwick, 135 Me. 479, 482, 200 A. 500, 117 A. L. R. 805; Merrill Trust Co. v. Perkins, 142 Me. 363, 53 A. 2d 260; Bryant v. Plummer, 111 Me. 511, 90 A. 171."

New England Trust Co. v. *Sawyer* (1955), 151 Me. 295, 301.

"- - - the court will, if possible, adopt such construction as will uphold all the provisions of the will - - - The will is to be viewed and construed as a whole - - -"

Davis v. *Callahan,* 78 Me. 313, 318.

"- - - And that rule is that the expressed intention of the testator as gathered from the language of the whole will, read, in case of doubt, in the light of surrounding conditions, must control, unless in contravention of positive rules of law, Crosby v. Cornforth, 112 Maine, 109. - - -"

Philbrook v. *Randall,* 114 Me. 397, 398.

" 'Because the testator is supposed to take the particular legacy from the residuary legatee only for the sake of the particular legatee; so that upon the failure of the particular intent, the court gives effect to the general intent' (See *Drew v. Wakefield, 54 Me. 291, 296* as to devises.)

"To be sure the testator may by the terms of the bequest narrow the title of the residuary legatee so as to exclude lapsed legacies. Dunlap v. Dunlap, 74 Maine, 402; - - -"

Emery v. *Union Society,* 79 Me. 334, 343.

See, also, *Stetson* v. *Eastman,* 84 Me. 366, 369.

These rational and empirical precepts in their substance are of considerable reliable assistance in interpreting the expressed intent of the testator.

In the instant case the will of John S. Burbank as an integral document with its unobliterated cancellations assented to by all parties, the agreed statement of the litigants and the court record are the source of several pertinent facts and derivative conclusions.

Subsequent to the execution of the will but prior to the partial revocations Blanche L. Smith profited by a legacy and a devise settled upon her by an unnamed benefactor other than this testator.

The will contains the stereotyped liminal statement, "I dispose of my estate as follows:" This might merely constitute a formal coincidence but cumulatively may bear meaning. *Davis* v. *Callahan,* 78 Me. 313, 318, *supra.*

The testator left no widow or direct descendants. Surviving him were collateral kin only.

At the time of execution of the will the near relatives with the significant exception of the complainant were each affirmatively and summarily disqualified from substantial bounty by a token legacy of one dollar each. And so it was with two second cousins. The complainant, if alive at the demise of the testator, or his heirs in the alternative was and were selected as the repository of those unique chattels authenticating and witnessing the historic American tradition in the Burbank family. In his family consciousness the testator thus turned to the complainant. Verne C. Swan was designated sole residuary legatee and devisee of the testator's estate and his heirs by substitution in the event the complainant predeceased the testator. The testator paused over the residuary disposition in a sort of abundance of caution to be exhaustive by a specific inclusion of any rights

and credits he might have against the estate of E. Frances Burbank. It could be purely specious to observe or it might be indicative that the residuary section contains the somewhat unusual wording, "All the rest, residue and remainder *of the property which I shall own at my decease,* I give, devise and bequeath," etc. (Italics supplied.) Verne C. Swan was nominated executor.

The entire context of the will as originally executed discloses a deliberated and striking effort to preclude intestacy. It evidences some generosity, gratitude or obligation toward Blanche L. Smith with an otherwise sole preference for Verne C. Swan or his surviving kin. The partial revocations occasioned by the fortuitous good fortune of Blanche L. Smith and following upon the execution of the will inferentially disburdened the testator from apprehensions and solicitude for her but even with the deletions the abiding consistency and tenor of the instrument generally give preponderance to the conclusion that the cancelled legacies and devise were purposed by the testator to redound to the enlargement of the residuum.

It should be noted that the testator with his cancellations made no attempt to add any positive provisions to his will by interlineations, writings, alterations or otherwise and gave no indication that his acts of revocation were induced by or were concurrent with any plan of his to make a new will.

Objection has been made that to tolerate here such a translocation of the property which had been the subject matter of the revoked sections is to condone the augmenting of the residue by an act of the testator after execution of the will without requiring the necessary formalities and attesting prescribed by the Statute of Wills. R. S. (1954), c. 169, § 1, P. L., 1957, c. 302; R. S. (1954), c. 169, § 3. Thus it is contended that the chattels and realty concerned must

devolve by intestacy to the next of kin in spite of the manifested desire of the testator to the contrary. There is a hard core of formal logic in such a position but the contrary opinion which entails only danger, if any, more speculative than realistic is better adapted to achieve justice. There is considerable and eminent authority in accord with our reasoning.

> "- - - The revocation may, however, enlarge the residuary gift; and this has been held to create a new disposition. But the more liberal view of the majority is that the residuum is a 'catch-all' gift and that the increase passes under a properly attested clause. - - -" 23 Harvard Law Review, Notes, 558, 559.

> "In this case, there is nothing to indicate an intention on the part of the testator that the property covered by the revoked clauses should not go to the residuary devisees. The residuary clause is expressed in the broadest terms. 'I give, bequeath and devise all the rest, residue and remainder of my estate of every description, of which I shall die seised and possessed.' The intention of the testator is clear, to give all his property, not otherwise disposed of by the will, to the trustees named therein, for the support of the charity established by the nineteenth clause. He revoked the sixth and thirteenth clauses, and purposely and intelligently left the other provisions to stand as his will. The only fair inference is that he intended that the property covered by those clauses, and which by his revocation became undisposed of by the other clauses of the will, should fall within the residuary clause. We are of opinion that this case falls within the general rule, and that the property in question passes to the residuary devisees.

> "The argument of the appellants, that this view is in conflict with the provisions of law which require that a will disposing of property should be executed in the presence of three witnesses, is not

sound. It is true that the act of revocation need not be done in the presence of witnesses; but such act does not dispose of the property. It is disposed of by the residuary clause, which is executed with all the formalities required in the execution of a testamentary disposition of property."

Bigelow v. *Gillott* (1877), 123 Mass. 102, 107.

See, also, *Batt* v. *Vittum,* 307 Mass. 488, 30 N. E. (2nd) 394.

"In the case now being considered, there is a gift to a supposed wife of the whole of testator's property so long as she remained his widow, and thereafter to his two sons. The gift to the wife was made by the third clause of the will, and to his sons by the fourth clause. The obliterations applied to the third clause are sufficient to destroy its effect as a testamentary act, indicating an intention on the part of the testator to revoke it so far as it contained a gift to his wife, and, as it had no other purpose, the obliterations are sufficiently extensive to entirely destroy it, the effect of which was to cast into the residue of the estate given to the sons that which had been previously given to the wife. It was not an alteration of the third clause, but a complete revocation of the devise given by it. The gift to the sons of all of his estate after the death or remarriage of his wife was a gift of all of the residue remaining after the satisfaction of the prior gift to her. The act of revocation does not dispose of the property that is disposed of by the gift to the sons. Bigelow v. Gillott, supra. I am therefore of the opinion that the revocation of the gift to the wife was valid, and is not, under our statute, made nugatory because the incidental effect of such revocation increases the residue of the estate given to the sons. - - - -"

Collard v. *Collard* (N. J.), 67 Atl. 190, 191.

"- - - The increase of the residuary estate which may result from the obliteration is not a new testamentary disposition, but a mere incidental conse-

quence resulting from the exercise of the power conferred on the testator by the statute - - -"

Brown v. *Brown* (S. C.), 74 S. E. 135, 136.

"It must be remembered that in the case now before the Court there was a cancellation of the words comprising the fifth item, only, and there was no attempt on the part of the testatrix to make any other changes or alterations in her will, as executed, by interlineations or writing on the face of it. The result of the cancellation was not to make a new will in any respect, it was only to take out of the will so much thereof as had been cancelled. It had no effect on any other item except such as might result to the residuary clause. While the cancelling of item five did have the effect of increasing that part of the estate disposed of by the residuary clause, yet when she executed her will, it was her intention that such part of her estate as was not otherwise specifically devised or bequeathed should go to her residuary legatees and devisees; and when she revoked the fifth item, it is reasonable to believe that no longer having specifically devised the property which was the subject of the fifth item, then it was her intention that such property should take its place with that other part of her property of which disposition had been made in the residuary clause, unless this should be contradictory to the declared purpose of the testatrix as found in other parts of the will. There is nothing in Mrs. Simpson's will to show a contradictory purpose with respect to the property originally devised in the fifth item.

"While the effect of the cancellation in the present case was to make a change in the will to the extent of increasing her residuary estate, yet this may be regarded as an incident to the cancellation and not such a change in the original will as could be made only by a codicil or a new will."

Meredith v. *Meredith*, 35 Del. 35, 157 A. 202, 24 A. L. R. (2nd) 514, 553.

Compare *In re Gorrell's Estate* (1941), 19 N. J. Misc. 168, 19 A. (2nd) 334, 338; In re *Frothingham's Will* (N. J.), 74 Atl. 471.

We accordingly decide that in conformity with the intent of the testator as we have interpreted it the personalty and realty described in the First and Third clauses or sections of the will when executed have passed via the residuary clause into the ownership of Verne C. Swan, sole residuary legatee and devisee.

The mandate must be:

Case remanded to the Probate Court for the County of Oxford in Equity for the entry of a decree in accordance with this opinion.

SIDNEY W. THAXTER
AS GUARDIAN AD LITEM
FOR
KATHLEEN T. SMALL
APPELLANT FROM
DECREE OF JUDGE OF PROBATE

York. Opinion, December 1, 1958.

Wills. Dower. Widows. Waiver. Incompetency. Guardians. Probate Courts. Equity. Jurisdiction

The Probate Courts of this state have no jurisdiction to disallow a notice of claim filed on behalf of an incompetent widow by her guardian or guardian *ad litem*. (R. S., 1954, Chap. 170, Sec. 14.)

The discretion whether to file notice of claim is conferred by statute upon the guardian and not the Probate Court.

Whether the equity powers of the Probate Court are broad enough to give the court power to approve or disapprove the guardian's election to file notice of claim is not decided.

An election, once made, will stand in the absence of bad faith or abuse of discretion.

A guardian, in making an election, must place himself, as nearly as may be, in the shoes of his ward. Each case must, of course, rest on its own facts.

ON REPORT.

This is an appeal to the Supreme Court of Probate before the Law Court upon report. Appeal sustained. Decree below vacated. Remanded to the Probate Court for further proceedings in accordance with this opinion.

Linnell, Perkins, Thompson,
Hinckley & Thaxter, for plaintiff.

Waterhouse, Spencer & Carroll,
N. B. & T. B. Walker, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL.

WEBBER, J. On report. Charles C. Small died testate and possessed of a substantial estate. In the third paragraph of his will appeared the following provision which contained the only reference to his widow: "THIRD: Over our many years of life together, I have purchased and given to my wife, Kathleen T. Small, monies, securities and other real and personal property and estate to an amount sufficient for all of her needs, having in mind her age and mental and physical condition, and which, in the aggregate, amounts to a sum considerably in excess of any legal share of my said wife in my estate, wherefore, I make no provision for my said wife in this my Will."

The bulk of the estate was placed in trust for the benefit of the testator's two adopted daughters, a nephew and two nieces. The widow was at the time of the execution of this will and at the time it was offered for allowance mentally incapacitated and confined as a patient in a hospital under commitment as an insane person. Very shortly after the death of the testator, guardians were appointed to conserve the separate and not inconsiderable estate of the elderly widow. One of the two guardians was also one of the two executors of Mr. Small's will. Mindful of the possible conflict of interest which might arise as a result of the dual capacity of one of the guardians, they filed a petition in the Probate Court for the appointment of the appellant as guardian *ad litem*. They further requested that the Probate Court "make due inquiry into the premises and after hearing determine whether or not the best interests of the said Kathleen T. Small under all of the circumstances of the case will be served by the filing of Notice of Claim of distributive share in this Court and pending hearing to instruct the Guardian Ad Litem appointed by this court to file such

notice as the court may direct, subject to final decree of this court on this petition."

Pursuant to this petition, the appellant was appointed guardian *ad litem* and seasonably filed notice of claim of the widow's distributive share of the estate "subject to the decision of this (probate) court as to whether it would be for the best interest of said Kathleen T. Small to claim her said right *provided that this court has authority to so decide,* and reserving all rights of appeal from any such decision or decree as is provided by law." (Emphasis supplied.) After hearing, the Probate Court disallowed the claim of the distributive share as not in the best interest of the widow. From this order an appeal was taken to the Superior Court sitting as the Supreme Court of Probate. The matter there being in order for hearing *de novo,* additional evidence was taken out and the case was reported for our final action.

Quite fortuitously, the illness of Mrs. Small was not of a permanent nature and she was discharged from the hospital in time to participate in the hearing now reported. Qualified medical authority, not challenged, pronounced her competent to testify in court and decide for herself her future needs. Her testimony records her unequivocal ratification of the action of her guardian *ad litem* in claiming her statutory interest as widow and leaves no doubt that if she had been competent to act in her own behalf at the time of her husband's death she would have taken like action. This appeal raises the issue as to whether the Probate Court had jurisdiction to disallow a notice of claim filed on behalf of an incompetent widow by her guardian or guardian *ad litem.* That issue has not been raised heretofore in this jurisdiction.

R. S., 1954, Chap. 170, Sec. 14 provides in part for the claim by a widow of her distributive share of the estate of her deceased husband. The statute deals with the case of the testator who has made no provision for his widow in his

will as well as the case where some provision has been made. The section further provides in part: "Such notice *may* be filed by an insane widow * * * by * * * her guardian, or by a guardian ad litem appointed for the purpose." (Emphasis supplied.) Attention is at once directed to the use of the word "may," ordinarily permissive in its connotation. The legislature did not intend an absurd result. It used the word "may" deliberately and advisedly. The guardian or guardian *ad litem* stands in the shoes of his ward and must protect her interest. There are many instances where the benefits conferred by the will equal or exceed the distributive share guaranteed by the statute. In such cases the legislature clearly did not contemplate that the guardian or guardian *ad litem* would claim the statutory interest to the detriment of the ward. We construe the language of the statute as imposing upon the guardian or guardian *ad litem* a duty to exercise a sound judgment and discretion in determining whether or not the best interests of the ward require that the statutory claim be filed.

It is important to note that this discretion was conferred upon the guardian or guardian *ad litem,* as the case may be, and not upon the Probate Court. In some states, similar statutes specifically provide that the decision of the guardian or guardian *ad litem* must have the approval of the court. No such language or its equivalent appears in our statute. It has many times been stated that the Probate Court is a statutory court of very limited jurisdiction. *Thompson, Appellant,* 114 Me. 338, 340; *Roy C. Knapp, Appellant,* 145 Me. 189, 192. There is no provision of statute, express or implied, which gives the Probate Court authority to approve or disapprove the election made by the guardian, and the disallowance of the claim in this instance was beyond its power.

We recognize that in some situations the fiduciary may feel compelled to seek the aid of a court of equity in making

his election. Moreover, parties in interest may in some instances require equitable relief when it appears that the election by the fiduciary stems from bad faith or amounts to an abuse of discretion. A court of general equity jurisdiction is clearly competent to afford relief in such cases. Under somewhat similar circumstances, the New Hampshire court held that a court of general equity jurisdiction was a proper tribunal in which to resolve any issue involving the alleged bad faith or abuse of discretion of a guardian making an election for his insane ward. *Wentworth* v. *Waldron* (1934), 86 N. H. 559, 172 A. 247. We are not required to decide here whether or not the more restricted equity powers of a probate court are broad enough to permit it to act in such premises. The proceeding before us is not a bill in equity. It is a proceeding in the nature of a petition by the guardians addressed to the Probate Court setting forth facts which show the necessity for an election on behalf of their ward, and which further show that the petitioners are disqualified by conflicting interests from making the election themselves. The petition seeks the appointment of a guardian *ad litem* to act in their place. This action on the part of the petitioners was commendable and proper. They could do no less in the proper performance of their duty to their ward. The petitioners, however, went further, apparently acting on the mistaken theory that the election was a province of the Probate Court and that its discretion would direct and control the action of the guardian *ad litem*. They further prayed that the court would determine what the best interest of the ward required and would instruct the guardian *ad litem* as to what action he should take. In this latter respect the petition was at best premature. The guardian *ad litem* who by statute was to make the election was not himself seeking the aid of equity in making his determination nor was this a bill to set aside the election of the guardian *ad litem* as made in bad faith or as constituting an abuse of his discretion. Even assuming for the pur-

pose of argument (and we do not here so decide) that the equity powers of probate courts are broad enough to confer jurisdiction in such matters, there was nothing before the court at this stage on which it could act save only the appointment of a guardian *ad litem*.

It is suggested that the notice of claim filed by the guardian *ad litem* was not effective because it was conditional. We do not so construe it. The appellant was faced with a petition underlying his appointment which clearly suggested the legal hypothesis that the controlling discretion would be that of the Probate Court rather than that of the appellant. The state of the governing law had never been declared in this jurisdiction. By his notice the appellant made it clear that if the choice was his to make, he elected to claim the statutory interest for his ward. He left the determination to the Probate Court if and only if authority to make that election was by law vested in that court. If, however, the law was as the appellant conceived it to be, the alleged condition was inoperative. We hold that the election was his to make and that he made it. Once made, it will stand in the absence of a showing of bad faith or abuse of discretion. *Morse* v. *Trentini* (1956), 121 A. (2nd) (N. H.) 563.

The matter on report comes to us for such action as might have been taken by the Supreme Court of Probate. We are mindful that in that capacity our powers are circumscribed by statute. *Hanscom* v. *Marston,* 82 Me. 288, 297. We hold that for the reasons above stated the Probate Court was powerless to take the action it did in the pending proceeding and its decree must be set aside.

Lest we seem to decide a case of novel impression on narrow jurisdictional grounds without any consideration of the merits, it may be noted that a bill in equity addressed to a court of general equity jurisdiction and charging the appellant with abuse of discretion would have produced no dif-

ferent result. The Probate Court below purported to balance equities and find them weighted against the claim of statutory interest on behalf of the insane widow in this case. We have read with interest the texts and cases cited which disclose very divergent points of view as to what constitutes the "best interest" of an insane ward. See Page on Wills, Vol. 4, Page 37, Sec. 1363 and cases cited; also Annotations in 74 A. L. R. 452 and 147 A. L. R. 336. It seems rather significant that, almost without exception, the cases deal with the situation in which *a substantial provision* has been made for the widow in the will and the issue is then whether or not "her best interest" requires that the statutory interest be claimed in preference to the testamentary provision. In the case before us *no provision* was made for the widow by the will of the deceased husband. As was stated by Justice Stearne in a vigorous dissenting opinion tendered in the case of *In Re Harris* (1945), 351 Pa. 368, 41 A. (2nd) 715, 730: "In every case cited by the majority the testator had, by his will, *made adequate provision* for his widow in a measure almost equivalent to her statutory intestate share. In none of the cases was the widow disinherited. But in no reported case which I have discovered, has this principle been applied to allow a widow to be disinherited because she possessed an individual estate of her own, was old, insane and therefore would not be able to enjoy it. Such considerations are, to my mind, wholly unsound and untenable." Where the benefit to the widow under the will was comparatively slight as compared to her statutory interest, the Kentucky court refused to look beyond the financial interest of the widow. *Ramsey's Ex'r.* v. *Ramsey* (1932), 47 S. W. (2nd) (Ky.) 1059. And where there was a "persuasive mathematical differential" of over $200,000 between the benefit conferred by will and that provided by law, a justice of the Supreme Court of New York felt that this must be recognized as a paramount consideration and that a common sense view would compel the assumption that the

widow would have elected to take the more valuable right. *In Re Hills* (1934), 157 Misc. 109, 283 N. Y. S. 733. All courts apparently agree that in making the election, the guardian must place himself as nearly as may be in the shoes of his ward. Each case must of course rest on its own facts. No doubt there have been and will be instances in which widows will be strongly impelled to follow the wishes of their deceased husbands as expressed in their wills even though such acquiescence works to the monetary disadvantage of the widow, but in a day of mounting inflation and of nagging doubt as to the economic future we think the case will be rare and unusual indeed in which the widow, cut off by her husband's will *from any benefit whatever,* will fail to claim her statutory interest. Above all, in cases where the guardian must elect for his incompetent ward, the overriding consideration must be that the ward *not be penalized by her insanity. Wentworth* v. *Waldron, supra; Mead* v. *Phillips,* 135 Fed. (2nd) 819, 829; *Emmert* v. *Hill* (1922), 226 Ill. App. 1. In determining whether in a particular case the ward is being penalized by her insanity we must not lose sight of the fact that, if sane, the widow could have claimed her statutory interest and no one could have questioned her right to do so. The facts of the instant case serve to illustrate graphically and support the view that except in rare and unusual circumstances a widow will not accept the provisions of a husband's will which confer on her no benefit and offer no protection for her future security. The ward in this case has made it plain that had she been competent in the first instance she would have claimed her legal share. Quite obviously, to have deprived her of that interest would have been to penalize her for her unfortunate mental illness. Doubtless the Probate Court, if it had had the advantage of the ward's testimony, would itself have reached a different conclusion. It is apparent therefore that no injustice results from a decision based upon technical grounds, for upon these facts and the applicable law as we

view it, the result would have been the same regardless of the nature of the proceeding. The entry must be

Appeal sustained. Decree below vacated. Remanded to the Probate Court for further proceedings in accordance with this opinion.

BYRON MARSHALL AND RICHARD C. JONES

vs.

ROLAND B. AND STELLA A. LOWD AND FRANCES HORN

York. Opinion, December 23, 1958.

Statute of Frauds. Demurrer. Parol Evidence.

The law is clear in this state that the defense of the Statute of Frauds may be raised by demurrer in those cases where the alleged agreement required to be in writing by the declaration shows it to be oral.

The sufficiency of the alleged memorandum in writing may be raised by demurrer but the court before sustaining the demurrer, must be satisfied (1) that the contract declared upon is within the Statutes of Frauds and (2) that the existence of the required memorandum can not be established from the written agreement itself or from the agreement supplemented by such parol evidence as the law will permit.

Parol or simple contracts for the sale of growing timber to be cut and severed by the vendee are not construed as contracts for the sale of an interest in land and are not within the Statute of Frauds.

A contract providing that the vendees shall "have three (3) years from date . . . to remove timber and pulp" is not necessarily a contract "not to be performed within a year." (R. S., 1954, Chap. 119, Sec. 1, Par. V.)

ON EXCEPTIONS.

This is an action of assumpsit before the Law Court upon exceptions to the overruling of a demurrer. Exceptions overruled.

Sewall, Strater & Erwin, for plaintiff.

J. Armand Gendron, for defendant.

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

SIDDALL, J. This is an action on the case in the nature of special assumpsit brought to recover damages for breach of a written contract for the sale and removal of standing wood and timber. The defendants demurred to the plaintiffs' declaration. The demurrer was overruled by the presiding justice, and exceptions were duly taken by the defendants.

The plaintiffs' declaration reads as follows:

> "1. In a plea of the case for that the said defendants on the 13th day of July, A. D. 1956, entered into a contract in writing with the Plaintiffs, duly signed and delivered, of which the following is a copy:
>
> THIS IS A CONTRACT MADE THIS 13TH DAY OF JULY, A. D., 1956 BETWEEN ROLAND B. LOWD AND STELLA A. LOWD OF BERWICK, COUNTY OF YORK, MAINE PARTY OF THE FIRST PART AND BYRON MARSHALL OF SOUTH BERWICK, COUNTY OF YORK, MAINE AND RICHARD C. JONES OF BERWICK, COUNTY OF YORK, MAINE PARTY OF THE SECOND PART, FOR THE PURCHASE OF STANDING WOOD AND TIMBER OWNED BY SAID LOWDS AND FRANCES HORN, SITUATE IN ACTON, said County of York.

MARSHALL AND JONES have the right to enter on property of ROLAND B. LOWD AND STELLA A. LOWD for the purpose of pulp and lumber operations.

MARSHALL and JONES to pay $18.00 per thousand for square edge pine and hardwoods sawed, except lumber or wood used other than sawed lumber in process of lumber and pulp operations. All lumber to be mill tally of sawable lumber, and to be paid for every two (2) weeks by MARSHALL and JONES.

ROLAND B. LOWD has right to chop pulpwood and boltwood with partner or helper for $5.00 per cord as long as operations are in process or as long as job lasts. Said pulp or boltwood cut by ROLAND B. LOWD to be browed by MARSHALL and JONES or men contracted to do that work.

It is agreed that ROLAND B. LOWD is to chop hardwood logs at $7.00 per thousand. Said logs to be either mill or International Rule Scaled, until such time as lumber is sawed and mill tally determined. All logs and pulp cut by ROLAND B. LOWD to be plainly marked if deemed necessary by ROLAND B. LOWD.

ROLAND B. LOWD to be paid every week for pulp or bolt wood he and/or his helper chops.

It is agreed that ROLAND B. LOWD and/or his helper will chop all wood agreeable to market demands and in a workmanship manner, under supervision of MARSHALL and JONES.

MARSHALL and JONES agree to take any and all pine lumber agreeable to be squared and to leave pine unfit for squaring.

MARSHALL and JONES have right to keep and store any equipment including mills, camps, horses, trucks and etc. of theirs or their agent and use water on the LOWDS land.

MARSHALL and JONES agree to pay ROLAND B. LOWD and STELLA A. LOWD, payable to

ROLAND B. LOWD, $1.50 for each cord of pulp or boltwood chopped. Survey to be made by Company to whom pulp and/or boltwood is sold.

It is agreed that MARSHALL and JONES not be liable for damage to land due to operations, such as building brows and roads, fire and etc.

It is agreed that MARSHALL and JONES have right to authorize any and all help or agents to enter on said land of ROLAND B. LOWD and STELLA A. LOWD at any and all times as deemed necessary to MARSHALL AND JONES.

Said MARSHALL and JONES to have three (3) years from date of this contract to remove lumber and pulp.

MARSHALL and JONES to have all pulp and lumber except that reserved by ROLAND B. LOWD and STELLA A. LOWD and marked as such on or before day operations begin. Said mark being a painted line.

MARSHALL and JONES have right to hire choppers and browers on pulp operations or any help or contract operations on pulp and lumber as they may deem necessary.

It is understood that MARSHALL and JONES are not to be held liable for any taxes; Government, State or Town, on land or withholding taxes other than tax on sawed lumber.

It is agreed that MARSHALL and JONES shall have all rights to all slabs and sawdust at their discretion.

2. That the Plaintiffs have duly performed all the conditions of said agreement on their part to be performed but the Plaintiffs were prevented by the Defendants from acting further under said agreement, and from further conducting the business contemplated thereby.

3. That said Defendants have not performed the conditions and agreement on their part to be per-

formed in and by said agreement, but have violated the same, in that they refused to permit the Plaintiffs to enter upon their land and further sold the wood described in the foregoing contract to a third party."

The record fails to indicate the execution of the agreement set forth in the declaration, but the parties have stipulated that the contract was signed by all persons to be charged thereunder.

To this declaration the defendants filed a demurrer, claiming as grounds of demurrer the following, viz:

"(1) That the promise, contract or agreement upon which the action is brought and the memorandum or note thereof in writing signed by the parties is fully set forth in plaintiffs' declaration by copy, as stated in said declaration;

(2) That the contract in question is a contract for the sale of an interest in real estate, and, for that reason, is within the express terms of the Statute of Frauds, R. S., Chapter 119, sec. 1, subsec. IV;

(3) That the contract in question is an agreement which, by its specific terms, is not to be performed within one year from the date of the making thereof, and for that reason, also, is within the express terms of the Statute of Frauds, R. S., Chapter 119, sec. 1, subsec. V;

(4) That the promise, contract, or agreement in this case, and the memorandum or note thereof, being the writing set forth in plaintiffs' declaration, as above stated, does not contain any description whatsoever of the real estate thereby affected, except that it states that said real estate is situated in the Town of Acton, in said County of York, and does not in any way identify said real estate, and, for that reason, is insufficient to satisfy the requirements of the Statute of Frauds."

The provisions of the Statute of Frauds, R. S., 1954, Chap. 119, claimed by the defendants to be applicable to the instant case are as follows:

> "**Sec. 1. Cases in which promise must be in writing; consideration need not be expressed therein.** — No action shall be maintained in any of the following cases:
>
> . . . .
>
> **IV.** Upon any contract for the sale of lands, tenements or hereditaments, or of any interest in or concerning them;
>
> **V.** Upon any agreement that is not to be performed within 1 year from the making thereof;
>
> . . . . unless the promise, contract or agreement on which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith, ..."

The case presents the following issues:

1) May the defense of the statute of frauds be raised by defendants' demurrer?

2) If so, for the purpose of demurrer, is the agreement set forth in the declaration (a) a contract for the sale of an interest in real estate or (b) an agreement not to be performed within one year from the making thereof?

3) If either, is the memorandum sufficient to take the case out of the statute?

The first question to be decided therefore is whether the alleged failure to comply with the statute of frauds may be raised by defendants' demurrer in the instant case in which the agreement between the parties is set forth verbatim in the declaration.

The law is clear in this state that the defense of the statute of frauds may be raised by a demurrer in those cases

in which an agreement required by the statute to be in writing is shown by the declaration to have been oral. *Lawrence* v. *Chase,* 54 Me. 196.

The same principle is true in equity. A demurrer is proper pleading in cases in which an agreement within the statute of frauds is shown by the bill to be verbal. *Farnham* v. *Clements,* 51 Me. 426, 428.

Our court has never determined whether or not a defendant may by demurrer raise the question of the sufficiency of a memorandum as a compliance with the statute in cases in which the written agreement is set forth verbatim in the declaration.

From the standpoint of pleading we can discover no distinction between a case in which the declaration sets forth an oral contract which is in violation of the statute, and a case in which the declaration sets forth verbatim a written agreement clearly lacking the essential elements from which a sufficient memorandum under the statute may be established. In either case a demurrer properly raises the question of whether the agreement is within the statute of frauds, and if so, whether the memorandum is a sufficient compliance with the statute.

However, before *sustaining* a demurrer, the court must be satisfied that the contract declared upon is within the statute of frauds, and that the existence of the required memorandum cannot be established from the written agreement itself or from the agreement supplemented by such parol evidence as the law will permit. See *Jacobson et al.* v. *Hendricks et al.,* 83 Conn. 120, 75 A. 85, in which the court on page 86 said:

> "For the purposes of the demurrer, which has been filed by two of the defendants, the demurrants are entitled to the assumption that there are no other writings which would help to establish the exist-

> ence of such a memorandum. The possibility of the existence of certain parol proof supplementing the writings filed cannot, however, be ignored. For example, an agency carrying with it the power to execute a sufficient written memorandum may be created by parol. *O'Sullivan v. Overton,* 56 Conn. 102, 105, 14 Atl. 300; *Moody v. Smith,* 70 N.Y. 598; *Long v. Hartwell,* 34 N.J. Law, 116; *Cœve v. Mackenzie,* 37 L.T. (N.S.) 218. So, also, ambiguities in the terms of a writing, or in the language of reference to other writings sought to be identified as those to which a signed writing refers, may be resolved by oral proof. Benjamin on Sales, Sec. 222, 222a. In order, therefore, that the action of the court below may be justified for reasons arising from the statute of frauds, it must appear from the complaint and the writings filed, regarding them as including all pertinent writings, that the plaintiffs could not offer admissible evidence to establish the existence of the necessary memorandum either by virtue of some one of said writings, or of all of them taken together, or of any one or all of them, when supplemented by such parol proof as the law would permit to be received."

In ruling that a demurrer is proper from a procedural standpoint, we are aware of the statement by the court in *Lawrence* v. *Chase, supra,* that if the declaration sets out a written promise the general issue is the proper plea. The declaration in that case, however, set forth an oral agreement, and the statement is mere dictum as to the issues in this case.

We now turn to the question of whether or not the agreement declared upon is a contract for the sale of an interest in real estate.

The contract in this case was a simple contract as distinguished from a contract under seal. Whatever the rule may be in other jurisdictions, it is well settled in this state that *parol* or *simple* contracts for the sale of growing timber

to be cut and severed by the vendee are not construed as contracts for the sale of an interest in lands and are therefore not within the statute of frauds. *Emerson* v. *Shores,* 95 Me. 237, 239; 49 A. 1051; *Banton* v. *Shorey,* 77 Me. 48, and cases cited therein.

The next question is whether the agreement is one not to be performed within one year from the making thereof under the provisions of Par. V of Sec. 1 of the Statute of Frauds.

Our court in many cases has had occasion to discuss the applicability of the statute of frauds to agreements alleged to fall within this provision.

In the case of *Longcope* v. *Lucerne-In-Maine Community Association,* 127 Me. 282, 143 A. 64, the plaintiff brought suit to recover damages for the alleged breach of an oral contract of employment. The general issue and statute of frauds were pleaded. The court on page 284 said:

> "The defendant's main reliance is upon the Statute of Frauds which bars actions upon contracts not to be performed within a year unless such contracts are evidenced by writing.
>
> Contracts of employment for a specified period of more than a year or for the performance of undertakings which necessarily require more than that time are obviously within the statute.
>
> Also within the statute are contracts wherein the manifest intent and purpose of the parties, affirmatively proved, is that more than one year shall be taken for their performance.
>
> Browne on The Statute of Frauds, (5th Ed.) Section 281, states this principle thus:
>
> 'Where the manifest intent and understanding of the parties, as gathered from the words used and the circumstances existing at the time, are that the contract shall not be executed within the year, the

mere fact that it is possible that the thing to be done may be done within the year will not prevent the statute from applying.'

And in Chitty on Contracts, (11th Ed.) Page 99, it is said that 'where the agreement distinctly shows, upon the face of it, that the parties contemplated its performance to extend over a longer period longer than one year, the case is within the statute.'

This Court in *White v. Fitts,* 102 Me., 244, quotes these authorities and in its opinion and decision affirms and applies the law as therein stated. See *White v. Fitts* and cases cited.

Some authorities hold that mere possibility of literal performance within a year removes the bar of the statute. Such is not the law in this jurisdiction. The intent of the parties that the contract is not to be performed within a year whether such intent is expressed in words or otherwise plainly manifested is controlling.

Mr. Longscope's contract as appears from his own testimony required him to act with Mr. Saddlemire during the time that the latter is engaged in carrying into execution vast plans of state-wide vacational, agricultural and industrial development. These ambitious projects certainly require more than a year for completion. The parties so understood and intended. It was indeed stated in the contract, as testified to by the plaintiff that the work undertaken would take 'a great many years' and that 'during that time' the plaintiff was to act as Mr. Saddlemire's right-hand man."

These principles were clearly set forth in *White* v. *Fitts, supra,* and in *Farwell* v. *Tillson,* 76 Me. 227; *Bernier* v. *Cabot Mfg. Co.,* 71 Me. 506; *Hearne* v. *Chadbourne,* 65 Me. 302; *Herrin* v. *Butters,* 20 Me. 119.

Under the legal principles enunciated by these authorities, the contract in this case is within the statute of frauds if

the performance thereof necessarily requires more than one year, or if the manifest intent and purpose of the parties gathered from the words used and the circumstances existing at the time is that more than one year should be taken for its performance.

None of the above cited cases came to this court on demurrer. All came from the court below after trial or hearing. The facts in those cases clearly indicate an intention on the part of the parties that the contract should not be performed within a year. The instant case presents purely a question of pleading. We do not have the benefit of any evidence showing the nature of the property upon which the cutting was to be made, the extent of the cutting required, or any other circumstances which might shed light upon the intent of the parties as to the time for performance. The only part of the contract which could have any possible bearing on the intention of the parties in respect to the time for performance is contained in the following provision, viz.: "Said Marshall and Jones to have three (3) years from date of this contract to remove lumber and pulp." Counsel for the defendants strenuously argues that this clause clearly brings the contract within the statute.

Does the mere fact that the plaintiffs have the right to enter and remove the lumber and pulp during the period of three years after the date of the contract necessarily indicate an intention that more than a year should be taken for its performance? We think not.

The case of *Herrin* v. *Butters, supra,* involved an agreement to clear certain land in three years. In that case the facts clearly showed an obligation to take three years to do the work, and there were other phases of the agreement from which an intention of the parties that the agreement was to extend beyond a year was clearly manifest. In the instant case the plaintiff had the right to remove the lumber

and pulpwood within three years, but the terms of the contract in no respect indicate an obligation or the necessity to take that time.

We are not satisfied that the provisions of the contract giving the plaintiffs three years to remove the lumber and pulp, taken into consideration with all of the other terms of the contract, necessarily show an intent on the part of the parties that more than one year should be taken for its performance.

We find for purposes of the demurrer that the contract is not necessarily within the provisions of R. S., 1954, Chap. 119, Sec. 1, Par. V.

In view of our rulings of law set forth above, it becomes unnecessary to consider the sufficiency of the memorandum or contract under the statute.

The demurrer was properly overruled.

Exceptions overruled.

JOAN GRATTO PRO AMI
EUGENE GRATTO

vs.

FRANK PALANGI

Androscoggin. Opinion, December 30, 1958.

Negligence. *Invitees.* *Great Ponds.* *Minors.*
Duty. *Proximate Cause.* *Foreseeability.*

The obligation which the proprietor of an amusement enterprise owes to his guest or invitees is to guard them against dangers of which he has actual knowledge and those which he should reasonably anticipate including wilful or negligent acts of third persons which are foreseeable.

Under the great pond rule, a beach proprietor has no possession or control of the swimming area as would authorize him to prevent boats entering the public waters of the swimming area.

One who swims or uses a boat in a great pond does so with full knowledge that boats and swimmers are or may be using the same waters for equally lawful purposes.

A child of twelve knows as a swimmer he must share the use of a great pond with boats.

When a plaintiff fails to produce evidence which would warrant a finding of negligence, a verdict is properly directed for defendant.

ON EXCEPTIONS.

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

Platz & Scolnik, for plaintiff.

Edward J. Beauchamp, for defendant.

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

WILLIAMSON, C. J. On exceptions. The plaintiff, Joan Gratto, a child then twelve years of age, was struck by a motorboat while she was bathing at defendant's public bathing beach, known as "Long Beach," on Sabattus Pond. These are companion tort actions brought by Joan Gratto pro ami to recover for the injuries sustained in the accident and by her father for his special damages. The cases are before us on exceptions to the direction of verdicts for the defendant and present identical issues of law. For convenience we will discuss only the case of the child Joan.

Under the familiar rule recently restated in *Ward* v. *Merrill,* 154 Me. 45, 47, 141 A. (2nd) 438, "The issue . . . is whether or not the ruling of the presiding justice was warranted, bearing in mind that the evidence, with its inferences must be viewed in the light most favorable to the plaintiff."

The jury could reasonably have found as follows:

On a July afternoon in 1956, Joan, her cousin Linda, and two other children were taken by Joan's mother to the bathing beach. Joan paid the admission fee of fifteen cents required by the defendant proprietor and was admitted to the beach and bathing area.

The children placed a blanket on the beach and went about waist deep into the water, made rougher than usual by a stiff breeze. After the other children returned to the beach Joan and Linda continued playing and ducking under water to see who could stay under for the longest time.

Mr. Boulette and Mr. Levasseur were launching a motorboat from the beach at a point about ten feet from the public beach on land owned by the defendant and leased to one Roberge. A fence marked the division between the public and private sections of the beach.

Boulette waded into the pond to hold the boat steady in the stiff breeze. When he was about waist deep he hoisted himself into the boat and his companion started the motor. Linda, standing in the water a few feet from the plaintiff, tried without success to "wave off" the oncoming boat. The plaintiff, who had ducked under water, did not see the boat, and as she was coming up was struck by the propeller. The evidence, although conflicting, was sufficient to establish that the accident occurred in front of the public beach within the area used by the defendant in connection with his business and at a point very near the line between the public and private beaches extended into the pond.

The operators of the motorboat were thoroughly familiar with the general location and were fully aware of the presence of children at the public beach.

(Boulette on the stand.)

"Q Is that why you were holding the boat so it wouldn't go over that way?

A No.

Q Why were you holding the boat?

A The water was rough.

Q And why did you hold the boat when the water was rough?

A Not to have any accident with the children."

(Levasseur on the stand.)

"Q Would you describe what the premises looked like on that day?

A Well, I would say like any ordinary day. There were people on the beach, some laying on blankets, others playing in the water.

Q There were other people in the water?

A There were people in the water along the beach."

The plaintiff contends the defendant was negligent in failing to maintain the standard of due care placed upon

beach proprietors, (1) in failing to enclose the bathing area in front of the public beach, (2) in failing to provide a lifeguard, (3) in failing to warn the plaintiff that motorboats often came into the bathing area, (4) in failing to make the premises reasonably safe for the plaintiff, (5) in failing to prevent or warn against the foreseeable negligent acts of third persons, as here the operators of the motorboat.

We turn to the measure of the duty owed by the defendant to the plaintiff under the circumstances here disclosed. Plainly the plaintiff was an invitee of the defendant at the public beach. The applicable principles were stated by Justice Thaxter in *Hawkins* v. *Theatre Co.*, 132 Me. 1, 4, 164 A. 628:

> "The obligation, which the proprietor of a theatre or amusement enterprise owes to his guests, has been clearly set forth. He must guard them not only against dangers of which he has actual knowledge but also against those which he should reasonably anticipate. . . The failure to carry out such duty is negligence. A recovery may be had, even though the wilful or negligent act of a third person intervenes and contributes to the injury, provided such act should have been foreseen. . ."

Other illustrative cases are: *Morrison* v. *Park Association*, 129 Me. 88, 149 A. 804 (fair); *Easler* v. *Downie Amusement Co.*, 125 Me. 334, 133 A. 905 (circus); *Brown* v. *Rhoades*, 126 Me. 186, 137 A. 58 (amusement park); *Hoyt* v. *Fair Association*, 121 Me. 461, 118 A. 290 (fair); *Higgins* v. *Agricultural Soc.*, 100 Me. 565, 62 A. 708 (fair); *Thornton* v. *Agricultural Soc.*, 97 Me. 108, 53 A. 979 (fair). See also Restatement, Torts §§ 343, 348; 52 Am. Jur., *Theaters, Shows, Exhibitions, etc.*, § 71; 86 C. J. S., *Theaters & Shows*, § 41.

The accident took place not on the beach, but in the waters of Sabattus Pond, a great pond under our law. Questions therefore arise whether the extent of the defendant's invi-

tation to the plaintiff or the measure of defendant's duty to the plaintiff were thereby changed.

We start with the established principle that the plaintiff and the defendant as members of the public have the right to make use of the great pond for swimming and boating.

> "The right of the individual to fish and fowl in these waters, provided he can do so without committing trespass upon the cultivated land of littoral proprietor . . . . the right of boating, bathing, cutting ice (*Barrett v. Rockport Ice Co.*, 84 Maine, 155, 24 Atl., 802, 16 L.R.A., 774), and the supplying of water to a municipality for domestic uses, have all been recognized as among the public purposes which are within the regulation and control of the State."
>
> *Opinion of the Justices*, 118 Me. 503, 106 A. 865.

> "Fishing, fowling, boating, bathing, skating or riding upon the ice, taking water for domestic or agricultural purposes or for use in the arts, and the cutting and taking of ice, are lawful and free upon these ponds, to all persons who own lands adjoining them, or can obtain access to them without trespass, so far as they do not interfere with the reasonable use of the ponds by others, or with the public right, unless in cases where the legislature have otherwise directed."
>
> *Inhabitants of West Roxbury* v. *Stoddard & another*, 89 Mass. (7 Allen) 158, 171.

The obligations of those using a great pond for boating and swimming to each other are not in issue in this litigation. Our problem deals only with the patron-beach proprietor relationship taken in the setting of our great pond rule.

The plaintiff as we have seen was an invitee on the beach. In our view this relationship continued into the swimming area used by the defendant for the benefit of his business, with, however, significant changes arising from the great

pond rule. The measure of duty not to harm negligently the plaintiff, however, was not thereby altered or restricted. The duty, nevertheless, must be applied with reference to the extent of the defendant's invitation.

The rule is stated in Annot. 48 A. L. R. (2nd) 118, in these words:

> "In a few instances, where the waters used for bathing were public waters, the contention has been made that the owner or operator of a bathing resort offering such waters for the use of the public owed no duty of care, or at least a more restricted duty of care, to persons using such waters; however, this contention has been rejected in every instance."

Skelly v. *Pleasure Beach Park Corp.*, 115 Conn. 92, 160 A. 309, illustrates the principle. There the plaintiff was injured on striking a float maintained beyond low-water mark at defendant's beach on Long Island Sound. The court held the defendant owed a duty to exercise reasonable care to prevent injury to patrons using the waters in the usual and ordinary way and consistent with the invitation extended.

The rule applicable to the patron-beach proprietor relationship was stated by the Massachusetts Court in *Johnson* v. *Bauer* (Mass.), 198 N. E. 739, 740, involving injury to a diver:

> "In these circumstances the defendant's duty to the plaintiff—breach of which would constitute negligence on his part—was to use reasonable care to keep such accommodations in a reasonably safe condition for the plaintiff's use according to the invitation or to warn her against any dangers attendant upon this use which were not known to her or obvious to an ordinarily intelligent person and either were known or in the exercise of reasonable care ought to have been known to the defendant."

See also *McKinney* v. *Adams,* 68 Fla. 208, 66 So. 988, L. R. A. 1915D 442 (life lines required by statute and life guards) ; *Perkins* v. *Byrnes,* 364 Mo. 849, 269 S. W. (2nd) 52, 48 A. L. R. 97 (failure to warn of undercurrent and no safety precautions) ; *Turlington* v. *Tampa Electric Co.,* 62 Fla. 398, 56 So. 696, 38 L. R. A. NS 72 (diving-depth of water) ; *Maehlman* v. *Reuben Realty Co.* (Ohio Ct. App.), 166 N. E. 920 (injury from broken bottle) ; *Beverly Beach Club* v. *Marron* (Md.), 192 A. 278 (cut foot).

In applying the governing principles to the facts, we conclude that a jury could not have found negligence on the part of the defendant.

In the first three charges of negligence, it appears that the defendant neither enclosed the bathing area, nor provided a lifeguard, nor warned the plaintiff that motorboats often came into the area. The facts on which these charges were based were supported by the evidence. The complaints, it is to be noted, relate to *warning* the operators of boats and the plaintiff swimmer.

In our opinion there was no breach of defendant's duty of due care under the circumstances from his failure to act in the manner outlined. The invitation insofar as the use of the swimming area was concerned, was limited in scope.

Under the great pond rule, the defendant had no possession or control of the swimming area such as we associate with possession or control of the beach or other premises, for example. The waters are public waters. The beach proprietor could not prevent boats from entering the swimming area, had he desired to do so.

Swimming and boating are obvious uses of our great ponds. One who swims or uses a boat in a great pond, it seems to us, does so with full knowledge that boats and swimmers are or may be using the same waters for equally

lawful purposes. A child of twelve knows he must share the use of the street with automobiles; and as a swimmer, must share the use of a great pond with boats.

In light of the lack of control over the swimming area and the obvious use of the pond for boating and swimming, we conclude that the defendant intended with reference to the plaintiff's swimming no more than to invite the plaintiff to exercise her right as a member of the public to swim in a great pond, using such facilities as the defendant provided.

The invitation no doubt raised a duty with reference to the diving float and the condition of the bottom of the lake in the swimming area, with neither of which we are here concerned. When we turn to the asserted acts of negligence, we find that the defendant at no time gave the plaintiff the slightest reason to rely on an enclosure of the swimming area (assuming without deciding that the defendant could lawfully "rope off" or "fence" the area), or on the presence of a lifeguard, or on any other warning. Thus no implication of a duty so to act arising from reliance by the plaintiff thereon in the past can be raised to charge the defendant.

The fourth charge of negligence is that the defendant failed to make the premises reasonably safe. The point here, however, is not that the premises, that is to say, the beach and bathing area, were not safe within the duty of the beach proprietor. Cases on safety of equipment, such as the float in *Skelly, supra,* present a different situation. The argument of the plaintiff is not that the equipment was not safe, but that the defendant failed to give warning.

We come to the fifth and last of plaintiff's claims, namely, that the defendant was negligent in failing to prevent or warn against the foreseeable negligent acts of the boat operators Boulette and Levasseur.

In our view, no question for the jury was raised by this claim. There are no facts, for example, pointing to a history or record of the negligent operation of motorboats along the shore during swimming periods, or, indeed of any other condition creating an appreciable hazard to the swimmer. The act of the boat operators could not have been foreseen by the defendant. At most, the accident arose from no more than an isolated instance of negligence on the part of the boat operators. A jury could not have found otherwise.

The language of *Hawkins* v. *Theatre Co., supra,* at p. 4, is in point:

> "The management of this theatre might well have been charged with notice that the filling of the balcony with children and the giving out of balloons would result in boisterous and unruly conduct. It was, accordingly, its duty to take reasonable precautions to restrain what all will concede are the ordinary inclinations of children under such circumstances. It was under no obligation to provide an attendant for every child, or to anticipate the isolated, wilful and sudden act of one boy, the natural tendency of which was to inflict serious harm upon another. There is no evidence that such an incident ever had happened before or that the defendant had any warning whatsoever that it was likely to take place. It was not a danger which it was bound to have foreseen or to have guarded against."

The jury could properly have found the plaintiff was in the exercise of due care. The decision rests, as we have indicated, on the failure of the plaintiff to produce evidence which would warrant a finding of defendant's negligence. The verdicts were properly directed for the defendant.

The entry in each case will be

Exceptions overruled.

STATE OF MAINE
vs.
SUMNER P. HOPKINS

York. Opinion, December 30, 1958.

Criminal Law. Turnpike. Speed. Pleading.

The failure of speeding complaint to allege the publication of rules and regulations is a fatal omission.

ON EXCEPTIONS.

This is a criminal action charging a violation of the rules and regulations of the Maine Turnpike relating to speed. The case is before the Law Court upon exceptions to the overruling of a demurrer. Exceptions sustained.

William P. Donahue, County Attorney,
Marcel R. Viger, County Attorney,
Frank F. Harding, Attorney General, for State.

Harold D. Carroll,
Sidney R. Batchelder, for defendant.

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

WEBBER, J. This case originated upon a complaint lodged in the Kennebunk Municipal Court charging the respondent with a violation of the rules and regulations of the Maine Turnpike Authority with respect to speed. After conviction, the respondent appealed to the Superior Court where demurrer to the complaint was seasonably filed. Exceptions taken to the overruling of this demurrer raise the issue here.

The complaint contains no allegation that the rules and regulations of the Maine Turnpike Authority were ever pub-

lished. Such omission is fatal and the complaint fails to charge an offense. The Private and Special Laws of Maine 1941, Chap. 69, Sec. 19 provides as follows: "**Sec. 19. Penalty.** Any violation of *published* rules and regulations relating to the turnpike, its use or services * * *, shall be deemed a misdemeanor and shall be punishable by a fine not exceeding $10 * * *." (Emphasis ours). The necessity of both allegation and proof of publication is not a mere technical requirement. The Legislature obviously intended that the public should have notice by publication before any violation of the rules and regulations could properly be charged. The situation created by failure to allege publication is not unlike that discussed in *State* v. *Merrill,* 132 Me. 103, 106.

The respondent relies upon his contention that serious constitutional questions are involved arising out of the alleged delegation of legislative power to the Authority. We neither intimate nor suggest what our holding would be upon these constitutional issues. Following well defined and established precedents, we hold that when reasons are apparent for sustaining a demurrer without resort to any constitutional question, the latter issue is not reached. The failure to allege publication is dispositive of the issue tendered by the demurrer. The entry will be

Exceptions sustained.

MARY A. BRITTON
ROBERT L. BRITTON
vs.
JOSEPH A. DUBE ET AL.

Cumberland. Opinion, December 31, 1958.

Negligence. New Trial. Damages. Husband and Wife. Loss of Consortium.

Upon motion for new trial the appellate tribunal takes the evidence with all proper inferences drawn therefrom in the light most favorable to the jury's findings and the verdict stands unless manifestly wrong.

A husband under a claim for loss of consortium is entitled to damages for the loss of services of his wife where it appears that the wife was active on a family farm and because of negligent injuries was required in a large measure to curtail the performance of her household duties.

Although a husband cannot recover for loss of wages while caring for his injured wife, he is entitled to the fair value of his work as a nurse or in caring for his wife.

A jury need not base the findings of value for services rendered by the husband or the services of the wife lost by reason of injuries upon particular evidence of value. His award, however, must not include items recoverable by the wife in her action.

ON MOTION FOR NEW TRIAL.

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

Basil A. Latty, for plaintiffs.

Robinson, Richardson & Leddy, for defendants.

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

WILLIAMSON, C. J. The plaintiff Mrs. Britton, a passenger in a car driven by her daughter Mrs. Libby, was injured in a collision of the Libby car and a car driven by the defendant Joseph Dube. Actions brought by Mrs. Britton and by her husband Robert for consequential damage against Mrs. Libby and Mr. Dube as joint tort feasors were tried together and resulted in defendants' verdicts in favor of Mrs. Libby and plaintiffs' verdicts against Mr. Dube in the amount of $7220 for Mrs. Britton and $3363.52 for her husband. For convenience unless otherwise indicated we will refer to Mrs. Britton as the plaintiff.

The cases are before us on motions for new trial. In the plaintiff's case liability is the issue, there being no claim of error in assessing damages. In the husband's case the issues are liability, which will follow the decision in the wife's case, and excessive damages.

Under the familiar rule we take the evidence with all proper inferences drawn therefrom in the light most favorable to the jury's findings and the verdict stands unless manifestly wrong. *Gregory* v. *James,* 153 Me. 453, 140 A. (2nd) 725; *Stinson* v. *Bridges, Admr.,* 152 Me. 306, 129 A. (2nd) 203.

From our review of the record we are satisfied the jury could properly have found the facts as stated herein. It will serve no useful purpose to review the record in detail.

The Libby and Dube cars collided on a clear May afternoon in Freeport on Beech Hill Road near its junction with Route 136. The accident occurred when Mrs. Libby, who had been travelling on Route 136 easterly or from the direction of Freeport, turned left into Beech Hill Road. The plaintiff and her two year old granddaughter were riding on the front seat with Mrs. Libby. Mr. Dube accompanied by Mrs. Dube was travelling southerly on Beech Hill Road.

The junction of Beech Hill Road and Route 136 is in the form of a "Y," with branches entering the north side of Route 136 on the east and west sides of an "island" or "heater piece." In the "island" there was a stop sign controlling traffic on Beech Hill Road approaching Route 136 and a telephone pole. At the scene of the accident in the westerly branch of the "Y" near the stop sign, Beech Hill Road had a tar surface 14 feet 5 inches in width plus a five foot strip of gravel between the easterly edge of the tar surface and the grass on the "island."

After the accident the Dube car was across the tar surface with the left front fender about twenty inches from the easterly edge, that is to say, on Mr. Dube's left side of the tar surface. The left front fender and left side of the car were damaged.

The Libby car after the collision continued on to the "island" and struck the telephone pole. There were brake marks of the Libby car made just before the collision which indicated the car was then heading easterly or across the road toward the "island."

The junction is quite blind at the season when the accident occurred. Mr. Dube could see well into Route 136, but Mrs. Libby would have had difficulty in seeing any depth into Beech Hill Road until almost upon it.

Mrs. Libby first saw the Dube car two or three car lengths away. She places the Dube car in motion and in part on Dube's left side of the way as she turned into the road. She testified:

"Q Now the two cars, the one you were driving and the Dube car, did collide, is that correct?

A Yes. I went to make my intersection turn. At first I saw him coming I thought he was going towards Freeport and I applied my brakes to give him time to get back on his side of the

> road. I saw he wasn't and I swung to get out of his way and his front left-hand wheel hit over my left-hand wheel."

In this description of the accident she is supported by her mother, the plaintiff. Just before the accident Mrs. Libby took her hands from the wheel and sought to reach and protect her child.

Mr. Dube, for his part, says in substance that his car was stopped wholly on his right-hand side of the center line of the Beech Hill Road, and that his car was pushed toward the east side of the road in the collision. Mrs. Dube confirms this testimony and says that Mrs. Libby "cut the corner."

We cannot say the jury erred in finding for the plaintiff against Mr. Dube. The evidence of Mrs. Britton and Mrs. Libby is not unreasonable, nor is it inconsistent with the known physical facts. Obviously if each driver had kept on his right-hand side of the center line of Beech Hill Road, the cars would have passed without incident. The jury, finding that Mr. Dube was "straddling," that is, was in some part at least on his left-hand side of the center of Beech Hill Road, could properly conclude that the defendant was negligent.

On the issue of contributory negligence, the record in our view presents a typical jury question.

The remaining question is whether the damages awarded the husband are excessive. The verdict of $3363.52 may be divided in two parts: first, an amount not exceeding $600 for medical and other proper expenses unquestioned by the defendant; second, $2700 roughly for loss of consortium.

Mrs. Britton, aged sixty, had a broken leg and other injuries. She was hospitalized for a week and her leg was in a cast for six weeks. She must use a cane. Her ability to do housework has been severely limited. Her physician testified

she suffered a 40-50% permanent disability of the left foot and it would probably get worse. Her husband cared for his wife at home for six weeks after the accident. He testified:

"Q What did she do on the farm?

A She did her housework. I would, I did most of the work outdoors. She would make butter, do the churning, that sort of stuff.

Q Since she was injured, has she done anything towards, in the operation of the farm?

A No, none whatsoever."

Mrs. Britton describes her condition in these words:

"Q How long was it after you received those injuries before you could do anything at all?

A I didn't do anything all that winter. I didn't do anything that winter. In fact, I haven't cleaned house for two years and can't do it now.

Q Did you before this accident ever have any physical ailments or impairments.

A No, sir."

The daughter and son-in-law confirm the change in Mrs. Britton's ability to work about the home.

We have then the picture of a wife active on the family farm who must now curtail in large measure the performance of her household duties. The plaintiff husband is entitled to recover compensation for the loss to him of such services to time of trial and in the future. The plaintiff does not offer evidence of future medical or other expense in addition to the $600 mentioned above, and the only loss of consortium lies in the loss of services. There is no evidence that the plaintiff lost the society or companionship of his wife, except for the limited period of total disability. It is in the *loss of services* to which the husband is entitled in his home that the husband makes a valid claim.

The husband performed services for six weeks for his wife. He cannot recover his loss of wages to be sure, but he is entitled to the fair value of his work as a nurse or in caring for his wife.

The jury need not base the findings of value for the services rendered by the husband or the services of his wife lost by reason of the injuries on particular evidence of value. The award, however, must not include items recoverable by the wife in her action. He recovers compensation for *his* loss, not for the loss or damage suffered by his wife.

> "Being a married woman and living with her husband, the plaintiff (the wife) is not entitled to recover for loss of ability to do domestic labor in their home, nor for the expenses in caring for her, surgically and otherwise. Under the marital relation, the labor in the house belonged to her husband. Her inability to perform that labor is his loss. And on the other hand, as the law imposes on him the duty of caring for her in sickness as well as in health, the burden of the expenses for medical and surgical treatment and for nursing falls upon him and not upon her, unless she has expressly undertaken to be personally responsible for them." *Felker* v. *Railway & Electric Company,* 112 Me. 255, 256, 91 A. 980.

See also *McCarthy* v. *McKechnie,* 152 Me. 420, 132 A. (2nd) 437; *Fossett et al.* v. *Durant,* 150 Me. 413, 113 A. (2nd) 620; *Marr* v. *Hicks,* 136 Me. 33, 1 A. (2nd) 271; *Abbott et al.* v. *Zirpolo,* 132 Me. 368, 171 A. 251; *Rice* v. *Keene,* 129 Me. 489, 151 A. 199; *Wood* v. *M. C. R. R. Co.,* 101 Me. 469, 64 A. 833; *Hooper* v. *Haskell,* 56 Me. 251; Restatement, Torts § 693; 10 Blashfield, Cyclopedia of Automobile Law and Practice § 6477; 27 Am. Jur., *Husband and Wife,* § 501 *et seq.;* 41 C. J. S., *Husband and Wife,* § 401 (c) ; 4 Shearman and Redfield on Negligence, § 860.

The award of $2700 is large, but in light of the circumstances and in particular of the severe and lasting injuries to the wife which may fairly be found to reduce forever and substantially her ability to perform her usual duties about the home, we cannot say the verdict is excessive.

The entry in each case will be

Motion for new trial denied.

INHABITANTS OF THE TOWN OF LEBANON, THE BOARD OF SELECTMEN OF LEBANON AND THE TOWN TREASURER OF LEBANON

vs.

JAMES H. SHAPLEIGH AND WILLIAM T. SHAPLEIGH, TRUSTEES, AND ALL PERSONS WHO CLAIM OR MIGHT CLAIM BY, THROUGH OR UNDER THEM; AND RICHARD W. SHAPLEIGH, DECEASED, AND ALL PERSONS WHO CLAIM OR MIGHT CLAIM BY, THROUGH OR UNDER HIM, AS HEIRS AT LAW OR OTHERWISE

York. Opinion, December 31, 1958.

Law Court. Report.

The parties must agree to the certification of causes in equity to the Law Court under R. S., 1954, Chap. 107, Sec. 24.

Defendants in default in an equity action under a decree *pro confesso* are still parties.

ON REPORT.

This is a petition for declaratory judgment before the Law Court upon report. Report discharged.

Willard & Hanscom,
Simon Spill, for plaintiff.

Titcomb, Fenderson & Titcomb,
Frank F. Harding, for defendant.

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

DUBORD, J. This is a petition for a declaratory judgment brought on the equity side. It seeks a determination relating to the interpretation of a gift given to the Town of Lebanon in 1894, by James H. Shapleigh and William T. Shapleigh, who describe themselves as trustees of Richard W. Shapleigh. Service on the defendants was made by publication. None of the defendants appeared, no guardian *ad litem* was appointed for minors or incompetent persons, and no decree *pro confesso* or otherwise was entered in the court below involving the defendants. No attorney appeared for the defendants. During the pendency of the proceeding, seventeen inhabitants of the Town of Lebanon were permitted to intervene. They filed an answer to the petition, in which they describe themselves as defendants.

The case is before us on report in attempted compliance with the provisions of Section 24, Chapter 107, R. S., 1954. The justice below signed the usual certificate to the effect that he was of the opinion that a question of law was involved of sufficient importance or doubt to justify the same and that the parties had agreed thereto.

It appears that the plaintiffs and the intervenors agreed to report the cause to the Law Court. However, there is nothing in the record to indicate that the defendants ever agreed to the report. The action of the intervenors in no way binds the defendants nor impairs their rights.

In *Fenn* v. *Fenn,* 130 Me. 520, the court in discharging the report said:

> "This Law Court has jurisdiction to determine causes in equity certified on report only when the presiding Justice is of opinion, and so certifies, that a question of law is involved of sufficient importance or doubt to justify the same, and the parties agree thereto. R. S., Chap. 91, Sec. 56; (now Chap. 107, Sec. 24, R. S. 1954) *Baker v. Johnson,* 41 Me., 15; *Whittemore v. Russell,* 78 Me., 337. Defendants in default in an equity action under a decree *pro confesso* are still parties and have some rights. Unless all parties agree to a report of the cause in which they are joined, we think it is the duty of the sitting Justice to hear the evidence and make such rules, orders or decrees thereon as the law of the case requires. Under this procedure, any party aggrieved has the right of exception and appeal reserved to him and the rights of all other parties are left unimpaired."

See also, *Hand, Admr.* v. *Nickerson,* 148 Me. 465, 95 A. (2nd) 813.

The defendants never have agreed in compliance with the statute, and as was said in *Whittemore* v. *Russell, Admr., supra,* the Law Court takes no jurisdiction from the record presented, and has no power to hear and determine the same. The report must be discharged.

STATE OF MAINE

RULES OF SUPREME JUDICIAL COURT AND SUPERIOR COURT

NATURALIZATION

All of the Justices of the Supreme Judicial and Superior Court concurring, Rule 43 of the Supreme Judicial and Superior Courts relating to Naturalization (154 Me. 81) is hereby *Amended to read as follows:*

— 43 —

The stated days of the terms of the Court in the several Counties of the State on which final action may be had on petitions for naturalization as provided by Federal law are hereby fixed as the third day of the January and September terms, the second day of the March term, the first day of the November term and the first Tuesday following the third Monday of June in *Androscoggin County;* the second day in April, September and November terms in *Aroostook County;* the first day of the May term in *Franklin County;* the third day of the February and second day of the October terms, the fourth day of the April term, and the first Wednesday after the third Monday of June in *Kennebec County;* the fourth day of the May and October terms in *Oxford County;* the third day of the January and May terms and the fourth day of the September term in *Somerset County;* the first day of the February and October terms in *Washington County.*

The time for the naturalization hearings to be held as hereinbefore provided shall be 2:30 o'clock in the afternoon except that those held on the third or fourth day of the terms shall be at 11:00 in the forenoon. The Justice presiding at the term in any County, at his discretion and with the consent of the naturalization examiner, may for cause or

convenience assign any pending case or cases for hearing on any other day or days during the term.

Provided, however, that petitions for naturalization pending on July 1, 1958, in the Superior Courts in and for the Counties of Penobscot and Piscataquis shall be heard and determined in said Courts.

This Rule shall become effective January 1, 1959, and shall be recorded in the Maine Reports.

Dated this 11th day of December, 1958.

Approved:

s/ ROBERT B. WILLIAMSON
s/ DONALD W. WEBBER
s/ WALTER M. TAPLEY, JR.
s/ FRANCIS W. SULLIVAN
s/ F. HAROLD DUBORD
s/ CECIL J. SIDDALL

Justices of Supreme Judicial Court

Approved:

s/ HAROLD C. MARDEN
s/ RANDOLPH A. WEATHERBEE
s/ LEONARD F. WILLIAMS
s/ ABRAHAM M. RUDMAN
s/ CHARLES A. POMEROY
s/ JAMES P. ARCHIBALD
s/ ARMAND A. DUFRESNE, JR.

Justices of Superior Court

A true copy
Attest:
HAROLD C. FULLER
Clerk of Courts

NORMAN SPAULDING, PRO AMI

vs.

NEW ENGLAND FURNITURE CO.

Somerset. Opinion, January 2, 1959.

Contracts. Infants. Minors. Necessaries. Disaffirmation. Common Knowledge.

One who defends in a minor's suit to disaffirm a contract and to recover the amount paid thereon has the burden of proving that the articles sold were necessaries.

"Necessaries" are limited in their inclusion to articles of personal use necessary for the support of the body and improvement of the mind of the infant.

Whether articles are necessaries is a question of fact for the fact finder and involves the interpretation of the evidence on (1) financial situation of infant (2) social position and conditions of life of the infant and his family (3) his requirements and needs (4) the nature and quality of articles furnished the infant and his family, his supply, if any, from other sources. Necessaries for one may be luxuries for another.

Both judges and referees may use their own common sense in making rational and logical deductions from known facts.

ON EXCEPTIONS.

This is an infant's action to recover money paid upon a disaffirmed contract. The case is before the Law Court upon exceptions to the overruling of objections to a referee's report. Exceptions overruled.

Walter R. Harwood, for plaintiff.

Berman & Berman, for defendant.

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

SIDDALL, J. This is an action brought by an infant under the age of twenty-one years to recover the sum of $388.00 paid to the defendant under the terms of a conditional sales agreement. The defendant pleaded the general issue. The agreement covered a number of items of household goods and furnishings purchased by the plaintiff from the defendant. The goods were repossessed by the defendant upon default of payment, and the contract was disaffirmed by the plaintiff. At the time of executing the conditional sales contract on October 24, 1955, the plaintiff was married and living with his wife and child, and this action was brought during the plaintiff's minority. Among the articles included in the conditional sales agreement were a "Florence stove" and a "three pc. bedroom set." The separate cost of the various articles did not appear in the conditional sales agreement, but it was shown by evidence that the Florence stove was a combination gas and oil stove for which a charge of $309.95 had been made, and that the charge for the bedroom set was $299.85. The total cost of all of the items, including certain service charges, was $1431.09. The plaintiff made numerous payments under the agreement, and it was stipulated during the course of the hearing before the referee that the amount of such payments was $388.00. No payment was credited to any particular item.

The case was referred with rights of exceptions on questions of law reserved to both parties.

R. S., 1954, Chap. 185, Sec. 2, reads as follows:

> "**Capacity; liabilities for necessaries.**—Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.
>
> Where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

> Necessaries in this section mean goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery. (R. S. c. 171, Sec. 2.)"

The referee found for the plaintiff in the sum of $388.00.

The referee found as a matter of law that the sales agreement was an "entire" contract as distinguished from a "severable" contract, and also made the following finding of fact:

> "Upon the record is it held that the goods in question were not 'necessaries.' This Court does not purport to say that *a* stove and *a* bed are not necessaries, but that as applied to this case, a $309.95 combination gas and oil stove and a $299.85 bed room set were not necessaries."

The defendant seasonably objected to the referee's report on the following grounds:

> "1. The Referee having expressly excluded from his finding the issue of whether or not the articles in question were necessaries, but finding that the combination gas and oil stove and the bedroom set were not necessaries, simply because of the price for which they were sold, committed error, in that there was no evidence in the record upon which the Referee could make such finding and therefore it constituted a finding without evidence.
>
> 2. The Referee having failed to find that a combination gas and oil stove and a bedroom set sold to the plaintiff in this case could have been purchased for less money, and there being no evidence in the case on this issue, the finding by the Referee that simply because of the price for which these two items were sold by the defendant to the plaintiff were not necessaries, constituted a finding wholly unsupported by the evidence and therefore is error.

3. The Court having expressly excluded from his finding the issue of whether or not articles of furniture sold by the defendant to the plaintiff were or were not necessaries, committed error as it was the duty of the Referee to make a general finding upon this issue and to rule thereon: the failure of the Referee so to do constituted error.

4. In view of the Court's express failure to find that the items in question were not necessaries for the plaintiff and his family, committed error in basing his finding and ruling purely upon the price charged by the defendant to the plaintiff for the items involved, and since there was no evidence to show that these items were either overcharged or could be obtained for less money, or that similar items of equal utility could have been purchased for less money, the finding constitutes error and is wholly without support by the evidence."

The referee was correct in ruling that the conditional sales contract was an entire contract. No question as to this ruling is raised by defendant's objections.

The rule is well established under our law that findings of fact by referees under rule of court are final and conclusive if there is any evidence of probative value to support them. *Knowlton* v. *John Hancock Life Ins. Co.,* 146 Me. 220; 79 A. (2nd) 581; *O'Brien* v. *Marston,* 145 Me. 394, 74 A. (2nd) 879; *Flood* v. *Earle, Jr.,* 145 Me. 24, 71 A. (2nd) 55; *Morneault* v. *B. & M. Railroad,* 144 Me. 300, 68 A. (2nd) 260; *MacNeill Real Estate Inc.* v. *Rines, et al.,* 144 Me. 27, 64 A. (2nd) 179; *Bradford* v. *Davis,* 143 Me. 124, 56 A. (2nd) 68.

A referee's report is prima facie correct, and the burden is upon the excepting party to show that findings of fact contained therein are not sustained by the evidence. *Poretta* v. *Dowel Co.,* 153 Me. 308; *Wood* v. *Balzano,* 137 Me. 87, 15 A. (2nd) 188; *Hovey* v. *Bell,* 112 Me. 192, 91 A. 844.

One who defends a minor's suit to disaffirm a contract and to recover the amount paid thereon has the burden of proving that the articles sold were necessaries.

> "In a suit by a minor to rescind a contract the burden is on the defendant to show that the article was a necessary." *Robertson* v. *King* (Ark.) 280 S. W. (2nd) 402 (1955).

See also *Barnes* v. *Rebsamen Motors, Inc.*, 24 Ark. 791, 255 S. W. (2nd) 961; *Crandall* v. *Coyne Electrical School*, 256 Ill. App. 322.

What are necessaries?

Our court in *Kilgore* v. *Rich*, 83 Me. 305, 306, 22 A. 176, said:

> ". . . Coke's enumeration of the kinds of necessaries has always been accepted as true doctrine, which are these: 'Necessary meat, drink, apparel, necessary physic, and such other necessaries, and likewise his good teaching, or instruction, whereby he may profit himself afterwards."

In *Utterstrom* v. *Kidder*, 124 Me. 10, 12, 124 A. 725, our court elaborated further upon the meaning of the term "necessaries" in the following language:

> "A minor is bound by and cannot disaffirm his contract for necessaries such as food, clothing, lodging, medical attendance, and instruction suitable and requisite for the proper training and development of his mind. *Kilgore* v. *Rich*, 83 Maine, 305; *Robinson* v. *Weeks*, 56 Maine, 102. While the term 'necessaries' is not confined merely to such things as are required for bare subsistence, and is held to include those things useful, suitable and necessary for the minor's support, use and comfort, it is limited in its inclusion to articles of personal use necessary for the support of the body and improvement of the mind of the infant, and is not extended to articles purchased for business purposes, even though the minor earns his living by

> the use of them, and has no other means of support."

For a further discussion of this subject see *Nielson* v. *Textbook Company,* 106 Me. 104, 75 A. 330; *Reed Bros.* v. *Giberson,* 143 Me. 4, 54 A. (2nd) 535; 27 Am. Jur. 758; 43 C. J. S. 187.

In the instant case the plaintiff was married and living with his wife and child at the time of the delivery of the articles set forth in the conditional sales contract. He was obliged to support his family. Although an infant, he was liable for the value of necessaries furnished to him for his family.

Whether or not the articles set forth in the conditional sales contract were necessaries was a fact for the referee to determine. The determination of this question involved the interpretation of the testimony as to the financial situation of the plaintiff, the social position and condition in life of the plaintiff and his family, their requirements and needs, the nature and quality of the articles furnished and their adaptability to the needs of the plaintiff and his family, and his supply, if any, from other sources. Articles which may be necessities for one family may well be luxuries for another. The record contains considerable testimony on this aspect of the case.

In its objections the defendant contends that the referee expressly excluded from his findings the issue of whether or not the articles in question were necessaries. We do not so interpret the report of the referee. As we view the report, the referee specifically found that the goods sold were not necessaries.

The defendant also claims that the referee found that the stove and bedroom set were not necessaries simply because of the price for which they were sold. We are discussing this claim briefly, although it may not be necessary to do so

in view of our interpretation of the referee's report. It is well known that in the modern markets there are available for purchase stoves ranging from the common iron kitchen stove to the most modern electrical appliances, and that the price range of such stoves varies greatly. It is also well known that there is great variety in the quality of bedroom furniture either in individual pieces or in bedroom sets, and the price to be paid therefor varies accordingly. The same is true as to refrigerators, living room sets, washing machines, and other articles of furniture. "In making rational and logical deduction from the known facts, both judges and referees may use their own common sense and need not pretend that they do not know that which everyone else knows and which they themselves know outside of court." *Hersum, Admr.* v. *Water Dist.*, 151 Me. 256, 264. The defendant's claim in this respect has no merit.

The defendant in his objections also complains that there was no evidence in the case that the stove and bedroom set could have been purchased for less money, or that they were overcharged or could have been obtained for less money, or that similar items of equal utility could have been purchased for less money. Such evidence was unnecessary and immaterial and had no bearing on the question of whether or not these articles were necessaries.

Whether the articles sold to the plaintiff were necessaries was for the referee to determine. He found they were not necessaries. His finding was justified by the evidence. The action of the presiding justice in overruling the defendant's objections was proper.

The entry will be

Exceptions overruled.

EDWARD J. BERMAN, ADMR.
ESTATE OF ROSE S. HALL, IN EQUITY
vs.
SIGMUND FRENDEL ET AL.

Cumberland. Opinion, January, 1959.

Laws of Descent. Lapsed Legacy. U. S. Bonds. Evidence. Agreed Statement. Foreign Law.

A brother of a devisee is not a lineal descendant under R. S., 1954, Chap. 169, Sec. 10.

"All the rest, residue and remainder . . . I give . . . to _____ and _____, share and share alike" creates a tenancy in common and not a joint tenancy in the residue.

U. S. Savings Bonds held in joint tenancy or survivorship pass under the U. S. Treasury Regulations. 31 U. S. C. A., Sec. 757 c (a); 31 Code of Fed. Reg. Sec. 315, 45 (1949); Treasury Regulation Dec. 26, 1957, Sec. 315, 61. See also Const. U. S., Art. VI, Clause 2.

Whether charitable legatees behind the "iron curtain" are qualified to accept legacies requires the presentation of evidence in admissible form and not merely a stipulation which binds only the parties agreeing thereto.

An agreed statement concerning proof of applicable foreign law by one not shown to be an expert, is not acceptable.

ON REPORT.

This is a bill in equity for construction of a will, instructions, and determination of ownership of certain savings bonds. 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 personal representative and charged in his probate account.

Berman, Berman & Wernick,
John J. Flaherty, for plaintiff.

Simon Spill & Louis Spill,
John E. Willey, for defendant.

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

WILLIAMSON, C. J. On report. This is a bill in equity by an administrator c.t.a. for construction of the will of Rose S. Hall, late of Portland, for determination of the ownership of certain savings bonds, and for instructions for the disposition of bequests to two institutions. Philip Frendel and Max Frendel, beneficiaries under the will, were permitted to join as parties plaintiff.

The testatrix, who executed her will on May 16, 1940, died on June 24, 1955, leaving one surviving child the defendant Sigmund Frendel, father of plaintiffs Philip Frendel and Max Frendel, her husband having predeceased her. Claire Freeman, daughter of the testatrix, died after the will was executed and before the death of her mother, leaving no children and a widower.

First — The second item of the will reads:

> "I give, bequeath and devise to my beloved daughter, CLAIRE FREEMAN, . . the sum of FIVE THOUSAND DOLLARS."

The contention of Sigmund Frendel that he takes as lineal descendant of his sister Claire is without merit. R. S., Chap. 169, § 10 reads:

> "*Certain devisees die before testator, lineal heirs take devise.* - - When a relative of the testator, having a devise of real or personal estate, dies before the testator, leaving lineal descendants, they take such estate as would have been taken by such deceased relative if he had survived."

> "The purpose and effect of the statute seem clear. It preserves such a devise from lapsing by sub-

> stituting in place of the deceased devisee his lineal descendants. By force of the statute they take under the will in his place, and they take the same estate he would have taken thereunder." *McKellar, Appellant,* 114 Me. 421, 423, 96 A. 734. See also *Morse v. Hayden,* 82 Me. 227, 19 A. 443.

The legacy has lapsed and fallen into the residue.

Second — The twenty-second item of the will reads:

> "All the rest, residue and remainder of my estate, wherever or however situate, whether same be real, personal or mixed, and if it is necessary to sell any of my personal property to meet the bequests hereinbefore provided, I direct my Executor to sell same, I give, bequeath and devise to my beloved daughter, CLAIRE FREEMAN, my beloved sister, YETTA SHATZER, and my beloved niece, ROSE LYMAN, share and share alike."

The testatrix clearly created a tenancy in common and not a joint tenancy in the residue. The case cannot be distinguished from *Strout* v. *Chesley,* 125 Me. 171, 132 A. 211, "in equal parts share and share alike." For a full discussion of the principles see *Stetson* v. *Eastman,* 84 Me. 366, 24 A. 868. On the death of Claire Freeman before the testatrix, her share in the residue lapsed. We have seen under the second item that Sigmund Frendel does not take as a substitute for his sister. The lapsed legacy from the residue under the terms of this will does not increase the shares of the other residuary legatees, but passes to the heirs of the testatrix as intestate property. *Strout* v. *Chesley, supra; Morse* v. *Hayden, supra; Crocker* v. *Crocker,* 230 Mass. 478, 120 N. E. 110.

Sigmund Frendel, therefore, takes a one-third share of the residue as sole heir of his mother the testatrix, and not as a legatee in substitution for his deceased sister Claire.

Third — Savings Bonds. The main question the administrator and other interested parties wish settled is whether certain savings bonds are the property of the estate, or of the surviving co-owners.

In 1945 Rose S. Hall purchased with her own funds nine $1000 U. S. Savings Bonds of Series E, of which eight are payable to "Mrs. Rose S. Hall or Sigmund Frendel," and one payable to "Mrs. Rose S. Hall or Philip Frendel." The bonds were kept in a safe deposit box of the testatrix' sister, the defendant Yetta Scherzer, in New York City. After the death of the testatrix, the bonds were delivered to the administrator. There is no suggestion of any fraud in the purchase and retention of the bonds by the testatrix.

The case is governed in our opinion by *Harvey* v. *Rackliffe*, 141 Me. 169, 41 A. (2nd) 455. See comment 51 A. L. R. (2nd) 167. The court, in an opinion written by Justice Thaxter, held that Treasury Regulations with respect to the transfer of savings bonds had the force and effect of federal law, that the terms of a savings bond constituted a contract between the purchaser and the government for the benefit of a third party, as here Sigmund (or Philip) Frendel, and that the State could not interfere with the relationship so established.

In the *Harvey* case, bonds purchased by A were issued to A payable on death to B. The controversy was between the estate of A, who died before B, and the estate of B. The court held that complete ownership passed to B on A's death and hence to B's estate. The same principle is applicable to the bonds payable to A or B in the case at bar.

The parties agree that the federal laws and regulations in effect in the *Harvey* case are substantially unchanged. The pertinent part of the statute authorizing the issuance of the bonds, as in the *Harvey* case, reads:

> "The Secretary of the Treasury, with the approval of the President, is authorized to issue, from time to time, through the Postal Service or otherwise, United States savings bonds and United States Treasury savings certificates, the proceeds of which shall be available to meet any public expenditures authorized by law, and to retire any outstanding obligations of the United States bearing interest or issued on a discount basis. The various issues and series of the savings bonds and the savings certificates shall be in such forms, shall be offered in such amounts, subject to the limitation imposed by section 757b of this title, and shall be issued in such manner and subject to such terms and conditions consistent with subsections (b)-(d) of this section, and including any restrictions on their transfer, as the Secretary of the Treasury may from time to time prescribe." 31 U. S. C. A. § 757c (a).

It is agreed that a regulation with respect to bonds issued in the co-owner form similar to the regulation discussed in the *Harvey* case reads:

> "If either coowner dies without having presented and surrendered the bond for payment or authorized reissue, the surviving coowner will be recognized as the sole and absolute owner of the bond and payment or reissue, as though the bond were registered in his name alone, will be made only to such survivor. . . ." 31 Code of Federal Regulations, § 315.45 (1949).

The record also contains Regulations governing United States Savings Bonds issued by the Treasury Department, dated December 26, 1957, which read in part:

> "Sec. 315.61. AFTER THE DEATH OF ONE OR BOTH COOWNERS. — If either coowner dies without the bond having been presented and surrendered for payment or authorized reissue, the survivor will be recognized as the sole and absolute owner."

It will serve no useful purpose to set forth in further detail the applicable federal law and regulations. We have reviewed the reasoning underlying the decision in the *Harvey* case and are convinced that it is equally controlling today in the situation before us.

The *Harvey* case has been repeatedly cited with approval by our court in the years since 1945. The inclusion of government bonds (whether payable to A or B, or to A payable on death to B) in estates for inheritance tax purposes has been upheld on the ground the federal regulations specifically provide that bonds are subject to such taxes. *Hallett* v. *Bailey,* 143 Me. 1, 54 A. (2nd) 533; *Gould, Admr.* v. *Johnson,* 146 Me. 366, 82 A. (2nd) 88; *Weeks* v. *Johnson,* 146 Me. 371, 82 A. (2nd) 416.

Thibeault v. *Thibeault,* 147 Me. 213, 85 A. (2nd) 177, and *Paulsen* v. *Paulsen,* 144 Me. 155, 66 A. (2nd) 420, involved rights between coowners in the proceeds of bonds cashed during the lifetime of the coowners, and not ownership after death.

Thus since 1945 we find our court has considered the law to be settled by the *Harvey* case. Further, our law is in accordance with the great weight of authority. See *Reynolds* v. *Reynolds* (Mass.), 90 N. E. (2nd) 338 (1950). See also annot. 37 A. L. R. (2nd) 1221. We find no reason to overrule and discard the *Harvey* case.

Article VI, Clause 2, of the Federal Constitution provides:

> "This Constitution, and the Laws of the United States, which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

"We are not asked to overrule a rule of law already established in this state, but only to decide that, because of the

supremacy of Federal law, the state rule has no application. . ." *Harvey* v. *Rackliffe, supra,* at p. 182.

We hold that Sigmund Frendel and Philip Frendel, and not the administrator, are entitled to the bonds.

Fourth — The sixteenth and seventeenth items of the will read:

> "I give, bequeath and devise to the JEWISH ORPHAN ASYLUM at Cernoutz, Roumania, the sum of ONE THOUSAND DOLLARS.
>
> "I give, bequeath and devise to the JEWISH HOSPITAL at Cernoutz, Roumania, the sum of ONE THOUSAND DOLLARS."

The administrator asks with reference to each bequest, "that this court determine what disposition should be made of the bequest . . . and determine to whom, if any one, said bequest should be paid and if not to be paid to any particular person or organization, whether or not said bequest having failed, has lapsed and becomes part of the residue of said estate."

The evidence in substance consists of a stipulation and agreement by the parties that certain persons if present would testify: (1) that the institutions existed before the war, and by inference when the will was executed; (2) that they were destroyed in the occupation by Hitler, or that they have been taken over by the Russian Government, and (3) that in any event under applicable Russian law such institutions are not permitted to accept contributions particularly from the West.

In our opinion the evidence should be presented in admissible form, and not under a stipulation which obviously can bind only the parties agreeing thereto. Further, on the issue of Russian law, assuming the admissibility of the evidence, we have nothing before us to indicate that the person making the statement is an expert in Russian law. In the

absence of adequate proof of the expert knowledge of the witness, we cannot accept his statement as sufficient proof of the applicable foreign law.

Lastly, there are, we believe, important and perhaps decisive questions of state and national policy involved touching payment of legacies behind the "iron curtain." This field cannot well be explored on report. For illustrative cases see *In re Kennedy's Estate* (Cal.) 235 P. (2nd) 837; *Petition of Mazurowski,* 331 Mass. 33, 116 N. E. (2nd) 854; *In re Braier's Estate,* 305 N. Y. 148, 111 N. E. (2nd) 424.

The following New York Surrogate Court opinions are found in 107 N. Y. S., (2nd) Pg. 221, *In re Yee Yoke Ban's Estate* (China); Pg. 224, *In re Best's Estate* (Soviet Union); Pg. 225, *In re Getream's Estate* (Hungary). See also 31 Code of Federal Regulations § 211.3(a), as amended 22 F. R. 4134, June 12, 1957; 34 C. J. S. Executors and Administrators § 497(c).

The decision upon the legacies to the institutions need not delay the settlement of the other issues in the case. It seems to us therefore the better course to decline to answer the questions relating to the institutions without prejudice to any interested parties. These questions can be disposed of in other proceedings.

The entry will be

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 personal representative and charged in his probate account.

JOHN E. MERRILL
vs.
IVAN WALLINGFORD

Cumberland. Opinion, January 27, 1959.

Negligence. Employees. Assumption of Risk.

Where the gist of the action is negligence, a plaintiff must prove such negligence, the omission of some duty, or the commission of such negligent acts as occasioned the injury.

An employer is not bound to inform the laborer of what he already knows, or what by the exercise of ordinary care and attention he might have known.

An employee who is familiar with his workaday surroundings assumes the risks of danger when he energizes an acetylene torch in a small enclosure where painting is in preparation and progress.

A servant assumes (1) such dangers as are ordinarily and normally incident to work, and a workman of mature years is presumed to know them whether he does or not; (2) such extraordinary and abnormal risks as he (a) knows and appreciates and faces without complaint or (b) are obvious and apparent.

ON EXCEPTIONS.

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

Richard Harvey,
Herbert H. Bennett, for plaintiff

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

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

SULLIVAN, J. This is a common law action of tort instituted by the plaintiff to retrieve his damages for personal

injuries and their consequences, sustained by him whilst working as a mechanic for the defendant. The Workmen's Compensation Act does not apply since the defendant has but two employees. R. S. (1954), c. 31, § 4; P. L., 1957, c. 343.

At the close of the plaintiff's evidence the defendant moved for a directed verdict. The motion was denied. Defendant excepted to such a ruling and now prosecutes his exceptions.

The plaintiff had complained that the defendant without heed to his duty had negligently failed to afford the plaintiff safe means or place for the performance of the plaintiff's work and that as a result the plaintiff without fault on his part had become severely injured in his person. The defendant pleaded a general denial, the contributory negligence of the plaintiff and the assumption of risk by the plaintiff.

The record is before us and upon the paramount issue of this case the basic principle has been plainly and often stated by this court, e. g.:

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

> than the cure. Sylvia v. Etscovitz, 135 Me. 80; Weed v. Clark, 118 Me. 466."
>
> *Jordan* v. *Portland Coach Co.* (1954), 150 Me. 149, 150.

We now review the evidence in this case in the light most favorable to the plaintiff.

The defendant was engaged in the business of dealing in farm machinery and of operating a bulldozer and rototiller. The plaintiff served him in part as a repair man and had done so for two months. For the conduct of his business the defendant rented a building 20 feet by 30 feet from his father who was a commercial orchardist. Yet the father simultaneously cooccupied the building with his own equipment and employees and for the furtherance of his own calling. The testimony fails to acquaint us with additional knowledge of the precise legal relation of son with father in regard to the building save to disclose that the defendant did not enjoy exclusive control.

The ground floor afforded a repair shop for son and father. Along one wall ranged a work bench with a vise, power drills and a tool box upon it. There was a quantity of metal in a rack and more on the cement floor. Various types of farm machinery were about as well as a mobile acetylene burning apparatus with tanks, hose and nozzle.

The plaintiff had had a very considerable experience with acetylene torches. On the morning of the accident the defendant assigned the plaintiff to the duty of fabricating a metal bumper and attaching it to a large Case tractor of the defendant which was resting on end on the floor. The defendant then left the shop in accordance with his intermittent practice.

At the same time the father of the defendant possessed a tractor which was stationed upon the floor only a few feet from the defendant's tractor which the plaintiff was re-

pairing. For two days to the knowledge of the plaintiff an employee of the father of the defendant had been removing the paint from the father's tractor by a sanding process and had been readying the vehicle for fresh coating. The father's employee and the plaintiff were alone in the shop. The former went outside to his automobile and fetched a brilliantly red can of paint thinner of one gallon dimension, one foot in height and topped with a screw cap. He set the object on the shop floor between the two tractors and near a drawer containing paint screens and sticks used for mixing purposes. The can was located about two feet from the bench, within three feet of the area where the plaintiff was working and some fifteen feet from the defendant's tractor. The employee of the defendant's father was thereupon attracted to a door of the garage in an opposite side of the building by a man seeking to negotiate some business with the defendant's father. The employee's back was to the plaintiff. The plaintiff placed or had placed a piece of steel in the vise at the bench and proceeded to cut the steel with the acetylene torch. Shortly there was an explosion and the employee of the defendant's father turned about to discover the plaintiff afire and the shop ablaze with high flames billowing above a puddle of liquid on the floor. The contents of the red can had obviously exploded and the bottom of the can which was otherwise intact had cleanly blown away as if parted at the seams by expansive pressure. The plaintiff was grievously injured.

The plaintiff had not observed the can nor had he exerted any pains to notice its close presence or position. The deduction is compelling that glowing particles from the steel under the impact of the torch's flame had cascaded to the floor and expanded gases in the can which yielded and burst at the weakest part.

The testimony personifies the plaintiff as a matured adult with several years of mechanical schooling and experience.

He was sufficiently familiar with the operation of an acetylene torch. Painting had been performed in the shop at three or four times during the plaintiff's two months' employment there and at the time of the unfortunate accident the plaintiff was aware that during two days preparatory disposition for the painting of the other tractor had been advanced and that the application of the paint was imminent. The thinner was a conventional ingredient in such painting and the conspicuous can was located where the plaintiff had only to look to see it before he projected the molten steel fragments. The defendant had no knowledge of the presence or of the situation of the can of paint thinner in the shop.

In the instant case this plaintiff has a primordial obligation of establishing the negligence of the defendant.

> "The action set forth is founded upon the charge of negligence. It is the gist of the action. To entitle the plaintiff to recover, he must prove such negligence, the omission of some duty, or the commission of such negligent acts on the part of the defendant as occasioned the injury to the plaintiff." *Wormell* v. *Railroad Co.*, 79 Me. 397, 403.

We find no evidence or proof to demonstrate that any tools or apparatus furnished the plaintiff by the defendant were deficient or unsafe. The shop of employment was not exceptional. It conformed much to the type dedicated to the repair and restoration of heavy farm or road machinery. We are informed of no hidden dangers concerning which the defendant should have advised the plaintiff. As a hazard the lodged can and its contents were obvious and outstanding. *Melanson* v. *Reed Bros.*, 146 Me. 16, 19.

> "- - - The obligation resting upon the employer to give the laborer such instructions as are reasonably necessary to enable him to understand the perils to which he is exposed, must be considered with reference to the reciprocal obligation resting

> upon the laborer to exercise the senses and faculties with which he has been endowed in order to discover and comprehend these perils for himself. He is not bound to inform the laborer of what he already knows, or what by the exercise of ordinary care and attention, he might have known."
>
> *Cunningham* v. *Iron Works,* 92 Me. 501, 510.

> "- - - Though he (the servant) may have the benefit of the presumption that his master has performed its duties, yet he is bound to use his eyes and his mind, and to see the things before him which are obvious - - - -"
>
> *Lebrecque* v. *Hill Mfg. Co.,* 104 Me. 380, 386.

> "- - - The danger was obvious. There is no duty to warn or instruct a competent and experienced employee as to obvious dangers connected with his work - - - -"
>
> *Morey* v. *Railroad Company,* 125 Me. 272, 282.

The plaintiff in pursuance of his accustomed work was operating an acetylene torch at the time of his misfortune. The apparatus was not dangerous per se but its potency and capability of releasing volatile and molten steel in a small enclosure where painting was in preparation or progress would seem to render the operator accountable for ordinary circumspection in advance of operation. The plaintiff was familiar with his workaday surroundings. At the time of the accident he was cognizant of what was expected of him in respect to the task to be done. He was acquainted with what the employee of the defendant's father was in the course of doing and purposed to do. The plaintiff had assumed the risk of the danger which then energized eventuated in severe injuries to him.

> "Every employer has the right to judge for himself in what manner he will carry on his business, as between himself and those whom he employs, and the servant having knowledge of the circum-

stances, must judge for himself whether he will enter his service, or, having entered, whether he will remain. - - - Buzzell v. Laconia M'f'g Co. 48 Maine, 121; Shanny v. Androscoggin Mills, 66 Maine 427; - - -"

Wormell v. *Railroad Co.*, 79 Me. 397, 405.

"Plaintiff assumed the obvious risk of that happening which did happen and which any reasonably intelligent person would know must happen if the work was carried on as plaintiff carried it on."

Blacker v. *Oxford Paper Co.*, 127 Me. 228, 231.

- - - But work has to be done at times in dangerous places. If the workman knows and appreciates the danger, or if by the exercise of reasonable care, he would have known and appreciated it, he is held to have assumed the risk of danger. Caven v. Granite Co., 99 Maine, 285. And this rule has especial force in a case where the dangerous risk lies in the voluntary movements of the workman himself, movements which he can control and for which he is responsible. When the place to work is itself dangerous, the master is absolved from liability, if the workman knew and appreciated the danger, or should have done so - - -"

Dunbar v. *Hollingsworth & Whitney Co.*, 109 Me. 461, 464.

"The conventional statement of the rule in America today is that the servant 'assumes (1) such dangers as are ordinarily and normally incident to the work, and a workman of mature years is presumed to know them whether he does or not; (2) such extraordinary and abnormal risks as he (a) knows and appreciates and faces without complaint or (b) are obvious and apparent.' "

Harper and James, The Law of Torts, Vol. 2, § 21.4, P. 1178.

The facts of this case do not justify the jury verdict and this court accordingly finds the verdict clearly wrong. Justice requires that it be set aside.

The mandate must be:

Exceptions sustained.

ANN S. LAMBROU
vs.
ULYSSES G. BERNA

York. Opinion, February 2, 1959.

Uniform Support Act. Divorce. Alimony. Support. Minors.

The Uniform Reciprocal Support Act is remedial in nature and is to be construed liberally with reference to the object to be obtained, and every endeavor should be made by the courts to render the act operable.

The right of the parties are determined by the laws of Maine when the Maine courts have jurisdiction of the respondent.

A plea of the general issue admits the capacity of petitioner to bring suit so that the objection, that petitioner lacks capacity because it is not shown that petitioner had custody of the minor, comes too late.

It is within the discretion of the presiding justice whether to return a petition to the initiating state because of misnomer. R. S., 1954, Chap. 167, Sec. 10.

The allegations of the petition are not evidence of the truth of such allegations; they are nothing more than inadmissible *ex parte* statements.

Where there is no evidence of probative force to justify a finding that a child was born to petitioner as alleged there is no basis for finding a duty of support.

Where a respondent in this state denies dependency or claims no knowledge of the birth of the alleged dependent child, the petitioner should appear and testify in person or by deposition so that the right of cross examination may be preserved to the respondent.

ON EXCEPTIONS.

This is a petition for support under R. S., 1954, Chap. 167 before the Law Court upon exceptions. Exceptions sustained. Case remanded to the Superior Court for the County of York for a new hearing.

Marcel R. Viger, for plaintiff.

Charles W. Smith, for defendant.

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

SIDDALL, J. This is a proceeding under the Uniform Reciprocal Enforcement of Support Act (R. S., 1954, Chap. 167), brought by the petitioner against the respondent who lived in Saco in the County of York at the time of the service of the petition. The petition was initiated in the state of Michigan under an act which is similar and substantially the same as our own act. The petitioner alleged in substance that she was married to the respondent in 1945 and that the marriage was dissolved on October 27, 1947. The petition further alleged that "she is the mother and said respondent is the father of Ann, age 10 years, born on the 10th day of December, 1946," and that the respondent owed a duty of support to said child and had failed, neglected, and refused to provide such support. The petition was presented to the Circuit Court of the County of Wayne in Chancery of the State of Michigan and was duly certified by the Judge of that court and transmitted to the Superior Court in and for the County of York for disposition. Service was made on the respondent in this state in accordance

with the order of court and hearing was held. The respondent was represented by counsel at the hearing and participated therein by testifying in his own behalf. No written pleadings were filed by the respondent. In the course of his examination he testified that his name was spelled "Berka" and not "Berna" as alleged in the petition. During the progress of the hearing respondent's counsel requested the court to send the petition back to the initiating state for clarification before proceeding further with the hearing, on the grounds set forth in respondent's Bill of Exceptions. The motion was denied by the court, and exceptions were reserved by the respondent. After hearing, the court found a duty on the part of the respondent to support his minor child Ann and ordered him to pay the sum of $10 per week for such support. The respondent comes to this court on exceptions summarized as follows:

EXCEPTIONS I

That the Court erred in not granting respondent's motion to return the petition to the initiating state for clarification, for the following reasons:

a. That the petition gave only the Christian name of the dependent for whom support was sought and failed to state her full name.

b. That because the respondent's name was not stated correctly in the petition, coupled with indications of the remarriage of the petitioner, there was a reasonable possibility that the alleged dependent child had been adopted, and that no liability for her support could be imposed on the respondent.

c. That the respondent had no opportunity to examine the petitioner to verify or disprove facts stated in her petition and that he was entitled to have pertinent information and evidence furnished by the initiating state.

EXCEPTIONS II

That there is no evidence to support the Court's finding of a duty on the part of Ulysses G. "Berna" to support the child Ann because:

a. The evidence shows the respondent's true and correct name to be "Berka" and not "Berna," and that the only inference which can be drawn from the decree is that the child's name is Ann Berna and that there is no evidence to support such a finding.

b. That there is no evidence to support the finding that the respondent failed, neglected, and refused to provide such support for the dependent Ann in the petition.

c. That the Court failed to consider the standard of living and situation of the parties, the relative wealth and income of the parties, and the responsibility of the obligor for the support of others.

At the time of arguments in the Law Court, the respondent made further claim, not discussed in his brief, that the petition should be dismissed on the ground that it fails to show that the petitioner had the legal custody of the alleged minor dependent at the time the petition was brought.

The respondent was undoubtedly incorrectly designated in the petition. It is apparent, however, that he was the person intended to be named in the petition, that he was the person upon whom the service was made, and that he was at one time the husband of the petitioner, and he makes no claim otherwise. He does not raise the issue of misnomer as to his *own* name. In proceedings for the enforcement of a decree in situations such as this, the petitioner undoubtedly would consider it desirable to identify the respondent by his true name and further show that the order was obtained against him under another name.

The Uniform Reciprocal Enforcement of Support Act is of recent origin and many confusing questions of interpretation and procedure have not been resolved by judicial determination. The act is designed to enable a dependent in one state to initiate proceedings in the state of his domicile for the purpose of securing money for support from a person residing in another state who is legally liable for the support of such dependent. See *Rosenberg* v. *Rosenberg,* 152 Me. 161, 125 A. (2nd) 863; *Smith* v. *Smith,* 125 Cal. App. 154, 270 P. (2nd) 613; *Keene* v. *Toth,* 141 N. E. (2nd) 509 (Mass.).

The law is remedial in nature and is to be construed liberally with reference to the object to be obtained, and every endeavor should be made by the courts to render the act operable. See *State of Ill. ex rel. Shannon* v. *Sterling,* 80 N. W. (2nd) 13 (Minn.); *Daly* v. *Daly,* 39 N. J. Super. 117, 120 A. (2nd) 510; *Shaffer* v. *Shaffer,* 175 Pa. Super. 100, 103 A. (2nd) 430.

These general principles are to be considered in examining the claims of the respondent.

We consider first the respondent's contention that the petition should be dismissed because it fails to show that the petitioner had the legal custody of the alleged dependent at the time of filing the petition. The respondent cites the case of *Mahan* v. *Read,* 240 N. C., 641, 83 S. E. (2nd) 706, as authority for his contention that the petition should be dismissed on this ground. In that case the petition was initiated by a former wife of the respondent, in the state of Arkansas, against the respondent, a resident of North Carolina, for the support of two children of the petitioner and respondent. The Arkansas act contained the following provision: "A petition in behalf of a minor obligee may be brought by a person having legal custody of the minor without appointment as guardian *ad litem.*" No determina-

tion of legal custody was alleged or shown. This provision was not in the act of the responding state, North Carolina. The North Carolina law provided that in an action in which any of the parties plaintiff are infants, suit must be brought in the *name of such infants and in their behalf* by general or testamentary guardian or by duly appointed next friend. The North Carolina court held that the rights of the parties are determined in the court having jurisdiction of the respondent (North Carolina), and the cause in that court must be so constituted as to conform to the laws of North Carolina, and the suit not having been brought in the name of the minors as required by law that there was a fatal defect of parties plaintiff.

The Maine act contains the following provision: R. S., 1954, Chap. 167, Sec. 12. "A petition *on behalf* of a minor obligee may be brought by a person having legal custody of the minor without appointment as guardian *ad litem.*" (Emphasis ours.)

Our act, unlike the North Carolina act, does not require the petition to be brought *in the name of* the dependent. It is sufficient that the petition be brought *on behalf* of such dependent. The rights of the parties are determined by the law of this state, our court having jurisdiction of the respondent. See *Mahan* v. *Read, supra.* An analysis of the petition clearly indicates that it was brought on behalf of an alleged minor dependent, born during wedlock, by the mother of such dependent against its alleged father. Under the provisions of R. S., 1954, Chap. 166, Sec. 16, the father and mother are the joint natural guardians of their minor children and are jointly entitled to their care, custody, and control. It is true that there is no allegation in the petition that the petitioner had the legal custody of the minor, but the respondent failed to raise the question of the capacity of the petitioner until after hearing and decree of court. The court had jurisdiction of the subject matter

of the petition and obtained jurisdiction of the person of the respondent when he appeared generally and participated in the hearing. Our court in the case of *The Rundlett Co.* v. *Morrison,* 120 Me. 439, 443, 115 A. 247, held that a plea of general issue admitted the capacity of the plaintiff to sue. For a discussion of the same principle, see 39 Am. Jur. 979; 67 C. J. S. 1111. The principle of law involved in the determination of the respondent's claim is not dissimilar to that set forth in *The Rundlett Co.* v. *Morrison, supra.* By appearing generally and participating in the hearing without objecting to the capacity of the petitioner to bring the petition, the respondent waived any right to raise this issue later. It is now too late for him to claim want of capacity on the part of the petitioner.

Under respondent's Exceptions I he contends that the court below erred in not returning the petition to the initiating state for clarification because the petition gave only the Christian name of the alleged dependent and failed to state her full name. The Maine act provides that the petition "shall state the name and, so far as known to the petitioner, the address and circumstances of the respondent and his dependents for whom support is sought. . . ." R. S., 1954, Chap. 167, Sec. 10. The petition clearly indicates that the child Ann was the child of the petitioner and of the respondent named in the petition as Ulysses G. Berna, and that the child was born to the petitioner during the time she was married to the respondent. Although the child's last name was not specifically given, the petition was in compliance with the statute insofar as the name of the child was concerned. If the case should reach the point in which a petition to enforce a decree becomes necessary, good practice might indicate the desirability of naming the dependent under her true name as well as the name given in the petition filed in this case. The court below undoubtedly in his discretion had the authority to return the petition to the

initiating state for correction in this respect, but his refusal to do so does not constitute an abuse of discretion.

The respondent further claims under his Exceptions I that due to the fact that his name was not stated correctly in the petition, coupled with the apparent remarriage of the petitioner, that there was a reasonable probability that the child had been adopted, and that no liability for her support could be imposed upon the respondent. We cannot accede to respondent's views in this respect. The only reasonable inference which can be drawn from the allegations in the petition is that the petitioner and respondent are the parents of the alleged dependent who was born of their marriage. There was no abuse of discretion on the part of the court below in refusing to return the petition to the initiating state for clarification in respect to this claim of the respondent.

The respondent also claims under his Exceptions I that the court erred in not granting his motion to return the petition for clarification because he had no opportunity to examine the petitioner to verify or disprove facts stated in the petition, and that he was entitled to have pertinent information and evidence furnished by the initiating state. We have already ruled that the court's action in not returning the petition for the reasons stated by the respondent at the time of the request was not an abuse of discretion. Whether the court had the right to consider the petition as evidence of the truth of the allegations contained therein will be considered in our examination of respondent's Exceptions II.

Under respondent's Exceptions II he claims that there was no evidence to support the court's finding of a duty on the part of Ulysses G. Berna to support the child Ann. The Maine act provides as follows: "If the court of the responding state finds a duty of support, it may order the respond-

ent to furnish support or reimbursement therefor and subject the property of the respondent to such order." (R. S., 1954, Chap. 167, Sec. 19. Under this provision of the statute the court before making a valid order must find a duty on the part of the respondent to support the dependent. The finding of the court must be based upon evidence given at the hearing of the case. See *Pfueller* v. *Pfueller,* 37 N. J. Super. 106, 117 A (2nd) 30 (1955). The allegations in the petition are made in the initiating state without notice to the respondent and without an opportunity for cross-examination on his part, and, although necessary for the purpose of bringing the case before the proper court of the initiating state for transmission to the responding state, are not admissible as evidence in proof of such allegations. They amount to nothing more than inadmissible *ex parte* statements. In *Carpenter* v. *Carpenter,* 231 La. 638, 92 S. (2nd) 393, the court says:

> "When, in his answer, he [respondent] denied liability for the alimony herein sought a duty devolved upon plaintiff to prove her claim with legal evidence as in ordinary suits, that is, by means of oral testimony, interrogatories, depositions, etc., with the defendant having the right to cross examine the witnesses. Yet this plaintiff introduced only and she relied wholly on the testimony given by her during the hearing before the California court, at which the defendant was not cited to appear and hence had no opportunity for cross examination; and it amounted to nothing more than an inadmissible ex parte statement. Therefore, we are compelled to set aside the judgment appealed from and to remand the case to the Family Court for the purpose of receiving legal evidence respecting the issues created by the petition and answer. Thereafter, that court shall render such judgment as the evidence and the law warrant."

An examination of the testimony of the respondent discloses that upon his return from oversea service on March

21, 1946, he lived with the petitioner for five or six weeks. He then returned to Maine and neither saw nor heard from the petitioner afterwards. According to his testimony the only information that came to his attention that the petitioner had given birth to a child was through a letter received by someone other than himself. The petition alleges that the child Ann was born on December 10, 1946, but this allegation cannot be considered as evidence of that fact. There was no other evidence relating to the birth of the child. We find that there was no evidence of probative force to justify a finding that a child was born to the petitioner on December 10, 1946. Consequently, there was no basis for a finding of a duty of support on the part of the respondent.

The hearing below was conducted by the justice with care, but in reaching his findings he must have considered the allegations contained in the petition as evidence. The respondent is entitled to a new hearing and his exceptions are allowed.

What is the procedure to be followed by the courts of this state when confronted with a situation in which the respondent either denies dependence, or, as in the instant case, claims to have no knowledge of the birth of an alleged dependent child, and the petitioner is not present to testify? In the typical court hearing the plaintiff and his witnesses testify first, and then the defendant and his witnesses testify, and afterwards the plaintiff has an opportunity to rebut the evidence given by the defendant. In hearings under the act, however, this order is often reversed. The petitioner is rarely present in court, and if not, the respondent testifies first. The petitioner should then have an opportunity to testify, and respondent should have the privilege of rebuttal.

In *Pfueller* v. *Pfueller, supra,* the court said:

> "Where, as here, the defendant does not admit the charge of desertion, either expressly or impliedly,

> the court has open to it two alternative courses of procedure. First, if it is feasible for the wife to appear personally (her residence is fairly near the court in this case), notice can be given to her through the initiating court (perhaps also to her directly by mail) to appear at a specified time, at which time the responding court may take her testimony and such further testimony of the defendant (he having been subpoenaed for the occasion) as may be called for.
>
> Second, if it is not feasible for her to appear personally in court, her deposition may be taken in a civil action in the Superior Court."

Proceedings in this state under the act are ordinarily conducted without the benefit of formal pleadings on the part of the respondent. In many cases, perhaps in most cases, a duty of support may be determined by the testimony of the respondent. In some cases, however, the respondent in his testimony denies dependency. In the present case the respondent claims a lack of knowledge of the birth of an alleged dependent. In such cases, bearing in mind the purposes of the act, a similar proceeding to that set forth in *Pfueller* v. *Pfueller, supra,* may be followed. The court on his own motion, or upon motion of the attorney or official representing the petitioner (in this case the County Attorney), in the absence of some good reason to do otherwise, may continue the case for the purpose of allowing the petitioner to present evidence of dependency, either by appearing personally or by presenting a deposition taken according to law after notice to the respondent and an opportunity on his part to cross-examine the deponent.

The entry will be

Exceptions sustained. Case remanded to the Superior Court for the County of York for a new hearing.

MARY E. MILLER
vs.
CLARENCE E. DORE

Somerset. Opinion, February 4, 1959.

Physicians and Surgeons. Contracts. Negligence. Malpractice. Abandonment. Temporary Absence. New Trial.

Testimony by a plaintiff that her physician told her that during childbirth "nowadays they give a mixture of ether and gas" is insufficient to support a finding that the doctor agreed to administer such anaesthesia.

The relationship of physician and patient is a personal one and once initiated, continues until ended by consent of the parties, revoked by dismissal of the physician, or until his services are no longer needed.

A physician has the right to withdraw from the case but he is bound to give due notice to the patient and afford ample opportunity for other medical attendance.

A physician may take temporary absence or leave from a patient, provided (1) he makes proper provision for attendance of a competent substitute and (2) gives timely notice of his unavailability and substitution and (3) does not absent himself while his patient is in critical condition.

ON MOTION FOR NEW TRIAL.

This is an action of assumpsit before the Law Court upon motion for New Trial. Motion sustained. Verdict set aside. New Trial ordered.

Lloyd H. Stitham,
Bird & Bird, for plaintiff.

Locke, Campbell, Reid & Hebert, for defendant.

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

DUBORD, J. The defendant is a medical doctor engaged in general practice in the city of Waterville. Plaintiff was a married woman, who had previously given birth to two other children and sometime in January 1956 she consulted the defendant and engaged him to attend her in an expected confinement. The evidence indicates the defendant had estimated the awaited child would be born on or about May 16, 1956.

On Saturday, May 19, 1956, the defendant feeling tired out physically from overwork, and in need of a rest, decided to go to Moosehead Lake for a two day fishing trip. He did not personally notify the plaintiff that he would be unavailable during the two days in question. However, before he left, he made arrangements with Dr. Kenneth W. Sewall, head of the obstetrical department of Thayer Hospital of Waterville, for the attendance by Dr. Sewall of defendant's maternity cases during his absence. On the eve of May 20, 1956, the plaintiff became aware of the fact that her accouchement was approaching. Previous reservations having been made by the defendant for the reception of the plaintiff at Thayer Hospital, early in the morning of May 20, 1956, she entered the hospital. Dr. Sewall having been notified, gave instructions concerning medication to alleviate pain and sometime during the forenoon saw the plaintiff at the hospital. When he saw her, she was already on the delivery table ready for the birth of the child. The physician who attended the plaintiff was Dr. Edward M. Southern, associate of Dr. Sewall, and a medical doctor with a good background in the practice of obstetrics. When Dr. Sewall entered the delivery room, Dr. Southern was preparing delivery and upon being assured that "everything was all right," Dr. Sewall left the room. Dr. Southern testified that he saw the plaintiff in the labor room and introduced himself to her and informed her that he would attend

her. At that time it was a few minutes after 11:00 a.m. The doctor noting that delivery was imminent, ordered that she be moved to the delivery room where a healthy child was born within a very few minutes.

The defendant returned to Waterville that night and resumed the attendance of the plaintiff for post natal care.

Plaintiff brought an action against the defendant for breach of contract and based her claim upon the theory that the defendant had agreed to give her ether or gas at the time of her delivery; that his substitute failed to administer this type of anaesthetic, and that as a result she suffered pain, both mental and physical, which otherwise she would not have experienced. She also charged that the defendant failed to notify her that he would be unavailable and thus permit her an opportunity to employ another physician of her own selection, and she further charged that she suffered severe pain and mental anguish, all resulting from defendant's failure to attend her at the time of her labor and delivery of the child.

Subsequently, she was permitted to amend her writ by the addition of another count alleging that Dr. Southern was the agent of the defendant. The jury was instructed by the presiding justice to disregard this additional count on the theory that there was no proof of agency. To this instruction the plaintiff excepted, but the jury having returned a verdict for the plaintiff, this exception was not pressed.

It is clear from the nature of the pleadings and the manner in which the case was tried that plaintiff's claim was predicated in large measure upon an alleged breach of a contract to administer ether or gas. However, we treat the pleadings as broad enough to include an alleged breach of contract, both by reason of alleged failure to give gas or ether, and also failure to notify the plaintiff that he would

be unavailable and that pain was suffered by reason of defendant's absence at the time of her delivery.

The jury returned a verdict for the plaintiff and the defendant filed a general motion for a new trial. Exceptions were taken by the defendant to an instruction given by the presiding justice, and also to the refusal of the presiding justice to give certain requested instructions.

We give our attention first to plaintiff's contention that the defendant had agreed to give her gas or ether during the time of her delivery. The only allegation in her writ bearing upon this contention reads as follows:

> "That during the term of her pregnancy, the defendant told the plaintiff that gas or ether would be used at the time of delivery, so that plaintiff would have no pain or suffering at the time of delivery."

There is no averment in the declaration that the defendant agreed to give her gas or ether. However, if the allegation can be construed as being broad enough to allege an agreement that gas or ether would be administered, the evidence is entirely bare of any evidence supporting such a contention. The only evidence in the record is the testimony of the plaintiff, in which she said:

> "I asked him (defendant) finally if he gave ether or something, is the way I put it."

He said:

> "Nowadays they give a mixture of ether and gas."

We are, therefore, convinced that the evidence does not support a finding that the defendant had agreed to give gas or ether.

We give our attention now to some of the rules of law applicable to the relationship of physician and patient, a relationship which is a personal one and which creates obliga-

tions which vary from those arising from an ordinary commercial agreement.

The decisions in diverse jurisdictions are conflicting and difficult of reconciliation. That opinions of courts vary is not only due to the fact that dissimilar rules are adopted in different jurisdictions, but the facts and circumstances of each case are not always the same. Moreover, some actions are based upon negligence, while others as in the instant case, are founded upon an alleged breach of contract. Some actions have been brought against physicians alleging negligence, or breach of contract, for abandonment of the case. Others are predicated upon the temporary absence of the attending physician. In the instant case, we are no concerned with abandonment, but with a temporary leaving of the patient on the part of the defendant. As previously pointed out, the evidence discloses that shortly after the birth of the child, the defendant resumed the attendance of the patient, and insofar as the record indicates, without complaint on the part of the plaintiff.

The following are general rules applicable to the relationship between physician and patient:

> "It is the settled rule that one who engages a physician to treat his case impliedly engages him to attend throughout that illness, or until his services are dispensed with. In other words, the relation of physician and patient, once initiated, continues until it is ended by the consent of the parties, revoked by the dismissal of the physician, or until his services are no longer needed." 41 Am. Jur. 194, Physicians and Surgeons, § 72.

> "A physician has a right to withdraw from a case, but if he would discontinue his services before the need for them is at an end, he is bound first to give due notice to the patient and afford the latter ample opportunity to secure other medical attendance of his own choice." 41 Am. Jur. 194, Physicians and Surgeons, § 72.

> "If a physician abandons a case without giving his patient such notice and opportunity to procure the services of another physician, his conduct may subject him to the consequences and liability resulting from abandonment of the case." 41 Am. Jur. 194, Physicians and Surgeons, § 72.
>
> "The relation of physician and patient continues until terminated in modes recognized by law. And it is the universal rule that a physician cannot discharge himself from a case and relieve himself of responsibility for it by simply abandoning it or staying away without notice to the patient." 41 Am. Jur. 217, Physicians and Surgeons, § 102.
>
> "A physician or surgeon who leaves or abandons his patient in a critical stage of disease, without reasonable notice to enable the patient to secure another medical attendant, when the giving of such notice is reasonably possible, is guilty of culpable dereliction of duty, and, if damages are occasioned thereby, is liable therefor." *Stohlman* v. *Davis*, 220 N. W. 247, (Nebr.)

See also *Barbour* v. *Martin* (1873), 62 Me. 536, 141 A. L. R. 139.

In the instant case, the attending physician, without notice to his patient left for a short fishing trip and before his departure he made arrangements with the head of the obstetrical department of Thayer Hospital to attend to his patients. It was conceded that the substitute was a competent one.

In 57 A. L. R. (2nd) 417, we find the following statement as to the law applicable in a case similar to the instant one:

> "In a number of cases the question arose whether the fact that a physician temporarily leaves his practice renders him liable on the ground of lack of diligence in attending the patient, where before doing so he arranges for another physician to take his place. As to this question, the general rule seems to be that a physician is not liable for lack of

> diligence in attending a patient if he temporarily leaves or interrupts his practice, provided (1) he makes proper provision for the attendance of a competent physician during his absence in case of a call, (2) timely informs his patient of his unavailability and the substitution, and (3) does not absent himself while a patient is in a critical condition."

We adopt the foregoing rule. As to what is meant by "timely notice" would depend upon the circumstances of the case. It should be a notice given in sufficient time to enable the patient to engage another physician of his or her own choice, in the event the substitute is not acceptable. Whether or not the notice was a timely one might well be a jury question depending upon the existing exigencies and circumstances. Moreover, we do not think the notice need necessarily be given directly to the patient, as long as it is conveyed to the patient in ample time.

It is to be noted that if an attending physician is to excuse his temporary absence, he must comply with all three of the requirements of the foregoing rule. Manifestly, if the substitute is competent and is acceptable to and accepted by the patient, then the physician is exonerated from liability. Presumably, a physician could protect himself when he is first engaged, or during the progress of the treatment, particularly in confinement cases, by giving his patient the name of a proposed substitute, in the event it becomes necessary for him to absent himself temporarily. Assent on the part of the patient would cover the situation and afford the attending physician the necessary protection.

During the trial of the instant case, the presiding justice instructed the jury that defendant would be absolved from responsibility if the jury found from the evidence that the defendant had either notified the plaintiff in reasonable time to allow her to engage another doctor for her delivery, or if he had arranged for a competent substitute. It will be

noted that this instruction is more favorable to the defendant than would have been an instruction based upon the rule we have just enunciated. However, the presiding justice qualified the foregoing instruction with the following statement:

> "If the defendant doctor did procure a substitute competent doctor to attend his patient, then it was the duty of the defendant doctor to notify the substitute doctor of the agreed specific undertaking, of the manner of treatment to be given and the anaesthesia to be used, if such you find to be a part of the contract. If such notice was not given by the defendant doctor to the substitute doctor, or if the plaintiff was delivered by a volunteer with whom the plaintiff made no contract to deliver her, and a different anaesthesia was used, then the plaintiff would be entitled to recover for the greater physical pain and suffering, if any, that was present, which would not have been present if the contracted specific anaesthesia had been used, if you should so find greater physical pain and suffering."

In view of the charge in relation to the duty of the defendant to inform his substitute of the nature of any existing contract to administer ether or gas, as the case was tried almost completely upon plaintiff's contention that there was such a contract, it seems clear that the jury would not have returned a verdict for the plaintiff without finding that such a contract existed. We have already determined that the evidence does not support such a finding.

The record is replete with page after page of testimony given by different physicians concerning varying types of anaesthesia used in childbirth cases. The jury may well have been confused by this mass of perplexing testimony.

It is impossible for us to determine upon what hypothesis the jury returned a verdict for the plaintiff. If the underlying reason is a finding that a contract to give ether

or gas existed, then the jury erred. If the jury based its verdict upon the theory that the defendant had violated any of the rules of law applicable to the relationship between physician and patient, again it was in error as there is no evidence in the case to show that the plaintiff would have suffered less or escaped any of the elements of damage for which she seeks recovery had the defendant attended her in person during the interval of his absence. See *Jackowicz* v. *Knobloch,* 275 Mich. 125, 265 N. W. 799; *Bonnor* v. *Conklin,* 62 F. (2nd) 875.

In either event the verdict was erroneous. It has all the earmarks of an ill considered finding.

The entry will be

Motion sustained.
Verdict set aside.
New trial ordered.

ALTHEA MARSHALL, COLLECTOR
vs.
INHABITANTS OF TOWN OF BAR HARBOR

Hancock. Opinion, February 4, 1959.

Taxation. Exemptions. Municipal Airports. Harmless Error.

The findings of fact of a referee are unassailable if there is any credible evidence to support them.

Where the evidence conveys an authentic summary impression that the use of the assessed (airport) buildings with all properties of the integrated airport was primarily and mainly in the *public interest,* such property is properly found by the referee to be within the exemption from taxation of R. S., 1954, Chap. 91-A, Sec. 10, Par. 1, sub. Par. G (P. L., 1955, Chap. 399, Sec. 1), Public Mun. Airports.

Where the evidence supports a finding that the use of the buildings assessed was for public airport and aeronautical purposes such buildings were exempt from taxation for 1956 and would have enjoyed such immunity under the statutes prior to the 1955 Amendment. R. S., 1954, Chap. 92, Sec. 6.

If the ruling is right, the fact that a wrong has been assigned therefor, is immaterial.

ON EXCEPTIONS.

This is an action of debt before the Law Court upon exceptions to the acceptance of a referee's report.

Exceptions overruled.

Silsby & Silsby, for plaintiff.

William Fenton, for defendant.

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

SULLIVAN, J. This is a statutory action of debt by the tax collector of the Town of Trenton. R. S., c. 91-A, Sec.

107, as enacted by P. L., 1955, c. 399, Sec. 1. The cause was submitted to a referee with the reservation to the parties of the right to except upon issues of law, to his decision. A hearing was had. The referee reported in favor of the defendant. The plaintiff in writing objected to such report and subsequently excepted to the acceptance of the report by the Justice of the Superior Court. Rule of Court 21, 147 Me. 473. The plaintiff now prosecutes her exceptions.

The defendant, a municipal corporation, was, on the annual tax assessment date of April 1, 1956, the owner of an airport comprised of land and buildings all situated in the Town of Trenton. The land is an area of 350 acres, more or less, and had been obtained by the defendant in various acquisitions during the years 1934, 1941, 1942, 1943 and 1944. During World War II the Navy utilized the airport and erected many of the buildings and supplied much equipment all of which, at the close of hostilities, was given to the defendant by authority of the War Assets Administration with a title somehow conditioned that the buildings and equipment be maintained by the defendant to the end that they might be available for the government again in the event of a national emergency. The airport has been subject to inspection and control by the Civil Aeronautics Administration.

This action seeks to obtain from the defendant a tax of $1110 upon the following assessed items:

Hangar	$3800
1 Snack Bar	300
5 Quonset Huts	500
2 Garages 100, 200	300
1 Building	100

R. S., c. 91-A, Sec. 10, Par. I, Sub-par. G, as enacted by P. L., 1955, c. 399, Sec. 1, reads as follows:

"**Sec. 10. Exemptions.** The following property and polls are exempt from taxation.

I. Public property.

- - - - - - - - - - - - - - - - - - - -

G. All airports and landing fields and the structures erected thereon or contained therein of public municipal corporations whether located within or without the limits of such public municipal corporations; provided, however, that any structures or land contained within such airport not used for airport or aeronautical purposes shall not be entitled to this exemption; and provided further that any public municipal corporation which is required to pay taxes to another such corporation under this paragraph with respect to any airport or landing field shall be reimbursed by the county wherein the airport is situated."

The above statute became effective on August 20, A. D., 1955.

The record acquaints us with the properties of the airport. There was an administration or terminal building which served as the main offices for the lessees, Bar Harbor Airways, Inc. and Northeast Airlines, with a common lobby and rest rooms. Airways, Inc. had radio equipment and its air control switches there. It there functioned as airport manager, did its bookkeeping, conducted over the counter sales and carried on an air taxi service. It maintained in its office a V H F transreceiver for direct communication from ground to air and from aircraft and thus supplied wind condition, direction and velocity communications for 'planes using the runways. This building was not taxed.

There was a hangar, 90 x 100 feet, primarily for storage of aircraft. On April 1, 1956 some twenty 'planes were housed there. Two were State 'planes; the balance were privately owned. 75% of the 'planes were dead storage in winter. One 'plane was from the flying school. Charges

were made for storage. During the summer of 1956 nine or ten weekly public dances were held there with a net income therefrom of $1000 to $1500 to Bar Harbor Airways, Inc.

There was a building, 30 x 50 feet, occupied by Airways, Inc. as a repair shop for aircraft maintenance for the public who were required to pay Airways, Inc. for such service. This structure was one of the "2 Garages" taxed.

The other "Garage" was a small building, 15 x 20 feet, originally a carpenter shop but used in 1956 for vehicle storage by one of the stockholders of Airways, Inc.

A building, 30 x 40 feet, served the purposes of a public snack bar. This concession was promoted to their private gain by the father and mother of the two men who were the active members and owners of Airways, Inc. The father and mother also used the building as their living quarters. Lunches were sold to the public from late May to September. Coffee and doughnuts were served to persons patronizing two of the five daily flights of the regular passenger 'plane service.

The 5 Quonset huts, 20 x 40 feet, each, were utilized for storage. In four of them were airplane parts, new, used, usable and obsolete. The accumulation was one of years' accruing. In the fifth hut were old cots abandoned in navy days at the airport.

One building, 15 feet square, was a public toilet.

There were additional small structures of little moment here.

There were three runways with hard surfaces, 4500 x 150 feet, 3900 x 150 feet and 3600 x 150 feet, respectively.

The airport had been in operation for several years. It was a fixed base with radio beacon for navigation of aircraft, maintenance of 'planes, aircraft sales, air taxi and

gasoline service. There were night lighting facilities and runway beacons constantly available. No charge was exacted for landing or for lights. The operation of the field was for twelve months of the year and for public patronage.

There were three dump trucks used with plows for snow removal, a crane for lifting airplanes, a panel truck, a truck with flat body and a tractor, all the property of the defendant Town. Two runways were kept clear of snow, one for a length of 2500 feet, the other for a distance of 1500 feet.

Bar Harbor Airways, Incorporated is a corporation, the proprietorship, stock ownership and management of which were in two brothers. The direct object of the enterprise was the livelihood of its owners. On February 9, A. D. 1956 the defendant Town leased to Airways, Inc. for a term of years at an annual rental of $3000 the airport with the exception of such part of the administration-terminal building as was later leased to Northeast Airlines. In part consideration for the tenancy Airways, Inc. agreed to act as airport manager for the defendant Town. The Town of Bar Harbor by the lease reserved unto itself the right at will to enter the demised property for adding structures and buildings necessary for airport purposes. The lease was subject to cancellation on sixty days' notice by either party to it. The Town agreed to pay all taxes assessed and to carry fire and liability insurance upon the physical properties of the airport. The Town-lessor reserved a right to make and direct repairs to the landing area and public facilities and to protect the aerial approaches against obstruction and hazard. The lessor-Town reserved a paramount right, in a national emergency, to lease the landing area to the United States Government for military or naval use. This lease given Airways, Inc. was subordinated to any then existing or future agreement between the Town of Bar Harbor and the United States - -

> "relative to the operation or maintenance of the airport, the execution of which has been or may be required as a condition precedent to the expenditure of Federal funds for the development of this airport."

The Town of Bar Harbor by the lease retained the right to - -

> "enter to view and make improvements as the same may be necessary consistent with the use and operation of the premises as a public airport," - -

and to expel the lessee-corporation for waste or violation of any of the obligations of the lessee.

The lease contained the following covenant:

> "The lessee agrees to operate the airport for the use and benefit of the public; to make available all airport facilities and services to the public, without unjust discrimination; and to refrain from imposing or levying excessive, discriminatory, or otherwise unreasonable charges or fees for any use of the airport or its facilities or for any airport service. It is understood and agreed that nothing herein contained shall be construed to grant or authorize the granting of an exclusive right within the meaning of Section 303 of the Civil Aeronautics Act."
>
> (See, *Inhabs. of Owls Head* v. *Dodge,* 151 Me. 473, 478.)

With reference to the foregoing covenant quoted attention is directed to this excerpt from the Federal Statutes in effect in 1956:

> "- - - there shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal Funds have been expended."
>
> U. S. C. A., Title 49, Section 453.

On February 9, A. D. 1956, the date of the lease between the defendant Town and Airways, Inc., those same parties

entered into a written agreement supplementing the lease to this stated purpose:

> "- - - particularly stating and defining the duties to be performed by the Airways as Airport Manager - - -"

Airways, Inc. agreed to furnish janitorial and custodial services for the administration-terminal building, to maintain the field, parking spaces and storage area in a presentable condition, to be responsible for the proper operation of the airport and of the aircraft and to keep the lights clean and capable of functioning. The defendant Town in turn committed itself to remove the snow and heat the terminal building in the event that an established airline used the airport in winter upon a schedule, to pay the cost of repairs, replacements and of technical skill necessary to keep the lights in working condition and to pay for current for the runway lights. The Town of Bar Harbor undertook to pay Airways, Inc. Two Thousand Dollars per annum for the latter's services under the agreement and to pay Airways, Inc. any money that might accrue to the defendant Town from the Maine Aeronautics Commission as reimbursement to the Town for snow removal.

On May 19, A. D. 1956 the defendant Town leased to Northeast Airlines for a scale of fees the use of the airport with all its facilities provided for common usage with any other authorized persons and an exclusive portion of the terminal building so as to enable Northeast Airlines to supply a regular passenger service to the public during the summer months and at other times if feasible and indicated. The lessor-Town engaged to maintain the airport lighted, heated, clean, manned and in repair, free of snow and obstructions, etc. The lease was subject to cancellation in the event of the taking of the airport by the United States, in the event of the loss to the lessee of the air mail carrying franchise or in the event of substitution by the Post Office

Department of an airport other than this so-called Bar Harbor Airport as the regional air mail depot. The lease was expressly subordinated to any existing or future agreement between the lessor-defendant and the United States "relative to the operation or maintenance of said Airport, the execution *(sic)* of Federal funds for the past or future development of the Airport."

Bar Harbor Airways, Inc., during 1956, under its lease and companion agreement, used the buildings against which the tax was assessed for the purposes hitherto reviewed. It sold gasoline for aircraft consumption, collected rental for storage of 'planes, repaired 'planes for a monetary consideration and acted as sales agent for a 'plane manufacturer. It conducted a flying school for gain. Yet it fulfilled the duties, all the while, of airport manager and its various businesses, with the exception of the Snack Bar of the parents, were within the control of the Civil Aeronautics Board.

In the light of the foregoing facts and circumstances the referee reported in substance that the defendant had succeeded in supporting its burden of establishing its exemption from taxation as to the property here assessed. The referee concluded that the dominant character of the use of all the assessed property had been for airport or aeronautical purposes and that all additional usage of that property had been incidental.

The plaintiff by her exceptions protests that the referee and the accepting justice have erred and assigns as specific errors the following:

A. There is no evidence to support the findings of fact requisite to justify the referee's conclusions.

B. The referee erred in his failure to find and rule that the defendant had the burden of proving by a preponder-

ance of the evidence that it was exempt from taxation by reason of a use of the assessed buildings for public airport or aeronautical purposes which must be distinguished from mere airport or aeronautical purposes.

C. The referee was wrong in failing to find and rule that the use of the assessed buildings was "so mixed, comingled and inseparable" that "it was impractical and unreasonable" for the assessors of the Town of Trenton or for the referee "to ascertain the dominant use thereof."

D. The referee was incorrect in failing to find and rule that the dominant and principal use of the assessed buildings was for private airport or aeronautical business undertakings as distinguished from a dominant use of public airport or aeronautical facilities freely usable and accessible to the public.

The findings of fact of a referee are unassailable if there is any credible evidence to support them. *Hincks Coal Co.* v. *Milan and Toole,* 135 Me. 203, 206; *Melanson* v. *Reed Bros.,* 146 Me. 16, 18.

The evidence to fortify the referee in his conclusion that the dominant character of the use of the assessed buildings had been for airport and aeronautical purposes seems ample. That same evidence does more. It conveys an authentic summary impression that the use of the assessed buildings with all other properties of the integrated airport was primarily and mainly in the public interest. Throughout 1956 it is apparent that the airport of the Town of Bar Harbor was operated to accommodate and foster public aviation, commerce, the tourist business so prominent in Maine's economy and provisionally the public defense. An exclusive right to the use of any landing area or of any air navigation facility had been foreclosed to all because the Government had made expenditures upon the property. The project was continuously subject to the control of the Civil

Aeronautics Board. Management of an experienced and competent order was required and provided during all of the twelve months of the year. Regular public passenger conveyance and government air-mail service were afforded during the summer season upon a daily schedule. All air traffic was offered accommodations. Repairing, refueling, parking, storage, snow removal, night lighting and radio communication were supplied for the benefit of all who came to avail themselves. Lunches were made procurable. There were rest rooms. The Town of Bar Harbor was not engaged in a commercial pursuit. It owned an extensive property which returned to it a token net rental of $1000. Obviously, then, the operation of the airport was as for the municipality of Bar Harbor essentially public and patriotic. The defendant Town at all times by binding legal safeguards kept adequate control over the property which it in turn was obligated to conserve in anticipation of an ever possible national emergency. The defendant Town which can function only through agents or servants had to employ a specialized personnel to manage the airport. It engaged Airways, Inc. and contrived to have its corporate employee compensate itself by a profit fittingly repressed, from the incidental services rather than to pay it directly a set fee or a commission. Airways, Inc. also maintained an agency for the sale of a brand of 'planes and a school for student flying. It conducted some ten weekly public dances with admission charges. Yet the receipt of revenue for its functions by Airways, Inc. and its engagement in some collateral and extra pursuits was not of a scope or magnitude to affect essentially the tenor of the airport so as to give the commercial preponderance over the public motif.

The usage of the hangar and other buildings assessed, save for the occasional dances, even as that usage enured to the monetary and corporate advantage of Airways, Inc., all had a considerable congruity with the replete function-

ing of a public airport. Whatever use by Airways, Inc. might by the strictest standards be adjudged expendable from the public service was not exclusive but partial as to any given building and was not concentrated in any one facility. Even the "Snack Bar" contributed a service that must be regarded as indispensable to airmen and the traveling public from whom it drew its patronage.

The evidence supports a finding that in 1956 the principal and dominant use of the buildings assessed was for *public* airport and aeronautical purposes. Therefore those buildings were exempt from taxation for 1956 and would have enjoyed that immunity even under the statute as it was worded prior to the 1955 amendment. R. S. (1954), c. 92, Sec. 6; *Inhabitants of Owls Head* v. *Dodge,* 151 Me. 473, 480, 481.

The plaintiff specifies as exceptionable that the referee rested his ruling of exemption upon mere usage by the defendant of the assessed property for airport and aeronautical purposes rather than upon a usage for *public* airport and aeronautical purposes. Such a distinction or refinement is not determinative or of moment here. Were we to concede that the referee was in error as to the ground for his conclusion - - - and such concession we have not made

- - - that shortcoming would not vitiate his correct ruling.

> "- - - In other words, if the ruling is right, the fact that a wrong reason has been assigned therefor is immaterial. Warren v. Walker, 23 Me. 453; Petition of Kimball, 142 Me. 182; 49 Atl. (2nd) 70; Austin v. Inhabitants of St. Albans, 144 Me. 111; 65 Atl. (2nd) 32." *Water District* v. *Me. Turnpike Authority,* 145 Me. 35, 55.

This court accordingly deems it unnecessary for the merits of the instant case to proffer an opinion as to whether or not, under the statute controlling and as worded by force of the amendment of 1955, the buildings assessed would

have been exempted from taxation had the evidence supported only a finding of their unqualified usage for airport and aeronautical purposes by this defendant and not such a usage dedicated to public purposes.

The exceptant has failed to demonstrate that as a matter of law the evidence did not warrant the award against her. *Wood* v. *Balzano,* 137 Me. 87, 88.

Exceptions overruled.

RICHARD L. HOWARD
vs.
FREDERICK DESCHAMBEAULT

York. Opinion, February 10, 1959.

Trover. Damages. Assumpsit. Negligence.

Evidence of repossession by plaintiff of his automobile from the river is admissible in mitigation of damages.

Where the defendant's alleged acts of conversion are limited to moving plaintiff's automobile from the place where it was improperly blocking defendant's driveway to a suitable place on defendant's lot and there is no intention on defendant's part of depriving plaintiff of ownership or otherwise interfering with plaintiff's full and complete control, it is not a conversion.

See Restatement of Torts, Sec. 260, 264.

ON EXCEPTIONS.

This is an action of trover before the Law Court upon plaintiff's exceptions to the directing of a verdict for defendant. Exceptions overruled.

Walter E. Foss,
Robert A. Wilson, for plaintiff.

Waterhouse, Spencer & Carroll, for defendant.

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

WILLIAMSON, C. J. This is an action of trover to recover damages for the conversion of plaintiff's automobile. Exceptions to the direction of a verdict for the defendant are overruled.

We take the evidence and the inferences to be drawn therefrom in the light most favorable to the plaintiff. *Ward* v. *Merrill,* 154 Me. 45, 141 A. (2nd) 438. Under the rule a jury could have found the following facts:

The plaintiff parked his automobile on River Street in Biddeford in such a way as to obstruct the driveway or entrance to defendant's parking lot. Whether the front end of the car, which was on the driveway, was in fact on the sidewalk or on the parking lot was not determined, nor is it material. In either event, the entrance was blocked. The parking lot reached from the street to the bank of the Saco River, a distance of about sixty feet.

The plaintiff left his car with the keys in it and crossed the street to discuss business with an automobile salesman. While he was so engaged a customer of the defendant requested the defendant to remove the car that he might leave the parking lot. The customer and the defendant tried without success to move the car. Thereupon the defendant, without permission of the plaintiff, started the plaintiff's car and drove it into the parking lot with the intention of parking at the rear of the lot where it would be available for the owner. For some reason, attributed by the defendant to a failure of the brakes, he was unable to stop and continued over the bank into the river.

The salvage value of the car exactly equalled plaintiff's cost of removing it from the river. The repossession of the car by the plaintiff would not have defeated defendant's lia-

bility for conversion if liability had otherwise existed. Evidence of this nature is admissible in mitigation of damages. *Merrill* v. *How,* 24 Me. 126; *Hunt* v. *Haskell,* 24 Me. 339; Anno. 3 A. L. R. (2nd) 225.

The acts of the defendant do not come within the definition of conversion stated in the often cited case of *McPheters* v. *Page,* 83 Me. 234, 22 A. 101. There the defendant proprietor of a meat market was held liable for conversion for cutting up and distributing a carcass and saddles of deer received from an officer of the law who had wrongfully seized them from the plaintiff owners. The court said, at p. 235:

> "It is established as elementary law by well-settled principles, and a long line of decisions, that any distinct act of dominion wrongfully exerted over property in denial of the owner's right, or inconsistent with it, amounts to a conversion. It is not necessary to a conversion that it be shown that the wrong-doer has applied it to his own use. If he has exercised a dominion over it in exclusion, or in defiance of, or inconsistent with, the owner's right, that in law is a conversion, whether it be for his own or another person's use."
>
> * * * * * * * * *
>
> "In this case the defendant was more than a mere naked bailee. He exercised a dominion over the property destructive of it, and inconsistent with the plaintiff's ownership."

The distinction is at once apparent between the case at bar on the one hand and the *McPheters* case and the following cases on the other: *Dubie* v. *Branz,* 146 Me. 455, 74 A. (2nd) 217 (pledge of property by one who has converted it); *Sanborn* v. *Matthews,* 141 Me. 213, 41 A. (2nd) 704 (sale of mortgaged personal property); *Harvey* v. *Anacone,* 134 Me. 245, 184 A. 889 (sale by a conditional vendor); *Crocker* v. *Gullifer,* 44 Me. 491 (unauthorized use by a bailee with limited right of possession). See also 53 Am. Jur.,

Trover and Conversion, § 24 and 89 C. J. S., *Trover and Conversion,* § 1.

There is no suggestion here of any attempt to dispose of the car, or to make use of it other than to remove it from the driveway to another place for parking. There is nothing in the record to indicate the slightest intention of depriving the plaintiff owner of his possession, or otherwise of interfering with his full and complete control, except to the limited extent of moving the car from the place where it was improperly blocking defendant's driveway to a suitable parking place on defendant's lot. In this situation there is no conversion. "It is not a conversion for one to move from his premises, or from one part of his premises to another, chattels which the owner has left there either with or without license therefor." 89 C. J. S., *Trover and Conversion,* § 49.

The defendant plainly had the right to remove the obstruction, that is to say, the plaintiff's car, from his driveway. The defendant's possession for this purpose was justified. The evidence denies the elements of conversion.

The case is analogous in many respects to *Gilman* v. *Emery,* 54 Me. 460, in which the court said, at p. 462:

> "In this case the defendant found a horse hitched to one of his shade trees. He unhitched him and led him a few feet and hitched him to a post set in the ground on purpose to hitch horses to. This was not an act of trespass, and probably the plaintiff would not have complained of it, but for the fact that his horse afterwards broke loose from the post and ran away and broke his wagon. But there is no evidence that the defendant did not use ordinary care in hitching the horse, and the plaintiff's writ does not charge him with negligence; it simply charges him with trespass *vi et armis,* in taking and carrying away the horse, buggy, etc."

The court held a nonsuit was properly ordered and sustained a discretionary ruling denying a motion to add a count charging negligence.

Restatement, Torts § 260 (1) reads:

> "Except as stated in Subsection (2), the possessor of land or chattels is privileged intentionally to intermeddle with a chattel in the possession of another when such intermeddling is or is reasonably believed to be necessary to protect the actor's interest in the exclusive possession of his land or chattels."
>
> "Illustration 1:
>
> A, without a privilege, parks his automobile in B's front yard. B releases the brake and pushes the car out into the street. In so doing, without any fault on the part of B, the car is damaged. B is not liable to A."

See also Restatement, Torts § 264 (abatement of private nuisance).

The plaintiff has failed to present evidence which under the rule would permit a jury to find for him and thus to force a sale of his car upon the defendant. The defendant is not of course excused from liability for negligence on his part. This issue, however, is not raised in the present action of trover to recover damages for conversion. We therefore need not, nor do we, consider the sufficiency of the evidence with reference to negligence.

The entry will be

Exceptions overruled.

ROBERT P. MORRISSETTE
vs.
RANDOLPH G. CYR

York. Opinion, February 11, 1959.

Negligence. *Intersection Collision.*

Where a plaintiff in driving his automobile into an intersection and fails to see that which in the exercise of due care he should have seen and fails to govern himself accordingly, he is contributorily negligent as a matter of law.

ON EXCEPTIONS.

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

Lausier & Donahue, for plaintiff.

Robert A. Wilson,
Basil Latty, for defendant.

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

WILLIAMSON, C. J. This case arises from a collision in a street intersection in Biddeford between automobiles operated by the plaintiff and the defendant. Exceptions to the direction of a verdict for the defendant are overruled.

The sole issue in the case is whether as a matter of law the plaintiff was guilty of contributory negligence. Under the familiar rule we take the evidence with the inferences drawn therefrom in the light most favorable to the plaintiff. *Ward* v. *Merrill,* 154 Me. 45, 141 A. (2nd) 438.

The jury could have found on the record as follows:

The accident took place at 10:30 o'clock on a clear night in March at the intersection of Jefferson Street running north and south and thirty feet in width, and Adams Street running east and west and forty feet in width.

The plaintiff was proceeding uphill and northerly on Jefferson Street at fifteen miles per hour, and the defendant was proceeding westerly on Adams Street and also uphill until within a few feet of the intersection. A fence on the east side of Jefferson Street near the intersection prevented the plaintiff from observing traffic to his right on Adams Street until the hood of his car was in the intersection. He could then see two hundred feet easterly on Adams Street.

Lights of defendant's car were first seen by the plaintiff when he was in the center of the intersection. The defendant's car was then about forty feet from him and advancing at forty miles per hour. The defendant's car struck the right-hand door and the right rear fender of plaintiff's two-door sedan. The plaintiff's car was pushed by the force of the collision to the west side of the intersection.

The plaintiff testified that he looked easterly on Adams Street as he entered the intersection and no car was in sight. If a jury could have found this to be the fact, then the case should have gone to the jury.

The plaintiff, however, was mistaken. From the moment when the plaintiff in the intersection looked to his right and saw nothing until the moment of collision less than two seconds elapsed. The plaintiff at fifteen miles per hour, or twenty-two feet per second, traveled less than the width of Adams Street, or less than forty feet. Within this brief period, on plaintiff's evidence, the defendant came into view, was first seen forty feet from the intersection, and collided with the plaintiff.

It seems to us plain that when the plaintiff entered the intersection the defendant must have been in sight. At

forty miles per hour the defendant was traveling about sixty feet per second. Thus, when the plaintiff says he looked to the right and saw nothing, the defendant was in fact not over one hundred twenty feet distant and well within the unobstructed view of the plaintiff.

There is no reasonable explanation on the record why as the plaintiff entered the intersection he did not observe the lights of the defendant's car approaching on Adams Street. The only conclusion that can be drawn from the record is that the plaintiff did not look to the right as he entered the intersection. Had he done so he would have seen, or should have seen, the defendant's car approaching at a high rate of speed in time to avoid the collision.

The plaintiff failed to see what he should have seen in the exercise of due care and to govern himself accordingly. Illustrative cases are: *Gold* v. *Portland Lumber Corp.*, 137 Me. 143, 16 A. (2nd) 111; *Gregware* v. *Poliquin*, 135 Me. 139, 142, 190 A. 811; *Petersen* v. *Flaherty*, 128 Me. 261, 147 A. 39.

The entry will be

Exceptions overruled.

PATRICIA ANN DUHAMEL, PETITIONER
vs.
JOHN T. DUHAMEL, RESPONDENT

Oxford. Opinion, February 17, 1959.

Custody and Support. Wife. Children. R. S., 1954, Chap. 19, 43. Appeal. Exceptions. Practice.

The exclusive method of review of Superior Court decrees issued pursuant to R. S., 1954, Chap. 166, Secs. 19 and 43 is by appeal and not exceptions. If the Legislature had intended a concurrent right of exceptions it would have so stated.

ON EXCEPTIONS.

This is a petition before the Superior Court for support and custody under R. S., 1954, Chap. 166, Secs. 19 and 43. The case is before the Law Court upon exception to the decree. Exceptions dismissed.

Theodore Gonya, for plaintiff.

William E. McCarthy, for defendant.

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

TAPLEY, J. On exceptions. Action was instituted by Patricia Ann Duhamel against her husband, John T. Duhamel, for support of herself and their minor children and to obtain custody of the children. The petition was brought by authority of Secs. 19 and 43 of Chap. 166, R. S., 1954. The justice who heard the petition denied the petitioner relief under Sec. 43 but granted relief under Sec. 19 in apportioning custody of the two children between the petitioner and respondent and ordering the respondent to pay the sum of $15.00 per week for the support of the two children. The petitioner was denied support. The action origi-

nated in the Superior Court. The respondent took exceptions to the decree of the presiding justice and the case is now before this court on these exceptions.

Counsel for the petitioner, at the outset, contends that the Law Court is without jurisdiction to consider the exceptions, asserting that the statutory provisions creating the right to petition for relief specifically provides a review, by means of appeal. This question having arisen, it becomes our duty to decide it before directing our attention to any other phase of the case.

The pertinent portions of Secs. 19 and 43 concerning review read:

> "**Sec. 19.** - - - - - An appeal shall lie from such decree or decrees to the supreme court of probate, where originating in the court of probate, *or to the supreme judicial court where originating in the superior court,* but the original decrees shall be in force until reversed." (Emphasis ours.)
>
> "**Sec. 43.** - - - - - Any party aggrieved by any order or decree authorized by the provisions of this section and made by a probate court or municipal court may appeal from said order or decree in the same manner as provided for appeals from such court in other causes, and *appeal may be taken from the superior court to the law court.* Pending the determination of such appeal, the order or decree appealed from shall remain in force and obedience thereto may be enforced as if no appeal had been taken." (Emphasis ours.)

We are faced with the question as to whether relief by appeal, as provided by statute, is exclusive or does the respondent have the power of choice to use the process of appeal or proceed by exceptions as provided under the general exception statute (Chap. 106, Sec. 14, R. S., 1954).

The process of appeal from any decree or order of the Probate Court is not one of right and is only available

when conferred by statute and then only to the extent that the statute may provide. *Cotting, Appellant* v. *Tilton,* 118 Me. 91. The appeal process from the Probate Court to the Supreme Court of Probate is created by statute and is exclusively confined to that process. An aggrieved party may seek review of the decision of a Justice of the Superior Court sitting as a Supreme Court of Probate by means of exceptions only. *Tuck, Appellant* v. *Bean,* 130 Me. 277. The review methods applicable to the Probate Court and the Supreme Court of Probate are statutory and the Law Court has no jurisdiction unless the case is before it through the prescribed statutory channels.

In the instant case the provisions for review are analogous to those prescribed for probate review, as in probate reviews the statute under which the instant proceedings were brought provides means by which parties may seek appellate consideration. In both Sec. 19 and Sec. 43 provisions are made for a specific method of review. The language is clear that review shall be by appeal. The case of *Kelley, Appellant,* 136 Me. 7, is in point. In the *Kelley* case a wife petitioned the Probate Court that it order her husband to contribute to the support of their minor child. The petition was based on Chap. 74, Sec. 9, R. S., 1930, as amended by P. L., 1933, Chap. 36. The amendment affects the appeal section and reads: "and appeal maybe taken from the Superior Court to the Law Court." The *Kelley* case went to the Law Court on exceptions. The court, on page 9, had this to say:

> "Statute language is necessarily of prime importance on whether or not the case is properly here.
>
> The Supreme Judicial Court, while sitting as a Law Court, has such powers only as are conferred by statute. *Morin v. Claflin, 100 Me., 271, 61 A., 782; Heim v. Coleman, 125 Me., 478, 135 A., 33;*

Crawford v. Keegan, 125 Me., 521, 134 A., 564; Cheney v. Richards, 130 Me., 288, 155 A., *642.*

Regarding the cognizance of this class of cases, statutory provision is, in essence:

In complaining to an upper court, either the Superior or the instant one, of injustice done by a subordinate court, procedure shall be an appeal. R. S., Chap. 74, supra, as amended.

Appeals, in distinction from exceptions, bring up questions of fact as well as of law.

The statute is binding upon the court, and the parties, alike, and cannot be dispensed with to meet the circumstances of any particular situation. Legislative requisition must be applied the same in all instances which come within it. When lack of jurisdiction is patent, proceedings stop. *Thompson, Appellant, 114 Me., 338, 96 A., 238.* Without jurisdiction, a judgment would be merely void. *Lovejoy v. Albee, 33 Me., 414."*

The Legislature in enacting Secs. 19 and 43 had the power to prescribe the method of review and when it determined, and so stated, that review should be by appeal, it established the right of aggrieved parties to a review by this means and by so doing conferred jurisdiction upon the Law Court to hear it on the basis of an appeal and by no other procedure. *Sears-Roebuck & Co.* v. *City of Portland, et al.,* 144 Me. 250.

Secs. 19 and 43 not only provide for an appeal but also that the order or decree remain in full force and effect during pendency of appeal. The provision that the order or decree shall remain in force during the appeal obviously was made to insure support of the wife and children for that period. This evidences legislative intent that appeal would be the exclusive vehicle for review. Had the Legislature intended that the right of review by appeal under Secs. 19 and 43 be concurrent with right of exceptions provided for by Sec. 14, Chap. 106, R. S., 1954, it would have so stated.

This case is before us on exceptions. Secs. 19 and 43 provide review by appeal. In this case jurisdiction of the Law Court depends upon presentation by appeal as prescribed by the statute so we, therefore, have no authority to consider the case on exceptions.

The entry must be,

Exceptions dismissed.

IN MEMORIAM

SERVICES AND EXERCISES
BEFORE THE SUPREME JUDICIAL COURT
AT AUGUSTA, MAY 13, 1958
IN MEMORY OF
HONORABLE PERCY T. CLARKE
Late Justice of the Supreme Judicial Court

Born June 19, 1885 Died August 25, 1957

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

WILLIAM B. BLAISDELL

President of Hancock County Bar Association

May it please this Honorable Court:

We gather here today to pay tribute to the memory of one of the distinguished sons of Maine, a former associate Justice of this Court, whose career of public service has ended. Justice Percy T. Clarke was a native of Hancock County where he had always maintained his residence.

He was a conscientious, wise and just Judge. We all learned to love and respect him. He was always courteous and patient; always ready to listen to those who came before him, but stern and direct when the occasion required it.

For this reason the Hancock County Bar desires to offer to this Court resolutions expressive of its appreciation, love and affection for Justice Clarke, and I call upon Herbert Silsby II who will present the same in behalf of the Hancock County Bar Association.

RESOLUTIONS OF HANCOCK COUNTY BAR ASSOCIATION

HERBERT T. SILSBY II, ESQ.

May it please this Honorable Court:

In accordance with long established custom this hour has been set aside by the Court for the purpose of paying tribute to a beloved and respected member of the Hancock County Bar, who rose to the office of Associate Justice of the Supreme Judicial Court, Honorable Percy Truman Clarke.

I am instructed in behalf of the members of the Hancock County Bar Association to beg leave to present the following resolutions and move they be made a part of the permanent record of this Honorable Court.

WHEREAS, in the death of Percy Truman Clarke, Associate Justice of the Supreme Judicial Court of Maine, there has gone from us a Christian gentleman, patient, thoughtful and kind to all and sundry, in the best tradition of his beloved State, a man who in his civic life gave freely of his time and ability which accomplished well ordered government and law and material progress for his home town, County and State, a man who in his family life was worthy of all emulation, an individual of heroic standards; a learned and dignified Judge, patient, fair, impartial, who, conducted himself and so performed his duties as to give everlasting credit to the Bench of his State.

RESOLVED, that in his passing we recognize an irreparable loss to the Bench and Bar and citizenship of Maine, that we rejoice in his useful life, his strength of character, his courage, his patience and fairness, that we admire him as a genial companion, a loyal friend, a gentleman, a man reliable in all his dealings, that his memory lives on in the hearts of his many friends as a rich and abiding heritage.

RESOLVED, that these resolutions be presented to the Court with the request that they may be entered upon its permanent records and that a copy thereof be sent to his widow in token of our respect and sympathy.

PHILIP R. LOVELL
NORMAN SHAW
HERBERT T. SILSBY II

Committee on Resolutions

Remarks of

RALPH C. MASTERMAN, ESQ.

On behalf of the Members of the Hancock County Bar Association, I am asked to state that we will agree with all that has been said in these memorial exercises for our late Brother Percy Truman Clarke. We also indulge with the Court the deep sense of loss to ourselves and to the State in his passing and join with you in extolling his service to his fellow man.

Percy Truman Clarke was born in Franklin, Maine, June 19, 1885, the son of James Willard Clarke and Mabel Lillian Clarke. While working in a sawmill at Franklin in 1898, he met with an accident which necessitated the amputation of his left hand.

He graduated from Maine Central Institute in 1907 and was a Trustee of that institution at the time of his death. He received his Bachelor of Law degree from the University of Maine in 1912.

He taught in the public schools of Maine in the towns of Bradley, Steuben, Franklin and Bradford and was Superintendent of Schools at Franklin.

He married Clara B. Hamblen and to this marriage three children were born, Priscilla H. Higgins, Ellsworth; Barbara C. Gardner, Wickford, Rhode Island, and Percy T. Clarke, Jr., of Ellsworth, all of whom survive him.

He was a Representative to the State Legislature from his district two terms, 1921 and 1923 and a member of the State Senate in 1925.

Judge Clarke began the practice of law in Stonington, Maine, in 1914 and continued to practice there until 1929 when he transferred his office to Ellsworth, where he continued as a sole practitioner until 1939, when he formed a partnership with William Silsby and this partnership continued until he was appointed a Justice of the Superior Court on October 1, 1947.

He was County Attorney for Hancock County for six years, serving his first term in 1930.

He served as a Justice of the Superior Court until June 29, 1955, when he was appointed to the Supreme Judicial Court.

He served for a period as High Sheriff of Hancock County.

He was a leader in the Deer Isle Bridge Committee and was a member of the delegation to visit the President of the United States in connection with Federal approval of the project.

He was a Mason, a member of all the York Rite bodies and also a member of the Shrine.

He was profoundly interested in Coastal Maine and at a short time before his death he was gathering information to be used in an article which he proposed to write on the Headlands of the Maine Coast.

Judge Clarke was an excellent judge to try a case before, his experience as a trial lawyer, his patience and high judicial temperament combined to make him an ideal judge at nisi prius.

Disraeli said, "Justice is Truth in Action"; to Judge Clarke the law was the truth and he sought it out with diligence and understanding. When, however, he found that the law contravened his preconceived judgments, however cherished, he abandoned such judgments with an alacrity possessed only by those of high intellectual attainments and great personal integrity.

Judge Clarke has gone to his reward. His friendliness to all who knew him and the ease and grace with which he conducted his court, as well as his high judicial temperament, will be an inspiration to those who plead for the rights of others, as long as memory shall last.

Remarks of

WILLIAM S. SILSBY

Vice President of Maine State Bar Association

May it please the Court:

I have been requested by the Executive Committee of the Maine State Bar Association and the members of the Hancock County Bar Association to endorse all that has been said here concerning Justice Clarke's life, character and accomplishments and to join in expressing their respect and admiration for his life and services as a citizen, as an attorney and as a distinguished Justice of the Superior and Supreme Judicial Courts of this State. Memories of him will always be welcome guests.

In Hancock County we first knew him professionally as a young man in 1914 when he began the practice of law in Stonington, Maine. In his professional life he paid close attention to his practice of law and on his election as County Attorney for Hancock County in 1930 he soon acquired the confidence and respect of the citizens of Hancock County by his sincerity and fairness as prosecuting attorney.

In the trial of cases he was always prepared and had a complete grasp of the facts and the applicable law. He could always hold the absolute attention of the jury by his kindness and courtesy to witnesses. In the arguing of his cases he was practical and eloquent.

He held many public offices of importance and in addition to those which have already been enumerated he served as a member of the State of Maine Governor's Council from the Fifth Councillor District from 1936-1940, and in making decisions as a public officer he displayed strict fidelity and devotion to his duty.

As a jurist we knew him as kind, courteous, helpful, sound and impartial, more interested in the accomplishments of substantial justice than in the meticulous technicalities. He was particularly patient with young attorneys and gave unselfishly sound advice from his vast experience in trying cases. He enjoyed his many, many friends and gave much of his valuable time in discussing the affairs of State, especially while a member of the Governor's Council and he was the one person that made it possible for the citizens of Stonington and Deer Isle to enjoy the bridge across Eggemoggin Reach.

On the personal side I had the privilege and pleasure of practicing law with him from 1939 until he was appointed to the Superior Court Bench in 1947 and over that period of time we enjoyed discussing our legal and factual analysis of many cases. We did not always agree but he never criti-

cised my opinion, and to him and to his memory I shall always be grateful for the sound advice he gave me, which advice has always served me well.

I can also testify from my associations with Justice Clarke that behind the reserve and dignity which accompanied his many public appearances and offices he had a splendid sense of humor and thoroughly enjoyed social gatherings and the exchange of humorous anecdotes one encounters in public life.

He enjoyed nature and outdoor sports and while practicing law with me sought recreation and inspiration in hunting. For many consecutive seasons he was a member of a hunting party known locally as the Spectacle Pond Hunting Party in which he was a leading spirit and on those occasions in the woods and in the camp he was always a cheerful, humorous and delightful companion and friend.

Today more than ever justice, law and its faithful observances are essential to the continued existence of our State and Nation, without either Government will fail and it was to these principles that Justice Clarke devoted his life and he touched many others as he touched me that I have so spoken. I speak for each and every one of the many men and women of younger years whose lives have been enriched by him and by whom Justice Clarke will be forever held in deep affection and high honor. He was a man and a friend whose spirit lives beyond the day.

Remarks of

FORMER CHIEF JUSTICE EDWARD F. MERRILL

May it please the Court:

It is with a sense of pride and satisfaction to me personally that I was asked to speak a few words in memory

of the late Associate Justice Percy T. Clarke. I have no written remarks. I came down here, not expecting to speak, but merely as a tribute to the memory of the late Justice Clarke, whom I count among my close and esteemed friends. I first became acquainted with Justice Clarke in 1921 during his first term at the Maine Legislature. As I remember it, he was a member of the Legal Affairs Committee. He was known as a safe, sound, hard working legislator. He served two terms in the House and a term in the Senate, and the reputation that he acquired in his first term in the Legislature remained with him, not only through his second term, but into the Senate. Those of us who knew him found upon important matters that he exercised a calm and sound judgment, and that he could be counted upon to do the right thing irrespective of the political aspect of the question upon which he was called upon to act.

I knew him when he was a member of the Governor's Council for four years, and he there was considered one with conscientious, sound business judgment in handling the affairs of the State.

I next saw him when I was a member of the Superior Court. He tried at least one case before me—a case which went to the Law Court—the first of the blood test cases, and he handled it in the most skillful manner. He showed that he had an understanding of human nature and sound common sense. I need not state that he was successful in the case.

After he was appointed to the Superior Court, he held several terms in Skowhegan, and I had an opportunity to observe him on the Bench. He was careful; he was considerate; he handled his court room with dignity, but with a light hand, and the Bar of our county welcomed his return. After he was upon the Bench his wife came with him to Skowhegan and it was my pleasure to entertain him and

his wife at our home, and they both endeared themselves to me and to Mrs. Merrill.

He reached the highest pinnacle which a lawyer can expect to reach. He became a member of your Court, the highest in the State, and he did it through hard work, honesty, integrity, and character.

As I said before, I have no written remarks, but it is a great privilege to me to be able, at this time, to pay this tribute to the memory of one who was not only a member of the Judiciary while I was a member, but one whom I truly feel I may call a friend. Would that we could have more men like Percy Clarke, who through adversity, through hard work, integrity and character attained the highest pinnacle.

Remarks of

HONORABLE RANDOLPH A. WEATHERBEE

Justice, Superior Court

Very few Justices in the history of this Court brought to the bench a more abundant and varied experience than was Percy Truman Clarke's, and before his distinguished career ended with his death on August 25, 1957 he had served his state with honor in each of the three branches of its government.

He was born in Franklin, Maine on June 19, 1885, the son of James Willard Clarke and Mabel Lillian Clarke, who was the former Mabel Lillian Butler. Before his graduation from the University of Maine College of Law with a Bachelor of Arts degree in 1912 and his admission to the practice of law that year he had taught in the schools of his area. In those days, especially, a young lawyer often supple-

mented an early meager professional income by teaching school and Justice Clarke returned to teaching and for several years taught in the schools of Steuben, Franklin and Bradford and returned to Franklin again as Superintendent of Schools.

In 1920 he began his career of public service with his election to the State Legislature, serving in the House of Representatives in 1921 and 1923 and in the State Senate in 1925. From 1930 to 1936 he was County Attorney for Hancock County being elected to that office for three consecutive terms. From 1936 to 1940 he was a member of the Governor's Council from the Fifth Councilor District. For a short time he served as Sheriff of Hancock County following the death of Sheriff Wescott.

Justice Clarke had opened his first law office in Stonington. In 1930 he moved to Ellsworth where he later entered into a partnership with William S. Silsby which continued until his appointment to the Superior Court. His practice was general and varied and he tried skillfully and successfully many of the important jury trials of his day.

He was married to the former Clara B. Hamblen and she and their three children, Priscilla H. Higgens, Barbara C. Gardner and Percy T. Clarke, Jr. survive him. He was deeply devoted to his family and his homeland. Many of us remember that as he approached the end of a week away on circuit in a remote court house he often spoke of his eagerness to return to The County. During his legal and judicial career he gave generously of his time and energy to projects benefiting his community. Doubtless the beautiful Deer Isle Bridge stands as the most spectacular reminder of the success of one of the many community efforts in which he joined.

He was appointed to the Superior Court by Governor Hildreth on October 1, 1947. On the Court he was loved and

admired. One thinks first of his patience, kindness and fairness because they were his most characteristic qualities. In addition, he demonstrated his ability to combine his understanding of the law with a practical common sense acquired and remembered from a long, varied career.

On June 29, 1955 Governor Muskie elevated him to the Supreme Judicial Court and from his retirement until shortly before his death he served as an Active Retired Justice.

Because he served only a short time on the Supreme Judicial Court before his retirement Justice Clarke had opportunity to leave but few printed opinions to stand in the Maine Reports as his memorials but I am certain that he will often be remembered with the warmest affection and admiration as long as there still remain lawyers who practiced before him.

RANDOLPH A. WEATHERBEE

CHIEF JUSTICE ROBERT B. WILLIAMSON

Responded for the Supreme Judicial Court

Members of the Bench and Bar:

In accordance with custom which runs to the early days of our State, we this day turn from our usual duties to pay tribute and do honor to the memory of our departed brother. The representatives of the Bar of Hancock County and of the Maine State Bar Association, Chief Justice Merrill and Justice Weatherbee of the Superior Court, have spoken feelingly of the life and character of Justice Clarke. My Associates and I are deeply moved by what has been said. The Resolutions are gratefully received and will be inscribed in our records and printed in our Reports.

Those who have spoken in this ceremony have had an advantage not given us of working and living with Justice

Clarke day by day over the years. They have watched his career unfold in the world of politics and of government both county and state, and at the Bar and on the Bench.

They have spoken with intimacy of details not known to us. The memories invoked by their words must be many indeed to those who have shared the life of the times with him.

We of the Bench who labored with him in a common enterprise over the decade of his service found in him a man devoted to the giving of justice. Those who reached behind the mere act of decision on his part could see clearly the continuous play of forces within his mind and heart to insure Justice.

Percy Truman Clarke was an active member of the Supreme Judicial Court for no more than twelve months—serving from June 29, 1955, to his retirement on June 7, 1956, when he was appointed an active retired justice. During this short period he struggled each day against illness which those associated with him plainly saw was wasting his strength.

His record is not truly measured by his active service on this Bench of less than a year. The fair record of his judicial service is found in the long years on the Superior Court. He came to the Bench from a busy practice and with a broad experience in public affairs. For 8 years from his appointment to the Bench in 1947 he served the State and its people well, and faithfully, and with honor in that exacting task of administering justice at nisi prius. From Aroostook to York, through the roll of the counties there are men, women,—yes, and children—who will never forget him, whose lives were touched by him for the better, and who saw in him an example of the good Judge.

He was always patient and kindly, and never too busy to be concerned with the problems of the lawyer, young or old.

Above all, he was never for a moment forgetful of the vital importance of the matter before him to the parties involved.

Justice Clarke left his mark upon his community, his county, his state. It is a good mark—the mark of a man who gave his strength and energy in the battle of life with dignity and courage. The record of his service in the cause of Justice is secure. He will long be remembered in the hearts and affections of his friends throughout our beloved State.

As a further mark of our love and honor for Justice Clarke the Court will now adjourn for the day.

IN MEMORIAM

HONORABLE LESLIE E. NORWOOD
Late Clerk of the Supreme Judicial Court

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

Remarks of

HONORABLE ROBERT B. WILLIAMSON
Chief Justice

Since the Court last met in Portland we have suffered the loss of the Honorable Leslie E. Norwood, who served the Court well and faithfully as our Clerk for nearly a decade.

Leslie E. Norwood was born December 4, 1898 in South Portland, and there resided his entire life. He attended the public schools in South Portland and graduated from Bowdoin College in 1921. After reading law in the office of Hinckley & Hinckley in Portland he was admitted to the Bar on February 12, 1924. He practiced law in the office of Hinckley & Hinckley until February, 1926 when he was appointed Deputy Clerk of Courts for Cumberland County by the late Linwood F. Crockett. In August, 1948 he was appointed Clerk, pro tempore on the death of Mr. Crockett.

Later that year, in October, he received an appointment from the Governor as Clerk of Courts, the office which he held until the date of his death, February 27, 1958. He was as well Clerk of the Law Court from his appointment August 10, 1948 by the late Chief Justice Guy H. Sturgis.

Portland University Law School was established in February of 1948. At the outset Brother Norwood became identified with the school as a teacher. He taught pleading,

practice and real property and was honored with a well deserved Honorary Degree of Master of Law. "The Leslie E. Norwood Fund" at the Law School for the financial assistance of worthy students, established by his friends, attests both his interest in youth and the affection of his friends.

At one time he was City Solicitor for the City of South Portland. He was a member of many of the Masonic Bodies. He served in the infantry in the First World War, and was a life long member of the American Legion.

Those who knew him best tell of his love for the sea, and of his decision to follow the law and not the sea. Throughout his life he was active in both city and state politics and managed the campaign of many successful candidates.

Leslie E. Norwood touched the lives of many members of this Court over a long span of years. Each of us has his own memories of the task accomplished and action taken with his able assistance. I remember so well his kindness and helpfulness when I first presided in the Superior Court in Cumberland. The machinery of the Courts ran smoothly thanks in large measure to his understanding of the problems both of the Bench and of the Bar.

We do not here attempt to speak in detail of his life, but of the ties which we had with him in the conduct of the Courts. He was a sound lawyer, a student of pleading and procedure, a storehouse of precedent always available on request, a friend of the Bar and in particular a friend of the younger members of the profession. We recognize our debt to him.

As a further mark of our respect and esteem for our friend, we will now rise and pause in the work of the day.

IN MEMORIAM

SERVICES AND EXERCISES
BEFORE THE SUPREME JUDICIAL COURT
AT PORTLAND, APRIL 7, 1959
IN MEMORY OF
HONORABLE SIDNEY ST. FELIX THAXTER
Late Justice of the Supreme Judicial Court

Born March 4, 1883 Died June 30, 1958

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

(Invocation by The Very Rev. Leopold Damrosch, Dean, St. Luke's Cathedral, Portland)

PAUL L. POWERS

President of Cumberland County Bar Association

Mr. Chief Justice, Members of the Court,
Members of the Bar, Ladies and Gentlemen:

In my capacity as President of the Cumberland Bar Association, I address you at this time concerning our late Justice of the Supreme Judicial Court of Maine, the Honorable Sidney St. Felix Thaxter, who passed on June 30, 1958.

Mr. Justice Thaxter, for a great many years, was an active and esteemed member of our Cumberland Bar Association and, because of our affection and respect for him as a Judge, as a lawyer and as a man, these exercises are being held today in his honor.

Mr. Justice Thaxter was admitted to the Maine Bar in 1907. He conducted an active practice of the law for nearly a quarter of a century and until he was appointed to our

Superior Court in January of 1930. Nine months later, Judge Thaxter was elevated to our Supreme Judicial Court in September of 1930 where he served with distinction until he retired from the bench in 1955.

The members of the Cumberland Bar Association, his associates on the bench and all who had the privilege of knowing Judge Thaxter, of working with him and the great opportunity of practicing before his court will long remember him as an able and well informed lawyer, an astute and kindly Judge, an affectionate husband, a devoted father and above all, a real man.

At this time may I respectfully move that the Court receive resolutions prepared by our Committee on Memorials to permit justices and former justices of this Court and members of the Bar present to offer their expressions to this Court as memorials of their respect and affection for Judge Thaxter, his life, his accomplishments and his memory.

As a part of these services this afternoon, Mrs. Sidney St. Felix Thaxter will unveil and present to this Court a living memorial to her late husband in the form of a portrait of him by the noted artist, Mr. Claude Montgomery.

With the permission of the Court, Mr. John J. Flaherty, Chairman of our Committee on Memorials, will address the Court.

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Remarks of

JOHN J. FLAHERTY, ESQ.

May it please the Court:

The Committee of the Cumberland Bar Association, appointed for the purpose, does herewith present to this Honorable Court, resolutions in memory of its former Associate Justice, the late Justice Sidney St. Felix Thaxter:

RESOLUTIONS

RESOLVED: That in the death of Sidney St. Felix Thaxter, former Associate Justice of the Supreme Judicial Court of Maine, the State of Maine has sustained a deep loss.

RESOLVED: That the outstanding contributions to the development and expansion of our system of jurisprudence which have been made by Mr. Justice Thaxter in his many decisions rendered while a Justice of this Court, will continue to be a source of enlightenment and guidance to members of the Bench and Bar alike in the years to come.

RESOLVED: That the members of the Cumberland Bar note with sorrow the loss of this Justice who won the affection and respect of the Bar in the many years of his service as its resident justice; and that we gather here today to pay our deep respect to his memory.

RESOLVED: That our profound sympathy is extended to the members of his family in their great loss.

RESOLVED: That these resolutions be presented to this Honorable Court with the respectful suggestion that they be spread on its permanent records, and a copy thereof be forwarded to Mrs. Sidney St. Felix Thaxter in token of our respect and sympathy.

Respectfully submitted,

Committee on Resolutions for the Cumberland Bar Association.

JOHN FITZGERALD

SILAS JACOBSON

JOHN J. FLAHERTY

MR. POWERS: I am very happy to present at this time Sidney W. Thaxter, son of the late Justice Sidney St. Felix Thaxter, who will present a memorial to his late father.

Remarks of

SIDNEY W. THAXTER, ESQ.

May it please the Court:

In the course of human events, few of us leave any lasting marks on the sands of time. We may be impressed with our own importance in the microcosm in which we live, but one hundred years later who remembers us. We have then become merely a limb on our family tree. However, those who have the rare privilege to serve on our Supreme Judicial Court will live on, in their opinions, many years after they have been forgotten as persons. For years, they continue to act as preceptors to succeeding generations of students, lawyers and judges.

I indeed appreciate the opportunity that has been given to me to record for posterity a short outline of the life and accomplishments of my father, Sidney St. Felix Thaxter, an associate Justice of this Court for twenty-four years and a member of the Bar for over fifty years. I hope also to convey a few impressions of him as a person as seen through the eyes of his son.

Sidney St. Felix Thaxter was born on March 4, 1883 in Portland, Maine, the son of Sidney Warren Thaxter and Julia St. Felix (Thom.) Thaxter. His father was a merchant, being engaged in the wholesale grain business. His father was a graduate of the Class of 1861 at Harvard College, of which class Justice Oliver Wendell Holmes, Jr. was a member; and he served in the Civil War with the 1st Maine Cavalry Regiment and was awarded the Congressional Medal of Honor for "most distinguished gallantry" at Hatcher's Run on October 27, 1864.

Sidney St. Felix Thaxter attended Portland High School, graduated from Harvard College in the Class of 1904, where he was a classmate of Franklin Delano Roosevelt. He graduated from Harvard Law School in the Class of 1907, *cum laude* and was an associate editor of the Harvard Law Review. He married Phyllis Schuyler, daughter of Canon Philip Schuyler and Marie Nelson Schuyler on June 25, 1913 at St. Lukes Cathedral in Portland, his father-in-law, Canon Schuyler officiating at the ceremony. They had four children, Sidney Warren, Hildegarde Schuyler, now Mrs. Edward T. Gignoux, Phyllis St. Felix, now Mrs. James T. Aubrey, Jr., and Marie Louise Reynaud, now Mrs. Paul Dietrichson. When he died on June 30, 1958 he had eleven grandchildren, the youngest of whom was born a few weeks before his death. His namesake, Sidney St. Felix Thaxter II, is present in court today.

He was admitted to the practice of law in Maine in 1907 and engaged in practice until 1917 with Roscoe T. Holt under the firm name of Thaxter & Holt. He then practiced alone until January 1, 1925 when he formed a partnership with Philip F. Chapman, Ralph Owen Brewster and Carl W. Smith under the firm name of Thaxter, Chapman & Brewster. This partnership was dissolved on January 1, 1927 and he entered into an association with Ernest M. White and John E. Willey under the firm name of Thaxter, White & Willey. He was appointed a Justice of the Superior Court by Governor William Tudor Gardiner in January of 1930 and was appointed an Associate Justice of the Supreme Judicial Court on September 16, 1930 and served as such until his retirement on February 28, 1954, three days before his 72nd birthday. He qualified as an Active Retired Justice on March 3, 1954 and served as such until his death on June 30, 1958. While he was on the Supreme Judicial Court, he also served for a period of approximately ten years as a Referee in labor cases on the National Railroad Adjustment Board and several times served on Emergency Boards convened by the President of the United States.

He was a Trustee of the Estate of Mary J. E. Clapp from 1925 to 1957 and was a Director of the National Bank of Commerce of Portland from 1940 to 1955. He was a Trustee of the Portland Public Library, of the Portland City Dispensary, President of the District Nursing Association, Director and President of the Corporation of the Maine General Hospital. He was at one time Chancellor of the Diocese of the Episcopal Church of Maine. He was a member of the Harvard Club of Boston, of New York City, a member and one-time President of the Harvard Club in Maine; he was at various times a member of the Fraternity Club, Cumberland Club, Purpoodock Club, the Portland Yacht Club, the Portland Country Club and the Portland Club. He was a member of the Cumberland County, Maine State, and American Bar Associations.

Judge Thaxter's opinions range through twenty-two volumes of the Maine reports. They cover almost every field of the law within the jurisdiction of our courts. On the one hand, you find him, with the sympathy and understanding of a parent, deciding that a father may not permanently be denied the custody of his child merely because he had been at fault at the time of the divorce. Thus, in *Stanley* v. *Penley,* 142 Me. 78, at p. 82, he said:

> "But is a father because of such wrong-doing to be forever deprived of his right to his child? . . . Is there nothing that he can do to make requital? Or must we establish as a rigid rule of law that he must carry the burden of his transgressions with him for the rest of his journey through life?"

On the other hand, he would cut through the maze of detail involved in the most complicated public utility case with crystal clarity to reach the only result which the facts and law could logically justify. Such were the famous *Portland Railroad Co. Case,* 144 Me. 74, and the *New England Telephone & Telegraph Co.* rate case, 148 Me. 374. This latter decision requiring the Public Utilities Commission to ap-

prove rates which allow the utility "a fair return on the fair value of its property" was not a very popular decision, but it was the only one that could be justified under the state of the law at the time.

Judge Thaxter was a reasonable person and able to see and understand the views of others, and I am sure he cooperated with his colleagues in so far as he possibly could. However, where he believed that they were wrong, he was not afraid to express his dissent. Thus in *Lesieur v. Lausier,* 148 Me. 500, where the majority held that Lesieur had no right to contest an election in Biddeford in which he had been a candidate because at the time he was serving in an incompatible office, Judge Thaxter dissented on the basis that one did not hold the incompatible office until he "qualified" for the new one. He went on to say at p. 514 —

> "If the appellee, Mr. Lesieur, had the right to run in the election for the incompatible office of mayor of Biddeford, he had the right to see that the votes were properly and fairly counted in that election. . ."

Again, he dissented in *Kennebunk etc. Water District* v. *Maine Turnpike Authority,* 145 Me. 35 at p. 55, because he felt that the majority was being too technical and had departed from a salutary practice of the Maine Court which he stated as follows:

> "We have been able in this jurisdiction to soften the asperities of common law pleading and adapt its forms to the need of changing conditions because of the wisdom of our predecessors on this court who interpreted liberally statutes and rules designed to settle promptly the issues which the parties have intended to try."

Even his avocations provided facts and lent beauty to the language of his opinions. He was an ardent yachtsman and had sailed or cruised over the coastal waters of Maine since his early childhood. In *State* v. *Ruvido,* 137 Me. 102,

the question was the extent of the territorial waters of the State. At p. 105, he says —

> "Our shore in the State of Maine is fringed with thousands of islands, many of which are large and the homes of varied industries, others so wild and inaccessible that they seldom feel the tread of human feet. All are, however, an integral part of our state and to a greater or less extent, as bulwarks against the sea, form our harbors and the calm reaches through which commerce flows up and down our shore."

Then, he goes on to describe Penobscot Bay and demonstrates his thorough knowledge of its geography. Concerning the limits of this bay, he says:

> "It is difficult to conceive of a body of water more clearly defined by nature than this, or more easily patrolled and protected by the state which controls its shores. All of the islands which surround it are within the State of Maine. The mariner who passes through any of these channels almost instinctively feels himself within our domain."

I know that most of the lawyers and judges in this State knew him well as a person. I am sure that to many he may have appeared somewhat aloof. This was not because he was impressed by the office he held but because he was essentially a shy man. No one, however, entered his office whether on business or for personal reasons but that he was welcomed and received quiet attentive consideration. He was a loving, considerate and somewhat indulgent father. He also had a rare sense of humor and I am sure that he frequently regaled his colleagues on the court with his stories from and about Judge Pattangall and his stories about our Maine coast fishermen. Personally, I am proud to have had him as a father and I know that he will be long remembered by his friends and associates and that his work will live on forever in the minds and hearts of lawyers.

MR. POWERS: We are very happy to have as our next speaker on this program one of our most competent members of the Bar in this County, a man who was long a friend of the late Judge Thaxter, the Honorable Leonard A. Pierce.

Remarks of

HON. LEONARD A. PIERCE

May it please the Court:

I would be less than frank if I failed to acknowledge that I felt greatly even though unduly honored by being asked by the Committee of the Cumberland Bar Association to take part in these exercises in the memory of the Honorable Sidney St. Felix Thaxter, who for many years served with distinction as a Justice of the Superior and of the Supreme Judicial Courts of this State.

Judge Thaxter was born March 4, 1883 in Portland and died there June 30, 1958. As is true of so many other members of our Judiciary he came from distinguished Maine ancestry. His father, Sidney Warren Thaxter, a graduate of the Class of 1861 at Harvard, served in the Civil War with the famous First Maine Cavalry and rose to the rank of Major. He is one of the few sons of Maine to have received the Congressional Medal of Honor for most distinguished gallantry in action. As is stated in the official citation, although he had been ordered to proceed to his home and be mustered out at the expiration of his service, when he learned that an important movement was to be made, he voluntarily remained and participated in the ensuing battle. In the official reports of that battle he was specifically mentioned for conspicuous gallantry by his Brigade and Division Commanders and General Hancock who commanded the Union forces called particular attention to this

incident. His son, in whose honor we are met this afternoon, had a justifiable pride in his father's record.

I see no advantage in repeating the biographical data which has been so well stated by Judge Thaxter's son and his distinguished service in other capacities. It is, however, with his service as a Judge that we are today primarily concerned. This Committee sees no occasion to engage in extravagant praise as to his career on the bench. All of you knew, admired, and respected him as did and do we. We are, however, confining ourselves strictly to the limits of absolute verity when we say that Judge Thaxter will go down in the Judicial history of this State as one of our ablest and most conscientious judges. I will not attempt to review his judicial service or the important cases in which he wrote the opinion of this, our highest Court. We submit, however, in all confidence that for all time to come a lawyer from Maine or elsewhere who has occasion to refer to his opinions will find them models of clear thinking; and that his exact and careful legal scholarship and practical common sense, all combined to make him one of the most useful judges of our time. He had in the fullest degree that outstanding requisite of an ideal judge in that his technical learning and careful review of the authorities never caused him to lose sight of the ultimate goal of judicial action, viz.: to arrive at justice between party and party as well as between party and the State.

One outstanding and rather unusual contribution which he made to his native State came during the period following the Bank Holiday of 1933. No lawyer either for the receivers of, depositors in, or the debtors of any of the closed banks, the liquidation of which came under his supervision, could help being impressed by the meticulous care which he devoted to the onerous duties and responsibilities which those receiverships imposed upon the Judges in charge. He at all times had in mind the responsibilities of

his position and kept an even balance between the claims of the depositors, the obligations of the debtors, and the consequences to the community which would inevitably result from ill-considered and hasty action. Serious as the consequences of the 1929 depression and the subsequent bank failures were to this community, no person familiar with the circumstances and with the courage and care which he used in solving the numberless practical problems which arose day by day can fail to have recognized his contribution to the community and all its people.

I should feel as a member of and to a certain extent today one of the representatives of the Cumberland Bar these remarks would be incomplete if I failed to comment on certain outstanding personal traits of Judge Thaxter which, so long as any of us who knew and practiced with him and before him may live, will endear him in our memories. As much as any man whom I can remember he exemplified the personal traits of kindness, courtesy, and loyalty without any trace of partiality. His friendships were not lightly entered into but once begun they were never of the fair weather type but permanent and enduring as long as he and the fortunate recipient lived. These are not mere words but based on the personal experiences of all of us who had to do with him either as a member of the Bar or as a Judge. I, therefore, on behalf of all the members of the Cumberland Bar wish to place on the permanent records of this Court our appreciation of the many kindnesses and courtesies for which all of us will always be indebted to him.

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MR. POWERS: May it please the Court, we are very privileged to have as our next speaker the former Chief Justice of this Court, a man who served for several years with Judge Thaxter on this bench, the Honorable Edward Folsom Merrill of Skowhegan.

HONORABLE EDWARD F. MERRILL

May it please the Court, Mr. President, fellow members of the Bar and friends:

Before giving my address, may I extend to the Court my sincere thanks at your invitation to sit with you upon the Bench today, but I am here not as an ex-member of the Court but in my capacity as a member of the Bar and I felt it was more fitting if I join my brethren of the Bar and addressed the Court from the floor.

It is with mingled feelings of sorrow and pride that I speak to you on this occasion. Sorrow, when I recall the recent passing of one of my oldest and most cherished friends. Pride in the magnificent achievements and enviable record of one of the most distinguished jurists ever to grace the Bench of the Supreme Judicial Court of the State of Maine.

Someone has said, "The young may die, the old must die, and the wisest knoweth not how soon." Death is inevitable and is the common lot of man. When in the inscrutable workings of Fate a young man, in the vigor of youth, or a mature man, in the full prime of his productive manhood, each with the possibilities of the future before him, is taken from us by the grim reaper, sorrow far beyond the pain of personal loss is justly felt by those who are left to mourn.

How different when the time comes when one who in the full maturity of his years, who has drunk life's cup to the full, who has during more than fifty years as a member of the Bar, of which for almost thirty years he was a member of this, the highest Court of his State, rendered valiant service to the State of his nativity and its business and civic interests, when such a man is called to his Eternal rest.

Of course we, who are left to mourn his passing, feel the acute wrench of broken heartstrings. But in place of grief

in the consideration of all that might have been, we are here comforted by the remembrance of what has been, and can take supreme satisfaction in the glory of his accomplishments.

Holy Writ tells us that "The days of our years are three score years and ten, and if by reason of strength they be four score years, yet is their strength labor and sorrow; for it is soon cut off, and we go away."

How true this was of him whom we honor today. Soon after his retirement from active service he suffered the misfortune of failing health, and felt the heavy hand of bodily affliction. To him the final summons must have come as a blessed relief from physical infirmity.

Of him, paraphrasing the poet, I believe it may well be said that he so lived that when his summons came "to join the innumerable caravan which moves to that mysterious realm, where each shall take his chamber in the silent halls of death," he went, "not like the quarry slave, scourged to his dungeon; but sustained and soothed by an unfaltering trust," he approached his "grave like one who wraps the draperies of his couch about him, and lies down to pleasant dreams."

We who, like him, tread the sunset slope and see our friends and associates fall one by one, may well ask, "And will there sometime, be another world? We have our dream. The idea of immortality, that like a sea has ebbed and flowed in the human heart, beating with its countless waves against the sands and rocks of time and fate, was not born of any creed, nor of any book, nor of any religion. It was born of human affection, and will continue to ebb and flow beneath the mists and clouds of doubt and darkness as long as love kisses the lips of death."

To this question, my answer as I view the burgeoning of spring after the cooling hand of death in winter is in

the affirmative, and I fully believe Justice Thaxter would join in my opinion to that effect.

My first acquaintance with Justice Thaxter, then and always "Sid" to me, was when we were fellow students, though not classmates at the Harvard Law School.

In the Law School he was early recognized as a man of outstanding ability and high mental attainments. Numbered among his close associates were men whose names have become nationally known as jurists and leaders in the legal profession. In this group of outstanding legal minds, Justice Thaxter was recognized for the clear, sound thinker and indefatigable student of the law that he was.

As tangible recognition of his legal standing among the students, he was elected to, and served on the Editorial Staff of the Harvard Law Review. He graduated from the Law School in June 1907, receiving the degree of Bachelor of Laws *cum laude*.

Others have traced his progress at the Bar and given the details of his service on the Bench and in civic life. For me to recapitulate would be redundant, and serve no useful purpose.

On an occasion like this, speaking of one whom we loved, admired, respected and honored, it is difficult on the one hand to avoid the repetition of the banal, and commonplace, and on the other hand in so doing, to escape the extremes of fulsome praise.

Much as I would like to paint the portrait of Justice Thaxter as a loyal friend, and delightful companion to those who really knew him, I choose to evaluate him and his service to the State of Maine as an able, brilliant and conscientious Judge.

Justice Thaxter brought to the Court an uncommonly keen, analytical and well-trained mind; a mind not only

trained in the law but well versed in the humanities. He was a true scholar in the very best tradition.

These things when coupled, as in his case, with the will and the ability to work, could not but assure success in his career on the Bench.

At the time of his elevation to the Supreme Judicial Court, it was presided over by that brilliant and scintillating Chief Justice, William R. Pattangall. The Associate Justices were Charles J. Dunn, Guy H. Sturgis, Charles P. Barnes (all later Chief Justices), and Frank G. Farrington, whose all too early death brought to a close his promising career.

To this group, at the age of forty-seven years, came he, to whom we here pay tribute. During the almost twenty-five years of Justice Thaxter's ensuing service as an Associate Justice, the Court was presided over by six Chief Justices, of whom I am the only one now living. He served with seventeen Associate Justices, only two of whom are now in active service,—Chief Justice Williamson and Associate Justice Webber. Thirteen of them have departed this life.

Justice Thaxter was elevated to the Court September 16, 1930 and sat at the Law Term of that month. His first opinion was filed October 22, 1930, and it is interesting to note that of the cases argued at that, his first term, his opinion in *Bunker, Aplt.*, 129 Me. 317, is the first to appear in the Maine Reports. His last opinion, *State* v. *McBurnie*, 150 Me. 368, 2/9/55, appears in Volume 150 of the Maine Reports and was filed when he was an Active Retired Justice February 9, 1955.

The record of Justice Thaxter's work on the Supreme Judicial Court, sitting as the Law Court, is found in the Maine Reports Volumes 129 to 150, both volumes inclusive. His opinions are a monument more enduring than shaft of stone or tablet of bronze. They are engraved upon, nay

they form an essential and integral part of the Jurisprudence of this our beloved State of Maine.

"By their works ye shall know them" is particularly applicable to Judges, and their works as expressed in their opinions, are open to all who can read, not only to us who are their contemporaries, but to all who come after them as long as civilization may endure.

Judged by his works, Justice Thaxter was a great Judge. He was the unquestioned peer of all who were associated with him on the Bench during his almost twenty-five years' service on the Court. His very presence breathed quiet dignity. He had a profound respect for the Court, as one of the three coordinate branches of government. He felt the responsibility resting upon him as a member thereof. He respected his fellow members of the Court as such, and yet he felt for them a quiet affection that marked him as a true friend.

Justice Thaxter was a master in the use of the English language. His opinions were clear, cogent and convincing. One is never at a loss to discover his real meaning. He had a real respect for precedent, yet withal he knew the common law for a living, growing thing. He was particularly well qualified to evaluate a novel situation and never hesitated in applying thereto old principles of law.

He had a great respect for the "Bill of Rights." He fully sensed that it guaranteed not only personal liberty, but the right to acquire and own property, the latter being one of the foundations of a stable government.

One of the most difficult tasks that falls upon a Judge is when he is called upon to distinguish between hardship and injustice, and, despite apparent hardship in the specific case, to render a decision in accord with law. Justice, as administered by the Courts, is the rendition to every man his exact due in accord with his strict legal rights, except

as those legal rights may be modified by the accepted principles of Equity Jurisprudence. When a Judge departs from such a course because of what to him seems the hardship of the case, you have a "rule of men and not of law." The function of a Judge is to declare the law and apply it, not to make the law.

Under our concept of government, our rights are determined by the law in effect at the time action is taken, or rights are to become otherwise fixed. It takes courage to decide cases where the decision causes apparent hardship and what to the lay mind is termed "manifest injustice." Such courage Justice Thaxter possessed and exercised to a remarkable degree. He never feared to call things as he saw them, or "to let the chips fall where they may."

It has been said: "Every man's work, whether it be literature, or music, or pictures or architecture *or anything else,* is always a portrait of himself, and the more he trys to conceal himself the more clearly will his character appear in spite of himself." The record of Justice Thaxter's achievements and his influence upon the jurisprudence of this State, is not found in *his* opinions alone. His wise counsel and sound suggestions, uttered in consultation, and often embodied in notes to his associates before the final approval and announcement of their opinions, has had a profound effect upon the judicial thinking and the opinions of his associates through the years of his service on the Bench. No one knows and appreciates this better than we who were privileged to serve with him on the Court.

As time goes on the true worth of Justice Thaxter, as a Justice of this Court, will become more and more apparent; and his influence upon the stream of the jurisprudence of this State will become greater and greater.

In closing, may I but say I appreciate the great honor conferred upon me by allowing me to participate in these

exercises, and to testify to my affection and admiration for Justice Thaxter. In my opinion he was, and ever will be, regarded as one of the outstanding Justices who have graced the Bench of the Supreme Judicial Court of the State of Maine.

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MR. POWERS: May it please the Court, it is our privilege this afternoon to have the Superior Court represented here today by Mr. Justice Charles A. Pomeroy. Judge Pomeroy.

HONORABLE CHARLES A. POMEROY

May it please the Court:

Our custom of holding memorial exercises has become time honored. Such custom is fitting and proper. It might well be said such custom is necessary. No student of history can have proper understanding of the history of any period of time unless he knows and has proper understanding of the men who made such history. This exercise, then, becomes the occasion, when we who have gathered here, make record of our just estimate of one who has contributed so very much to the history of the time in which he lived. We do this, to the end that those who come after us can learn from the tributes which we here enroll, what manner of man and magistrate was our friend and associate whose life we are gathered to commemorate. I deem it honoring that I should be one of those chosen to create the chronicle.

Justice Sidney St. Felix Thaxter became a member of the Superior Court of Maine the day that Court came into being, January 1, 1930. On September 16, 1930 he was elevated to the Supreme Judicial Court. There he remained as an Associate Justice until his retirement on February 28, 1954. Three days later he became an Active Retired Justice

of that Court, which position he held on the day he passed away, June 30, 1958. In all, he served on the Maine Court twenty-eight and one-half years.

It may be said the history of our Maine Court can be divided into three periods. The first extends from 1820 to 1930, when the *nisi prius* function was taken from the Supreme Judicial Court and vested in the Superior Court. This second phase of our Court's history can be said to have ended when our legislature authorized our Supreme Court to promulgate rules for civil procedure, thus paving the way for a radical departure from our ancient practice statutes. It will be noticed, then, Justice Thaxter's period of service on the Court encompassed all the years of the second phase of our Court's history. Interestingly enough, his first published opinion, *Bunker, Aplt.*, 129 Me. 317, concerned itself with solving a problem resulting from the creation of the Superior Court and endowing it with jurisdiction as the Supreme Court of Probate, a function formerly exercised by the Supreme Judicial Court. That opinion, like all those which followed from his pen, demonstrated a refreshing common sense approach to the solution of practice problems. In all, during his years of service, he contributed 224 written opinions to our body of the law. All, without exception, are characterized by their clarity of thought and expression. In many ways, his opinions were similar to those of the great Cardozo. He had the knack of seeing the true issue and dispelling the confusion which surrounded particular points of law, with a few easily understood words.

It is significant that a substantial number of his cases have found their way into the case books. Their selection for case book use was not by chance. Each was chosen for its excellence of reasoning and clarity of expression.

Within days of his entry upon the Law Court, Justice Thaxter was called upon to solve the serious legal problem

resulting from the abandonment by railroads of their rights of way. The landmark case *Stuart* v. *Fox,* 129 Me. 407, resulted.

Some Judges acquire a reputation for deep understanding in some particular and perhaps limited field. Judge Thaxter's great knowledge was not confined to any one area of the law. *Tuscon* v. *Smith,* 130 Me. 38, related to the obligations of town officers; *Eastern Trust Co.* v. *Maine Broadcasting Co.,* 140 Me. 220, interpreted the declaratory judgments statute; *Harvey* v. *Radcliffe,* 141 Me. 170, contains as clear and noble a statement of the effect of the supremacy clause of the Constitution of the United States as was ever penned; while *Woodsum* v. *Portland R. R. Co.,* 144 Me. 74, analyzed the Public Utility Holding Company Act. These are but a few of the many opinions which demonstrate his tremendous intellectual capacity.

In 1957 the Legislature of Maine authorized our Supreme Court to change our civil practice by rules. I think it is accurate to say probably no other one man did as much to make this progressive step forward possible as did Justice Thaxter. Starting with his first published opinion, he constantly warred upon what he considered the rigors of the common law rules as interpreted and applied by the Court upon occasion. It is interesting to note that of four dissenting opinions he wrote, two, *Waye* v. *Decoster,* 140 Me. 192 at pg. 200, and *Water District* v. *Maine Turnpike,* 145 Me. 35 at pg. 55, voiced his opposition to what he considered a failure of the Court to, in his words, "soften the asperities of common law pleading and adapt its forms to the needs of changing conditions."

Justice Thaxter was a very quiet man, never loudly pressing his viewpoint; never violently proclaiming his stand. And yet, those who know and understand the Court of his time, realize he exerted a tremendous subtle influence upon their doings. Upon only four occasions did he feel con-

strained to express his dissenting view. But somehow, the words "Thaxter, J. does not concur" shouts more eloquently than perhaps might ten thousand words his protest against what he considered "legal sophistry."

If we were asked to name one characteristic which most distinguished him, I am sure we would all say "his intellectual integrity." One of his opinions, above all others, demonstrates the correctness of this conclusion. Strangely enough, it is one of his unpublished opinions and probably only a few people now living know of its existence. I consider it one of his greatest, and it seems to me every magistrate should read it again and again. I say this because it contains a statement of the duty of a Judge which is so moving and so compelling that a mere reading of it is bound to inspire us to a more conscientious application to our oaths as Judges. To fully appreciate what he wrote, it is necessary that we understand the nature of the litigation which occasioned the opinion. In early March, 1937 a disaster struck the cities of Lewiston and Auburn in the form of industrial strife, as a result of which riots soon broke out and both cities were placed under martial law which continued for months. An injunction was sought and was issued by the late beloved Justice Harry Manser, who was one of Justice Thaxter's closest friends and associates. It is not difficult to imagine that feelings were running at fever pitch. Allegation was, certain Union organizers, including one lawyer, had violated the injunction. Contempt citations duly issued and a sensational trial was had before Justice Manser and a jury. Upon conviction, the contemptors were sentenced and denied bail. In this atmosphere, application was made to Justice Thaxter for a Writ of Habeas Corpus. It is not necessary now that we decide that Justice Thaxter's conclusions of law were right or wrong. Suffice it to say they were his conclusions. To my mind, once he reached those legal conclusions, the action he took became the ultimate in judicial integrity. I quote at some length from his

opinion explaining why he felt constrained to take the action he took. I do this because I feel what he said those 22 years ago ought to be reported for all to see, and I deem this a most appropriate occasion to accomplish that. He said in part:

> "The judge to whom such an application as this is presented is in a position of great responsibility. An error on his part in discharging a prisoner may result in a serious interference with the legal processes designed to preserve law and order; an error in holding one entitled to freedom may mean the breakdown of those safeguards established as a protection to individual liberty. Furthermore, an order discharging a prisoner is final. In considering this question I have no right to be influenced by a desire to sustain a ruling of the court of which I am a member on the one hand, nor by any sympathy for these petitioners on the other. My sole desire is to determine what are their rights under the statutes and constitution of this state.
>
> "To deny petitioners their constitutional rights would be to become a party to the violation of law, the ultimate effect of which would be worse than the commission of the highest crime by an individual or group of individuals. The court must, if our system of government is to persist, hold the scales of justice balanced between a prisoner and the state and between a prisoner and public opinion, however strong, however militant. No possible supposed public purpose can justify a denial of the constitutional rights of an individual.
>
> "It has been urged on me that to discharge these men on bail will have an adverse effect on the efforts of public authorities to maintain public order. In reply I can only say that the same duty is on me to observe and enforce the law as I understand it, as there was on

> these men now in jail to obey it. No one of us is above the law. That is the essence of respect for law."

Still adhering faithfully to the injunction of perfect candor, then let the record show, in the judgment of those who knew him best, associated with him and shared his friendship, Sidney St. Felix Thaxter was a true gentleman, a loyal friend, a brilliant scholar and a great magistrate.

We cannot help but feel sadness on an occasion such as this when we honor the memory of a friend who is with us no more. And it is well that this is so because sadness is an honest emotion. To feel it is a sincere tribute to the esteem in which he was held. But let our reasoning mind make us feel glad — glad that ours was the privilege of knowing him, and working with him and appreciating his many talents. Let us take comfort in the thought that, though our efforts to memorialize may be pitifully inadequate, the twenty-two volumes of Maine reports between 1930 and 1955 contain memorials to him which shall endure so long as men shall search after the truth.

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MR. POWERS: May it please the Court, our next speaker is, by coincidence, representing the Federal Bench today, at the same time a member by marriage of Judge Thaxter's family. I am very happy to have with us the Honorable Edward T. Gignoux, United States District Court. Judge Gignoux.

HONORABLE EDWARD T. GIGNOUX

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 here with the Bench and the Bar of the State of Maine in this splendid

tribute to the late Justice Sidney St. Felix Thaxter, who retired from this Court on February 28, 1954 and died on June 30, 1958 after a distinguished career of fifty years as a member of the Bar and twenty-four years as an Associate Justice of the Supreme Judicial Court. As one of Judge Thaxter's sons-in-law, I further particularly appreciate this opportunity to express my personal esteem and affection for Judge Thaxter and, on behalf of Mrs. Thaxter, Mrs. Gignoux and the other members of his family, most of whom are here present, to thank all of those who have participated in these services for the kind and wonderful things which have been said in his memory.

Others who have preceded me this afternoon have spoken fully of the personal warmth and kindliness of Judge Thaxter, of his accomplishments and stature as a man and a judge, and of his dedication to the service of his community, of his church, of his state, his country and his fellowmen. Therefore, although my heart is full with personal remembrances, my remarks will be brief.

As one who was privileged to have known Judge Thaxter very intimately, both as a member of his family and as a younger member of the Bar, I am happy personally to endorse the respect and affection with which he was regarded by all whose lives he touched. A judge whose penetrating and illuminating opinions bespeak his skill and learning in the law, a judge who was patient and courteous with everyone, a judge who was always courageous and was uninfluenced by popular clamor, and a judge whose judgments and decision were fine and sound. It is perhaps sufficient to state that Judge Thaxter exemplified the best of those qualities of character and intellect which are to be found in a truly great jurist. Without making a long story of it, the result is unanimously recognized as undoubtedly one of the best judges of this Court.

With the unveiling of the portrait which is being presented to this Court this afternoon, I know that we shall all

feel that Judge Thaxter is again with us in spirit in this courtroom which he loved so well. And, as in the years ahead we who are left view the portrait which is thus displayed, it will be a constant reminder and comfort to reflect, in our remembrance of the man, that while he can no longer be physically with us, the things which he has done in the service of his state and his country and in the love of mankind are truly imperishable.

And so, without more, on behalf of your brethren on the Federal Bench, I am most happy to join in this tribute to the memory of a fine gentleman, a great jurist, and a distinguished public servant.

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MR. POWERS: May it please the Court, we are favored this afternoon with the presence of a lady who could probably give us a very splendid testimonial in memory of Judge Thaxter. It is my understanding that she was his private secretary for some fifty years,—Mrs. Mary O'Neil. I would be very pleased to have her stand and be recognized at this time.

(Mrs. Mary H. O'Neil then stood for a moment.)

MR. POWERS: As I stated in my opening remarks, Mrs. Thaxter has consented to be present this afternoon and to present to this Court, and have the same unveiled, a living portrait of her late husband. Mrs. Thaxter, we would be very happy to have you speak at this time.

MRS. SIDNEY ST. FELIX THAXTER: It is a great happiness to me and to my family to be able to present to the Court this portrait of my husband, Sidney St. Felix Thaxter. It was painted twenty years ago by a Maine artist, Claude Montgomery. The only time in his life that my husband had ever put on any weight, so perhaps to a great many of you he may not look the same as you really remember him, but it did look like him at the time very much, and

he liked the portrait himself, which I think is a test of a portrait. He would have been very touched, very grateful, as I am, by the honor you have shown him, and I know he would be very proud to think it is going to hang in this courtroom where he spent so many years of his life in a profession he loved so much. His grandson and namesake, Sidney St. Felix Thaxter II, will now unveil the portrait.

(The portrait was then unveiled by Sidney St. Felix Thaxter II.)

MR. POWERS: Thank you very much, Mrs. Thaxter.

It is a fact that arrangements have been made for the portrait to be put on display in this courtroom, and after the conclusion of the Exercises this afternoon everyone present is invited to step forward so that they may have a better view of the portrait, which will then be moved around where lighting conditions are more favorable.

Mr. Chief Justice, we would be very happy to have your remarks at this time.

Remarks by

HON. CHIEF JUSTICE ROBERT B. WILLIAMSON

Mrs. Thaxter, Members of the Bench and Bar:

We meet this spring afternoon to honor the memory of our beloved brother. The central idea and worth of a service such as this has been no better expressed than by former Governor Cobb on a like occasion in memory of Justice Bassett. Governor Cobb said:

> "Among the many traditions that have attached themselves to the profession of the law, none makes a stronger appeal to the laity, none seems more fitting, more in accord with the dignity and responsibility of

> the profession itself and the true spirit of companionship and mutual respect that prevails among its members, than the custom of holding a formal service in memory and honor of an associate who has heard and answered the summons of death."

We thank the members of the Bar and Bench who have so fully and with such feeling set forth the record of our friend.

Before us stands his portrait to evidence the just judge to the lawyer and layman alike for future generations, and we thank Mrs. Thaxter and the members of the family for their thoughtful and generous gift.

In responding for the Court, I will not touch upon the details of Justice Thaxter's life. The record of achievement as a student, at the Bar, as the recorder of that highly important court—the Municipal Court, as a citizen active in good causes without number, all this has been stated by those with far more intimate knowledge than I possess.

I turn rather to the career of our brother from his appointment to the Superior Court in January 1930. His life on the Bench began and ended, as has been pointed out, at significant and important points in the history of our courts; namely, the reorganization of the Superior Court on a statewide basis, as we know it today, and the revision of the rules of civil procedure now under way. I am confident that Justice Thaxter would have approved and supported the steps now being taken to simplify procedure in the effort of Bar and Bench alike to improve the administration of justice.

His record as a jurist rests upon his work as an associate justice of this court. His time on the Superior Court was measured in brief months.

In his long service on the Supreme Judicial Court of nearly 24 years, plus four years as an active retired justice,

he wrote, as I counted them, 224 opinions for the Court and four dissenting opinions. I do not vouch for the accuracy of the count. The cases began with *Bunker, Appellant,* in 1930, 129 Me. 317, filed barely six weeks from his qualification, and the cases end with *State* v. *McBurnie,* 150 Me. 368, filed Feb. 9, 1955, written during his commission as an active retired justice.

Within the past weeks I have noted his opinions and read many of them again. I would not have you believe that I studied them critically — not at all. I found again, however, what every lawyer and judge in Maine has known since 1930, that the opinions of "Thaxter, J." are good, solid, and substantial.

They are not surpassed for reasoning, clarity, and style in the range of our reported cases. He was articulate, if you will, with the pen. The opinions in many of our "leading cases" were written by him.

This, however, is not the time and place for an extended review of his opinions. I mention only three, of a longer list:

Snow & Clifford v. *Bowdoin College,* 133 Me. 195 (1934), (cy pres)
New England Tel. & Tel. v. *P. U. C.,* 148 Me. 374 (1953), (public utility rate case)
Harvey v. *Rackliffe,* 141 Me. 169 (1945), (supremacy of federal law).

In the close and intimate association which marks the lives of appellate judges, we saw him directly and swiftly reach the heart of a legal problem. In conference, he spoke not often, or at length, but always with great effect. He drew readily from the rich store of his years on the Court for the benefit of his colleagues. He was beloved by all who were associated with him.

Sir Matthew Hale, Lord Chief Justice of England, wrote of "Things Necessary to be Continually Had in Remembrance": (I do not read them all)

"I. That in the administration of justice I am entrusted for God, the king and country; and therefore,

II. That it be done, 1st, uprightly; 2dly, deliberately, 3dly, resolutely.

III. That I rest not upon my own understanding or strength, but implore and rest upon the direction and strength of God.

IV. That in the execution of justice I carefully lay aside my own passions, and do not give way to them, however provoked."

Surely the precepts of Sir Matthew Hale were observed by our brother.

Justice Thaxter was characterized by a quiet and deep devotion to the cause of justice. Justice among men and between man and his State was to him indeed a living truth. No man could leave his Court—or his presence—without the realization that he had been fairly heard and would receive a reasoned judgment and justice.

This, the Bar and the Bench, and all whose lives he touched, have long known and understood. He was the just judge.

We leave this courtroom this afternoon where our brother sat in justice for so many years, made better and stronger, and more likely to act justly and to be merciful, from the memories invoked on this occasion.

The resolutions submitted by the Committee of the Cumberland Bar Association of which he was for so long a member are gratefully received by the Court and ordered spread upon the records.

And now, as a further mark of our love and honor for Justice Thaxter, this Court will now adjourn until tomorrow morning at 9:30.

(Court adjourned.)

STATE OF MAINE

SUPREME JUDICIAL COURT

The following letter from Mr. Justice Frankfurter, addressed to me at Portland, Maine, and mailed in ample season to reach me before the exercises, unfortunately was carried to Portland, Oregon, and did not reach Portland, Maine until April 13, 1959.

ROBERT B. WILLIAMSON

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

April 4, 1959

Dear Chief Justice Williamson:

It is good to praise famous men not as an act of piety but to derive from a worthy past added strength to meet the recurring tasks of the day. History is thus transmuted into energy. And so I am glad to learn that on Tuesday my brethren of the Maine bar will gather to recall what manner of man Sidney Thaxter was and the qualities that made him a judicial exemplar.

He and I were friends for half a century, nurtured in the same legal traditions to which we felt a deep loyalty because we deemed them essential for a society that pursued the ideals of freedom and justice.

He was certainly loyal to these ideals in action—as a lawyer, as a judge, as a mediator in conflicts to which his country summoned him when in need of his skill and proven disinterestedness. I deeply cherish his memory as friend and notable servant of his State and the Nation. It is well that the portrait of this wise and benignant judge will look

down upon untold generations of judges and lawyers and litigants and kindle in them his own benignancy and wisdom.

My thoughts, so poorly conveyed in what I have written, will be with you on Tuesday.

Sincerely yours,

s/ FELIX FRANKFURTER

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CONSTITUTION CONSTRUED

Constitution of Maine, Art. I, Sec. 4,
United Interchange v. ***Harding,*** 128.
Constitution of **Maine, Art. I, Sec. 5,**
State v. *Chapman,* 53.
Constitution of Maine, Art. IX, Sec. 14-A,
Martin v. *Maine Savings Bank et al.,* 259.

CONSTITUTIONAL LAW

See Amendments, *State* v. *Chapman,* 53.

CONTRACT CARRIERS

See Public Utilities, *Merrill* v. *P.U.C.,* 38.

CONTRACTS

Where the evidence supports a referee's finding, exceptions will not lie.

The failure of a referee to make a finding upon an immaterial issue is not exceptionable.

One cannot properly complain about the non-compliance with a technical requirement of a contract when it is apparent that compliance would not have changed the result.

D'Alfonso et al. v. *Portland,* 242.

One who defends in a minor's suit to disaffirm a contract and to recover the amount paid thereon has the burden of proving that the articles sold were necessaries.

"Necessaries" are limited in their inclusion to articles of personal use necessary for the support of the body and improvement of the mind of the infant.

Whether articles are necessaries is a question of fact for the fact finder and involves the interpretation of the evidence on (1) financial situation of infant (2) social position and conditions of life of the infant and his family (3) his requirements and needs (4) the nature and quality of articles furnished the infant and his family, his supply, if any, from other sources. Necessaries for one may be luxuries for another.

Both judges and referees may use their own common sense in making rational and logical deductions from known facts.

Spaulding v. *N. E. Furniture Co.,* 330.

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See Executors and Administrators, *Eaton et al.* v. *MacDonald et al.,* 227.

CORAM NOBIS

The proper object of the rules of evidence is truth and its establishment with due acknowledgment and satisfaction of the rights of the parties. Unless the rules are adapted to those ends, they fail of their purpose and become rote.

A transcript of the previous testimony of petitioner's deceased attorney as a State's witness against one Carroll is admissible in evidence against the State in *coram nobis* proceedings, even though

privity in a legal sense is lacking since the very issues now raised for resolution preempts any just claim of the State now to oppose the admission of such evidence because of any lack of opportunity to examine or cross-examine.

One cannot complain that he has not had the opportunity for cross-examination where the transcript of former testimony was that of his *own* witness and he has had the substantial equivalent.

The permissive corroboration of a witness by his previous consistent statements is not ordinarily permissible but there is an exception where the testimony is given (1) under a bias or (2) under influence arising from some late occurrence subsequent to the main event or (3) is a recent contrivance or (4) that the facts described in the previous testimony have been concealed under conditions which warrant the belief that, if they were true, the witness would have been likely to have revealed them.

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See Cross-examination, *State* v. *Jutras*, 198.

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Health and Welfare, *State* v. *Harnden*, 76.
Perjury, *State* v. *Potts*, 114.
Speeding (Turnpike), *State* v. *Hopkins*, 317.

CROSS-EXAMINATION

While the matter of the scope of cross-examination is ordinarily a matter of discretion for the presiding justice, it is error to limit the cross-examination of a witness to the inquiry whether the witness was *convicted* of crime since being detained or charged with the crime under consideration or even some other offense might indicate that his testimony is affected by fear or bias.

While the mere charge of a crime disconnected with the subject matter under investigation does not affect the credibility of a witness, the fact that the witness knows himself to be officially accused of the crime which his evidence tends to fasten upon another person cannot be overlooked in considering whether he is free from every influence that might lead to falsehood.

Every fact or circumstance tending to show the jury the witness' relation to the case or the parties is admissible to the end of determining the weight to be given to his evidence.

It is the essence of a fair trial to place a witness in his proper setting and reasonable latitude should be given the examiner even though he is unable to state to the court what facts might develop. Cross-examination is necessarily exploratory.

The provision of the Maine Constitution (Sec. 14-A of Article IX) which provides that "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*" is not abridged by Sec. 5 VIII of the Enabling Act which limits the mortgagors "to local development Corporations."

The words of the Maine Constitution of Sec. 14-A, Article IX "*of such industrial and manufacturing enterprises*" does not require complete ownership of the real estate by the industry since the people by the Constitution intended broad powers in the legislature to implement the policy permitted under Section 14-A.

An advisory opinion even though joined in by all justices is the advisory opinion of each justice acting individually.

Advisory opinions bind neither the justices who gave them nor the court when the same questions are raised in litigation.

Legislative acts are presumed to be constitutional; and the burden is upon him who claims an act is unconstitutional.

The "industrial building" contemplated by both the Constitution and the Statutes must be used by an industry or manufacturing enterprise, in order to qualify for an insured mortgage; construction merely suitable for or adapted to industrial purposes is not enough.

Martin v. *Maine Savings Bank et al.*, 259.

INHERITANCE

See Adoption, *Williams, Assignee*, 88.

INSURANCE

An action upon an "Accident and Sickness Insurance Policy" must be brought within the two year limitation of the Standard Provisions of the policy when such provisions are consonant with the statutes in force at the time the policy was issued and the loss occurred.

Standard provisions providing for a two year limitation are not contrary to public policy when they are in the same terms as the applicable statutes.

An amendment to the statute providing for a three year limitation is prospective and not retrospective. (P. L., 1953, c. 114, Sec. 111, Subsec. II-11.) (R. S., 1954, Chap. 60, 118, Subsec. II-A 11.)

The usual six year statute of limitation is not applicable to statutory actions upon insurance policies where other applicable law applies. (R. S., 112, Sec. 90, Subsec. IV; R. S., 113, Sec. 40.)

Where a defendant pleads the limitations of the policy, no further plea of limitation is necessary.

It is immaterial that the wrong reason was given for the right result in the court below.

Hubert v. *National Casualty Co.*, 94.

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See Negligence, *Walker* v. *Weymouth*, 138.
Gratto v. *Palangi*, 308.

JURIES

The ordering of a mistrial is within the sound discretion of a presiding justice.

In this State, in capital cases, a jury may not be permitted to separate during the trial and before the case is submitted to them for deliberation.

It is not every withdrawal of one or more jurors from their fellows that constitutes a "separation" in the legal sense. (*i.e.*, temporary separations during emergencies where precautions are taken.)

Supervision rules must be practical and realistic.

There is no "separation" in the legal sense where no juror was shown to be more than momentarily out of the sight of the jury officer and then under circumstances that negative any reasonable likelihood of communication or influence.

Whether conclusive presumption of prejudice from "separation" not decided.

State v. *Woods*, 102.

JURISDICTION

See Divorce, *Jacques* v. *Lassiter*, 84.
Duhamel v. *Duhamel*, 391.
Practice, *Davis* v. *Gorham Savings Bank*, 83.

JUVENILE DELINQUENCY

A juvenile over sixteen years and under seventeen years of age guilty of "juvenile delinquency" may be legally sentenced and committed to the reformatory for men under R. S., 1954, Chap. 27, Sec. 66 as amended (P. L., 1955, Chap. 318, Sec. 1) which provides for reformatory sentences of males over sixteen years of age who have been convicted of "crime."

The legislature by plain implication made sentences of juveniles to the reformatory permissive when it eliminated from the previous law the prohibition against "reformatory" sentences. (P. L., 1951, Chap. 84, Sec. 4; R. S., 1954, Chap. 146, Secs. 2 and 6). This is so notwithstanding juvenile delinquency is not a crime and a delinquent child is not a criminal.

Statutes must not be construed by a meticulous interpretation thereof apart from laws *in pari materia*. The phrase *"statute in pari materia"* is applicable to private statutes or general laws made at different times, and in reference to the same subjects.

The reformatory act and the juvenile delinquency statute are complementary, not repugnant.

Morton, Petr. v. *Hayden*, 6.

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See Cross-examination, *State* v. *Jutras*, 198.

LAW COURT

See Divorce, *Duhamel* v. *Duhamel*, 391.
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LEGACY

See Descent, *Berman, Admr.* v. *Frendel et al.*, 337.
Wills, *Swan* v. *Swan et al.*, 276.

Where a road commissioner refused to perform only non-statutory duties, the jury could properly find that he never voluntarily and intentionally abandoned the office.

A town may not take action to prevent an official from performing his duties and then charge that his failure amounts to abandonment of office.

Wardwell v. *Castine*, 123.

The findings of fact of a referee are unassailable if there is any credible evidence to support them.

Where the evidence conveys an authentic summary impression that the use of the assessed (airport) buildings with all properties of the integrated airport was primarily and mainly in the *public interest*, such property is properly found by the referee to be within the exemption from taxation of R. S., 1954, Chap. 91-A, Sec. 10, Par. 1, Sub. Par. G (P. L., 1955, Chap. 399, Sec. 1), Public Mun. Airports.

Where the evidence supports a finding that the use of the buildings assessed was for public airport and aeronautical purposes such buildings were exempt from taxation for 1956 and would have enjoyed such immunity under the statutes prior to the 1955 Amendment. R. S., 1954, Chap. 92, Sec. 6.

If the ruling is right, the fact that a wrong has been assigned therefor, is immaterial.

Marshall v. *Bar Harbor*, 372.

NEGLECT

See Health and Welfare, *State* v. *Harnden*, 76.

NEGLIGENCE

In testing the propriety of a directed verdict for defendant, the Court must determine whether the jury could have properly found for the plaintiff.

One approaching an intersection has the right to consider that others will observe the law as to stopping where the area is controlled by stop signals. One is not bound to anticipate another's negligence.

Driving against red or with a green light are acts to be considered in arriving at the question of negligence on the part of a motorist.

The reviewing Court is handicapped by references to "here," "there," point "X" and "B," "skid marks," etc. when the diagram to which reference is made is not reproduced.

Ward v. *Merrill*, 45.

A jury verdict of $2,500—for injuries to a 73 year old pedestrian who was struck while crossing the street is excessive where the evidence shows (1) medical and hospital expense—$308.50; (2) loss of wages—$300 (6 weeks @ $1.25 per hour—laborer); (3) pain and suffering from a broken rib with hospitalization from December 15th to December 31st and with some pain and discomfort from January to May.

In the instant case $1,000 is the highest amount a jury could properly assess for pain and suffering.

Gardner v. *Paradis*, 99.

The duty of the operator of tourist or overnight camps to paying guests or invitees is to use reasonable, ordinary, or due care to keep

PERJURY

The form of indictment for subornation of perjury may be set forth as the procurement to commit perjury as described in the statutory form relating to perjury. (R. S., 1954, Chap. 135, Sec. 4.)

An allegation in the indictment that the suborner knew that the testimony when given would be "corruptly and willfully false and untrue" sufficiently alleges that the suborner had knowledge that the witness knew the testimony was false.

It is immaterial whether a proceeding is pending when the procurement, in distinction from the perjury, takes place. The evil readied by the statute is the procurement of perjury at a future time.

False testimony given to furnish respondent with an alibi is material.

An indictment which plainly states the limitation upon the false testimony so that the basis for separation of the false from the true is certain and clear is valid even though the indictment alleged that all the quoted testimony was false and then excepted some as true.

State v. *Potts*, 114.

PHYSICIANS AND SURGEONS

See Negligence, *Miller* v. *Dore*, 363.

PLEADING

See Practice.

PRACTICE

The Law Court is without statutory power to act upon a general motion for a new trial addressed to it after a case has been heard and decided by the court below without the aid of a jury.

Davis v. *Gorham Savings Bank*, 83.

A variance requires a real difference between the allegation and proof; and no variance is material if the adverse party is not surprised or misled to his prejudice thereby.

An excepting party must show affirmatively that he was prejudiced by the exclusion of evidence technically admissible.

D'Alfonso et al. v. *Portland*, 242.

See Amendments, *State* v. *Chapman*, 53.
Divorce (Exceptions and Appeal), *Duhamel* v. *Duhamel*, 391.
Insurance, *Hubert* v. *National Casualty Co.*, 94.
Liens (Equity Appeal), *Andrew* v. *Dubeau et al.*, 254.
Negligence, *Ward* v. *Merrill*, 45.
Remarks of Counsel, *Tittle* v. *Rummel*, 73.
Speeding (Turnpike), *State* v. *Hopkins*, 317.
Statute of Frauds (demurrer), *Marshall et al.* v. *Lowd et al.*, 296.

PRIORITIES

See Executors and Administrators, *Eaton et al.* v. *MacDonald et al.*, 227.

PROBATE

See Executors and Administrators.
Wills, *Swan* v. *Swan et al.*, 276.

RESTATEMENT

RULES OF COURT

SENTENCE

SLANDER

SPEEDING

STATUTES CONSTRUED

REVISED STATUTES OF 1954

PUBLIC LAWS

STATUTE OF FRAUDS

The law is clear in this state that the defense of the Statute of Frauds may be raised by demurrer in those cases where the alleged agreement required to be in writing by the declaration shows it to be oral.

The sufficiency of the alleged memorandum in writing may be raised by demurrer but the court before sustaining the demurrer, must be satisfied (1) that the contract declared upon is within the Statutes of Frauds and (2) that the existence of the required memorandum can not be established from the written agreement itself or from the agreement supplemented by such **parol** evidence as the law will permit.

The presumption against intestacy is partly a rule of policy but mainly calculated to carry into effect the presumed intent of the testator.

The cancellation of legacies by the testator after the execution of a will, where the acts of revocation were not induced by or concurrent with any plan to make a new will, may be accomplished without requiring the necessary formalities and attesting prescribed by the Statute of Wills. R. S., 1954, Chap. 169, Secs. 1, 31, P. L., 1957, Chap. 302. This is so even though such cancellations redound to the enlargement of the residuum.

Swan v. *Swan et al.*, 276.

See Trusts, *Grigson et al.* v. *Harding et al.*, 146.

WITNESSES

See Coram Nobis, *Dwyer* v. *State*, 179.
Cross-examination, *State* v. *Jutras*, 198.

WORDS AND PHRASES

Abandonment, *Wardwell* v. *Castine*, 123.
Necessaries, *Spaulding* v. *N. E. Furniture Co.*, 330.

WORKMEN'S COMPENSATION

A decision of a Commissioner of the Industrial Accident Commission on questions of fact is final in the absence of fraud, Chap. 31, Sec. 37, R. S., 1954.

Gooldrup v. *Scott Paper Co. et al.*, 1.

A decree of the Industrial Accident Commission must be supported by evidence—even though slender, not speculation, surmise, or conjecture.

The applicable rule in Maine forbids the admission of learned medical treatises over objection, except when offered to impeach a medical witness who relies at least in part upon medical authority for the opinion he has expressed; but such evidence may nevertheless be properly received by consent.

Evidence admitted without objection or motion to strike is "consent evidence."

Hearsay admitted by consent may be given corroborative effect but taken alone will not support a verdict or finding.

The mere stipulation into evidence of medical treatises does not change their character as hearsay, unless the stipulation asserts that the absent witness (or author), if present, would state certain specified facts and opinions.

Goldthwaite v. *Sheraton Restaurant et al.*, 214.