MAINE REPORTS

155

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

MARCH 30, 1959 to NOVEMBER 30, 1959

Rules Edition

Maine Rules of Civil Procedure
Municipal Court Civil Rules
Criminal Rules

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MILTON A. NIXON

REPORTER

AUGUSTA, MAINE
DAILY KENNEBEC JOURNAL
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1960

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AUGUSTA, MAINE

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

HON. ROBERT B. WILLIAMSON, *Chief Justice*
HON. DONALD W. WEBBER
HON. WALTER M. TAPLEY, JR.
HON. FRANCIS W. SULLIVAN
HON. F. HAROLD DUBORD
HON. CECIL J. SIDDALL

HON. FREDERICK A. JOHNSON, *Clerk*
[1] HON. BESSIE O. KELLER, *Clerk*

ACTIVE RETIRED JUSTICES
OF THE
SUPREME JUDICIAL COURT

HON. EDWARD P. MURRAY

[1] Qualified May 28, 1959

JUSTICES OF THE SUPERIOR COURT

HON. HAROLD C. MARDEN
HON. RANDOLPH A. WEATHERBEE
HON. LEONARD F. WILLIAMS
HON. ABRAHAM M. RUDMAN
HON. CHARLES A. POMEROY
HON. JAMES P. ARCHIBALD
HON. ARMAND A. DUFRESNE, JR.
HON. THOMAS E. DELEHANTY

Attorney General

HON. FRANK E. HANCOCK

Reporter of Decisions

MILTON A. NIXON

TABLE OF CASES REPORTED

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

MILDRED M. BLAISDELL

vs.

HENRY DAIGLE

Kennebec. Opinion, March 30, 1959.

Trespass. Damages. Intent.

A trespass is committed "willfully" under R. S., 1954, Chap. 124, Sec. 9, if the defendant acts with an utter and complete indifference to and disregard for the rights of others. One should not be permitted to hide behind his lack of knowledge which is easily professed and with difficulty disproved.

ON EXCEPTIONS AND MOTION FOR NEW TRIAL.

This is an action of trespass before the Law Court upon defendant's exception. Exceptions overruled and motion denied.

McLean, Southard & Hunt, for plaintiff.

Jerome G. Daviau,
Donald J. Bourassa, for defendant.

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

WEBBER, J. On motion and exceptions. This was an action for trespass for the wrongful cutting of trees on the plaintiff's woodlot. Several points of law have been disposed of by waiver, stipulation or non-argument in the briefs before us. Only one issue remains to be considered here. The defendant admits an unintentional and innocent trespass. The jury, however, awarded double damages and answered in the affirmative as part of their verdict the specific question, "Was the cutting down of plaintiff's trees committed willfully or knowingly?" Our inquiry is now as to whether or not there was evidence to support this finding of the jury.

We look first to the statute which appears as R. S., 1954, Chap. 124, Sec. 9. After providing a remedy for trespass in such circumstances as these, the statute provides: "If said acts are committed willfully or knowingly, the defendant is liable to the owner in double damages." The use of the word "or" suggests at once that willfulness without actual knowledge of wrong doing will suffice to justify the imposition of double damages. We think therefore that it follows logically and almost automatically that the word "willfully" as used in this statute is intended to embrace conduct on the part of the defendant which displays an utter and complete indifference to and disregard for the rights of others. One should not be permitted to hide behind his lack of knowledge if he has meticulously avoided every means of acquainting himself with the truth. The statute impliedly recognizes that lack of knowledge is easily professed and with difficulty disproved. It offers small comfort to him who recklessly perseveres in keeping intact his ignorance of the facts.

What of the evidence of willful misconduct as thus defined? The Silver Spur Riding Club, Inc., owner of the land abutting the plaintiff on the north, sold its stumpage by written contract to one Beaulieu for $300. About a month

later Beaulieu in turn assigned his interest in the contract (by writing on the reverse side thereof) to one Voisine. Eight days later Voisine assigned his interest (again on the reverse side of the original contract) to the defendant. The last transaction took place in a lawyer's office. The jury has found on the basis of evidence that the defendant subsequently cut trees owned by the plaintiff which were fairly worth $900 (the verdict for double damages being $1800). The jury could properly consider that the defendant should have ascertained that his assigned contract showed on its face a purchase price of $300. The great discrepancy between the contract price and the value of the trees seemingly available for cutting should itself have been a danger signal. The defendant says he could not read English and never knew the contents of the contract he purchased. He never asked the parties or the attorney to read or explain it. He never asked either the plaintiff or any officer of the Riding Club to show him the line. He did not have the line run out. He made no examination or inquiry as to what metes and bounds might be shown by any deed of the property. He consulted a neighbor only after the cutting was complete and then, as he says, for the first time discovered his error. The jury could infer that he must have seen and therefore must have ignored a noticeable difference between the growth on the north and that on the south side of the property line. Witnesses testified that the location of the line as evidenced by the larger and darker trees of the plaintiff was clearly visible from the road. The jury could properly take into account that if the defendant had taken even one of the steps above suggested he would have discovered the truth before any cutting occurred. The defendant pleads his ignorance of the true facts but the jury may well have concluded that his ignorance was self-imposed and reflected utter indifference to the rights of others. The defendant relied also on his claim that Voisine had shown him the wrong line. The jury may either have

disbelieved part or all of this testimony, or may have concluded that a simply inquiry by the defendant would have disclosed the fact that Voisine had no personal knowledge of the line. Voisine did not appear as a witness. There was evidence that after the trespass was discovered the defendant prevented the plaintiff from removing logs by blocking the only access to the highway with his truck. This action the defendant admits was intentional. The jury may properly have inferred that such conduct indicated a continuing intention to proceed without regard to the rights of others.

We did not hear or see the witnesses. We cannot say on this record that the jury did not have before them sufficient evidence to justify a finding that the defendant committed a willful trespass within the meaning of the quoted statute.

The entry will be

Exceptions overruled.
Motion denied.

POMEROY D. JORDAN, LAWRENCE L. JORDAN,
STEWART C. JORDAN, PHILIP N. JORDAN,
EMMA F. JORDAN, CAROLYN V. TRYNOR
AND MERLE R. JORDAN

vs.

GLADYS I. JORDAN, NORMAN R. JORDAN,
WILLIAM H. JORDAN
(SOMETIMES KNOWN AS HENRY JORDAN)
AND
GLADYS I. JORDAN, AS ADMINISTRATRIX, C. T. A.
OF ESTATE OF EMMA D. JORDAN

Cumberland. Opinion, April 29, 1959.

Wills. Construction. Witnesses. Pretermitted Heirs. Trusts. Words and Phrases. Precatory Phrases.

In a suit for the construction of a will the proper execution of the will is assumed, and a contention that the will is void because witnessed by the wife of a legatee is without merit.

The omission of a child under R. S., 1954, Chap. 169, Sec. 9, although presumed to be as a result of forgetfulness, infirmity or misapprehension, may be shown to be intentional and extrinsic evidence is admissible to support such showing.

The words "I want the money from my share in father's farm deposited . . . for Henry" . . . creates a trust under the facts of the existing case and the words "*I want*" are not merely precatory or advisory where such a construction defeats the intent of the testator.

The phrase "it (the money) can be used to build a house for him (Henry) on the lot . . ." is precatory.

This is a petition for construction of a will before the Law Court upon report. Decree to be made by the sitting justice in accordance with the opinion. The costs and expenses of each of the parties, including reasonable counsel fees to be fixed by the sitting justice after hearing and paid

by the Administratrix, c.t.a. of the Estate of Emma D. Jordan, and charged to her probate account.

Linnell, Perkins, Thompson,
Hinckley & Thaxter, for plaintiff.

Harry C. Libby,
Sidney W. Wernick, for defendant.

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

TAPLEY, J. On report. The plaintiffs seek construction of the will of Emma D. Jordan, late of Cape Elizabeth, Maine, who died on July 5, 1945. The will was drafted by the testatrix without benefit of counsel and is couched in the following language:

"Will of Emma D. Jordan

Dec. 7, 1944

I want the money from my share in Father's farm deposited in the Maine Savings bank for Henry it can be used to build a house for him on the lot I have reserved for him, I put in trust with Gladys.

I give my bank book in Casco bank So. Portland to Everett to pay my funeral expenses.

Take me to S. S. Rich or Hay and Peabody at once.

Let what pieces of furniture Norman wants left.

Let Philip have his furniture and what other he wants.

Emma D. Jordan

Everett C. Jordan
Dorothy S. Jordan
Gladys I. Jordan"

The will was duly admitted to probate and an administratrix, c.t.a. was appointed and qualified. The administratrix, c.t.a. is Gladys I. Jordan, a daughter of the testatrix.

Emma D. Jordan was survived by a daughter, Gladys I. Jordan and seven sons, Pomeroy D. Jordan, Lawrence L. Jordan, Stewart C. Jordan, Philip N. Jordan, Norman R. Jordan, Everett C. Jordan and William Henry Jordan, sometimes known as and called Henry Jordan. The son, Everett C. Jordan, who survived his mother, died intestate on October 9, 1951, leaving a widow, Emma F. Jordan, and as his sole heirs at law, Merle R. Jordan and Carolyn V. Trynor. Henry Jordan was, on December 7, 1944 and for sometime previous, *non compos mentis.* His mother, Emma D. Jordan, at the time of the execution of the will, was aware of his mental deficiency. Henry, prior to the death of his mother, was not under legal guardianship but after her death, Gladys I. Jordan was appointed his guardian upon petition filed in the Probate Court.

At the time of her death, Emma D. Jordan was seized and possessed of one-third interest in common and undivided of certain lots or parcels of land, with buildings thereon, situated in Cape Elizabeth. This property was commonly known as and called "Nathaniel Dyer Farm." Emma D. Jordan acquired the one-third interest under the last will and testament of her father, Nathaniel Dyer.

The plaintiffs claim (1) that the will, having been witnessed by the wife of a beneficiary thereunder, is void under provisions of Chap. 169, Sec. 1, R. S., 1954; (2) that the three children of the testatrix, namely, Pomeroy D. Jordan, Lawrence L. Jordan and Stewart C. Jordan, not having been mentioned in her will, are pretermitted heirs, within the meaning of Chap. 169, Sec. 9, R. S., 1954; (3) that the language used by the testatrix is not dispositive but only expresses desire; (4) that paragraph 1 of the will

does not create a valid and enforceable trust due to indefiniteness as to the intention of the testatrix.

The parties to the action agreed by stipulation,

> "That all of the children of said Emma D. Jordan received in equal or nearly equal proportions substantial gifts in cash or otherwise from their mother, the said Emma D. Jordan, prior to her death."

and,

> "That at no time prior to the execution of her Will or prior to her death did Emma D. Jordan place any property, real, personal or mixed in trust with Gladys I. Jordan for, or for the benefit of, Henry Jordan or any other person."

Plaintiffs contend that the last will and testament of Emma D. Jordan is void and of no effect because one of the witnesses thereto was Dorothy S. Jordan, the wife of Norman R. Jordan, a son of the testatrix and a legatee named in his mother's will, who was beneficially interested under the will. (Chap. 169, Sec. 1, R. S., 1954.) This contention is without merit. The parties to the action admit the will was probated. The fact that it was probated is conclusive proof of its execution. Chap. 169, Sec. 15, R. S., 1954. Page on Wills, Vol. 4, Chap. 49, Sec. 1604:

> "In a suit for construction the proper execution of the will as probated is assumed."

See *Knapp, Appellant,* 145 Me. 189.

The three children of the testatrix, namely, Pomeroy D. Jordan, Lawrence L. Jordan and Stewart C. Jordan, were not mentioned in her will. They are claiming to be pretermitted heirs, within the meaning of Sec. 9, Chap. 169, R. S., 1954 (formerly Sec. 9, Chap. 155, R. S., 1944). The pertinent portion of this statute reads:

> "A child, or the issue of a deceased child not having any devise in the will, takes the share of

> the testator's estate which he would have taken if no will had been made, unless it appears that such omission was intentional, or was not occasioned by mistake, or that such child or issue had a due proportion of the estate during the life of the testator."

The law presumes that the omission to provide for a child in a will is the result of forgetfulness, infirmity or misapprehension, and not by design. *Walton, et al.* v. *Roberts,* 141 Me. 112. This presumption, however, is rebuttable. Extrinsic evidence is admissible to show the omission as being intentional. In the case of *Ingraham, Appellant,* 118 Me. 67, the court, on page 70, said:

> "The evidential office of the will is to prove that the child is without devise under it. The inquiry as to whether he was omitted therefrom by design and without mistake, and not by blunder or oversight, arises under the statute. Seeking the testator's intention it is pertinent to inquire, consonantly with the law of evidence, concerning him and his son; the affection, or lack thereof, that subsisted between them; of the motives which may be supposed to have operated with the testator, and to have influenced him in the disposition of his property. All the relevant facts and circumstances, including the intention of the testator as he declared it before, at, or after the making of the will, may be shown."

See *Whittemore* v. *Russell,* 80 Me. 297.

There is evidence in this case which discloses, in light of all the circumstances, that Emma D. Jordan intended to omit her three sons as devisees. A witness in the person of one Dorothy Simpson Jordan, upon inquiry, testified in substance that she had occasion to talk with the testatrix, Emma D. Jordan, prior to the execution of her last will and testament. She was asked the question:

> "Q. Can you tell us what Emma D. Jordan said to you about that will?"

and her answer was:

> "A. Yes, I can. She said to me that she had taken care of the rest of her children except Gladys, whom she felt was able to take care of herself, and what she had left she wanted to go to Henry. She naturally worried about him, and she wanted to feel, when he did get out of the hospital, he would have something and what she had left, she wanted him to have."

Another witness, Norman R. Jordan, testified that his mother talked with him a few months before she executed her will by saying:

> "A. She wanted what was left in her share in her father's farm left to Henry.
>
> Q. Did she say why?
>
> A. Yes.
>
> Q. Will you tell us why she said that?
>
> A. That was all there was left and the rest of us had had what she could give us."

A preponderance of the evidence shows that the omission from the will of the three sons as devisees was intentional and by design. The contention that Pomeroy D. Jordan, Lawrence L. Jordan and Stewart C. Jordan, being sons of Emma D. Jordan, the testatrix, were unintentionally omitted from the will as devisees is untenable.

Plaintiffs, in contention, further say that the language used by the testatrix is not dispositive but merely expresses desire and that paragraph 1 of the will does not create a valid and enforceable trust due to its indefiniteness as to the intention of the testatrix. Paragraph 1 of the will reads:

> "I want the money from my share in Father's farm deposited in the Maine Savings bank for Henry it can be used to build a house for him on the lot I have reserved for him, I put in trust with Gladys."

Plaintiffs argue that the language used by the testatrix in her will is more of an expression of desire rather than being dispositive and that it is in nature precatory and not mandatory. In the analysis of any portion of a will, with the view of construing it, great care must be used in arriving at the intention of the testator as it is paramount that the will speak as the testator intended. Intention must be found from the language of the will taken as a whole because as Justice Thaxter stated in *Moore* v. *Emery,* 137 Me. 259, at page 277: "There is no particular magic in isolated phrases." The rule is well expressed in the case of *Cassidy, Guardian, et al.* v. *Murray, Trustee, et al.,* 144 Me. 326, at page 328, where the court said:

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

Plaintiffs contend that the words "I want" were used by the testatrix in a precatory sense and it was not intended by her that they should be considered as mandatory. There have been some judicial determinations of the nature of the word "want" and its effect when used in a will. In the case of *Anders, et al.* v. *Anderson, et al.,* 97 S. E. (2nd) 415 (N. C.) a holographic will was concerned in which the testatrix intended to devise real property by the use of the words "I want." This case decided that the words as used in the will of Mrs. Hollingsworth were in a mandatory and not a precatory sense. See *Welch, et al.* v. *Rawls, et al.,* 186 S. W. (2nd) 103 (Texas); In re *Bearinger's Estate,* 9 A. (2nd) 342 (Penn.); *Sellers* v. *Myers,* 56 Penn. Supp. 207. When in a question of construction it is necessary to determine whether the words used by a testator are dispositive or precatory, a sound rule is found in Page on Wills, Vol. 1, Chap. 4, Sec. 91, which reads in part as follows:

> "- - - - - The test is whether or not testator intends, by his language, to control the disposition of his property. If he does, the words in question are testamentary and the instrument is his will, no matter in how mild a form this intention is expressed. Such terms are often said to be mandatory. Or, on the other hand, is he simply indicating what he regards as a wise disposition, or is he merely giving advice, leaving to some other person, frequently the person to whom the property in question is given by some other provision of the instrument, full discretion to ignore such device and to make a different disposition of the property. If so, it is not a will. Terms of this sort are often said to be precatory."

The words used by the testatrix should be construed with liberality, having in mind that she being a layman would be using words having natural, ordinary and popular meaning. An interpretation of the words must be consistent with other words and provisions of the will, having in mind such admissible facts as existed at the time the will was written and with the ultimate purpose of carrying into effect the intentions of the testatrix. 95 C. J. S., Wills, Secs. 598, 599. See *Doherty* v. *Grady,* 105 Me. 36.

Plaintiffs question that Emma D. Jordan by her will created a valid and enforceable trust because they say there is indefiniteness as to her intention to do so. In their brief, counsel for plaintiffs agree that "most of the tests in favor of a valid trust are met in the case at bar." They say, however, that from the language used, her intention to create a trust is difficult of ascertainment. This court in many cases has set forth rules of guidance in construing wills where intentions of testators are in question as, for intance, in *Tapley* v. *Douglas,* 113 Me. 392, on page 394, the court said:

> "In construing a will, it is proper to read it in the light of surrounding conditions, the relations between the testator and his intended bene-

> ficiaries, the amount and nature of his estate, and other relevant circumstances which legitimately tend, in cases of doubt, to show the probabilities of his intentions, one way rather than another."

In *Bodfish* v. *Bodfish,* 105 Me. 166, at page 172:

> "- - - - whether or not such a result will follow from the use of the language quoted, must depend upon the intention of the testator as disclosed by all of the provisions of the will examined in the light of such attending circumstances and manifest objects as may reasonably be supposed to have been in the contemplation of the testator at the time of making the will, such as the condition of his family, and the situation and amount of his property."

See *The New England Trust Company, et al.* v. *Sanger, et al.,* 151 Me. 295. A will should be construed so as to give effect to the intention of the testator and this intention is to be gathered from the language used in the will. It must be the intention of the testator at the time of the execution of the instrument. *Gorham Admr.* v. *Chadwick, et al.,* 135 Me. 479.

Emma D. Jordan wrote her own will. She had a son Henry who was mentally deficient and of this mental incapacity she was aware. At the time she wrote her will she owned a share in her father's farm which, according to the record, constituted the major portion of her estate. It is only natural that uppermost in her mind would be the thought of providing, in so far as she could, for her son Henry. She was unfamiliar, as most laymen are, with the terminology and phraseology a trained scrivener would use in the drafting of a will but a reading of her will shows the use of words that give expression to her intent to provide for her child, Henry. She wrote, "I *want* the money from my share in father's farm deposited in the Maine Savings Bank for Henry, - - -." In light of all the circumstances as shown by the record, the only reasonable inter-

pretation of the words "I want" as used in the will compels the conclusion that the testatrix intended her share in the farm be used for the benefit of Henry. To place an interpretation on the expression, "I want" as being words merely precatory or advisory in their nature would be to defeat intent when consideration is given to the will as a whole. Turning to the remaining portion of her will, she *gives* her bank book in the Casco Bank "to Everett to pay my funeral expenses." She disposes of some pieces of her furniture by *letting* Norman have what he wants and she *lets* Philip have his furniture and what other furniture he wants. Mrs. Jordan at the time she drafted her will was approximately 80 years of age. She, no doubt, used those words to express her intention which were familiar to her. They are not such words as would be employed by a trained legal mind in drafting a will but those which had meaning to her—words she was accustomed to use in her daily life. Within the four corners of her will she has expressed an intent, first to care for the boy Henry, and after that she wanted to be sure that her funeral expenses were paid so she directed Everett to take the money in the Casco Bank and pay them. She indicated concern that upon her death her body be taken to an undertaker at once. Finally someone was to *let* Norman and Philip have the furniture. These are the things which Emma D. Jordan intended should take place after her death.

In construing the will of Emma D. Jordan, we are led to the conclusion that she intended that a valid and enforceable testamentary trust be created for the benefit of her son, William H. Jordan (otherwise known as and called Henry Jordan) and that Gladys Jordan be trustee, with power to sell the real estate and deposit the proceeds to be used, as to corpus and interest, for the benefit of Henry. The phrase "it can be used to build a house for him on the lot I have reserved for him," we determine to be in the

nature of a suggestion to the testatrix' trustee that the proceeds from the sale of her share of the farm could be used to build a house for Henry on the lot she had reserved for him. This is merely an expression of desire which may or may not reach fulfillment and, by nature, is precatory and not mandatory. We further conclude that it was the intention of the testatrix to intentionally and designedly omit as beneficiaries in her will her three sons, Pomeroy D. Jordan, Lawrence L. Jordan and Stewart C. Jordan.

Decree to be made by the sitting Justice in accordance with the opinion.

The costs and expense of each of the parties, including reasonable counsel fees, to be fixed by the sitting Justice after hearing and paid by the Administratrix, c.t.a. of Estate of Emma D. Jordan, and charged to her probate account.

PROGRESSIVE IRON WORKS REALTY CORPORATION
vs.
EASTERN MILLING COMPANY

Kennebec. Opinion, April 29, 1959

Deeds. Escrow. Trusts. Equity. Specific Performance. Laches.

There is a fiduciary relationship created by and inherent in the nature of an escrow agreement.

While as a general rule an instrument cannot be deposited with the agent or attorney of the obligor or obligee, such person may so act if it involves no violation of duty to the principal and the person acts *as an individual* and *not as an agent.*

Where a plaintiff with no lack of diligence has performed his part of an escrow agreement, the defendant is without right to rescind the escrow agreement or interfere with the performance of the duties of the escrow agent.

ON APPEAL.

This is a bill in equity for specific performance of an escrow agreement. The case is before the Law Court upon appeal. Appeal denied. Remanded for further proceedings and modification of the decree below in accordance with this opinion.

Brooks Brown, Jr., for plaintiff.

Rudman & Rudman, for defendant.

SITTING: WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, WEBBER, J. On appeal from the decree of a single justice sitting in equity. On August 16, 1955 Progressive Iron Works Realty Corporation made a written agreement with the defendant Eastern Milling Company to sell certain industrial property for which the defendant was to pay

$20,000. The plaintiff seasonably tendered a warranty deed, whereupon the defendant questioned the plaintiff's title. The alleged flaw stemmed from the fact that the deed by which Progressive acquired title from its grantor was recorded about two hours before the recording of Progressive's certificate of incorporation. After negotiation, plaintiff and defendant orally agreed on September 15, 1955 that plaintiff should "bring proceedings in court as soon as is reasonably possible and carry them through to a conclusion" to insure the defendant a good and merchantable title. Pending conclusion of these proceedings the plaintiff was to deposit its warranty deed with the attorney for the defendant in escrow. The evidence in the case before us makes it clear that the plaintiff was to yield possession of the premises to the defendant with the right to occupy rent free and make improvements. The defendant was to deposit with the same escrow agent its check for $20,000. Both the deed and the check were to be delivered when the title was cleared in court. This escrow agreement was reduced to writing by the defendant's attorney and was signed by the plaintiff's officer. The written draft was thereafter retained by the defendant but never signed by its officer. However, the parties all took the necessary steps to perform the escrow agreement and it is not here contended that the oral agreement was not binding at its inception. The check and deed were deposited with the escrow agent. The defendant took and retained possession of the property. The plaintiff at once instituted the contemplated proceeding in equity against its grantor. Neither the plaintiff nor the defendant had anticipated more than token resistance on the part of the grantor, Great Eastern Lumber Corporation, but in fact vigorous opposition was offered by the grantor at every stage of the ensuing litigation between it and Progressive. This defendant, deeming itself damaged by what it termed the vexatious conduct of the grantor Great Eastern, brought suit against the latter for alleged

wrongful interference with the purchase contract first above mentioned. In January, 1956, apparently in a compromising mood, Great Eastern offered to deliver to Progressive a new deed if all claims for damages against it by both Progressive and Eastern Milling should be dropped. Upon submission of this offer for approval, Eastern Milling agreed with Progressive that it should be refused. On February 1, 1956 at the request of Eastern Milling, Progressive filed a new bill in equity against Great Eastern which was accompanied by attachments of real and personal property. In April, 1956 a jury trial was had in the action brought by Eastern Milling against Great Eastern (et al.) resulting in a verdict for the former. Steps were at once taken, however, by Great Eastern to have this verdict reviewed by the Law Court. In June, 1956 Great Eastern made a new offer of a deed to Progressive. When this offer was communicated to Eastern Milling the latter expressed indifference and shortly thereafter notified Progressive that it no longer intended to perform its part of the original agreement of purchase and sale because of what it considered an unreasonable lapse of time. In July, 1956 counsel for Great Eastern withdrew in the equity case with consequent further delay, but in September, 1956 Progressive obtained a decision in the equity court which had the practical effect of producing for it the long desired deed from Great Eastern. In December, 1956 Progressive tendered the escrow agent a new deed and requested delivery of the check in his hands. The defendant thereupon reaffirmed its repudiation of the purchase agreement and instructed the agent not to perform the escrow agreement. On March 12, 1957 plaintiff filed the bill in equity now before us seeking specific performance of the escrow agreement. On March 16, 1957 we certified our opinion in *Eastern Milling Company* v. *Flanagan et al.* (Great Eastern), 152 Me. 380, in which we set the verdict aside and held that there had been no flaw in the title of Progressive in the

first place. On April 15, 1958 findings were filed by the court below in the case now before us affording the plaintiff equitable relief and it may now be hoped that our decision in review of the findings and decree below may finally terminate litigation involving four expensive law suits and protracted over a period of three and a half years.

Questions which might otherwise have required extended discussion and detailed analysis are not raised here since the defendant contends only that the plaintiff unreasonably delayed performance of the escrow agreement and that the defendant was excused from performance and justified in rescission by lapse of time. It is enough then merely to note in passing as to issues not briefed or argued by defendant that equitable relief may be afforded in matters of escrow. 19 Am. Jur. 452, Sec. 31. There is a fiduciary relationship created by and inherent in the nature of an escrow agreement. The depositary has been "denominated a trustee for the parties, charged with the performance of an express trust governed by the escrow agreement." 30 C. J. S. 1203, Sec. 8; *Tucker* v. *Dr. P. Phillips Co.*, 139 F. (2nd) 601; *Bardach* v. *Chain Bakers,* 265 App. Div. 24, 37 N. Y. S. (2nd) 584. Furthermore, although the escrow agent selected by the parties in this case was attorney for one of them, he nevertheless acted throughout as an independent and neutral stakeholder. He maintained this position consistently and when it became apparent that there might be a conflict of interest and that his position as escrow agent for both parties had become incompatible with his position as attorney for the defendant, he very properly and promptly withdrew as attorney. "While as a general rule an instrument cannot be deposited with the agent or attorney of the obligor or obligee, such person may so act if it involves no violation of duty to the principal and the person acts *as an individual and not as an agent.*" (Emphasis supplied.) 30 C. J. S. 1202, Sec. 7d. This dis-

tinction was noted in *Hubbard* v. *Greeley,* 84 Me. 340, 346, when the court said: "We rest our decision upon the ground that the deed was, in fact, delivered to the grantees' attorney *as such,* and that such a delivery is equivalent to a delivery to the grantee himself." (Emphasis supplied.) In the case at bar the escrow agent, although attorney for the defendant, did not act "as such" when he accepted his trust and his entire conduct thereafter was consistent with his status as agent and trustee for both parties. Moreover, the intention of the parties at the time of deposit is controlling and it is apparent that in this case both parties intended to deposit with the escrow agent as an individual and not in his capacity as attorney for one of them. See *Eddy et al.* v. *Pinder,* 131 Me. 139, 141.

Now turning to the only contention made by the defendant, was lapse of time fatal to the right of the plaintiff to have performance of the escrow agreement? The learned justice below found in that connection: "The delays in obtaining the desired corrective deed of the premises from a third party were not, in my opinion, chargeable to the plaintiff and did not destroy the agreement of the parties." The finding is fully supported by the evidence and is correct both as to fact and law. As already noted, the original agreement was that the plaintiff should "bring proceedings in court as soon as is reasonably possible and carry them through to a conclusion" to insure the defendant a good and merchantable title. This is exactly what the plaintiff did. The defendant cannot be heard to complain that plaintiff substituted a new bill in equity five months after he had first commenced legal action since the second proceeding was instituted at the suggestion of the defendant and with its consent. Nor was it the fault of the plaintiff that its grantor offered sustained and time consuming opposition to the efforts of the plaintiff to carry the proceedings through "to a conclusion." The defendant might have had

a deed from Progressive conveying good title at any stage of the proceedings but preferred to have the added force of a court decision. That having been obtained and no lack of diligence on the part of the plaintiff having been shown, the defendant was without any right to rescind the escrow agreement or interfere with the performance of his duties by the escrow agent. The court below properly ordered specific performance and assessed additional damages directly resulting from the defendant's unwarranted repudiation.

Our attention has been directed to the fact that the plaintiff may have been put to additional expense for taxes during the pendency of this appeal. Further proceedings may be required to ascertain whether and to what extent the decree below should be modified in this respect.

The entry will be

Appeal denied. Remanded for further proceedings and modification of the decree below in accordance with this opinion.

NELLIE M. FAUCHER
vs.
RAYMOND J. DIONNE

Aroostook. Opinion, April 29, 1959.

Exceptions. Certificate. Conditional.

When a cause is heard by the presiding justice without a jury, exceptions to his rulings in matters of law do not lie unless there has been an express reservation of the right to except.

"Exceptions filed and allowed *if allowable.* Law" is merely a conditional allowance and is not sufficient.

George B. Barnes, for plaintiff.

Albert M. Stevens, for defendant.

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

PER CURIAM.

This cause was, by consent of the parties, heard by a Superior Court Justice without a jury. The docket entries are a part of the record and recite:

> "Plea filed. Hearing by court without jury. October 15, 1957 Findings filed: judgment for Plaintiff for $1287.55 (vacation judgment). December 27, 1957 Exceptions filed and allowed if allowable. 'Law.' "

The plaintiff contends that the presiding justice erred in rulings of law, that she is accordingly aggrieved and that the errors are exceptionable.

The right to except was not reserved in this case

> "----His petition was dismissed in accordance with the well established rule of law that 'when a

> cause is tried by the presiding justice without the intervention of a jury,' in accordance with the statute now in question, 'exceptions to his rulings in matters of law do not lie, unless there has been an express reservation of the right to except.' " *Graffam* v. *Casco Bank & Trust Co.*, (1940), 137 Me. 148, 149.

The presiding justice did not allow the plaintiff's exceptions so as to confer upon her the benefit of the rule in *Waterville Realty Corp.* v. *Eastport* (1939), 136 Me. 309, 312. See, also, *State* v. *Intox. Liquors* (1907), 102 Me. 385, 390.

The conditional allowance of the plaintiff's exceptions by the presiding justice did not suffice to entitle her to the consideration she now seeks in this court.

> " 'I wish to allow the exceptions now as of the October term, if I have authority to do so.' This was only a conditional allowance of the exceptions, and was not a decision that they were seasonably filed, but rather the contrary - - -"
>
> *Dunn* v. *Motor Co.* (1898), 92 Me. 165, 168.
>
> "- - - The certificate of the justice who presided, that the exceptions are allowed, is conclusive as to regularity, unless he makes some qualification. Colby v. Tarr, 140 Me. 128; Fish v. Baker, 74 Me. 107; Royal Insurance Co., v. Nelke, 117 Me. 366; Dunn v. Motor Co., 92 Me. 165; Borneman v. Milliken, 118 Me. 168; Mann v. Homestead Co., 134 Me. 37; McKown v. Powers, 86 Me. 291."
>
> *Bradford* v. *Davis* (1947), 143 Me. 124, 128.

Exceptions dismissed.

STATE OF MAINE
vs.
DANIEL A. TRASK

Kennebec. Opinion, May 5, 1959.

Mistrial. Juries. Juveniles.

The allowing of a jury to separate and the failure of the court to admonish the jury that during noon recess they were not to discuss the case with anyone is not ground for mistrial where no harm or injury has been shown.

The asking of an unanswered question on cross-examination by the State's attorney whether respondent "was the same (one) who was convicted in May, 1951 (1954) in Sagadahoc County Superior Court for the crime of larceny" is not ground for mistrial where such question is not pressed and the court admonishes the jury to disregard the reference "to the question in regard to a record of conviction."

A juvenile in 1954 could not have been convicted of larceny in Maine.

ON EXCEPTIONS.

This is a criminal indictment before the Law Court upon exceptions. Exceptions overruled. Judgment for the State.

Robert A. Marden, for plaintiff.

John B. Canty, for defendant.

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

SULLIVAN, J. The respondent had been indicted as follows:

> "- - - - on one Alexander Dionne feloniously did make an assault, and by putting in fear, one case containing twenty-four bottles of Schlitz beer, of the value of six dollars and ninety-five cents, of the

> property of said Alexander Dionne, in his presence, feloniously did steal, take and carry away - - -"

During his trial the respondent twice moved for a mistrial. Each motion was denied and he excepted. Now after guilty verdict he prosecutes his exceptions.

At the noon recess the jury had been permitted to separate for lunch. At the reconvening of the court for the afternoon session there was had this colloquy:

> Respondent's Counsel: "May it please the Court, at this time the respondent would like to make a motion in the absence of the jury.
>
> (In the absence of the jury)
>
> "May it please the Court, the respondent makes a motion for a mistrial on the ground of the Court failing to instruct the jurors before the noon recess that they were to speak with no one or to put themselves in any position whereby they might overhear any conversation in relation to this pending case, and the usual instructions that they should permit no one to discuss the case with them and that if anyone persisted in discussing it with them or in their presence that they might inform the Court so necessary steps could be taken.
>
> Where there was no instruction to the jury of any type we therefore feel it is prejudicial to the rights of the respondent to continue on with this case."
>
> State's Counsel: "May it please the Court. This motion is a surprise to the State and would insist that the motion is without merit for the reason that under the general instructions given to the jury by the Court at the beginning of the term the record will disclose appropriate instructions were given to jury in this regard."
>
> "The Court. Do you have any evidence of any kind that any one person has spoken to any member of the jury?"

Respondent's Counsel: "No, Your Honor, I have no such evidence."

"The Court: This is a veteran jury, now starting the third week. They have all had instructions on this same point several times, and the Court denies the motion."

Respondent's Counsel: "May we have an exception?"

"The Court: Exception may be noted."
(In the presence of the jury)

"The Court: May I see counsel?
(Bench Conference)

The Court: Mr. Foreman and members of the jury, the Court would like to ask one question. Did anyone during the lunch hour attempt to talk with any member of the jury panel about this case? Will you answer audibly?
(The members of the jury answered 'No'.)"

There was no error in the ruling of the court. The court was charged with the responsibility of exercising proper discretion in furtherance of justice. *Lebel* v. *Cyr* (1943), 140 Me. 98, 102. He acted judiciously. There was no manifest wrong or injury. *State* v. *Cox* (1941), 138 Me. 151, 176.

Prior to the respondent's trial the jury which was mature in service had been admonished several times. There is no reason to doubt the sufficiency of the judicial attention. 34 A. L. R. 1115, 1152. There was no evidence of spurious conversation or of any having been attempted. *Balavich* v. *Yarnish* (1952), 149 Me. 1, 5. There was testimony negating such irregularity. Respondent has the burden of proving any abuse. *State* v. *Hume* (1951), 146 Me. 129, 134. There had been no error in permitting the jury to separate during the progress of the trial in this case. *State* v. *How-*

ard (1918), 117 Me. 69, 72. The exception wants merit and must be overruled.

Respondent's further exception concerns itself with the effect of an unanswered question addressed to the respondent by the State's attorney in cross-examination. The crime alleged had been described as having occurred on December 31, A. D. 1957. Respondent's birthday was February 14, A. D. 1938. We quote from the record:

> "Q. Have you ever been convicted of the crime of - - a crime involving a felony, larceny or moral turpitude?
>
> Defense Counsel: "I object. This man is not competent to tell what is moral turpitude.
> State Counsel: "I will ask it a different way.
>
> Q. Are you the same Daniel Atwood Trask who was convicted in May, 1951, (1954) in Sagadahoc County Superior Court for the crime of larceny?
>
> Defense Counsel: "I object, Your Honor, and would like to state the reason for the objection in the absence of the jury, if I may, or at the end of the bench."
>
> (Court recess)
>
> (After recess)
>
> State Counsel: "No further questions.
> "The Court: The jury will disregard any reference to records of conviction."
>
> (In chambers)
>
> Defense Counsel: "For the purpose of the record the respondent moves for a mistrial on the ground of irreparable statements and prejudicial questioning of the county attorney relative to conviction of crime and relative to his questioning the respondent whether or not he had been convicted of any crime, a crime involving a felony, larceny or involving moral turpitude. It is the position of the respondent that questions of this nature propounded in the presence of the jury are detri-

mental and prejudicial to the respondent's rights and therefore he moves that a mistrial be granted. State Counsel: "In behalf of the State the county attorney submits that the question was propounded to the witness on the basis of a certified copy of a conviction of Daniel Atwood Trask at the May Term 1954 of the Sagadahoc County Superior Court for the crime of larceny and which certified record indicates that the said Daniel Atwood Trask was sentenced to the Men's Reformatory; the State not willing to assume that an illegal sentence was rendered by the Superior Court at that time, there now being questions raised as to this respondent and this witness' status at that time as a juvenile under the laws of the State of Maine.

"The Court: The Court denies the motion as, after a conference at the Bench, the question was not pressed and no record has been introduced and the Court has instructed the jury to disregard any reference to the question in regard to a record of conviction.

Defense Counsel: "I will take exception to the Court's ruling."

To affect his credibility it is permissible to elicit from a witness by cross-examination evidence of his record of conviction of felony, larceny or crime involving moral turpitude. R. S., 1954, c. 133, § 127; *State* v. *Knowles* (1904), 98 Me. 429, 432.

Before the question now preoccupying us was addressed to the respondent there had been testimony given by him that he was 19 years of age on December 31, A. D. 1957 when the crime alleged in this indictment was stated to have been committed. If he was truthful as to his age, then in 1954 the respondent could not have been convicted in Maine of larceny. R. S., 1954, c. 146, § 2, P. L., 1957, c. 112; *Wade* v. *Warden* (1950), 145 Me. 120, 126.

The prosecutor, however, possessed a certified copy of what purported to be an official record of a conviction of larceny of one Daniel Atwood Trask in the Superior Court in 1954. We cannot say that it was reprehensible for the prosecutor to have acted as he did. He had an onerous duty to discharge. Because of the appearance of the respondent the prosecutor may have been skeptical as to his age. For whatever consideration the circumstance may command here, there is no reason to ascribe any illicit motive to the State's attorney.

The question was not answered. The ostensible record was neither offered nor admitted. The presiding justice promptly warned the jury to "disregard any reference to records of conviction" and denied a motion for mistrial based upon the incident.

> "- - - But beyond this it may be advisable to point out that such a motion is addressed to the discretion of the presiding justice. - - - He is in contact with actual conditions, and peculiarly qualified to render a decision. Unless there is a clear abuse of such discretion, no exceptions lie to his ruling. - - -"
>
> *State* v. *Rheaume* (1932), 131 Me. 260, 261.

The burden of proof as to such abuse rests upon the respondent. *State* v. *Hume* (1951), 146 Me. 129, 135. We cannot fairly say, here, that irrelevant or prejudicial matter was not successfully eradicated from the minds of the jurors by the ruling of the presiding justice and by his instruction to disregard.

Upon examination and consideration of the record we do not find any manifest wrong or injury resulted to the respondent. *State* v. *Cox* (1941), 138 Me. 151, 177. The jury was an oath bound tribunal of fact. We cannot presume it was "too ignorant to comprehend" or "too unmindful of their (its) duty to respect, instructions as to matters pe-

culiarly within the province of the court to determine." *McCann* v. *Twitchell* (1917), 116 Me. 490, 493.

Exceptions overruled.

Judgment for the State.

OPINION

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

* * * * * *

QUESTIONS PROPOUNDED BY THE HOUSE IN AN ORDER
DATED APRIL 17, 1959
ANSWERED MAY 5, 1959

HOUSE ORDER PROPOUNDING QUESTIONS
STATE OF MAINE
HOUSE OF REPRESENTATIVES
99th LEGISLATURE

WHEREAS, a bill entitled "An Act Providing for Severance Taxation of Certain Natural Resources," (House Paper 902, Legislative Document 1271) is pending before the 99th Legislature and it is important that the Legislature be informed as to the constitutionality of the proposed bill; and

WHEREAS, it appears to the members of the House of the 99th Legislature that certain provisions of the bill present important questions of law and the occasion is a solemn one;

NOW, THEREFORE, Be it Ordered, that in accordance with the provisions of the Constitution of the State, the Justices of the Supreme Judicial Court are hereby respectfully requested to give this Legislature their opinion on the following questions:

1.

Do any of the provisions of section 12 of Legislative Document 1271 assess a tax upon real or personal estates without regard to apportionment according to the just value of such real or personal estate in violation of section 8 of Article IX of the Constitution of Maine?

2.

Do any of the provisions of section 5 of Legislative Document 1271 assess a tax upon real or personal estates without regard to apportionment according to the just value of such real or personal estate in violation of Section 8 of Article IX of the Constitution of Maine?

3.

Do any of the provisions of Sections 2, 4 and 5 of Legislative Document 1271 amount to a suspension of the sovereign power to tax in violation of Section 9 of Article IX of the Constitution of Maine?

4.

Do the provisions of Section 4 of Legislative Document 1271 delegate legislative power to the Commissioner of Inland Fisheries and Game in violation of Section 1 of Part First of Article IV of the Constitution of Maine?

5.

Would House Paper 902, Legislative Document 1271 "An Act Providing for Severance Taxation of Certain Natural Resources," if enacted by the Legislature, be constitutional?

HOUSE OF REPRESENTATIVES
Speaker laid before the House and
on Motion of Mr. Maxwell of Jay
Apr 17, 1959
passed.
Harvey R. Pease
Clerk

HOUSE OF REPRESENTATIVES
Read and
On Motion of Mr. Maxwell Of Jay
APR. 16, 1959
Tabled Pending passage.
Tomorrow assigned.
Harvey R. Pease
Clerk

Name: Maxwell

Town: Jay

Reproduced and distributed under the direction of the Clerk of the House.

A true copy. Attest: HARVEY R. PEASE
Clerk of the House

Transmitted by Director of Legislative Research pursuant to joint order.

NINETY-NINTH LEGISLATURE

Legislative Document **No. 1271**

H. P. 902 House of Representatives, March 17, 1959

Referred to the Committee on Taxation. Sent up for concurrence and 1,000 copies ordered printed.

HARVEY R. PEASE, Clerk

Presented by Mr. Maxwell of Jay.

STATE OF MAINE
IN THE YEAR OF OUR LORD NINETEEN
HUNDRED FIFTY-NINE

AN ACT Providing for Severance Taxation of Certain Natural Resources.

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

Sec. 1. R. S., c. 16-A, additional. The Revised Statutes are amended by adding a new chapter to be numbered 16-A, to read as follows:

'Chapter 16-A.

Severance Taxation of Natural Resources.

Sec. 1. Purpose. It is the intent of this chapter to provide equitable taxation of the natural resources of the State, utilizing tax measures consistent with conservation of such resources, to the end that the lands in the State shall continue to furnish increasing natural resource products, and the towns in which such lands lie shall receive just tax revenues from such lands.

Sec. 2. Property exempt from taxation. All real property taxed under the provisions of section 5 shall be exempt from taxes imposed under chapter 91-A, except as to such taxes as may have been previously levied.

Sec. 3. Forest crop land determined.

I. The owner of a tract of land in this State of not less than 40 acres may file a petition with the Forest Commissioner stating that he believes the tract of land described is more useful for growing timber and other forest crops than for any other purpose, that he intends to practice forestry thereon, that all persons holding incumbrances thereon have joined in the petition and request that the

land be approved as "Forest Crop Land" under this chapter. Wherever such land is encumbered by a mortgage securing any issue of bonds or notes, the trustees named in such mortgage may join in the petition, and such action shall for the purpose of this section be deemed the action of all holders of such bonds and notes.

II. Upon the filing of such petition the commissioner shall set the matter for public hearing at such time and place as he may determine, but not later than one year from the date of such filing. Notice of the time and place of the hearing and a description, as the commissioner deems advisable, of the property requested to be approved as "Forest Crop Land" shall be given to the owner of such land and to the assessor of the municipality in which it is situated, by mail at least 30 days before the day of hearing. In addition, a copy of such notice shall be published once a week for 3 consecutive weeks in such newspapers as the commissioner shall deem appropriate, the first publication to be at least 30 days before the day of hearing. The hearing may be adjourned from time to time and no notice of the time and place of the adjourned hearing need be given, except an announcement thereof by the presiding officer at the hearing at which the adjournment is had.

III. After hearing all the evidence offered at the hearing and after making such independent investigation as he sees fit, the Forest Commissioner shall make a finding of fact and make and enter an order accordingly. If the Commissioner finds that the facts give reasonable assurance that a stand of merchantable timber will be developed on such lands within a reasonable time, and that such lands are then held permanently for the growing of timber, and that all persons holding incumbrances against such land have in writing agreed to the petition, the order entered shall grant the request of the petitioner on condi-

tion that all unpaid taxes against said lands be paid within 30 days thereafter; otherwise, the commissioner shall deny the request of the petitioner. If the request of the petitioner is granted, a copy of the order shall be forwarded to the State Tax Assessor, to the clerk of each municipality and to the register of deeds of each county in which any of the land affected by the order is located. The register of deeds shall record the entry, transfer or withdrawal of all forest crop lands on the county records and shall be entitled to a fee to be paid by the owner of 10 cents for each page of each instrument so recorded. Any order of the Forest Commissioner relating to the entry of forest crop land issued on or before March 20th of any year shall take effect in such year, but all orders issued after March 20th of any year shall take effect the year following.

Sec. 4. Taxation of forest crop land. Upon the filing of the order specified in section 3, subsection III, the land described shall be "Forest Crop Land," on which taxes shall be payable only as provided in this chapter. The petition by the owner and the making and recording of the order of the Forest Commissioner shall constitute a contract between the State and the owner, running with the land, for a period of 50 years, unless terminated as provided, with privilege of renewal by mutual agreement between the owner and the State. The State as an inducement to owners and purchasers of forest crop land under this chapter agrees that until terminated as provided in this chapter, no change in or repeal of this chapter shall apply to any land then accepted as forest crop land, except as the Forest Commissioner and the owner may expressly agree in writing. If at the end of 50 years the contract is not renewed by mutual consent, the merchantable timber on such land shall be estimated by an estimator jointly agreed upon by the Forest Commissioner and the owner. In the event the Commissioner and owner

fail to agree, an estimator shall be appointed by the county commissioners of the county in which the land is located, whose estimate shall be final, and the cost of the estimate shall be borne jointly by the Forest Commissioner and the owner. The owner upon the completion of the estimate shall pay the severance tax on the stumpage in the same manner as if the stumpage had been cut. The owners by such contact consent that the public may hunt and fish on such lands subject to such regulations as the Commissioner of Inland Fisheries and Game may prescribe.

Sec. 5. Taxation.

I. The assessor of each municipality on making up the tax list each year shall enter as to each forest crop land description the words "Forest Crop Land" which shall be a sufficient designation that the land described is subject to this chapter. Such land shall thereafter be assessed as provided. No tax shall be levied on forest crop land except the taxes provided in this chapter, except that any buildings located on forest crop land shall be assessed as personal property, subject to all laws and regulations for the assessment and taxation of such property.

II. Any owner shall be liable for and pay to the treasurer of the municipality on or before January 31st of each year on each such description a sum called the "acreage share" computed at the rate of 10 cents per acre on all lands. If such acreage share shall not be paid by January 31st to the treasurer of the municipality, it shall be subject to interest at the rate of 1% per month or fraction thereof from January 1st preceding. Taxes levied under this chapter shall be collected in the same manner as are municipal taxes on real estate under chapter 91-A.

III. On or before the first of April each year the treasurer of the municipality shall certify to the Forest Com-

missioner for each owner the legal descriptions in such municipality on which the owner has paid the acreage share pursuant to this section, and also on acreage shares previously unpaid and paid prior to April 1st, except on lands on which an order of cancellation has been issued by the Forest Commissioner as provided. The treasurer of each municipality shall notify the Forest Commissioner of the names of the owner and the description of land on which acreage shares have not been paid for more than one year. The Forest Commissioner upon receipt of this information shall withdraw the order of entry of such land as forest crop land.

Sec. 6. Forestation.

I. No person shall cut any merchantable wood products on any forest crop land where the forest crop taxes are delinquent nor until 30 days after the owner has filed with the Forest Commissioner a notice of intention to cut, specifying the descriptions and estimated amount of wood products to be removed, and also the volume to be left as growing stock. The Forestry Commissioner may require a bond executed by a surety company licensed in this State for such amount as may reasonably be required for the payment of the severance tax provided in this chapter. The commissioner, after examination of the lands specified, may limit the amount of forest products to be removed in order that adequate growing stock may be left to furnish recurring forest crops. Cutting in excess of such limitation shall render the operator liable to double the severance tax prescribed. Merchantable wood products include all wood products except wood used for fuel by the owner.

II. Within 30 days after completion of cutting on any land description, but not more than one year after filing of the notice of intention to cut, the owner shall transmit

to the Forest Commissioner a written statement of the products so cut, specifying the variety of wood, kind of product, and quantity of each variety and kind as shown by the scale or measurement thereof made on the ground as cut, skidded or loaded, as the case may be. The commissioner may accept such report as sufficient evidence of the facts, or may investigate and determine the fact of the quantity of each variety and kind of product so cut during the period covered by such report. A severance tax on wood products covered by the report shall be paid at the rates prescribed in sections 11 and 12.

Sec. 7. Withdrawal of forest crop land.

I. The Forest Commissioner shall once in 5 years, or on application of the owner of any forest crop land or the officers of the municipality in which the land is located, or on his own motion at any time cause an investigation to be made and a hearing had as to whether any forest crop land shall continue under this chapter. If on such hearing after due notice and opportunity to be heard by the municipality and the owner, the commissioner shall find that the land does not meet the requirements of section 3, the entry of such land shall be cancelled and copies of the order of withdrawal specifying the description shall be filed with the commissioner, the State Tax Assessor, the clerk of the municipality and the register of deeds of the county in which the land lies, and none of the provisions of this chapter relating to forest crop land shall thereafter apply except so far as may be necessary to collect any previously levied severance tax.

II. If at any time the owner shall make use of the land for anything other than forestry, the commissioner shall issue an order of withdrawal and the owner shall be liable for the tax provided in subsection IV.

III. Whenever the owner of forest crop land conveys such land he shall, within 10 days of the date of the deed,

file with the Forest Commissioner on forms prepared by the commissioner a transfer of ownership signed by him and an acceptance of transfer signed by the grantee certifying that he intends to continue the practice of forestry on such land. The commissioner shall forthwith issue a notice of transfer to all officers designated to receive copies of orders of entry and withdrawal. Whenever a purchaser of forest crop land declines to certify his intention to continue the practice of forestry thereon, such action shall constitute a cause for cancellation of the order of entry.

IV. Any owner of forest crop land may withdraw part or all of it from this chapter, by filing a declaration with the commissioner containing a description of it and by payment within 30 days of the amount of all real estate tax that would have been charged against such lands in the previous 5 years had they not been subject to the provisions of this chapter with simple interest thereon at 5% per year. The exact amount of the tax shall be determined by the Forest Commissioner after hearing and upon due notice to all parties interested, provided that when the tax rate of the current year has not been determined the rate of the preceding tax year may be used. On payment of the tax the Forest Commissioner shall issue an order of withdrawal and file copies thereof with the clerk and assessor of the municipality and the register of deeds of the county in which such land lies. Such land shall then cease to be forest crop land.

Sec. 8. Taxation after withdrawal. When any land ceases to be forest crop land, by virtue of an order of withdrawal issued by the Forest Commissioner, taxes thereafter levied thereon are payable and collectible in the same manner as similar land not governed by this chapter.

Sec. 9. Records of Forest Commissioner. The Forest Commissioner shall keep a set of forest crop land books

which shall contain the description of each parcel of forest crop land, the owner's name and any other information he may deem pertinent.

Sec. 10. Forest crop land information. The Forest Commissioner shall annually publish and distribute information concerning the practice of forestry on forest crop land and the method of taxation of forest crop land provided in this chapter.

Sec. 11. Forest crop land not in a municipality. With respect to forest crop land not located in a municipality the State Tax Assessor shall exercise the authority and perform the duties of those municipal officers herein specified, except that the State Tax Assessor shall enforce the collection of delinquent taxes under this chapter in accordance with his authority for the collection of delinquent taxes provided under chapter 16.

Sec. 12. Severance tax on resource products. Taxes levied for the privilege of severing the resource products specified under this chapter from the soil of this State are predicated on the quantity of product severed, and shall be paid at the rates provided in this section. The word "severed" shall mean the taking from the soil of this State any of the products specified in this chapter in any manner whatsoever.

SCHEDULE OF TAX RATES

On sand, gravel or stone ..... 1c per ton

On pulpwood ..... 50c per cord

On soft or hardwood lumber .. $1 per thousand board feet

All metallic or non-metallic minerals, or other natural resources except sand, gravel, stone, pulpwood and soft or hardwood lumber ..... 3c per ton

The measure of tax is the quantity of the entire production in this State at the date of severance or production, regardless of the place of sale or to whom sold, or whether a sale has been made or by whom used, or to the fact that delivery may be made to points outside of the State, and the quantity or value, as the case may be, of all resource products shall be computed as at the date of severance from the soil in an unmanufactured state.

If any person for any tax under this section shall ship or transport resource products, or any part thereof, out of the State, without making a sale then the measurement thereof in the condition or form in which they existed immediately at the point of severance, shall be the basis for the assessment of the tax imposed by this section.

In all cases where the tax levied by this chapter has been previously paid by the owner, producer or vendor, then purchasers are not required to report for tax such production, but are required to report such purchases to the Tax Assessor as having had tax paid by owner, producer or vendor. This report shall be filed monthly by purchasers and shall give the following information; name and address of owner, producer or vendor, number of units purchased and amounts from each county from which the resource products were severed. If tax has not been paid by the owner, producer or vendor, it shall become the liability of the purchaser and shall be paid by him.

Sec. 13. Owner primarily liable for tax. The tax hereby levied is primarily assessed against the owner of resource products or against the owner of the land from which such products were severed.

The owners of resource products severed from the soil are proportionately responsible and liable for payment of any tax levied, and if tax due on such products severed from the soil is unpaid, then such taxes shall be paid to the State

Tax Assessor by the owners thereof and the tax shall operate as first lien and privilege shall follow said products into the hands of the ultimate manufacturer or person or dealer, whether in good or bad faith.

Sec. 14. Out-of-state transportation of resource products. If any person liable for any tax under this chapter shall transport such resource products or any part thereof, out-of-state, without making a sale, then the quantity in the condition or form in which they existed immediately before transportation out-of-state shall be the basis for the assessment of the tax imposed.

Sec. 15. Liability for tax on resource products. Liability for the tax imposed shall apply to any person who shall sever any natural resource products from government or privately owned land. All taxes levied shall be collected by the State Tax Assessor. The State Tax Assessor shall pay all of such collections into the State Treasury to be credited to the general fund.

Sec. 16. Title to resource products in dispute. When the title to any resource products being produced or severed from the soil is in dispute or whenever the purchaser of such products, or any person engaged in the producing or severing of resource products, from the soil, shall be withholding payments on account of litigation or for any other reason such purchaser of such products, or person actually engaged in producing or severing such products, is hereby authorized, empowered and required to deduct from the gross amount thus held the amount of the tax levied, and to make remittance to the State Tax Assessor, as provided by this chapter.

Sec. 17. Responsibility for making reports. Every person producing or severing such products from the soil in this State, shall, when making the reports required by this

chapter, file with the State Tax Assessor a statement, under oath, on forms prescribed by him of the business conducted by such person during the period for which the report is made, showing the kind of products and the gross quantity thereof so severed or produced, and such other reasonable and necessary information pertaining thereto as the State Tax Assessor may require for the proper enforcement of the provisions of this chapter.

All persons engaged in the business of purchasing or manufacturing, in whole or in part, any resource products in this State, shall make and keep for a period of 3 years, a complete and accurate record showing the gross quantity of products purchased, the value thereof, the names of the persons from whom purchased, the time of the purchase, the county in which severed and any other information which the State Tax Assessor may require. Any person failing to make the report required by this section shall be guilty of a misdemeanor and be punished by a fine of not less than $100 nor more than $500 for each offense.

Sec. 18. Removal of resource products from state. When requested by the State Tax Assessor, all transporters of resource products which are subject to the tax imposed, out of, within or across the State of Maine, shall be required to furnish the State Tax Assessor such information relative to the transportation of such products as may be necessary to carry out the provisions of this chapter.

The State Tax Assessor shall have the authority to inspect bills of lading, waybills or other documents, and such books or records as may relate to the transportation of resource products in the hands of such transporter out of, within or across the State. The State Tax Assessor shall be empowered to demand the production of such bills of lading, waybills or other similar documents and books and records relating to the transportation of such products at any point in the State of Maine which he may designate.

The removal by the owner, transporter, purchaser or producer of resource products, except interstate commerce carriers, from the State without first paying all severance tax that might be due, or obtaining from the State Tax Assessor or his duly authorized agent, in advance, written approval or permit to remove from the State any of the resource products taxed by this chapter, shall be guilty of a misdemeanor and, upon conviction, be fined not less than $100 nor more than $500 for each offense.

The State Tax Assessor, or his duly authorized agent, shall have the right and authority to assess and collect any severance tax found to be due and unpaid, at the point of removal from the State, upon all resource products found being removed from the State and shall assess, in addition to the tax found due, interest at the rate of 6% per annum, together with damages and penalties in an amount not to exceed $500, and not to be less than $100, upon any severer, producer, owner, purchaser or transporter, except interstate commerce carriers, found to be removing such products from the State.

In cases of interstate commerce carriers, duly qualified as such and having a permit to conduct such operations, using bills of lading or waybills prescribed or approved by the Interstate Commerce Commission, such common carriers shall all be required to keep the usual records at offices in this State where such records are usually kept.

Sec. 19. Requiring additional information for computation of tax. The State Tax Assessor shall have the power to require any person engaged in producing or severing resource products from the soil, to furnish any additional information deemed by him to be necessary for the purpose of computing the amount of said tax. The State Tax Assessor shall have the power to examine the books, records, letters, papers, documents and all files of such persons for the

purpose of assessing the tax; and to that end, shall have the power to examine witnesses, and if any such witness shall fail or refuse to appear at the request of the State Tax Assessor, or refuse access to books, records, letters, papers, documents and files, said State Tax Assessor shall have the power and authority to proceed as provided by chapter 17.

Sec. 20. Taxes due and payable. The taxes levied shall be due and payable in monthly installments, on or before the 15th day of the month next succeeding the month in which the tax accrues. The person liable for the tax shall, on or before the 15th day of the month make out a return on the form prescribed, showing the amount of the tax for which he is liable for the preceding month, and shall mail or send the same, together with a remittance for the amount of the tax, to the State Tax Assessor. When the total tax for which any person is liable under this chapter does not exceed the sum of $10 for any month, a quarterly return and remittance, in lieu of the monthly return may not be made on or before the 15th day of the month next succeeding the end of the quarter for which the tax is due. Such return shall be signed by the taxpayer or a duly authorized agent of the taxpayer.

Sec. 21. Reports. If any person shall fail to remit to the State Tax Assessor, as required, the tax imposed by this chapter for the reason that the owner of such resource products is paying the tax direct to the State Tax Assessor, then such person shall report to the State Tax Assessor, on forms prescribed by him, the kinds and quantities of such products upon which the tax was not paid. Such reports shall be made at the end of each calendar month.

When any board of county commissioners, or any members thereof, of any county in the State shall purchase any resource products upon which the tax has not been paid, then the said board shall file the reports and remit the tax

due to the State Tax Assessor in the same manner as is required of other taxpayers.'

Sec. 2. Effective date. The provisions of this act shall become effective January 1, 1960.

ANSWERS OF THE JUSTICES

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

In compliance with the provisions of Section 3 of Article VI of the Constitution of Maine, we the undersigned Justices of the Supreme Judicial Court, have the honor to submit the following answers to the questions propounded on April 17, 1959.

QUESTION (1): Do any of the provisions of section 12 of Legislative Document 1271 assess a tax upon real or personal estates without regard to apportionment according to the just value of such real or personal estate in violation of section 8 of Article IX of the Constitution of Maine?

ANSWER: We answer in the negative.

Section 12 concerns itself not with assessment of a tax upon real or personal estate, but with

> " 'a tax imposed upon the performance of an act, the engaging in an occupation or the enjoyment of a privilege.' . . . But our Constitution contains no provision limiting the legislative imposition of excise taxes or, to use the language of the Court: 'Our Constitution imposes no restriction upon the Legislature in imposing taxes upon business.' *State* v. *Telegraph Co.*, 73 Maine, 518, 531." *Opinion of Justices*, 123 Me. 576, 577, 578. See also *State* v. *Vahlsing*, 147 Me. 417.

QUESTION (2): Do any of the provisions of section 5 of Legislative Document 1271 assess a tax upon real or per-

sonal estates without regard to apportionment according to the just value of such real or personal estate in violation of Section 8 of Article IX of the Constitution of Maine?

ANSWER: We answer in the affirmative.

Section 5 does assess a tax upon real estate. Article IX, Section 8 of the Constitution of Maine reads:

> "All taxes upon real and personal estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof; but the legislature shall have power to levy a tax upon intangible personal property at such rate as it deems wise and equitable without regard to the rate applied to other classes of property."

The purpose of Article IX, Section 8 is to equalize public burdens so that the taxpayer shall contribute to the entire tax burden in proportion to his property. While the Legislature in its wisdom has the authority to exempt from taxation by uniform laws any particular class of property, it does not have the authority, except in the case of intangible personal property, to provide for one mode of assessment as to one class of property and another mode as to another class.

Section 5 of the proposed Act provides for an " 'acreage share' computed at the rate of 10 cents per acre on all lands" designated as "Forest Crop Land" under the provisions of the Act. This is palpably a tax on real estate and is so designated in Section 5 II. As such it is not assessed according to the just value of the property. Such provision is a violation of the limitation imposed by Article IX, Section 8.

QUESTION (3): Do any of the provisions of Sections 2, 4 and 5 of Legislative Document 1271 amount to a suspension of the sovereign power to tax in violation of Section 9 of Article IX of the Constitution of Maine?

ANSWER: We answer in the affirmative.

Article IX, Section 9 of the Constitution of Maine reads:

> "The legislature shall never, in any manner, suspend or surrender the power of taxation."

The Legislature has the ". . . power to determine what kinds and classes of property shall be taxed and what kinds and classes shall be exempt from taxation." *Opinion of Justices,* 141 Me. 446, 447, and cases cited.

> "No matter what words the Legislature uses, or what attempts it makes to pass an exemption statute without the right to change or repeal it, it cannot bind itself so as to prevent a future change or repeal. The Constitution would make the part which attempts the prevention of a change or repeal, *a nullity.*" (Italics supplied.) *Greaves* v. *Houlton Water Co.,* 143 Me. 207, 213.

Section 2, 4 and 5 cannot well be treated separately or apart from the remaining provisions. The Act purports first, to immunize "Forest Crop Land" from legislative power ever to change or repeal its tax status or liability by the device of an asserted contract between the State and the owner through a period of fifty years, unless sooner terminated, and second, to set for the life of such contract a tax, designated "acreage share," on the land without regard to just value. The Legislature cannot so suspend or surrender its power to tax under the Constitution.

QUESTION (4): Do the provisions of Section 4 of Legislative Document 1271 delegate legislative power to the Commissioner of Inland Fisheries and Game in violation of Section 1 of Part First of Article IV of the Constitution of Maine?

ANSWER: We answer in the affirmative.

No reference is made to the existing fish or game laws or administrative standards. No general policy of regulation

or control is set forth in the document as to hunting or fishing on the lands concerned. There appears no legislative direction ascertaining or determining the duties imposed by the document upon the Commissioner of Inland Fisheries and Game or what ministerial acts are authorized and necessary for the performance of such duties. *McKenney* v. *Farnsworth,* 121 Me. 450.

QUESTION (5): Would House Paper 902, Legislative Document 1271 "An Act Providing for Severance Taxation of Certain Natural Resources," if enacted by the Legislature, be constitutional?

ANSWER: We believe our answers to the foregoing specific questions will be sufficient for the purposes of your inquiry. We cannot well anticipate all of the questions that could arise under the Act in its present form.

Dated at Augusta, Maine, this 5th day of May, 1959.

Respectfully submitted:

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

FIRST PORTLAND NATIONAL BANK, SUCCESSOR, EX'R.
vs.
KALER-VAILL MEMORIAL HOME, ET AL.

Cumberland. Opinion, May 6, 1959.

Wills. Evidence. Construction. Beneficiaries. Identity. Executory Interests. Cy Pres. Lapsed Legacy. Void Legacy. Joint Interests.

A will is not operative until the death of the maker, it then speaks his or her intentions at the time of its execution.

In determining the admissibility of extrinsic evidence, the court must consider the principle that it is the province of the court to construe, but not rewrite a will.

Where doubt or ambiguity exist, evidence of surrounding circumstance, known to the testator at the time of making his will, are admissible for the purpose of showing testator's intent.

Extrinsic evidence is always admissible to identify a devisee or legatee since bequests are not to be defeated by more misnomers. This principle applies where the description of a will fits more than one person.

Extrinsic evidence may also be admissible to identify one where the will contemplates their future identification by methods set forth in the will.

The testator's *declaration of intent,* whether made before or after the making of a will, are alike inadmissible.

Cf. Incorporation of papers by reference.

Under the circumstances of this case, the allowance of testimony for the purpose of showing the intent of the testator as to the purposes of a corporation not in existence, or for the purpose of identifying such a corporation as the named beneficiary, could in many cases not only lead to uncertainty, misunderstanding, mistake, or imposition, but also, in effect might allow a testator to modify his will other than in the manner required by statute.

A bequest cannot be construed as executory where to do so would constitute a rewriting of the will rather than an interpretation or construction of it.

The cy pres doctrine is inapplicable where the name of the devisee has no charitable significance and the court is unable to determine the general purposes of the alleged devisee either from the will, or from any evidence in the case which the court is permitted to consider under the rules of evidence.

The rule is well settled in Maine that the lapsed portion of a residuary devise or bequest does not inure to the benefit of the other residuary beneficiaries under a residuary devise or bequest to several beneficiaries not as a class, but becomes intestate property unless the contrary intention of the testator clearly appears from the language of the will. This rule applies where a legacy is void rather than lapsed.

First Portland National Bank, Successor, Ex'r.
Drummond & Drummond

vs.

Kaler-Vaill Memorial Home *et al.*

Linnell, Perkins, Thompson, Hinckley & Thaxter for Vestry of Trinity Church of St. Augustine & Protestant Episcopal Church in Diocese of Florida & Cathedral of St. Luke; *Porter Thompson* and *Royden Keddy* for Walter Vaill; *Hutchinson, Pierce, Atwood & Allen* for Frederick Vaill, Jr.; *Ralph W. Farris, Asst. Atty. Gen.; John F. Dana pro se; Stephen S. Kaler pro se; Arthur A. Peabody & Velma G. Peabody* for Kaler-Vaill Memorial Home.

ON REPORT.

This is a bill in equity for the construction of a will. The case is before the Law Court on report and agreed statement. Case remanded to the Supreme Judicial Court in Equity for a decree in accordance with this opinion. Costs and reasonable fees to counsel for the executors and the several defendants to be fixed by the sitting justice, paid by said executors from the disputed one-fifth share and charged to its probate account.

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

SIDDALL, J. On report. This is a bill in equity brought by First Portland National Bank as successor executor of the will of Edward Griswold Vaill late of Scarborough for the interpretation and construction of the provisions of his will, and for instructions as to the disposition of one-fifth of his residuary estate upon the death of his wife. The case is before this court on report by agreement of all parties, upon the pleadings and so much of the evidence as is legally admissible, for such final decision as the rights of the parties may require.

The pertinent provisions of the will are set forth in the twelfth item thereof. After giving the residue of the testator's estate to his wife for life, the will contained the following provision:

> "12. Upon the death of my said wife, whatever of my estate then remains undisposed of, either principal or income, together with all accumulations which may have accrued to it since my decease, shall be divided into five equal parts, and the proper legal representative of my estate at that time shall convey, assign and deliver as follows:
>
> One equal part to The Cathedral Church of St. Luke's at Portland, Maine, for the upkeep of the church buildings at said Portland;
>
> One equal part to Trinity Episcopal Church of St. Augustine, Florida;
>
> One equal part to the Bishop of the Episcopal Church of the Diocese of Florida, in memory of my sister, Julia Cornelia Vaill, the same to be used as said Bishop shall decide is most expedient from time to time for the benefit of the girls in said Diocese.
>
> One equal part to the Kaler-Vaill Memorial Home located at said Scarborough for the general purposes of said Home;

> One equal part to Walter E. Vaill of Litchfield, Connecticut, provided he be living at the time of my decease."

The defendants in the bill are Kaler-Vaill Memorial Home, a corporation organized under the laws of Maine and located at Scarborough; John F. Dana and Stephen S. Kaler, executors of the will of Addie Kaler Vaill, also known as Addie K. Vaill, widow of the testator; Frederick S. Vaill, Jr. nephew and sole heir-at-law of the testator; Cathedral Church of Saint Luke, Portland, a Maine corporation, The Vestry of Trinity Church of St. Augustine, a Florida corporation, The Protestant Episcopal Church in the Diocese of Florida, a Florida corporation, and Walter E. Vaill, the residuary beneficiaries under said will other than "Kaler-Vaill Memorial Home . . ."

Frank F. Harding as Attorney General for the State of Maine also was named as a defendant, but no interest under said will is now claimed by the state of Maine.

It will be noted that the names of the defendant church corporations differ slightly from those named in the will, but no question is raised that these defendants are not those designated in the will. For convenience, the defendant Kaler-Vaill Memorial Home is hereafter called Memorial Home.

The dispute in the case concerns that one-fifth part of the residue given to "Kaler-Vaill Memorial Home located at said Scarborough for the general purposes of said Home." The record shows that the testator died on May 21, 1944. His will was dated July 17, 1941, and was duly allowed on June 6, 1944. At the time of his death the testator left a widow, Addie Kaler Vaill, also known as Addie K. Vaill, and as his sole heir-at-law, a nephew, the defendant Frederick S. Vaill, Jr. Neither the defendant Memorial Home nor any other legal entity of that or similar name existed in the state of Maine at the time of the death of the tes-

tator, or at any time prior thereto, or at any time thereafter until the incorporation of the defendant Memorial Home under the name of Kaler-Vaill Memorial Home. This corporation was organized under the provisions of R. S., 1930, Chap. 70, as amended. (Now R. S., 1954, Chap. 54.) A certificate of incorporation was filed with the Secretary of State on August 31, 1944, in which the purposes of the corporation are stated as follows:

> "To provide a suitable home for such respectable aged and needy women, residents of Scarborough, as by reason of age and other circumstances shall be deemed proper subjects for such provision, and to provide a temporary home for such convalescent women, residents of Scarborough or elsewhere, as shall be deemed proper subjects for such provision. The corporation shall not be conducted for profit and no part of its net earnings shall inure to the benefit of any member of the corporation, or any individual, interested in the activities of the corporation."

At the time of the hearing, the defendant Memorial Home offered in evidence against objection the testimony of Charlotte Stevens, a lifelong friend of Addie Kaler Vaill and a friend of the testator and said Addie since their marriage. This witness testified that the home occupied by the testator and his wife was known as the Kaler home prior to the marriage of Addie Kaler and the testator, and after the marriage it was known as the Kaler-Vaill home. She also testified that the mailbox in front of the home was marked KALER
VAILL.

This witness also testified of conversations between the testator and his wife, particularly in April, May, and June of 1941, generally relating to the use after their deaths of the home known as Kaler-Vaill home, as a home for aged women of Scarborough. Objections were duly made to the admission of this testimony.

Addie Kaler Vaill died on March 17, 1957. Her will dated April 4, 1955, was duly allowed on April 3, 1957. The defendant Memorial Home offered in evidence a certified copy of the will on the grounds "It is a fact of independent significance." Objection to the admission of this evidence was duly made. By the terms of her will, Addie Kaler Vaill, after numerous bequests, left a sizeable bequest and devise, including her homestead (known as Kaler-Vaill home) to the defendant Memorial Home. The testatrix expressed a desire that her homestead property, with such additions thereto as might later be made, be called the Kaler-Vaill Memorial Home as a permanent home for certain respectable, aged, and needy women of Scarborough and as a temporary home for certain convalescent women residents of Scarborough or elsewhere who might be deemed worthy of admission. The residue of testatrix's property was given to the Canal National Bank of Portland as trustee for the benefit of said Kaler-Vaill Memorial Home. Her will also contained a statement that her husband had left one-fifth of his residuary estate upon her death to said "Kaler-Vaill Memorial Home Corporation."

Aside from property left by the will of Addie K. Vaill to the said defendant Memorial Home, it has not at any time owned any property, real or personal, and at no time has either (1) received any income or incurred any liability, except the liabilities and expenses incident to its organization, (2) carried on any corporate business except to adopt a vote authorizing the acceptance of the bequest under Item 12 of the will of the testator, or (3) performed any of the functions or done any acts necessary to carry out the purpose expressed in its certificate of organization or otherwise, other than the acceptance of its charter.

After the death of the testator, his widow, Addie Kaler Vaill, took steps to organize the defendant corporation, Kaler-Vaill Memorial Home, and she was in her lifetime the president and one of the directors of the corporation.

The issues to be decided in this case are as follows:

1. Does the defendant Memorial Home take the one-fifth residuary share given to the "Kaler-Vaill Memorial Home located at Scarborough for the general purpose of the Home," as the designated beneficiary in said will?

2. If not, does the said Memorial Home or any charity take the said share under the cy pres doctrine?

3. If neither the said Memorial Home nor any other charity is entitled to take the disputed share, does such share become intestate property, or does it pass under the will to the remaining residuary beneficiaries?

The defendant Memorial Home maintains that it is entitled to receive the said share either as the designated beneficiary or by application of the cy pres doctrine. The executors of the will of Addie Kaler Vaill take no position on the question of whether or not the defendant Memorial Home is entitled to receive any part of the residuary estate. They do contend that if it should be decided that the said defendant Memorial Home as residuary legatee or by application of the cy pres doctrine is not entitled to said one-fifth share of the residue of testator's estate, so much of said share as does not pass to said Memorial Home should pass as intestate property, one-half to the nephew, Frederick S. Vaill, Jr., and one-half to the estate of Addie Kaler Vaill. The Cathedral Church of St. Luke takes the position that it does not desire to oppose the right of the said Memorial Home to take said one-fifth share of the residue, but if said Memorial Home cannot take, that said share should be divided among the remaining residuary legatees. The defendants Vestry of Trinity Church of St. Augustine and The Protestant Episcopal Church in the Diocese of Florida take the position that the said Memorial Home cannot take said share, and that it should be divided among the remaining residuary legatees. Walter E. Vaill takes the same position. Frederick S. Vaill, Jr., takes the position that the

said Memorial Home cannot take said share, and that it passes as intestate property to him and the estate of Addie Kaler Vaill in equal shares.

Is the defendant Memorial Home the designated beneficiary of said one-fifth share of the residue of testator's estate?

The cardinal rule to be applied in the construction of a will is that the intention of the testator when clearly expressed in the will must be given effect, provided it be consistent with legal rules.

The rule is well set forth in *Gorham* v. *Chadwick, et al.*, 135 Me. 479, 482, 483, 200 A. 500, as follows:

> "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. *Blaisdell v. Hight,* 69 Me., 306; *Torrey v. Peabody,* 97 Me., 104, 53 A., 988; *Palmer v. Estate of Palmer,* 106 Me., 25, 75 A., 130; *Spear v. Stanley,* 129 Me., 55, 149 A., 603. 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. *Cook v. Stevens,* 125 Me., 378, 134 A., 195; *Spear v. Stanley,* supra; In re *Mandell's Estate,* 252 Mich., 375, 233 N. W., 230."

In *Belding* v. *Coward,* 125 Me. 305, 308, 133 A. 689, the court said:

> "The 'pole star' of testamentary construction is the intention of the testator, when clearly expressed in the will. When so expressed, and it violates no rule of law or public policy, it must

> be given effect. It overrides precedents and technical rules of construction. *Bradbury v. Jackson,* 97 Me., 449. All rules of construction are designed to ascertain and give effect to the intention of the testator, and that intention is to be ascertained exclusively by the words of the will as applied to the subject matter under the surrounding circumstances. *Andrews v. Applegate,* 223 Ill., 535; 79 N.E., 176; 12 L.R.A., (N.S.), 661. The intention of the testator, expressed in his will, must prevail, provided it be consistent with rules of law, and this rule is one to which all other rules must bend, says Chief Justice Marshall in *Smith v. Bell,* 6 Pet., 68; 8 U.S., (L. ed.), 322. See also *Methodist Church v. Fairbanks,* 124 Maine, 187; *Barry v. Austin,* 118 Maine, 51; *Gregg v. Bailey,* 120 Maine, 263."

This principle has been enunciated so often that no other citations of authority are necessary.

The intention of the testator is that which existed at the time of the execution of the will. *Gorham* v. *Chadwick, et al., supra; N. E. Trust Co., et al.* v. *Sanger, et al.,* 151 Me. 295, 301, 118 A. (2nd) 760; *Butler* v. *Dobbins,* 142 Me. 383, 385, 53 A. (2nd) 270.

The testator's intent must be found from the language of the will, which in cases of doubt may be interpreted in the light of conditions existing at the time the will was executed.

This principle is stated in *Cassidy, et al.* v. *Murray, et al.,* 144 Me. 326, 328, 68 A. (2nd) 390, in the following language:

> "It is the intention of the testator which must prevail in the construction of a will. But that intention must be found from the language of the will read as a whole illumined in cases of doubt by the light of the circumstances surrounding its making. *Lord v. Bourne,* 63 Me. 368; 18 Am. Rep. 234; *Nash v. Simpson,* 78 Me. 142; 3 A. 53; *Davis v. Callahan,* 78 Me. 313; 5 A. 73; *Bryant v. Bryant, et als.,* 129 Me. 251; 151 A. 429."

In *Knapp, Aplt. from Decree Judge of Probate,* 149 Me. 130, 140, 99 A. (2nd) 331, our court said:

> "The intention of the testator must be gathered from the language that he used in the will. It may be sought within the 'four corners of the will.' If the language in a will is doubtful, or ambiguous, conditions existing when the will was made may be considered, if they were known to the testator and 'may be supposed to have been in the mind of the testator.' *Palmer v. Estate of Palmer,* 106 Me. 25, 28."

Among the more recent cases in which this rule has been applied are the following: *Berman* v. *Shalit,* 152 Me. 266, 268, 128 A. (2nd) 345; *New England Trust Co., et al.* v. *Sanger, et al., supra; Belfast* v. *Goodwill Farm, et al.,* 150 Me. 17, 23, 103 A. (2nd) 517; *Strout* v. *Little River Bank & Trust Co.,* 149 Me. 181, 183, 99 A. (2nd) 342; *Butler* v. *Dobbins, supra.*

In the instant case the only reference in the will, directly or indirectly, to the Kaler-Vaill Memorial Home is that contained in the twelfth item in which the testator leaves one-fifth of his remaining residuary estate to the "Kaler-Vaill Memorial Home located at said Scarborough for the general purposes of said Home." The will contains no information from which the "general purposes of said Home" may be ascertained. No organization of that name located at Scarborough or at any other place in this state was in existence until after testator's death, and no words in the will indicate that the testator contemplated the beneficiary should come into existence at some later time. On the contrary, the words used by the testator indicate the then existence of the beneficiary. Under these facts the language contained within the four walls of the will itself fails to indicate an intention on the part of the testator to make the defendant Memorial Home a beneficiary under his will.

We must therefore consider whether the right of the Memorial Home to take under the will has been established by

admissible extrinsic evidence, including statements or declarations made by the testator. Such evidence was objected to, and under the stipulation we are called upon to determine whether this evidence or any part thereof is admissible, and if so, whether it is of such a character as to show the testator's intention to make the defendant Memorial Home the beneficiary of the disputed share.

In determining the admissibility of extrinsic evidence, we must do so with the principle in mind that it is the province of the court to construe the will but not to rewrite it. We are not only concerned with the parol evidence rule but also with the provisions of our statute relating to the transmission of property by will (R. S., 1954, Chap. 169, Sec. 1), which require a will to be in writing and executed by the testator, or for him at his request, and in his presence, and subscribed in his presence by three credible attesting witnesses not beneficially interested under the will. Our courts have been zealous in upholding the right of a testator to dispose of his property as he sees fit, but have been equally zealous in safeguarding a testator from imposition or mistake by requiring a strict adherence to the requirements of the statute. The statute "clearly prescribes the method of transmitting property by will, which the court is not at liberty to ignore, although in particular instances the actual intention and desire of a person respecting the disposition of his property may be defeated by adhering to the rule prescribed." *Fitzsimmons* v. *Harmon,* 108 Me. 456, 458, 81 A. 667.

The cases previously cited establish the principle that where doubt or ambiguity exists, evidence of surrounding circumstances known to the testator at the time of making his will are admissible for the purpose of showing the testator's intent. ". . . all the surrounding circumstances of a testator, - -his family, the amount and character of his property. . ." *Bodfish* v. *Bodfish,* 105 Me. 166, 171, 73 A.

1033; "the relations between the testator and his intended beneficiaries, the amount and nature of his estate, and other relevant circumstances which legitimately tend, in cases of doubt, to show the probability of his intentions, one way rather than another." *Tapley* v. *Douglass,* 113 Me. 392, 394, 395, 94 A. 486; ". . . any evidence may be given of facts and circumstances which have any tendency to give effect and operation to the words of the will; such as the names, descriptions and designations of persons, the relations in which they stood to the testator, the facts of his life, as having been single or married one or more times, having had children by one or more wives, their names, ages, places of residence, occupation; so of grandchildren, brothers and sisters, nephews and nieces, and all similar facts." *Howard* v. *The American Peace Society,* 49 Me. 288, 295, 296. Such evidence is admitted for the purpose of enabling the court to put itself in the position of the testator at the time of the signing of the will and thereby render it better able to interpret the language used in the will.

Our court has also recognized that under certain circumstances extrinsic evidence may be introduced to establish the identity of a beneficiary. Beneficial bequests are not to be defeated by mere misnomers. In *Trust Co.* v. *Pierce,* 126 Me. 67, 69, 136 A. 289, our court said:

> "It is a familiar rule of interpretation that when the name or designation in the will does not designate with precision any person or corporation, but so many of the circumstances concur to indicate that a particular person or corporation was intended, and no similar conclusive circumstances appear to distinguish any other beneficiary, the person or corporation thus shown to be intended will take. *Preachers' Aid Society v. Rich,* 45 Me., 552; *Howard v. American Peace Society,* 49 Me., 288; *Tucker v. Seaman's Aid Society et als,* 7 Met. (Mass.), 188. Extrinsic evidence is always admissible to identify a devisee or legatee, and beneficent bequests are not to be defeated by mere

> misnomers. This rule applies to a devise or a bequest to a corporation. 40 Cyc, 1447, and cases cited; 28 R.C.L., 276. Numerous cases in support appear in notes of 47 L.R.A. (N.S.), 539, and Ann. Cas. 1915 B, 30."

Another class of cases in which extrinsic evidence is admitted to establish the identity of a beneficiary arises where the description of the devisee is clear upon the face of the will, but it is found that a legacy is claimed by more than one person whose description fits the words used in the will. *Howard* v. *The American Peace Society,* 49 Me. 288, 292.

These principles are not, however, involved in the instant case, as neither misnomer, nor the existence of two beneficiaries answering the description contained in the will are involved under the facts of this case.

Another class of cases in which extrinsic evidence is allowed to identify a beneficiary arises in cases of bequests to beneficiaries whose identity may not be determined at the time of making the will, but the will contemplates their future identification by methods set forth in the will. Thus in *Lear* v. *Manser,* 114 Me. 342, 96 A. 240, in which the testator left the residue of his estate "to such institutions as shall care for me in my last sickness," the identity of the person who cared for the testator during his last illness was shown by extrinsic evidence. The principle involved in this class of cases is not applicable to the case at bar.

There is, however, a clear distinction between the admission of extrinsic evidence of *facts and circumstances* existing at the time of the execution of the will and the admission of *testator's declaration of intent.* In the case of *Bryant* v. *Bryant, supra,* at page 258, the court said:

> "In the construction of a will, parol testimony is frequently of some assistance for the purpose of identifying the beneficiary, or the subject matter of the devise, or explaining the situation and circumstances surrounding the testator at the time of

making the will to be construed, or for the purpose of throwing some light upon the sense in which words of doubtful and ambiguous meaning were used. But the testator's declarations of intention, whether made before or after the making of the will, are alike inadmissible. 1 Greenleaf on Evidence, Sec. 230; *Farnsworth v. Whiting,* 102 Me., 296."

In the case of *Tibbetts* v. *Curtis,* 116 Me. 336, 101 A. 1023, the court upheld the full opinion of the Judge of Probate for Androscoggin County, in which he made the following statement:

"It is familiar law and not disputed, that the intention of the testator collected from the whole will and all the papers which constitute the testamentary act, is to govern; that the intent is to be sought in the will as expressed, and that the declarations of the testator before or after the will was made cannot aid the interpretation. 'It may well be doubted if any other source of enlightenment in the construction of a will is of much assistance than the application of natural reason to the language of the instrument, under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution and connecting the parties and the property devised with the testator and with the instrument itself.' *Clark v. Johnston,* (Miller, J.) 18 Wall., 493, cited and quoted in *Bradbury v. Jackson,* 97 Maine, 455, 456."

Page on Wills, Vol. 4, page 660, contains the following language:

"With the exception of cases in which language is used which seems intelligible and consistent, but which applies equally to two or more persons or things, evidence of testator's declarations, whether made before or after the will, including his instructions to the scrivener, and including declarations at the time of execution and including those declarations which are in writing, if not executed in accordance with the Statute of Wills,

> are inadmissible to show testator's actual intention, apart from, in addition to, in opposition to the legal effect of the language which is used by him in the will itself. This is true even though the evidence is offered to show that due to mistake the will does not express the testator's true intentions, or that the person drafting the will erroneously failed to carry out the testator's instructions."

The strictness with which the requirements of the statute relating to the making and execution of wills is viewed is well illustrated by the so-called "Incorporation By Reference Cases." In the case of *Sleeper* v. *Littlefield,* 129 Me. 194, 151 A. 150, one of the questions involved related to the admission as a part of the will of the testatrix of a book marked "A" on the inside cover and referred to in the will by a direction to her executor to distribute among her friends, and carry out the directions "as will be found in a little book marked A on inside cover, which will be found with my will." The court in that case said on page 199:

> "If we were to lay down the rule in this state that papers or memoranda may be incorporated in a will by reference, the evidence in this case comes short of proving that the book 'marked A' was in existence and compiled at the time the will was executed. *Fitzsimmons v. Harmon,* 108 Me., 456, 458. In fact there is internal evidence in the book itself that it was not. Where such incorporation by reference is permitted, compliance with the statute of wills requires that the paper or document sought to be incorporated by reference must be complete and in existence at the time and clearly described in the will. *Bryan's Appeal,* 77 Conn., 240; *Newton v. Seaman's Friend Soc.,* 130 Mass., 91; *Bemis v. Fletcher,* 251 Mass., 178; Est. of Young, 123 Cal., 339; 68 L.R.A., Anno. 354."

In the instant case we too are concerned with the requirements of the statute of wills. We are asked to admit testimony to show an intent on the part of the testator that

the disputed gift should go to a corporation not organized until after his death, and for purposes which were not set forth in the will. The testator easily could have indicated in his will that the beneficiary was to be subsequently organized, and also could have clearly indicated the purposes for which the bequest was to be used. This was done by the testator in the case of *Swasey* v. *American Bible Society*, 57 Me. 523, 524, in which the court held valid a bequest made in the following language:

> "I give and bequeath and leave in trust to the first Calvinist Baptist Society that may be organized in what is now the first school-district in the town of Bucksport, one thousand (1,000) dollars, for the purpose of buying a lot of land and erecting thereupon a meeting-house for the use of said society, . . ."

Obviously an organization not in existence cannot have defined purposes. The will itself fails to indicate the nature of the purposes intended by the testator, and contains no reference to any writing in existence at the time of its execution from which such intended purposes may be determined. Under the circumstances of this case, the allowance of testimony of the nature given by the witness, however truthful it may have been, for the purpose of showing the intent of the testator as to the purposes of a corporation not in existence, or for the purpose of identifying such a corporation as the named beneficiary in the will, could not only lead in many cases to uncertainty, misunderstanding, mistake, or imposition, but also in effect might allow a testator to modify his will other than in the manner required by the statute of wills. This is the very situation which our statute seeks to avoid, and to allow this testimony in the present case would in effect nullify the provisions of our statute relating to the making and execution of wills. We in no way infer that the testimony of the witness, if admissible,

is sufficiently definite, clear, and certain to accomplish the purpose intended.

The testimony of the witness, Charlotte Stevens, to the allowance of which objections were made, is excluded.

The defendant Memorial Home also offered in evidence a certified copy of the will of Addie Kaler Vaill, testator's widow. The testator's will contained no reference whatever to this document. As a matter of record, this will was not in existence at the time of the execution of testator's will, as it was not executed until April 4, 1955, almost fourteen years after testator's will and over eleven years after his death. As previously stated, Mrs. Vaill's will gave real and personal property to the defendant Memorial Home and contained a statement that her late husband Edward Griswold Vaill had left one-fifth of his residue estate on her death "to said Kaler-Vaill Memorial Home Corporation."

We know of no principle of the law of evidence which warrants the admission of this evidence in the present case, and it is therefore excluded.

The defendant Memorial Home argues that the bequest to the "Kaler-Vaill Memorial Home is an executory bequest; a gift to begin in the future on delivery of the property by the personal representative of the testator. It claims that in view of the fact that it was in existence as a corporation at the date of the death of the testator's widow, it is entitled to take the disputed share. We do not consider it material to the issues of this case to determine whether the bequest was an executory bequest to take effect in the future or a vested remainder. In either case we are confronted with the following circumstances: (1) the will on its face indicated an existing corporation, (2) the defendant Memorial Home was *not* in existence at the time of testator's will, and the purposes of the corporation could therefore not have been known to him at that time, or at

any time before his death, (3) the will contained no indication as to the nature of the purposes to which the testator intended his gift to be applied. To allow the defendant "Memorial Home" to take the one-fifth share of the residue as the beneficiary, under the terms of this particular will, and under the circumstances of this case, would in effect constitute the rewriting of the will rather than an interpretation or construction of it.

We therefore conclude that the defendant Memorial Home does not take as the designated beneficiary under the will.

Does the defendant Memorial Home or any charity take said share under the cy pres doctrine?

Our court in the recent case of *Pierce* v. *How,* 153 Me. 180, 136 A. (2nd) 510, has rendered an exhaustive opinion involving this doctrine. The doctrine is very adequately explained on page 188, 189, of that case, in part as follows:

> "The doctrine of cy pres is the principle that equity will, when a charity is originally or later becomes impossible or impractical of fulfillment, substitute another charitable object which is believed to approach the original purpose as closely as possible. It is the theory that equity has the power to mould the charitable trust to meet emergencies."

Before the cy pres doctrine can be applied, three prerequisites must be met. 1. The court must find that the gift creates a valid charitable trust. 2. It must be established that it is to some degree impossible or impractical to carry out the specific purpose of the trust. 3. There must be a general charitable intent. *Pierce* v. *How, supra; Grigson, et al.* v. *Harding, et al.,* 154 Me. 146.

A liberal policy in the construction of charitable trusts has always been maintained in this state. *Bates* v. *Schillinger,* 128 Me. 6, 17, 145 A. 388.

The recent Maine case of *Grigson, et al.* v. *Harding, et al.,* 154 Me. 146, contains an exhaustive review of cases in this and other jurisdiction relating to the validity of trusts for charitable purposes. Recognizing that the liberality of the courts in construing such trusts is not without qualification, the court in that case on page 150, 151, said:

> "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. . . . . 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. . . . . '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."

What constitutes a valid charitable trust?

A valid charitable bequest must be for a purpose recognized in law as charitable. *Bates* v. *Schillinger, supra.* On page 18 of this case our court defined a charitable trust in the following language:

"The definition of a 'charitable trust' or a 'public charity' as given in *Jackson v. Phillips,* supra, has been adopted and applied in this state. *Bills v. Pease,* supra; *Haskell v. Staples,* 116 Me., 103. 'A charity in the legal sense, may be more freely defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burden of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature.' "

"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, supra.*

"If the charity *is definite in its objects,* is lawful, and is to be regulated by a trustee appointed for the purpose, it is sufficient." (Emphasis ours.) *Lewis Pierce, Admr., in Equity,* 109 Me. 509, 511.

"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, 39 A. 475.

"An invalid charitable trust will not be cured by an application of the cy pres doctrine. Thus where the trust is invalid because the court can not ascertain the purpose of the testator or is unable to carry out his plans the cy pres doctrine has no application." The Cy Pres Doctrine in the United States, by Edith L. Fisch, Sec. 5.01.

Having in mind that the purposes for which the bequest may be used must be charitable and charitable only, does the language in the testator's will giving a share of the residue of his estate to the "Kaler-Vaill Memorial Home located at said Scarborough for the general purposes of said Home" create a charitable trust? We are compelled to answer in the negative. For reasons already given the will of Addie Kaler Vaill and the testimony of Charlotte Stevens are excluded from consideration. We must therefore rely upon the terms of the will itself to determine whether the gift was for a purpose recognized by law as charitable. The name "Kaler-Vaill Memorial Home" has no charitable significance, and we are unable to determine the "general purposes of said Home" either from the will or from any other document in existence at the time of the execution of the will, or from any evidence in the case which we are permitted under the rules of evidence to consider.

We must therefore conclude that no valid charitable trust was created as to the disputed share, and that the first prerequisite for the application of the cy pres doctrine has not been met. It is unnecessary to consider the other remaining essentials to the application of this doctrine.

Neither the defendant Memorial Home nor any charity takes the disputed share under the cy pres doctrine.

The remaining question concerns the disposition of the disputed share. Does it go to the other residuary beneficiaries or does it pass as intestate property?

It may be well to note that before disposition of the residue of his property, the testator had in previous items in his will devised certain real estate in Portland to his wife for life and upon her death to Frederick S. Vaill, Jr. He also made specific bequests to certain churches, including one of the residuary beneficiaries, The Salvation Army, The Children's Hospital, the Animal Refuge League, and bequests to certain friends. The residue was given to his wife for life with power to use the principal for her support, with the request that she pay to Walter E. Vaill, if living at testator's decease, $500 annually during his lifetime, provided such annuity would not limit the support of his wife.

Property not disposed of by will shall be distributed as the estate of an intestate. R. S., 1954, Chap. 169, Sec. 2.

The rule is well settled in Maine, and in a majority of other jurisdictions as well, that the lapsed portion of a residuary devise or bequest does not inure to the benefit of the other residuary beneficiaries under a residuary devise or bequest to several beneficiaries not as a class, but becomes intestate property unless the contrary intention of the testator clearly appears from the language of the will.

> " 'When a legacy lapses which is a part of the residue it cannot fall again into the residue. It must pass as intestate property.' Rugg, C.J., in *Crocker v. Crocker,* 230 Mass., 482. See also to same effect *Morse v. Hayden,* 82 Maine, 230; *Lyman v. Coolidge,* 176 Mass., 9; *Dresel v. King,* 198 Mass., 548; *Kerr v. Dougherty,* 79 N.Y., 346; *Hard v. Ashley,* 117 N.Y., 606; *Burnet v. Burnet,* 30 N.J., Eq., 595; 40 Cyc., 1519, and cases cited - - 44 L.R.A., N.S., 811 (Note).
>
> The defendant, however, says that this rule does not apply when the residuary bequest is to a class of persons, but that upon the death of one or more it passes to those of the class living at the decease of the testatrix. This is true. In such case there

> is no lapse in any proper sense. The individual dies but the class designated as the taker of the residue remains in esse.
>
> But the legacy in the instant case is plainly not to a class. It is to four named persons 'in equal parts share and share alike.' The individuals were not connected with the testatrix or with one another by common kinship. Apparently they had nothing in common except the good fortune of being legatees in the same will.
>
> When legatees are designated by name and the character of the estate bequeathed is indicated by the words used in Mrs. Morgan's will, 'in equal parts share and share alike,' there is a strong presumption of testamentary intent that the legatees shall take as individuals and not as a class. *Blaine v. Dow,* 111 Maine, 483, and cases cited; *Hay v. Dole,* 119 Maine, 424; 28 R.C.L., Page 261; *Dresel v. King,* supra, 44 L.R.A., N.S. 811 (Note). This presumption may indeed be controlled by plain language in the will manifesting a contrary intent. But no such controlling language is found in Mrs. Morgan's will. *Fairbank's Appeal,* 104 Maine, 333, and *Estate of Brown,* 86 Maine, 572, are upon this ground plainly distinguishable from the instant case." *Strout v. Chesley,* 125 Me. 171, 173, 174.

For a discussion of the same principle, see also *Davis et al.* v. *McKown,* 131 Me. 203, 160 A. 458; Page on Wills, Vol. 4, p. 195; Annotations in 28 A. L. R. 1237, 139 A. L. R. 868, and 36 A. L. R. (2nd) 1117; 57 Am. Jur. 977; 96 C. J. S., 1081 *et seq.*

Technically the bequest in this case is classified as void rather than lapsed. The rule stated applies, however, to either a void or a lapsed legacy. 4 Page on Wills, p. 210; 96 C. J. S. 1081.

Having in mind the foregoing principles, a careful examination of the will in all its parts satisfies us that the resi-

duary beneficiaries, three church organizations, an individual, and the "Kaler-Vaill Memorial Home," took under the terms of the will as individual or separate beneficiaries rather than as a class, as tenants in common rather than as joint tenants. We are unable to discover any clear intention on the part of the testator that the failure of one legacy should increase the shares given to the other beneficiaries. Indeed, it seems to us the direction of the testator that upon the death of his wife, the remaining estate "shall be divided into five equal parts" and one equal part given to the five named beneficiaries carries a strong implication that he did not intend to increase the share of any beneficiary beyond one-fifth of the residue.

The disputed share passes as intestate property to those entitled to receive such property under the laws of descent. At the time of his death, the testator left a widow, Addie Kaler Vaill, since deceased, and as his sole heir at law, a nephew, the defendant Frederick S. Vaill, Jr. The disputed share is to be distributed equally to the estate of Addie Kaler Vaill and Frederick S. Vaill, Jr.

Case remanded to the Supreme Judicial Court in Equity for a decree in accordance with this opinion. Costs, and reasonable fees to counsel for the executors and the several defendants to be fixed by the sitting justice, paid by said executors from the disputed one-fifth share and charged in its probate account.

JOSEPH R. CIANCHETTE IN THE NAME OF
EDWARD S. TITCOMB, TRUSTEE IN BANKRUPTCY
OF MAINE STATE RACEWAYS

vs.

ROBERT A. VERRIER, ET AL.

Cumberland. Opinion, May 8, 1959.

Res Adjudicata. Equity. Fraud. Estoppel by Judgment. Restatement Sec. 68. Bankruptcy.

The doctrine of *res judicata* applies when the matter in controversy has once been inquired into and settled by a court of competent jurisdiction; the same matter cannot be again drawn into question in another suit between the same parties or their privies; this principle includes not only issues actually tried but also those which might have been tried. But the principle does not apply where issues are expressly reserved since *identity of issues* is an essential element of the doctrine.

Section 68 (1) of the Restatement of the Law of Judgments, states where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action . . . (with stated exceptions not applicable to instant case).

The doctrine of *res judicata* and collateral estoppel by judgment are applicable to bankruptcy proceedings.

The issue of fraudulent conspiracy is not actually litigated under the rules relating to collateral estoppel by judgment (1) by the bankruptcy court's approval of a lease, where the real issue is abuse of the court's discretion and not the existence or lack of existence of a fraudulent conspiracy (2) by the bankruptcy court's dismissal of reorganization proceeding, where the actual issue was the feasibility of reorganization not fraudulent conspiracy (especially where trustee proceedings were exparte and plaintiff did not have cross-examination rights) and (3) by a denial of plaintiff's petition to restrain a foreclosure action and order a disclaimer, where the issue of fraudulent conspiracy was expressly reserved.

Where the matter of the existence or non-existence of a conspiracy is a mere evidentiary fact in other proceedings and not one of

ultimate finding, there is no estoppel by judgment on the issue of fraudulent conspiracy even though the determination of other facts properly in issue is dependent upon such evidentiary facts.

ON APPEAL.

This is a bill in equity before the Law Court upon appeal from a decree allowing the defendants pleas of estoppel by judgment and dismissing plaintiff's bill. Decree reversed and cause remanded for such action as may be appropriate.

C. Keefe Hurley,
Clair Cianchette,
James L. Reid, for plaintiff.

Robinson, Richardson & Leddy,
Verrill, Dana, Walker, Philbrick & Whitehouse,
Hutchinson, Pierce, Atwood & Allen, for defendants.

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

DUBORD, J. This cause is before the court upon plaintiff's appeal from a decree of the sitting justice allowing defendants' pleas of estoppel by judgment and dismissing plaintiff's bill in equity.

Pursuant to permission granted by the United States District Court, Joseph R. Cianchette brought a bill in equity, dated January 3, 1956, in the name of Edward S. Titcomb, duly appointed trustee in bankruptcy of Maine State Raceways, a Maine corporation. Joseph R. Cianchette alleges in the bill that he is creditor and stockholder of Maine State Raceways and that he brings the bill on behalf of himself and all others similarly situated.

The bill alleges that the defendants "did willfully and intentionally scheme and conspire at a time when some of

the defendants occupied a fiduciary relationship with respect to Maine State Raceways and the others acting with full knowledge thereof, and by the use of corporate and other devices, to defraud the said Maine State Raceways by obtaining legal title to extremely valuable race track properties by unlawful means and placing same in the name of defendant, Scarborough Downs (a Maine Corporation), and causing the said Maine State Raceways to become a bankrupt corporation to the detriment of its creditors and stockholders."

Other allegations in the bill, and evidence disclosed by the transcript, indicate that it was the contention of Joseph R. Cianchette that title to the race track properties, known as Scarborough Downs, was acquired by the present owner through fraud and deceit.

The bill prays for

(1) An accounting on the part of the defendants;

(2) That defendants be declared to be trustees for Maine State Raceways in respect to all profits, cash, properties or securities found to have been realized or received by the defendants in connection with their operation and control of the race track property at Scarborough Downs;

(3) That the defendants, Scarborough Downs and Scarborough Holding Company be decreed to be trustees with respect to all properties relating directly or indirectly to the race track properties for Maine State Raceways, or the trustee in bankruptcy of Maine State Raceways;

(4) That defendants be ordered to convey the assets of the aforesaid race track properties to Maine State Raceways or to the trustee in bankruptcy for the benefit of its creditors and stockholders; and

(5) That the defendants be enjoined from operating the aforesaid race track.

Upon motions filed by the defendants, Rebecca Goldfine, Executrix, Morton Goldfine and Sidney Goldfine, the actions against these defendants were dismissed for want of jurisdiction.

The other defendants filed pleas of collateral estoppel by judgment inserted in their answers to the bill.

The pleas of the remaining individual defendants and corporate defendants were as follows:

"II. And Defendant Robert A. Verrier further pleads to the Plaintiff's Bill, and for plea says: On the 1st day of October, 1951, Maine State Raceways filed a debtor's petition for reorganization under Chapter X of the Federal Bankruptcy Act. (11 U.S.C. Sections 501-676.) This petition listed in Paragraph 11 the possibility of the Corporation having 'assets consisting of claims against officers, directors and others not shown on the books of the corporation.'

"The issue of the claims of the corporation against these defendants was an essential element of the hearings on the petition for reorganization. Furthermore, such issue was actually brought into the hearings by the attorney for Plaintiff Cianchette and the debtor corporation, C. Keefe Hurley, and testimony was taken under oath in relation thereto.

"The allegations in the present Bill in Equity relating to the alleged unlawful fraud or scheme perpetrated by the defendants were alleged in essentially the same manner and to the same effect in the aforesaid reorganization proceedings. Comparison of the allegations in the Plaintiff's Bill with those made in the reorganization proceedings as shown in the record on appeal is set forth in Exhibit A attached hereto and made a part hereof.

"The United States District Court for the District of Maine on April 1, 1952 appointed as Trustees in the afore-

said reorganization proceedings Franklin G. Hinckley, Esq., of Portland, Maine, bar, and Cornelius J. Russell of Bangor. The Trustees were specifically ordered by said court as follows:

> '9.d. To institute, prosecute and defend, intervene in or become a party to such other actions or proceedings in law or in equity, in State or Federal Courts, as may in their judgment be necessary or advisable for the protection, maintenance and preservation of the property and assets of the within Estate.'
>
> '13. That said trustees be, and they hereby are, directed to investigate the acts, conduct, property, liabilities and financial condition of said Debtor, the operation of its business and the desirability of the continuance thereof, and any other matter relevant to the proceedings or to the formulation of a plan . . .'

"These aforesaid trustees represented by counsel, Edmund P. Mahoney, Esq. and Barnett I. Shur, Esq., pursuant to the foregoing orders, examined all persons having any knowledge bearing thereon, including this Defendant, at hearings on July 9th, 10th, 15th and 21st of 1952. This testimony was not made a part of the record on appeal. All parties to the present Bill in Equity were present either in person and/or represented by counsel at all the aforesaid hearings.

"The aforesaid trustees reported to the United States District Judge as instructed on July 28, 1952. Their findings was as follows:

> 'Many mistakes were made which were to be expected in the operation of a new enterprise, but with exceptions of isolated instances of alleged misconduct, which so far remain unproven, no substantial evidence of fraud has been discovered.' (Record on Appeal, page 580)

"The aforesaid trustees investigated said defendants and their relations with Maine State Raceways prior to leasing

the properties of said corporation and reported the results of such investigation to the District Court. The Court in an Opinion dated April 15, 1952 stated:

> 'They (the trustees) concluded Mr. Verrier, Mr. Mourkas and their attorney, Mr. Mayo S. Levenson, and the Goldfines, were persons in whom this Court could repose complete confidence.'
>
> '. . . I feel also that everyone should be satisfied that the above-named parties have demonstrated that they are alert and worthy of the confidence of the Court.' (Record on Appeal, pages 237-238)

"This opinion was later expanded in formal manner by the reported opinion and decision of the District Court, dated June 19, 1952, 105 F. Supp. 620. (Record page 477.)

"The District Court approved and confirmed each and every report of the trustees in its entirety, and on January 16, 1953 dismissed the reorganization proceedings notwithstanding the contention that the Corporation, namely, Maine State Raceways, had a valuable asset in the form of a cause of action against these defendants. The decisions of the District Court were appealed to the United States Court of Appeals for the First Circuit by Joseph R. Cianchette, the real plaintiff in this action. In that appeal, the said C. Keefe Hurley again raised the issue of the alleged fraud practiced by these defendants against Maine State Raceways, praying that all the orders of the District Court be vacated, and that the matter be returned to the District Court for further reorganization proceedings.

"All offers of proof of fraud and conspiracy, rulings thereon, and all opinions and orders of the Referee, the Special Master, and the District Judge relating to the same were specifically included in the Statement of Points, twenty-one in number, relied on by the present plaintiff in his appeal. (Record of Reorganization Proceedings, p. 1063).

"The Court of Appeals for the First Circuit of January 15, 1954 affirmed *per curiam* all the actions of the aforesaid District Court for Maine, thus judicially determining that there was no basis for the charges of fraud alleged in that action and identical with those alleged in the present Bill.

"All issues raised by the Bill in this proceeding have been raised at least once in prior proceedings to which all the parties hereto or their predecessors in interest, were also parties and all such issues have been determined adversely to the claims of the Plaintiff in the present suit. For these reasons the prosecution of the present suit in equity is barred and estopped."

The pleas of the individual defendants were numbered paragraph II and the pleas of the corporate defendants were numbered paragraph III.

The cause was heard by the sitting justice upon a complete record of all prior proceedings in the bankruptcy matter of Maine State Raceways, including motions, petitions, hearings before bankruptcy referees, special masters, and the United States District Court, (together with transcripts of the evidence in several of the hearings), decrees, orders and reports of the referees, special masters, and the trustees in reorganization, orders and opinions of the United States District Court, and the complete record of appeal of the plaintiff herein from the orders and decrees of the referees and of the United States District Court to the Circuit Court of Appeals of the United States for the First Circuit.

After a hearing the sitting justice sustained the pleas of estoppel by judgment and dismissed the bill.

The findings of the court, dated January 30, 1958, are as follows:

> "By agreement of counsel this cause came to be heard upon bill of complaint, plea II, plea III in

the pleadings of corporate defendants, evidence and arguments.

"Upon consideration thereof the Court finds that the facts relied upon by the defendants in their plea II, plea III in the pleadings of corporate defendants are proved, that plea II of the defendants, plea III of the corporate defendants should be allowed and that the bill of the plaintiffs should be dismissed.

"Defendants shall draw a decree in their favor in accordance with these findings, file it and give notice."

The final decree entered on February 24, 1958 was as follows:

"This cause came on to be heard November 1, 1956, and further heard this day, and was argued by counsel and THEREFORE upon consideration thereof and pursuant to the findings of this Court in this cause, dated January 30, A.D. 1958:

"It is ORDERED, ADJUDGED and DECREED as follows, viz.:

"That the pleas of the corporate defendants No. III and pleas of the individual defendants No. II are allowed, and that the Bill of the plaintiff be dismissed."

The record in this long pending case consists of nearly 2000 printed pages and there were so many motions and petitions, orders and decrees recorded that it is extremely difficult for one not conversant with all of the steps of the litigation to keep clearly in mind the chronology of events.

Without attempting to detail all of the facts which may be pertinent, the following statement of facts may be of assistance in understanding the issues.

Maine State Raceways was incorporated in December 1949, and built the Scarborough Downs race track in the spring of 1950.

On October 19, 1950, a corporation known as Scarborough Holding Company, Inc., which had acquired existing mortgages of the property of the corporation by assignment, foreclosed the mortgages.

On December 19, 1950, Scarborough Downs, Inc., was incorporated. On January 3, 1951, creditors of Maine State Raceways instituted involuntary proceedings in bankruptcy against the corporation. These bankruptcy proceedings are still pending and are docketed as #23,467 in the United States District Court for the District of Maine, and all of the proceedings occurring in the bankruptcy court prior to the filing of the instant bill in equity bear this number.

Scarborough Holding Company, Inc., leased the track to Scarborough Downs, Inc., for the 1951 racing season.

On October 1, 1951, Maine State Raceways filed a voluntary petition for reorganization under Chapter X of the Bankruptcy Act.

On April 1, 1952, the United States District Court for the District of Maine appointed two trustees in reorganization and authorized them to take possession of the assets of Maine State Raceways and to lease the track for the 1952 racing season.

Two days later, Joseph R. Cianchette, who had been permitted to intervene in the proceedings, as a shareholder and creditor, filed a motion to vacate the order of the District Court of April 1, 1952 authorizing the trustees in reorganization to take possession of the assets and to lease the track.

After extensive hearings the United States District Court denied the motion. In re Maine State Raceways, 105 F. Supp. 620.

On July 28, 1952 and August 7, 1952, the trustees in reorganization filed reports. The last report recommended

that no plan of reorganization be attempted with reasons set forth. The reports of the trustees were accepted by the Judge of the United States District Court and on January 19, 1953, the United States District Court ordered that the reorganization proceedings be dismissed.

On January 23, 1953 the present plaintiff and others filed a petition to restrain the Scarborough Holding Company, Inc., from foreclosing on the property of Maine State Raceways, pending determination by the trustee in bankruptcy of whether or not to prosecute the claim which is the subject of the instant case. The petition prayed in the alternative for an order disclaiming the right of the bankrupt estate to prosecute the claim and authorizing other parties in interest to do so. The referee denied this petition and the United States District Court by opinion dated October 1, 1953, and reported as In re Maine State Raceways, 115 F. Supp. 263, affirmed the decision of the referee.

Subsequently, Joseph R. Cianchette appealed to the United States Circuit Court of Appeals from all the orders previously entered by the referees in bankruptcy, the special masters and the United States District Court.

By a *per curiam* decision reported as *Joseph R. Cianchette et al.* v. *Hinckley et al., Trustees,* 208 F. (2nd) 799, the orders of the United States District Court for the District of Maine were affirmed.

On June 28, 1954, the present trustee in bankruptcy was appointed and on September 28, 1955, the plaintiff was authorized by the referee in bankruptcy to institute the present suit.

The defendants contend that the issue of fraudulent conspiracy set forth in the bill now before us has been determined adversely to Joseph R. Cianchette in three different legal proceedings and that he is now estopped by the judg-

ments in these proceedings from again raising the same issue.

The defendants say that when the motion filed by Joseph R. Cianchette on April 1, 1952 asking that the order authorizing the trustees in reorganization to take possession of the assets of Maine State Raceways and to lease the track be vacated, was denied by the United States District Court, this adjudication estopped proceedings in the instant action. It is the contention of the defendants that this motion of April 1, 1952 was based upon the alleged fraudulent conspiracy now the subject of the instant bill.

Defendants say further that the decree of the United States District Court accepting the reports of the trustees in reorganization, necessarily involved an adverse adjudication of Cianchette's claim that the trustees in reorganization had a valuable asset in the form of a cause of action against the present defendants for an alleged fraudulent conspiracy; and so they aver that this adjudication also acts as an estoppel.

They further say, that when the United States District Court denied Cianchette's petition for an injunction against foreclosure of the mortgages on the race track, that this also embraced a finding that there was no fraudulent conspiracy as alleged by Cianchette; and they argue that this also results in estoppel.

They further argue that the decision of the United States Court of Appeals affirming all prior orders of the United States District Court is an adjudication which estops the plaintiff in the instant action.

The plaintiff answers these contentions by saying that the doctrine of collateral estoppel is not applicable, because:

(1) The plaintiff in the present suit was not a party to the prior proceedings and is not in privity with a party to the prior proceedings;

(2) That the prior proceedings were not final judgments;

(3) The question of fact here involved (the alleged fraudulent conspiracy) was not determined in the prior proceedings, and was not essential to the prior decisions; and

(4) The question here involved was expressly reserved and not decided in the prior proceedings.

The presiding justice had before him the same record which is available to this court. The only issue, therefore, for our determination, relates to the correctness of the legal conclusions which he arrived at from the evidence disclosed by the record.

It seems essential that we should give attention to what is meant by "collateral estoppel by judgment" as distinguished from *"res judicata."* It is conceded by both sides that the doctrine of *res judicata* is not applicable to the issues in the instant case, and that the cause is to be decided by a determination of whether or not the doctrine of collateral estoppel by judgment is applicable.

Both doctrines viz.: *"res judicata"* and "collateral estoppel by judgment" are based on the theory of estoppel. However, much confusion appears to have arisen in court decisions as well as in various textbooks as to a true distinction between the two theories which preclude relitigation.

The following quotations will serve to explain the confusion previously referred to and also to point out the distinction between *"res judicata"* and "collateral estoppel by judgment."

"The doctrine of res judicata as stated in many cases is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction." 30A Am. Jur. § 324 Res Judicata, at 371.

"The doctrine of res judicata may be said to inhere in the legal systems of all civilized nations as an obvious rule of expediency, justice, and public tranquility. Public policy and the interest of litigants alike require that there be an end to litigation which, without the doctrine of res judicata, would be endless. The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate, the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. The doctrine of res judicata not only puts an end to strife, but produces certainty as to individual rights and gives dignity and respect to judicial proceedings. It is considered that a judgment presents evidence of the facts of so high a nature that nothing which could be proved by evidence aliunde would be sufficient to overcome it; and therefore it would be useless for a party against whom it can be properly applied to adduce any such evidence, and accordingly he is estopped or precluded by law from doing so." 30A Am. Jur. § 326 Res Judicata, 373.

"At the outset of the consideration of the doctrine of res judicata, it must be noticed that there is a wide difference between the effect of a judgment as a bar to the prosecution of a second action upon the same claim, demand, or cause of action, and its effect to preclude the relitigation of particular facts or issues in another action between the same parties on a different claim or cause of action. The

> rule precluding the relitigation of the same cause of action and the rule precluding the relitigation of the same issues do not necessarily have the same consequences. However, the distinction between the two rules has not always been recognized and both rules are frequently included within the use of the term 'res judicata' and the term 'estoppel by judgment.'" 30 A Am. Jur. § 327 Res Judicata, 375.
>
> "The doctrine of res judicata has been declared to be a branch of and grounded in the law of estoppel, and the opinions applying the doctrine of res judicata, which speak of the party being thereby 'estopped' are so numerous as to make citation thereof neither necessary nor desirable. The term 'estoppel' is frequently used both in connection with the rule which precludes the relitigation of particular facts and issues, and the rule which precludes the relitigation of particular causes of action. Sometimes the phrase 'collateral estoppel' or 'estoppel by judgment' is used to describe the first rule. On the other hand, 'estoppel by judgment' has been used to describe the effect of a judgment to bar subsequent actions founded on the same cause of action, and the phrase, 'estoppel by verdict,' to describe the effect of the former proceeding to preclude further litigation on the particular facts on which the jury necessarily made findings in the former action. The latter doctrine is sometimes regarded as arising by way of estoppel, rather than by way of strict res judicata. However, although there may be cases in which both doctrines may be applied, the general principle of estoppel, while akin to, must be distinguished from, the doctrine of res judicata, since it is not governed by the same limitations." 30A Am. Jur. § 328 Res Judicata, 376.

A good example of the fact that confusion has been caused by misapplication of the terms is given by the following quotation from 50 C. J. S. § 593, at 13, which seeks to distinguish *"res judicata"* from the doctrine of "estoppel by judgment."

> "The law of res judicata is frequently treated as a branch of the law of estoppel, and both terms have been used indiscriminately to indicate the force and effect of judgments and decrees. Such treatment has been criticized as a confusing and erroneous misapplication of terms which should be distinguished, and the recognized basis of the rule of res judicata is different from that of technical estoppel."
>
> "It has been pointed out that the difference between the effect of a judgment as a bar to the prosecution of a second action on the same claim or demand and its effect where the subsequent action involves a different cause of action or claim is often overlooked, with the result that the law is sometimes misapplied. As is discussed infra §§ 657, 716, in an action on the same claim or demand the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim, but also as to every matter which might and should have been litigated in the first suit, while in an action on a different claim or demand only those facts or matters are conclusively established by the former adjudication which are essential to, or shown to be involved in, the judgment or decree rendered. The so-called estoppel in the former class of cases frequently is termed 'estoppel by judgment,' while that in the latter class of cases is termed 'estoppel by verdict.' In some cases, however, the rule which forbids the relitigation of a particular fact or matter in dispute between the parties has been denominated 'estoppel by judgment,' although the subsequent action is on a different cause of action; in such cases the term 'res judicata,' as distinguished from 'estoppel by judgment,' is applied to the rule that a judgment bars a second action on the same cause of action."

In describing the general principle of *res judicata* our own court has held in numerous opinions that when the matter in controversy has once been inquired into and

settled by a court of competent jurisdiction it cannot be again drawn in question in another suit between the same parties or their privies. It has also been held that the principle includes not only issues actually tried, but those that might have been tried. Our court has also pointed out that the rule does not apply where the issue is expressly reserved and it has been held that the essential element of the doctrine is identity of the issue. Our court has said that where issues are different, *res judicata* cannot be upheld and that the rule is conclusive only to such facts without proof of which it could not have been rendered. *Bray* v. *Spencer,* 146 Me. 416, 418, 82 A. (2nd) 794; *Mitchell* v. *Mitchell,* 136 Me. 406, 413, 11 A. (2nd) 898; *Burns* v. *Baldwin-Doherty Co.,* 132 Me. 331, 333, 170 A. 511; *Susi* v. *Davis,* 133 Me. 354, 358, 177 A. 610; 134 Me. 308, 312, 186 A. 707; *Edwards* v. *Seal,* 125 Me. 38, 40, 130 A. 513.

> "It is wholly immaterial to the question of the conclusiveness of a judgment, whether the issue between the parties was raised by the averments of the plaintiff or of the defendant. The real point is, was the fact in issue the subject of judicial controversy, relied upon either in the support or the defence of the action, and comprehended within the verdict at the former trial? If so, it is, by inference of law, conclusively settled between the parties by the judgment." *Walker* v. *Chase,* 53 Me. 258, 262.

See also *Kelsey* v. *Irving,* 118 Me. 307, 311, 108 A. 100; *Arsenault* v. *Brown Company,* 122 Me. 52, 55, 118 A. 738; *Bowker Fertilizer Company* v. *Cluskey,* 124 Me. 384, 130 A. 209.

See the case of *United States* v. *Silliman,* 167 F. (2nd) 607, for an excellent opinion which deals with the distinction between the ordinary term of *"res judicata"* and "collateral estoppel." The decision in this case is to the effect that where a question of fact essential to a judgment is actually litigated and determined by a valid final judgment,

the determination is conclusive between parties in subsequent action on a different cause of action.

> "Under the doctrine of collateral estoppel, an aspect of res judicata, though the causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in one action is likewise conclusive between the same parties in all subsequent actions, and this applies to a state court judgment upon a contested issue which is sought to be applied in a suit between the same parties in a federal court." *Vanderveer* v. *Erie Malleable Iron Company,* 238 F (2nd) 510, 512.
>
> "In any suit at law, or in equity, a judgment by a court of competent jurisdiction in a prior action between the same parties is generally conclusive, under the doctrine of res adjudicata, as to issues tried or that might have been tried. If for a different cause of action it is conclusive by estoppel as to matters actually litigated." *Bray* v. *Spencer, supra.*
>
> "Where the parties are the same but the cause of action, or issue, is different, the prior judgment is only conclusive upon such issues as actually tried, and the burden is on the party setting up an estoppel by judgment to show that the same issue was involved and determined, on its merits, in the prior proceeding." *Bray* v. *Spencer, supra.*

The rule of collateral estoppel by judgment is succinctly set forth in § 68 (1) Restatement of the Law of Judgments, Page 293 as follows:

> "Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action, except as stated in sections 69, 71 and 72." (Exceptions inapplicable to issues in instant case.)

That the doctrines of *res judicata* and collateral estoppel by judgment are applicable to decisions in bankruptcy proceedings is indicated by a long line of decisions. See *Abrott* v. *Athanasatos,* 61 P. (2nd) 982; *Baker Clothes, Inc.* v. *Miller* (N. Y.), 144 N. Y. S. (2nd) 11; *McCulloch* v. *Davenport Savings Bank,* 226 F. 309; *Blanks* v. *West Point Wholesale Grocery Company* (Ala.), 142 So. 49; *McMahon* v. *Pithan* (Iowa), 147 N. W. 920; *Underwood* v. *Lennox,* 136 N. E. 343; *Feiring* v. *Gano* (Colo.), 168 P. (2nd) 901; *Wiswall* v. *Campbell,* 93 U. S. 347; 135 A. L. R. 695; 8 C. J. S. 1314, Bankruptcy, § 444; 6 Am. Jur. (Rev. Ed) 848, Bankruptcy, § 512.

As the paramount issue for our determination is whether or not the question of the existence of a fraudulent conspiracy on the part of the defendants was litigated and determined, we give consideration first to the third contention of the plaintiff to the effect that the question of fact here involved, viz., the alleged fraudulent conspiracy was not determined in the prior proceedings and was not essential to the prior decisions.

To briefly recapitulate the three proceedings relied upon by the defendants as a basis for collateral estoppel are as follows:

(1) The decision of the United States District Court, dated June 19, 1952, found in 105 F. Supp. 620 denying the motion of Joseph R. Cianchette to vacate the order authorizing the trustees in reorganization to take possession of the assets of Maine State Raceways and to lease the track,

(2) The order of the United States District Court dated January 19, 1953 accepting the report of the trustees in reorganization and dismissing the proceedings for reorganization, and,

(3) The opinion of the United States District Court dated October 1, 1953 to be found in 115 F. Supp. 263

denying the petition of Joseph R. Cianchette to restrain the foreclosure of mortgages on the property of Maine State Raceways and in the alternative for an order disclaiming the right of the bankrupt estate to prosecute the claim and authorizing other parties in interest to do so.

In the decision of the District Court of the United States to be found in 105 F. Supp. 620, the court said at page 624:

> "The ultimate issue is whether or not there was an abuse of discretion on the part of the Court in its approving the lease of the debtor's property, executed by the trustees to Scarborough Downs, Inc."

The court further said at page 627:

> "In the opinion of this Court this is an unusual case and immediate action was mandatory. It appeared that any further delay would have made it impossible to operate Scarborough Downs during the 1952 season, which undoubtedly would have precluded the formulation of any feasible plan of reorganization."

The court further said at page 628:

> "The action of the Court in approving the lease, executed by the trustees, must stand unless an abuse of discretion clearly appears - - - that is, arbitrary action not justifiable in view of the situation and circumstances."

It is clear, therefore, that although it was the contention of Joseph R. Cianchette that the court had abused its discretion in approving the lease because the lessee was an improper party and that he questioned the character of the principal owners of the lessee, the real issue was not the existence or lack of existence of a fraudulent conspiracy, but solely whether or not the court had abused its discretion. In other words, the court might have approved a lease to parties whose character might be questionable and yet

might have concluded that it was in the best interests of Maine State Raceways to approve the lease which had been executed.

We conclude, therefore, under the rules applicable to collateral estoppel by judgment that the matter of the alleged conspiracy was not actually litigated. *Susi* v. *Davis, et al.*, 133 Me. 354, 358; 177 A. 610; *Bray* v. *Spencer, supra.*

Passing now to the second proceedings relied upon by the defendants, viz., the acceptance of the report of the trustees in reorganization, the actual issue before the court was whether or not reorganization was feasible. In ruling that reorganization was not feasible and that the proceedings for reorganization should be dismissed, there was no ruling on the part of the court upon the issue of fraudulent conspiracy.

As a matter of fact, the proceedings before the trustees in reorganization were ex parte and merely for the purpose of discovery. These proceedings were not controlled in any manner by Joseph R. Cianchette and he did not have the right of cross examination.

Although there is a statement in the report of the trustees in reorganization to the effect that no substantial evidence of fraud was discovered, his finding on the part of the trustees is not necessarily the basis for the decision of the court which was merely to the effect that reorganization was not feasible.

Considering now the third proceedings relied upon by the defendants which culminated in the opinion of the United States District Court to be found in 115 F. Supp. 263, this opinion seems to conclusively point out that the issue of fraudulent conspiracy was not determined, but rather reserved.

We quote from this opinion at page 265:

> "After a hearing on the petition on January 28, 1953, the Referee denied the first prayer on

> the ground that the property under consideration, against which foreclosure proceedings were brought, was not in the possession or custody, constructive or otherwise, of this Court, and further it was not in custody of this Court at the time of the filing of the original petition in bankruptcy. Therefore, the Referee held that this Court lacked the power to issue a restraining order affecting the said property.
>
> "*With reference to the second prayer, the Referee concluded that the relief prayed for was premature because Maine State Raceways has not as yet been adjudged a bankrupt; that no receiver in bankruptcy had been appointed; that since there had not been an adjudication, no trustee had or could be appointed; and that therefore there was no proper officer of the Court who could properly make an examination and investigation to determine what rights, if any, were vested in the estate and also to determine what action should be taken thereon.*" (Emphasis supplied.)

It was these findings of the referee which were affirmed by the court.

That the ultimate issue of fraudulent conspiracy was reserved is also indicated by the statement of the court in 105 F. Supp. 620 at 630 as follows:

> "Regardless of the relationship, unless it can be clearly and convincingly shown by the intervenors that the debtor and its creditors were to be damaged by the execution of the lease, the action of the Trustees, approved by the Court, must stand. It is, therefore, immaterial to the issue to determine the relationship between the lessee and the debtor."
>
> "The general rule relied on by the libelee has no application to a case where the issue was not decided by the trier of facts, but expressly reserved by him for hearing in another case."
> *Mitchell* v. *Mitchell,* 136 Me. 406, 413.

Undoubtedly, throughout the various hearings, counsel for Joseph R. Cianchette advanced the contention of the existence of a fraudulent conspiracy. However, the position of the plaintiff in the instant case is well taken that the fact of the existence or non-existence of a conspiracy was only an evidentiary fact rather than one of ultimate finding of fact.

See Note (P) under § 68, Restatement of the Law of Judgments, page 312:

> "The rules stated in this Section are applicable to the determination of facts in issue, but not to the determination of merely evidentiary facts, even though the determination of the facts in issue is dependent upon the determination of the evidentiary facts."

It is significant that in none of the rulings, findings and opinions of the referees and of the Judge of the United States District Court is there any specific finding that a fraudulent conspiracy did or did not exist.

The ruling of the United States Circuit Court of Appeals 208 F. (2nd) 799, sustaining the orders of the District Court merely affirmed the previous findings, viz., (1) (a) That there had been no abuse of discretion in the approval of the lease made by the trustees in reorganization; (b) that the question of the relationship between the lessee and the debtor had not been determined,

(2) That a reorganization of Maine State Raceways was not feasible, and

(3) (a) The court was without power to restrain the foreclosure, and (b) that the petition for the relief prayed for was premature.

The record indicates that on August 10, 1955, Joseph R. Cianchette petitioned the court for authority to bring the action which is now before this court.

The Referee in Bankruptcy set a hearing on this petition on September 13, 1955, and notice was given. The trustee in bankruptcy filed an answer joining in the prayers of Joseph R. Cianchette. While there is nothing in the record to indicate how many of the defendants were represented by him in his capacity as attorney, the record does show that the defendant, Mayo S. Levenson was present at the hearing, at which time, the petitioner's counsel advanced arguments in support of his contention that his claim was not a frivolous one.

It is perhaps significant that the defendants did not advance any contention at that time that Joseph R. Cianchette was estopped as a result of the court proceedings now invoked as a reason for the estoppel.

The Referee in Bankruptcy in his opinion and order said:

> "That there is reasonable grounds for believing that a possible cause of action exists in favor of the Trustee in Bankrutpcy of Maine State Raceways Corporation against Robert A. Verrier, Thomas Mourkas, Mayo S. Levenson, the estate of Morris Goldfine, Morton Goldfine, Sidney Goldfine, Scarborough Holding Company, a corporation, and Scarborough Downs Corporation, a Maine corporation."

The Referee further found that:

> "An appropriate action in law or in equity against the above-named parties, based upon such alleged cause of action, would not be frivolous litigation."

We therefore conclude that the issue of the alleged fraudulent conspiracy has not been litigated. The instant case was heard by agreement of counsel upon defendants' pleas of collateral estoppel and we assume that the remaining plea of laches and the plea that Joseph R. Cianchette is barred from prosecuting the instant suit upon the equitable maxim that "he who comes into equity must come with clean hands" still remain for determination.

We wish to commend counsel for all parties on the very excellent and helpful briefs presented to the court.

The decree below is reversed and the cause remanded for such action as may be deemed appropriate.

So Ordered.

GERARD LAVERRIERRE
vs.
CASCO BANK & TRUST COMPANY

Cumberland. Opinion, May 14, 1959.

Trover. Conversion.

It is well established law that any act or dominion wrongfully exerted over property in denial of the owner's right or inconsistent with it, amounts to a conversion; there need be no manual taking or removal in order to constitute a conversion.

ON EXCEPTIONS.

This is an action of conversion before the Law Court upon exceptions to the acceptance by the Superior Court of a referee's report. Exceptions overruled.

Wheeler & Campbell, for plaintiff.

Woodman, Skelton, Thompson & Chapman, Benjamin Thompson, for defendant.

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

SIDDALL, J. This was an action of trover to recover the value of seven roof trusses and fifteen roof sections which the plaintiff alleged had been converted by the defendant.

The case was referred with the right of exceptions as to matters of law reserved to both parties.

The referee found that the defendant had converted the seven roof trusses and assessed damage in the sum of $2800 plus interest.

The defendant filed objections to the acceptance of the report. The objections were overruled, and the referee's report was accepted by the presiding justice. Exceptions to the acceptance of the report were seasonably taken by the defendant. The referee found no conversion of the fifteen roof sections, and we are concerned here solely with the alleged conversion of seven trusses.

The record shows that in 1953 Ellis C. Snodgrass, Inc., hereafter called Snodgrass, acquired title to certain trusses and roof sections which had been a part of a building located in the shipyard at South Portland. Twelve trusses and thirty-three roof sections, after demolition of the building into which they were incorporated, were stored by Snodgrass in an area of the West Yard of the Greater Portland Development Commission in said South Portland. In 1953 Snodgrass sold seven trusses and fifteen roof sections to Hunnewell Trucking Co., hereafter called Hunnewell, and five trusses and eighteen roof sections to Deep Sea Products, Inc., hereafter called Products, Inc., which was at that time indebted to the defendant, and as security for such indebtedness had given to the defendant a chattel mortgage containing an after acquired property clause. Several months afterwards defendant foreclosed this mortgage. Hunnewell sold to one Roberts the seven trusses and fifteen roof sections which it had purchased from Snodgrass, and Roberts in turn sold this property to the plaintiff. On January 12, 1956, after foreclosure of its chattel mortgage, the defendant made a sale of trusses and roof sections, and received a check from the purchaser reciting

upon its face that it was in payment of "twelve trusses and roof sections." Later, a bill of sale dated back to January 12, 1956, was given by the defendant to the purchaser, specifying that the defendant had sold to the purchaser on January 12, 1956, twelve trusses and fifteen roof sections.

After the sales by Snodgrass the roof sections and trusses were allowed to remain on the premises, and nothing was done to protect them from the elements.

Snodgrass paid rent on the land on which the personal property was located until it sold the property. After Products, Inc. made its purchase from Snodgrass it commenced paying rent. After foreclosure of the personal property mortgage given by Products, Inc., the defendant paid rent until January 12, 1956, at which time the purchaser of the personal property from the defendant started to pay rent. No rent was paid by the plaintiff or by its predecessors in title, Roberts or Hunnewell.

In the spring of 1957 the purchaser of the property from defendant started to dismantle the roof sections. It dismantled some of the roof sections, but at the time suit was brought the twelve trusses were still undisturbed on the premises.

It is unnecessary to set forth in detail the defendant's exceptions. It is sufficient to state that these exceptions are now confined to the issue of whether or not under the facts in the case, the referee was in error in finding a conversion of the plaintiff's property by the defendant.

It is well-established law that any act or dominion wrongfully exerted over property in denial of the owner's right, or inconsistent with it, amounts to a conversion. *McPheters* v. *Page,* 83 Me. 234.

> "But if one person interferes with the goods of another, and without his consent undertakes to dispose of them as having the property, he does it at

> his peril; and there need be no manual taking or removal in order to constitute a conversion. It is sufficient if he exercises an authority over the goods against the will and to the exclusion of the owner, by an unlawful intermeddling with them, or assumes upon himself the property and right of disposing of them. This is abundantly established by the authorities cited by the counsel for the plaintiff." *Webber* v. *Davis,* 44 Me. 147, 152.

The defendant, however, claims that the mere giving of a bill of sale covering trusses owned by the plaintiff without the interruption of the possession or the right of possession on the part of the plaintiff does not constitute a conversion.

The referee in his report has so well stated the pertinent facts of the case applicable to this claim, and his conclusions of law relating thereto, that we quote with approval the following extract from his report:

> "The defendant bank's purported sale of twelve trusses, which included the seven trusses of the plaintiff, to Commercial Riggers, Inc. on January 12, 1956, was a tortious conversion, as of said date, of the seven trusses which plaintiff owned and to which plaintiff had the right to immediate possession.
>
> Ordinarily, a wrongful sale of another's personal property, because it is an assertion of dominion over the property in defiance of, or inconsistent with, the owner's rights is a tortious conversion. This is true even though the wrongful sale is made in good faith or because of honest mistake.
>
> The defendant asserts, however, that in this case the sale by the defendant on January 12, 1956, even though wrongful, cannot be deemed a conversion. The reason given is that defendant accomplished nothing more than a paper sale of the seven trusses of the plaintiff without any delivery of possession or other physical interference with

the trusses. In support of this contention, defendant relies on dicta in two Maine cases:

Davis v. Duffum, 51 Me. 160, 163

Piano Co. vs. Allen, 101 Me. 218, P. 221

My conclusion is that these dicta are not properly applicable to the facts of the present case. The dicta contemplate a situation in which the owner of a chattel, wrongfully sold by another, has clear possession and control of it at the time when it is thus sold. The dictum is so stated explicitly in *Davis vs. Duffam,* supra:

> 'The giving of a bill of sale of personal property *in the possession of a third person who is the owner of the same,* without any other interference therewith or delivery thereof, is not as against such owner a conversion. . .' (p. 163) (underscoring ours)

The point is that when there is no actual, or apparent, control over the chattel by the person purporting to sell it, it would be incongruous to conclude that the mere giving of a bill of sale, without more, is an assertion of a dominion sufficiently inconsistent with the owner's rights to constitute a conversion.

In the present instance, however, the seven roof trusses, wrongfully sold by the defendant bank, were not in the clear possession, or dominion, of their owner, the plaintiff, at the time the defendant sold them to Commercial Riggers. If any person had the physical control of the trusses at that time, it was the defendant, if only because the defendant was paying rent for the premises on which the trusses were located and thus had the power to exclude all persons from entering the premises and dealing with the trusses. Indeed, so it appeared to the purchaser of the trusses - - it being important to note that Commercial Riggers, Inc, upon completion of the purchase itself com-

> menced the payment of rent for the premises on which the trusses were situated.
>
> We are here dealing with a situation in which there were verbal assertions of ownership and right to possession by the bank, accompanied by overt actions of dominion by the making of a sale and the acceptance of money in payment for the purchase, - - all coupled with an apparent ability on the part of the defendant bank to exercise dominion and all of the facts indicating a determination by the defendant bank to control the property for its own benefit and purpose."

These findings of fact by the referee are fully justified by the evidence, and his legal conclusions drawn therefrom are correct.

We are not called upon here to determine whether or not the mere act of giving a bill of sale of property in the possession of the owner constitutes a conversion. In the instant case not only did the evidence fail to show clear possession on the part of the owner, the plaintiff, but on the other hand it indicated possession and control on the part of the defendant. The evidence also showed assertions of ownership on the part of the defendant and a clear intent on its part to exercise dominion over the property of the plaintiff, and the apparent ability to do so, culminating in the sale of plaintiff's property evidenced by a bill of sale. Under these facts there was a clear conversion by the defendant of the seven trusses.

The acceptance of the referee's report by the presiding justice was proper.

The entry will be

Exceptions overruled.

HAZEL NEVICO
vs.
MARTIN J. GREELEY

JULIAN NEVICO
vs.
MARTIN J. GREELEY

Cumberland. Opinion, May 15, 1959.

Negligence. Exceptions. New Trial.

No exceptions lie to the action of a presiding justice on a motion for a new trial addressed to him. This rule applies where the court denies, then *sua sponte* reconsiders and grants the motion for new trial because of its failure to instruct the jury as to the wording and meaning of an applicable statute. (When the court ordered the new trial it incorporated by reference the content of R. S., 1954, Chap. 113, Sec. 60 which carried its conclusion that justice demanded a new trial.)

ON EXCEPTIONS.

This is an action of negligence before the Law Court upon exceptions to the reconsideration and granting of a new trial by the presiding justice. Exceptions dismissed.

John J. Flaherty, for plaintiffs.

William B. Mahoney,
James R. Desmond,
Lawrence P. Mahoney, for defendant.

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

WEBBER, J. These two cases, tried together, arose out of an automobile accident and resulted in verdicts for the defendant. The plaintiffs seasonably filed motions for new

trial with the presiding justice which were denied. The plaintiffs then, and within the time allowed by statute, filed motions for new trial addressed to the Law Court. The presiding justice then *sua sponte* reconsidered the motions addressed to him and entered in each case an order which contained the following language:

> "The presiding Justice having reconsidered sua sponte the motion heretofore addressed to him and having concluded that justice demands a new trial,
>
> NOW THEREFORE, in the event that plaintiff elects to withdraw his motion addressed to the Supreme Judicial Court, IT IS HEREBY ORDERED that under the provisions of Sec. 60 of Chapter 113 of the Revised Statutes 1954 a new trial be granted."

The docket entries show that the plaintiffs promptly withdrew their motions addressed to the Law Court. Defendant then sought to obtain review of the orders of the presiding Justice by way of exceptions. His extended bill of exceptions was allowed "if allowable." The plaintiffs here by motion seek to have the exceptions dismissed as not properly before the Law Court.

The defendant readily concedes that under ordinary circumstances no exceptions lie to the action of a presiding justice on a motion for a new trial addressed to him. R. S., 1954, Chap. 113, Sec. 60; Rule 17 of Revised Rules of Supreme Judicial and Superior Courts, 147 Me. 470. He contends, however, that there must necessarily exist an unstated right to review by exceptions where it is apparent on the face of the record that the justice below lacked jurisdiction to order a new trial. He further argues that such is the situation in the instant case. Briefly stated, his argument is that the only reason motivating the presiding justice to reconsider his decision upon the motions was his failure to instruct the jury as to the wording and meaning

of an applicable statute. Since the authority to grant a new trial is narrowly limited by R. S., 1954, Chap. 113, Sec. 60 to the situation in which "in his opinion, the evidence demands it," the justice below, says the defendant, lacked jurisdiction to grant a new trial *for any other reason.*

It is unnecessary here to analyze either the strength or weakness of the defendant's legal hypothesis, since we cannot on the facts of this case accept the premise upon which it is based. It is true, and the bill of exceptions so informs us, that the presiding justice *sua sponte* raised the question of reconsideration at a conference with counsel in chambers and then indicated that he was disturbed by his own failure to instruct the jury with reference to the statute. When later, however, he ordered the new trial, he incorporated by reference the content of R. S., 1954, Chap. 113, Sec. 60 into his decision and gave as the only additional reason for his action his conclusion "that justice demands a new trial." We are satisfied that in so wording his order, he ruled and intended to rule that the provisions of that section of the statute were satisfied and that in his opinion the evidence, when viewed in the light of the applicable law, required a contrary verdict and therefore a new trial. This action was clearly within his jurisdiction and no exceptions lie thereto.

The entry will be in each case,

Exceptions dismissed.

DEBORAH A. BEAN
PRO AMI RITA BEAN
vs.
RAYMOND W. BUTLER
* * * * * *
RICHARD E. BEAN
vs.
RAYMOND W. BUTLER

Androscoggin. Opinion, May 18, 1959.

Negligence. Pedestrians. Children. Sudden Appearance. Duty.

Under the "sudden appearance" doctrine the driver of a car who is obeying the laws of the road is not generally liable for injuries received by a child who darts in front of the car so suddenly that the driver cannot stop or otherwise avoid injuring him.

Where the driver of a car is aware of the presence of a child or children near or adjacent to the highway or should reasonably be expected to know that children are in the vicinity, he must exercise reasonable and proper care for their safety.

ON EXCEPTIONS.

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

Berman & Berman, for plaintiff.

John Platz, for defendant.

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

TAPLEY, J. On exceptions. These cases were tried together before a jury at the March Term, A. D. 1958 of the Superior Court for the County of Androscoggin, within and for the State of Maine. One action sought damages by the

plaintiff, Deborah A. Bean, a minor, for injuries sustained as a result of having been struck by an automobile driven by the defendant, and the other action by Richard E. Bean, father of the minor, seeking consequential damages. At the conclusion of all the testimony, defendant presented motions to the presiding justice for directed verdict in favor of the defendant in both cases. The motions were granted and, to the ruling of the presiding justice in granting the motions, plaintiffs excepted.

The accident took place on High Street, a public street in Auburn, Maine. The defendant was proceeding in the operation of his motor vehicle in a northerly direction on and along High Street. The area is residential. Deborah, the minor plaintiff, was a little girl of 2½ years and lived with her family in a tenement house on the easterly side of High Street, opposite a school playground. At the time of the accident Deborah was in the company of an older sister who was 5 years of age. The two girls were standing between two parked cars on the easterly side of the road. The older sister safely negotiated the distance across High Street from east to west but Deborah in her attempt to do so was struck by defendant's automobile. Counsel for plaintiff in their brief argue question of due care on the part of minor child and of the older child who accompanied her. Defendant's counsel concedes that the jury could properly find plaintiff child was in the exercise of due care in view of her tender age, so there remains no necessity for us to consider this question.

The law is settled in this State that if on the evidence, when taken in its most favorable light for the plaintiff, a jury would be justified in finding for the plaintiff, then the direction of a directed verdict for the defendant is erroneous. The rule is well stated in *Ward* v. *Merrill,* 154 Me. 45, at page 47:

> "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."

Much law has been written concerning the responsibilities of a motorist where children are concerned. There are many and varied cricumstances and conditions under which children of tender years are injured by being struck by motor vehicles. Under some circumstances, like those obtaining in *Bernstein* v. *Carmichael,* 146 Me. 446, there is no liability on the part of the driver. The *Bernstein* case concerned a young boy 6 years of age who was found unconscious under the running board of an automobile parked at the curb. The defendant had passed the parked car and stopped within a few feet. Both grandparents who were with the child testified they had heard two thumps and a screeching of the brakes. No witness saw the boy crossing or attempting to cross the road or that the automobile struck him. The court in its opinion, on page 451, said:

> "Automobiles should be driven at all times with a degree of care commensurate with attending circumstances, but one driving along such a highway as that here involved is under no duty to anticipate children dropping from trees, or running into his path from between motor vehicles parked along the curbs."

There is a line of cases holding the driver is not responsible for injuries to a child when the child suddenly darts out from behind a parked car into the path of an oncoming automobile under circumstances where the driver is unable to see the child until he is in the path of the car or his presence in the street could not be reasonably foreseen. This type of situation has been termed the "sudden appearance doctrine." Blashfield, Cyclopedia of Automobile Law and Practice, Vol. 2A, Sec. 1498:

> "Drivers or owners of motor vehicles are not insurers against all accidents wherein children are injured. Accordingly, a driver proceeding along a street or highway in a lawful manner using ordinary and reasonable caution for the safety of others, including children, will not be held liable for striking a child whose presence in the street could not reasonably be foreseen. He is not required to anticipate the appearance of children in his pathway, under ordinary circumstances, from behind parked automobiles or other obstructions.
>
> Thus, when a motor vehicle is proceeding upon a street at a lawful speed, and is obeying all the requirements of the law of the road and all the regulations for the operation of such machine, the driver is not generally liable for injuries received by a child who darts in front of the machine so suddenly that its driver cannot stop or otherwise avoid injuring him."

Under other circumstances, conditions arise which confront the driver of a car whereby the presence of children creates a responsibility on the part of a motorist to use extreme care and to anticipate that a child might suddenly appear from behind a parked car or other object and into the path of the vehicle. A driver of a motor vehicle, upon observing the presence of a child of tender years near the highway, must alert himself to the possibility that the child may suddenly attempt a crossing of the street and the motorist has the duty to have his car under such control that he can promptly stop it should the child make the attempt to cross. *Hamlin* v. *N. H. Bragg & Sons,* 128 Me. 358. Where a driver of a motor vehicle is aware of the presence of a child or children near or adjacent to the highway or should reasonably be expected to know that children are in the vicinity, he must exercise reasonable and proper care for their safety. This situation is aptly illustrated by school children going to and from school. The characteristics of young children are well known and the likelihood of them,

without thought on their part, running across a highway in the path of oncoming traffic must reasonably be expected, thus requiring of the motorist a complete control of his vehicle to prevent injury to the child. In light of the evidence as developed in this case, what legal duty, if any, did the defendant have toward the minor plaintiff? Was he exercising that due care required of him under all of the circumstances? There is no problem as to speed because no one testified that the defendant was driving his car other than at slow speed. We are not concerned with contributory negligence but only with the question of negligence of the defendant. The defendant testified that he was proceeding along High Street at a slow rate of speed when he saw a little girl in a red coat darting across in front of him when he was approximately 25 feet away from her. He then continued along his way until he was stopped by an oncoming motorist at a point not far distant from where the accident happened. It was then he first knew that he had struck the plaintiff child. He never saw her nor did he notice any unusual motion of his car such as would be expected by the wheels passing over the body of the child. He had no thought that another child might be following the first child although he appreciated the fact that he had passed a school zone sign, was approaching a school zone and that it being a week day school was apt to be in session. He said that at that particular time of the day he thought that the children would be in the school building. This in substance is the defendant's version of the accident. Looking at the plaintiff's side of the case, we find a witness in the person of one Robert G. Tabor who was driving his car along High Street toward the defendant. Mr. Tabor testified that he saw the child in a red coat cross the street in front of his car and that of the defendant and that, "The other little child came out of the yard, I saw it myself, and the right front and right rear wheels went over it. The car kept on

going and I stopped him and asked if he knew he had hit a child."

A police officer of the Auburn Police Department talked with the defendant after the accident and the following is what the officer testified to concerning the conversation between himself and the defendant:

> "A. He told me he was proceeding northerly on High St. and that a little girl, two little girls had started to cross the street but one had turned back and the other one had ran across the street, and he applied his brakes, and somebody tooted their horn at him for him to stop. He said he stopped and went back and found he had hit a little girl."

According to the record, a jury could find from the testimony that the defendant was aware of and had notice that two children were in the act of crossing the street, one of them completing the crossing and the other, being the plaintiff, starting to cross but turning back. The defendant in his testimony takes the position he never saw the plaintiff child before striking her although his statement to the officer shows otherwise and this statement, in conjunction with the testimony of Mr. Tabor, would be sufficient to justify a jury finding that the defendant under the circumstances would be reasonably expected to see the child before impact.

The instant case bears some similarity, in its factual aspect, to *Morel, et al.* v. *Lee,* 33 S. W. (2nd) 1110 (Ark.). In the *Morel* case Mr. Morel and his chauffeur were driving on a public street at a speed of 10 or 15 miles an hour. There were two cars parked on the side of the street. One of the parked cars started into the street whereupon Mr. Morel's chauffeur stopped the car. At this point a boy, 11 years of age, ran from behind the parked cars and across the street. After the boy passed the Morel car it started up

and as it did a child of 3½ or 4 years came from behind the parked cars and was struck by the Morel car. The court said on page 1112:

> "- - - - - - he was not driving *it* an excessive rate of speed, he did not see the little boy before striking him, his attention being concentrated on the larger boy, who also came from behind the standing car on the west side of the street, passed in front of his car and on to the east side of the street, fearing lest he might attempt to return and be injured. He knew that people lived along the street, and that children played about and crossed over it, saw the larger boy run across the street in front of his car from west to east, and watched him until he got entirely across, not looking to see whether other children were attempting to follow him across; and the jury could have found that he was negligent in so doing, not exercising reasonable care to avoid injury to the little boy, following the other one, whose presence he should have anticipated."

Reference is made to an annotation in 30 A. L. R. (2nd) beginning on page 9, where a most comprehensive treatment will be found on a motorist's duty to children.

There is some controversial evidence relative to the adequacy of the brakes on the defendant's car. The rule is well established that the question of defective brakes becomes germane only when the defect has causal connection with the injury. See annotation in 170 A. L. R., page 611. According to the record in this case the defendant was not aware of the fact that he had struck the plaintiff child and had no knowledge of it until he was so advised by a witness. There is lacking any connection between the use or non-use of the alleged defective brakes and the injuries sustained by the plaintiff child so this question of the inadequacy of the brakes becomes immaterial.

The defendant's statement as made to the investigating officer establishes that he was aware of the presence of the

plaintiff child and that, she being of tender years, great care and caution should be exercised to avoid injury to her should she suddenly retrace her steps and follow her sister across the street. This and other evidence in the case raises a question for jury determination as to whether or not under all of the circumstances the defendant was in the exercise of due care.

The entry in each case will be,

Exceptions sustained.

WEBBER, J. (DISSENTING)

I am unable to agree with the result reached in the opinion. Because I feel that the decision of the court will have far reaching consequences with relation to the duty of motorists to children on sidewalks and in yards adjacent to streets, some explanation of the reasons which prompt a contrary view may be helpful.

Where the evidence is without selective application as between two factual theories, on one of which the defendant is free of any negligence, the jury may not be permitted to conjecture, surmise or speculate as to what may have occurred. *Jordan* v. *Portland Coach Co.*, 150 Me. 149. A mere scintilla of evidence will not suffice to take the case to the jury. *Beaulieu* v. *Portland Co.*, 48 Me. 291, 296. Is there more than a scintilla here? The justice below concluded that there was not and I am satisfied that his ruling was correct. What is the evidence? An alleged admission by the defendant made to a police officer after the accident contains the following:

> "(R. 83) * * * two little girls had started to cross the street but one had turned back and the other one had ran (sic) across the street * * *."

But where, we may properly ask, did this turning back take place? On the sidewalk, or in an adjacent yard, or in

the gutter between parked cars, or in the street in front of defendant's car? We are not told. If the plaintiff "turned back," where did she go and how far did she travel away from possible danger? And where was the defendant's car when the turning back occurred with relation to the plaintiff? The evidence is silent. Quite significantly, perhaps, neither of the disinterested eye witnesses presented by the plaintiff observed that either child "turned back." One recalled only that the plaintiff "came out of the yard" while the other had the plaintiff standing concealed from the defendant between two parked cars. Neither gave any testimony suggesting that the defendant was afforded any opportunity whatever in a very brief time sequence to avert the collision.

Two facts are not disputed—that there were cars parked along the side of the street from which the plaintiff emerged, and that the defendant was proceeding very slowly. It is apparently conceded that the only thing the defendant did not do was *to stop his car.* The court must be of the opinion that the defendant had a duty to stop, since there is no other possible basis for a jury finding of negligence. But is the mere presence of children in the area sufficient to raise a duty to stop, or must there be more? If the motorist must stop and wait because children are nearby and may run into the street in front of his car, how long must he remain stopped before proceeding ahead? Or may the operator proceed slowly and with caution as this defendant did? Our court has clearly held that a motorist need not anticipate that children will suddenly and without warning dart from between parked vehicles directly into the path and under the wheels of an automobile. *Bernstein* v. *Carmichael,* 146 Me. 446. Where, as here, the evidence fails to show, either directly or by reasonable inference, either where the plaintiff was or where the defendant was with relation to each other at any given moment

or that the latter had any reasonable opportunity to stop his car and thereby avert the collision, a verdict should be directed. The jury should not be permitted to guess.

In my view the opinion of the court makes the motorist an insurer of the safety of small children who may be near enough to the traveled portion of a street to be able, suddenly and without warning, to dart in front of his car in such proximity as to make a collision inevitable. I would overrule the exceptions.

STATE OF MAINE
vs.
RALPH E. BENSON
AND
STEPHEN GREENLAW

Cumberland. Opinion, May 22, 1959.

Assault and Battery. Trespass. Self Defense. Credibility. Harmless Error.

A person assaulted, when without fault, may stand his ground and repel force with force to the extent which seems to him reasonably necessary to defend himself.

Resistance must not exceed the bounds of defense.

The right to use force does not exist in the first instance in ejecting a trespasser who has peaceably entered.

If a trespasser uses actual force in gaining entrance a request to leave is not necessary, nor is it necessary where it would be useless, or dangerous, or could not be effectively made.

Instructions given by the trial court should state the law applicable to the particular facts in issue, which the evidence of the case tends to prove; abstract propositions, even though correct, should not be given.

ON EXCEPTIONS.

This is a criminal action before the Law Court upon exceptions to portions of the charge of the presiding justice and his refusal to give certain requested instructions. Exceptions overruled.

Arthur Chapman, Jr., County Attorney,
Clement F. Richardson, Asst. County Attorney, for State.

William Hutch,
Basil Latty, for defendants.

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

DUBORD, J. These two respondents were indicted for assault and battery on one William Reagan, on August 3, 1957. They were tried together and found guilty by a jury. The presiding justice thereafter found that the offenses were of a high and aggravated nature.

The case is before us on exceptions by the respondents to certain portions of the charge of the presiding justice and to the refusal of the presiding justice to give a certain requested instruction to the jury.

It appears from the evidence that the respondents, accompanied by the wife of one of them, had frequented a number of places in the vicinity of Portland where intoxicating liquors in the form of beer and ale were dispensed. The respondents admitted having consumed some beer or ale, but contended the amount consumed was small in spite of the duration of the time they spent in the so-called beer parlors.

At the time of the assault, William A. Reagan, Jr., a Portland police officer, resided at 27 Anderson Street, in

the City of Portland. It appears that on another street running parallel to Anderson Street is Cleeve Street, and at number 27 on Cleeve Street there resided at the time in question one Marjorie McDonald, who plays a role of some interest in the drama which ensued.

The Reagans after listening to a rather well known television program, which concluded at 1:15 a.m. were preparing to retire. Mr. Reagan, who was suffering from some pain in one of his legs, was already undressed and in bed applying heat to his leg. Mrs. Reagan was in the act of disrobing. The Reagan children had long since gone to bed and were asleep.

Shortly after 1:15 on the morning of August 3, 1957, the Reagans heard a loud noise down stairs. Mrs. Reagan immediately put on her dress and started for the front hall. She put on the light and went down stairs where she was confronted by the respondent, Benson. Mrs. Reagan testified that she had bolted the door before preparing to retire for the night and that Benson had forced his way in by pushing the door with such force as to loosen the bolt. Upon inquiry as to the purpose of his presence, he said he was looking for Margie, whereupon she informed him there was no Margie on the premises, told him to leave and called her husband. Mr. Reagan came down promptly carrying his policemen's night stick or billy club. The evidence is somewhat confused as to just what ensued, but the Reagans testified that without further provocation, Benson struck Reagan violently in the mouth. As a result of this assault, Reagan struck back with his club. During the fracas the Reagans contend that they repeatedly asked Benson to withdraw and leave the house. However, he was very shortly joined by the other respondent, Greenlaw. One of the respondents, or both of them wrested the club from Reagan and he testified that Benson struck him with the club upon the head with such force as to break the club in

two pieces. The Reagans testified to other acts of physical violence upon Reagan. The latter was very seriously injured and was in the hospital for five days and had to remain away from his employment for twenty-three days.

The respondents gave the following explanation for their entrance into the Reagan home.

It seems, according to them, that they had concluded to go to Margie's home and by mistake instead of going to 27 Cleeve Street went to 27 Anderson Street. Both respondents testified, and they were supported by Mrs. Benson, that upon arriving at 27 Anderson Street, they could see a woman in the Reagan home on the second floor by the window. They said that the car window was rolled down and one of the respondents shouted to the woman, who must have been Mrs. Reagan, according to their story, "Is Margie here? Is Margie home?" To this the woman answered. "Margie? Oh, yes, just a minute. I will come down and let you in."

Then after being admitted by the woman, who was Mrs. Reagan, immediately Benson was attacked and Greenlaw went to his rescue.

In the light of all the evidence, the stories told by the respondents and by the wife of one of the respondents is so highly improbable and incredible as to be unworthy of belief. Certainly the jury was warranted in rejecting their story of how the episode began. It is also of importance to note as bearing upon their credibility that one of the respondents admitted a conviction of larceny and the other respondent admitted one or more convictions for larceny as well as convictions for two other very serious crimes.

Before the jury retired the respondents took exceptions to the following portions of the charge of the presiding justice:

> "When one goes on the land of another without invitation or license he is there unlawfully as a trespasser and the owner may take reasonable measures to remove him. The first duty of the trespasser is to retreat to a lawful position."
>
> "One who has an opportunity to withdraw and fails to avail himself of it is thereafter unlawfully where he has no business to be, and therefore cannot claim self defense."

These constitute the basis for the first two exceptions now before this court.

The respondents also requested the presiding justice to charge the jury as follows:

> "If you find that there was any hostility on the part of a witness against the respondent then you may take that hostility into consideration in determining the credibility of that witness."

This request was refused and the refusal is the basis for the third exception now before us for determination.

In justification of their assault on Reagan, the respondents claimed self-defense.

> "According to the first law of nature, that of self-preservation, a person unlawfully assaulted, when without fault, may stand his ground and repel force with force to the extent which to him seems reasonably necessary to protect himself from injury." 4 Am. Jur. § 38, page 147.
>
> "The extent of the resistance or the force that may lawfully be used in the defense of the person must be governed by the violence and nature of the attack. Care must be exercised that the resistance does not exceed the bounds of mere defense, so as to become vindictive. Generally stated, the force that one may use in self-defense is that which reasonably appears necessary, in view of all the circumstances of the case, to prevent the impending injury." 4 Am. Jur. § 50, page 152.

> "One who, in acting in self-defense, uses force in excess of that which he is privileged to use, is liable for so much of the force used as is excessive, and the other person has the normal privilege of defending himself against the use or attempted use of excessive force." 4 Am. Jur. § 51, page 153.

So much for the general rules relating to self-defense. Now what of the law when trespassers are involved?

> "If a trespasser is assaulted, without a request to leave, or is assaulted when he is willing to leave peaceably, he is entitled to the right of self-defense in resisting an assault." 4 Am. Jur. § 43, page 149.

> "The right to use force, however slight, in ejecting a trespasser who has peaceably entered does not exist in the first instance; the owner or occupant of the premises must first request or notify the trespasser to depart before he will be justified in the use of force to compel him to leave. But if the trespasser uses actual force in gaining an entrance, a request to leave is not necessary nor is a request to leave necessary when such request would be useless, when it would be dangerous to make the request, or when substantial harm might be done before a request could effectively be made." 4 Am. Jur. § 74, page 166.

> "While the force that may be used in ejecting a trespasser depends on the circumstances surrounding each particular case, the rule that the force must be such as appears to be reasonable in the circumstances finds universal support. It must not exceed that which is correctly or reasonably believed to be necessary to terminate the intrusion. If greater force is used to put the trespasser off the premises, the defendant is liable for the assault by reason of the excess force employed, that is, for so much of the force as is excessive; and under such circumstances, the person being ejected may defend himself against the use or attempted use of excessive force." 4 Am. Jur. § 70, page 165.

In the instant case the jury could have found that the defendant Benson forced his way into the Reagan home, and that even though requested to leave, he became the aggressor by first striking Reagan.

The first instruction to which the respondents except was a correct statement of the law. If the respondents had desired elaboration of the law of self-defense, counsel should have requested the presiding justice to give additional instructions.

The respondents take nothing by their first exception.

As to the second instruction to which the respondents take exceptions, it would appear that this instruction was not, in the first instance, broad enough to explain to the jury that Reagan had no right to use more than reasonable force to eject Benson. However, the inadequacy of the instruction was corrected by the presiding justice after a conference at the bench and suggestion made that this particular issue should be clarified.

The respondents take nothing by their second exception.

As to respondents' third exception to the refusal of the presiding justice to instruct the jury that hostility on the part of a witness against the respondents could be taken into consideration in determining the credibility of that witness, the law seems to be clear that animosity of a witness towards a party may have a bearing on credibility. See 98 C. J. S. § 547, page 489.

> "A witness may be discredited by showing his bias, as by proving near relationship, sympathy, hostility or prejudice." 58 Am. Jur. § 706, page 382.

See also *State* v. *Salamone,* 131 Me. 101, 104; 159 A. 566. In this case the decision in *Motley Applt.* v. *State,* 207 Ala. 640, 93 So. 508, was cited with approval. In that case the court said:

> "When a witness denies any feeling of hostility or unfriendliness towards the party against whom he has testified injuriously, it is the party's right to inquire, on cross examination, as to the existence of any fact, including previous relationship of course, which in the light of human experience might reasonably engender hostility towards the party, or affect the witness with partisan feeling, and thus impair the trustworthiness of his testimony."

In the instant case counsel for the respondents attempted to show hostility on the part of the Reagans to the respondents by reason of some trouble which had occurred sometime previous to the alleged assault, between Mrs. Reagan and some friend of Margie, or both Margie and her friend. It is to be noted that unlike the case of *Motley* v. *State*, neither of the Reagans were asked if they had any hostility towards either or both of the respondents. In our opinion, it was quite a farfetched theory to attempt to show or prove that the Reagans were hostile to the respondents because of any trouble which Mrs. Reagan might have had with Marjorie McDonald or her friend.

The law is well settled that the general principle is that instructions given by the trial court, whether as a part of its general charge or upon special request of counsel, should state the law as applicable to the particular facts in issue in the case at bar, which the evidence in the case tends to prove. Mere abstract propositions of law applicable to any case, or mere statements of law in general terms, even though correct, should not be given unless they are made applicable to the issues in the case at bar. See 53 Am. Jur. § 573, page 451. Moreover, the rule that instructions are to be confined to the issues, applies in criminal cases as well. See 53 Am. Jur. § 575, page 454.

See also, 23 C. J. S. § 1310, page 902; § 1311, page 904, and § 1312, page 906.

The foregoing principle that requested instructions should be based on some specific evidence in the case has been sustained in numerous opinions by this court.

> "Requests (for instructions) should be made applicable to the facts in evidence." *Brackett* v. *Brewer,* 71 Me. 478, 484.

See also, *Pillsbury* v. *Sweet,* 80 Me. 392, 394; 14 A. 742.

> "Moreover, requested instructions must be complete and correct in their entirety, - - - - - - as well as applicable to the facts proved." *Tower* v. *Haslam,* 84 Me. 86, 90; 24 A. 587.

See also *Mears* v. *Biddle,* 122 Me. 392, 395; 120 A. 181.

In *Illingworth* v. *Madden,* 135 Me. 159; 192 A. 273; it was held that it is not error to refuse to allow the jury to consider an impossible or impracticable theory which has no support in the evidence.

It is our opinion that the request upon which respondents' third exception is based was properly refused for the reason that it was not founded upon any evidence tending to prove the existence of hostility. In so finding, we are not unaware that the weight and sufficiency of the evidence to establish a fact in issue is a question for the jury.

> "However, in order to warrant giving an instruction, the evidence should be sufficient fairly to raise the question involved therein. No instruction should be given which is not reasonably supported by the evidence, or which is not based on some theory logically deducible from some portion of the evidence. Thus an instruction should not be given on evidence which at the most merely raises a possibility or a conjecture." 23 C. J. S. §1313, page 913.

We have read with great care the entire evidence in the case. We are satisfied that the jury must have been unfavorably impressed with the evidence offered by the re-

spondents. They related a story of riding around in an automobile after 1:15 in the morning, in search of a woman named Margie, the location of whose residence was in doubt and whose last name they did not even know. The reason for their attempted call on this woman at this unusual hour of the night was not given, nor is it of importance. The respondents suggested as their reason for a call at such an unreasonable hour the closeness of the friendship between them and this woman; and yet the evidence discloses that one of the respondents had never met Margie and that the acquaintance of the other respondent, Benson, and his wife, dated back only two weeks.

We are convinced that the respondents were not prejudiced by any of the instructions given to the jury, nor by the refusal to give the instruction pertaining to alleged hostility.

> "There are numerous cases in which it has been held a new trial will not be granted even if instructions are erroneous unless it appears also that they might have been prejudicial to the excepting party. *Russell v. Turner,* 59 Me. at 258, and cases there cited. Neither will a new trial be granted where there are erroneous rulings by the presiding justice on abstract principles of law not affecting the truth of the result." *Levine* v. *Reynolds,* 143 Me. 15, 19; 54 A. (2nd) 514.
>
> "Upon the law and legal evidence, whatever the errors in the rulings of the court, the result of the trial was evidently right. It would seem like trifling with the ends of judicial procedure to say that an erroneous ruling, which did not affect the truth of the result, should be regarded as a sufficient reason for the overturning of a fair and honest judgment. If the court erred, the jury did not. They were right." *Gordon* v. *Conley,* 107 Me. 286, 292; 78 A. 365.

As was said in *State* v. *Mann,* 143 Me. 305, 312; 61 A. (2nd) 786:

"We do not hesitate to say that the complete record bears convincing witness to a fair trial and a just verdict."

Exceptions overruled.
Judgment for the State.

OPINION

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

* * * * * * *

QUESTIONS PROPOUNDED BY THE SENATE IN AN ORDER
DATED APRIL 16, 1959
ANSWERED MAY 5, 1959

SENATE ORDER PROPOUNDING QUESTIONS
STATE OF MAINE

In Senate, April 16, 1959

WHEREAS, it appears to the Senate of the 99th Legislature that the following is an important question of law and the occasion a solemn one; and

WHEREAS, there is pending before the Senate of the 99th Legislature a bill entitled "An Act Creating a Motor Vehicle Accident Indemnity Fund," (Senate Paper 167, Legislative Document 338) : and,

WHEREAS, it is important that the Legislature be informed as to the constitutionality of the proposed bill, be it therefore

ORDERED, that in accordance with the provisions of the Constitution of the State the Justices of the Supreme Ju-

dicial Court are hereby respectfully requested to give the Senate their opinion on the following questions:

1.

Do any of the provisions of Senate Paper 167, Legislative Document 388 result in a diversion of revenues derived from fees, excises and license taxes relating to registration, operation and use of vehicles on public highways. in violation of Section 19 of Article IX of the Constitution of Maine?

2.

Do any of the provisions of Senate Paper 167, Legislative Document 388, provide for the raising of money by taxation for a private purpose in violation of Article 1, Sections 6 and 21, and Article IV, Part Third, Section 1, of the Constitution of Maine?

3.

Would Senate Paper 167, Legislative Document 388, "An Act Creating a Motor Vehicle Accident Indemnity Fund," if enacted by the Legislature, be constitutional?
A true copy.

Attest CHESTER T. WINSLOW,
Secretary of the Senate

Name: Weeks

County: Cumberland

In Senate Chamber Apr. 16, 1959. Read and passed.

CHESTER T. WINSLOW, Secretary.

NINETY-NINTH LEGISLATURE

Legislative Document **No. 388**

S. P. 167 In Senate, February 4, 1959.

Referred to Committee on Judiciary. Sent down for concurrence and ordered printed.

CHESTER T. WINSLOW, Secretary.

Presented by Senator Ross of Sagadahoc.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED FIFTY-NINE

AN ACT Creating a Motor Vehicle Accident Indemnity Fund.

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

R. S., c. 22-A, additional. The Revised Statutes are amended by adding a new chapter 22-A, to read as follows:

'Chapter 22-A.

Motor Vehicle Accident Indemnity Fund.

Sec. 1. Definitions. Unless a different meaning is plainly required by the context:

I. "Insurer" means an insurer duly authorized to transact business in this State and licensed to write policies of liability insurance on motor vehicles.

II. "Motor Vehicle Accident Indemnity Fund" or "fund" means the fund derived from sources specified in this chapter.

III. "Motor Vehicle Accident Indemnity Premium" or "premium" means the sum collected under this chapter and credited to the Motor Vehicle Accident Indemnity Fund.

IV. "Policy of liability insurance" means a policy which, as to the vehicle with respect to which it is issued, insures the named insured and any other person using or responsible for the use of such vehicle with the permission of the named insured against loss from any liability imposed by law or for damages, including for care and loss of services, because of bodily injury to or death of any person or injury to or destruction of property caused by accident and arising out of the ownership, operation, maintenance, control or use of such motor vehicle within the limits of the United States or the Dominion of Canada, subject to a limit, exclusive of interest and costs, of at least $10,000 because of injury to or death of one person in one accident, and, subject to the limit for one person, to a limit of at least $20,000 because of bodily injury to or death of 2 or more persons in any one accident, and to limit of at least $5,000 because of injury to or destruction of property of others in any one accident.

V. "Qualified person" means a resident of this State or the owner of a motor vehicle registered in this State which is involved in an accident.

VI. "Financial Responsibility Law" means the Financial Responsibility Law of the State of Maine.

VII. "Registration license year" means the period beginning January 1st and ending December 31st of each year.

VIII. "Treasurer" means the Treasurer of State acting as custodian of the Motor Vehicle Accident Indemnity Fund.

IX. "Uninsured motor vehicle" means a motor vehicle registered in this State as to which there is not in force a policy of liability insurance, or as to which proof of financial responsibility when required under the Financial Responsibility Law has not been furnished. Registration of a motor vehicle in this State shall be conclusive evidence for the purpose of seeking recovery under this chapter only, that the registered owner is a resident of this State.

Sec. 2. Provisions providing for indemnity fund. Every person registering an uninsured motor vehicle in this State for any registration license year, starting with the year beginning January 1, 1960, shall pay a premium of $15 at the time the vehicle is registered. This premium shall not be construed as full or partial payment of, or in lieu of, any fee, excise or license tax otherwise imposed by law, but regarded solely as a regulatory device imposed as a matter of public policy to eliminate or substantially reduce the numbers of uninsured motor vehicles in the State providing, until this is accomplished, that the State, as trustee of the money contributed by the uninsured motor vehicle owner, shall administer it as a separate fund for the specific purpose of indemnifying accident losses caused by such vehicles.

Any person offering to register a motor vehicle shall furnish the Secretary of State, as evidence that the vehicle is insured, a certificate of insurance or self-insurance in form prescribed by him, or a receipt showing that he has posted bond or made a financial security deposit under the provisions of the Financial Responsibility Law.

Premiums collected under this section shall be deposited in the General Fund to the credit of a special Motor Vehicle Accident Indemnity Fund, and shall be expended only as

provided in this chapter or as otherwise provided by law to carry out the provisions of this chapter.

All premiums collected by the Secretary of State shall be remitted to the treasurer within 30 days after receipt and become part of the fund, and held by the State in trust for the purposes of this chapter. The fund may be invested and reinvested in the same manner as state funds and shall be disbursed according to the order of the treasurer.

Sec. 3. Premium refunded upon insuring motor vehicle. Any owner of an uninsured motor vehicle registered under section 2 shall be refunded the premium paid upon insuring such vehicle at any time during the same registration license year.

Sec. 4. Registration suspended upon termination of insurance. No policy of liability insurance issued on any motor vehicle registered in this State shall be cancelled or terminated other than by expiration of the term for which issued by any insurance carrier for any reason until at least 20 days after notice of cancellation or termination has been filed with the Secretary of State.

Within 20 days after the expiration of any policy of liability insurance issued on any motor vehicle registered in this State, if the same has not been renewed, the insurance carrier which issued such policy shall notify the Secretary of State that such policy has expired and has not been renewed.

The Secretary of State shall forthwith suspend the registration certificate and license plates for any motor vehicle for which a policy of liability insurance has been cancelled, or terminated or has expired unless the owner thereof files evidence in form satisfactory to the Secretary of State that the vehicle is covered by a policy of liability insurance, or

that he has paid or pays the premium prescribed for registering an uninsured motor vehicle.

Sec. 5. Application for payment of judgment. When any qualified person or his personal representative recovers a valid judgment in any court of competent jurisdiction in this State for an amount exceeding $100, exclusive of interest and costs, in an action for damages resulting from bodily injury to or the death of any person occasioned by or arising out of the ownership, operation, maintenance, control or use of a motor vehicle on or after January 1, 1960, by the judgment debtor, and any amount of the judgment remains unpaid, the judgment creditor may, upon the termination of all proceedings, including reviews and appeals, file a verified claim in the court in which the judgment was entered, and, upon 10 days written notice to the treasurer, apply to the court for an order directing payment out of the fund of the amount unpaid upon the judgment, subject to the limitations stated in section 8. The court shall proceed upon such application in a summary manner.

Sec. 6. Matters to be shown by applicant prior to payment. In any proceeding before a court upon an application for payment of a judgment, the applicant shall show:

I. That he has obtained a judgment as set out in section 5, stating the amount thereof and the amount owing thereon at the date of application.

II. That he is not a person covered with respect to such injury or death by any workmen's compensation law, or the personal representative of such a person.

III. That he is not a spouse, parent or child of the judgment debtor or the personal representative of such spouse, parent or child.

IV. That he was not at the time of the accident, operating or riding in an uninsured motor vehicle owned by

him or his spouse, parent or child, and was not operating a motor vehicle in violation of an order of suspension or revocation.

V. That the judgment debtor at the time of the accident was not insured under a policy of liability insurance under the terms of which the insurer is liable to pay in whole or in part the amount of the judgment, and, had not posted bond, made a financial security deposit or filed a certificate of self-insurance.

VI. That he has caused to be issued a writ of execution upon the judgment that the officer executing the same has made a return showing that no assets, real or personal, of the judgment debtor, liable to be levied upon in satisfaction of the judgment, could be found or that the amount realized on the sale of such assets found, under the execution, was insufficient to satisfy the judgment, stating the amount so realized and the balance remaining due on the judgment after application thereon of the amount realized.

VII. That he has made reasonable searches and inquiries to ascertain whether the judgment debtor is possessed of assets, real or personal, liable to be sold or applied in satisfaction of the judgment.

VIII. That by such search he has discovered no assets, real or personal, liable to be sold or applied or that he has discovered certain of them, describing them, owned by the judgment debtor and liable to be so sold and applied and that he has taken all necessary action and proceedings for the realization thereof and that the amount thereby realized was insufficient to satisfy the judgment, stating the amount so realized and the balance remaining due on the judgment after application of the amount realized.

IX. That the application is not made by or on behalf of any insurer by reason of the existence of a policy of in-

surance whereby the insurer is liable to pay, in whole or in part, the amount of the judgment and that no part of the amount to be paid out of the fund is sought in lieu of making a claim or receiving a payment which is payable by reason of the existence of such a policy of insurance and that no part of the amount so sought will be paid to an insurer to reimburse or otherwise indemnify the insurer in respect of any amount paid or payable by the insurer by reason of the existence of such a policy or insurance.

X. Whether he has recovered a judgment in an action against any other person against whom he has a cause of action in respect of his damages for bodily injury or death or damage to property arising out of the accident and stating the amounts recovered upon such judgments or the amounts, if any, received for compensation or indemnity for damages or other benefits for such injury or death or damage to property from any person other than the operator or owner of the motor vehicle causing such injury, death or damage.

In any case in which recovery from the fund is sought for injuries or damages sustained as the result of an accident which occurred outside this State, the applicant shall in addition be required to show that the judgment on which his claim is based was rendered on the basis of evidence which would have entitled him to recovery had the cause of action arisen in this State.

Each applicant at the time the application is heard shall file an affidavit with the court that there has not been nor will there be any collusion between the applicant and the owner or operator of or any guest in the uninsured motor vehicle.

Sec. 7. Order for payment of judgment. If the court is satisfied upon hearing:

I. Of the truth of all matters required to be shown by the applicant under section 6; and

II. That the applicant has fully pursued and exhausted all remedies available to him for recovering compensation for the damages which are the subject of the action in respect to which the judgment is given by:

A. Commencing action against all persons against whom the applicant might reasonably be considered as having a cause of action in respect of such damages and prosecuting every such action in good faith to judgment; and

B. Taking all reasonable steps available to him to collect on every judgment so obtained and all other reasonable steps available to him to recover compensation for such damages and by applying the proceeds of any judgment or recovery so obtained towards satisfaction of the amount due upon the judgment for payment of which the claim is made; then the court shall issue an order directed to the treasurer requiring him, subject to section 8, to pay from the fund the amount of the judgment or the balance owing thereon, and, the treasurer shall comply with the order.

In making an order, the court shall reduce the amount that it would otherwise require to be paid from the fund by a sum equal to any amounts for compensation or indemnity for damages or other benefits which the applicant has received or, in the opinion of the court, is likely to collect from any person other than the judgment debtor.

Sec. 8. Limitations on payments from the fund. No order shall be made for the payment, and the treasurer shall make no payment, out of the fund, of:

I. Any claim for less than $100.

II. The first $100 of any judgment or of the unsatisfied portion thereof, or

III. The unsatisfied portion of any judgment which, after deducting $100 therefrom, exceeds:

A. The maximum amount or limit of $10,000, exclusive of interest and costs, on account of injury to, or death of, one person in any one accident, and

B. The maximum amount or limit, subject to such limit for any one person so injured or killed, of $20,000 exclusive of interest and costs, on account of injury to, or death of, more than one person in any one accident, and

C. The maximum amount or limit of $5,000, exclusive of interest and costs, for damages to property in any one accident.

These maximum amounts shall be reduced by any amount received or recovered as specified in section 7. Any amount paid out of the fund in excess of the amounts so authorized may be recovered by the treasurer in an action brought by him against the person receiving the same.

Sec. 9. Consent, fraudulent and collusive judgments. No claim shall be allowed and ordered paid out of the fund if the court finds, upon a hearing of the application for payment from the fund:

I. That it is founded upon a consent judgment.

II. That the judgment upon which the claim is founded was obtained by fraud, or by collusion of the plaintiff and of any defendant in the action, relating to any matter affecting the cause of action upon which such judgment is founded or the amount of damages assessed.

Sec. 10. Assignment of judgment. The treasurer shall not pay any sum from the fund, in compliance with an order

made for the purpose, in any case in which the claim is founded upon a judgment until the applicant assigns the judgment to the treasurer and, thereupon, the treasurer shall be deemed to have all the rights of the judgment creditor under the judgment and shall be entitled to enforce the same for the full amount thereof with interest and costs and if more money is collected upon any such judgment than the amount paid out of the fund, the treasurer shall pay the allowance, after reimbursing the fund, to the judgment creditor.

The treasurer shall give notice to the Secretary of State of the entry of any judgment obtained by him, or of any judgment upon which a claim is made against the fund and of the payment of any such judgment. Payment from the fund of a claim upon a judgment shall not be considered satisfaction thereof for the purposes of the Financial Responsibility Law.

Sec. 11. Privileges not restored until fund reimbursed. Where the license of any person, or the registration of a motor vehicle registered in his name, has been suspended or cancelled under the Financial Responsibility Law, and the treasurer has paid from the fund any amount in or towards satisfaction of a judgment recovered against that person, the cancellation or suspension shall not be removed, nor the license or registration restored, nor shall any new license be issued to, or registration be permitted to be made by, that person until he has:

I. Repaid in full to the treasurer the amount so paid by him, together with the expenses incurred by the fund, as certified by the treasurer, in connection with such payment, together with interest thereon at 4% per year from the date of such payment; and

II. Satisfied all requirements of the Financial Responsibility Law in respect of giving proof of financial responsibility.

A discharge in bankruptcy shall not relieve a person from the penalties and disabilities provided in this chapter.

Sec. 12. Operating an uninsured motor vehicle without payment of premium. Any owner of an uninsured motor vehicle who operates an uninsured motor vehicle on which the premium has not been paid, or any owner who permits such uninsured motor vehicle to be operated, shall be punished by a fine of not more than $500 or by imprisonment for not more than 30 days, or by both.

The Secretary of State, upon receipt of evidence that the owner of an uninsured motor vehicle on which the premium has not been paid has operated or has permitted such vehicle to be operated shall suspend the registration and license of such owner. No such vehicle nor any other vehicle shall be registered or re-registered in the name of such person nor shall any license be issued to or license be restored to such person until:

I. One year has passed since the date of such suspension and surrender of such person's license and registration, and

II. The person has complied with the Financial Responsibility Law in respect of giving proof of ability to respond in damages for future accidents.

Sec. 13. False or untrue statements. Any person who knowingly files any notice, statement or other document required under this chapter which is false or untrue or contains any material misstatement of fact shall be punished by a fine of not more than $1,000 or by imprisonment for not more than one year, or by both.

Sec. 14. Purposes for which moneys may be disbursed from fund. All moneys deposited to the credit of the Motor Vehicle Accident Indemnity Fund shall be held in trust by

the State for the satisfaction of claims allowed under this chapter, and shall be disbursed out of the fund for the following purposes only:

I. Payment of the expenses of the Secretary of State and treasurer of State incurred in administering this chapter during each fiscal year.

II. Payment of claims allowed under this chapter.

Sec. 15. Reliance upon other process not prevented. Nothing in this chapter shall prevent a plaintiff in any proceeding or action from proceeding upon any other remedy or security available at law or diminish the liability of any defendant.'

Sec. 2. Effective date. This act shall be effective for the calendar year 1960 and for the subsequent years until changed by legislative enactment.

ANSWER OF THE JUSTICES

To the Honorable Senate of the State of Maine:

In compliance with the provisions of Section 3 of Article VI of the Constitution of Maine, we, the undersigned Justices of the Supreme Judicial Court, have the honor to submit the following answers to the questions propounded on April 16, 1959.

QUESTION (I): Do any of the provisions of Senate Paper 167, Legislative Document 388, result in a diversion of revenues derived from fees, excises and license taxes relating to registration, operation and use of vehicles on public highways, in violation of Section 19 of Article IX of the Constitution of Maine?

ANSWER: We answer in the affirmative.

Section 19 of Article IX of the Constitution of Maine provides:

> "All revenues derived from fees, excises and license taxes relating to registration, operation and use of vehicles on public highways, and to fuels used for the propulsion of such vehicles shall be expended solely for cost of administration, statutory refunds and adjustments, payment of debts and liabilities incurred in construction and reconstruction of highways and bridges, the cost of construction, reconstruction, maintenance and repair of public highways and bridges under the direction and supervision of a state department having jurisdiction over such highways and bridges and expense for state enforcement of traffic laws and shall not be diverted for any purpose, *provided* that these limitations shall not apply to revenue from an excise tax on motor vehicles imposed in lieu of personal property tax."

The manifest purpose of the quoted section is to prevent diversion of such revenues to other than highway purposes. Although the proposed act in terms refers to the charge to be imposed on uninsured motorists as a "premium" and specifically provides that "this premium shall not be construed as full or partial payment of, or in lieu of, any fee, excise or license tax otherwise imposed by law," the fact remains that the proposed act imposes a charge which is prerequisite to the registration of a motor vehicle. Such a charge, however designated, clearly falls within the spirit if not the exact letter of the constitutional limitation and may not therefore be diverted to purposes other than those enumerated in the quoted section of the Constitution. *Opinion of the Justices*, 152 Me. 449.

QUESTION (II): Do any of the provisions of Senate Paper 167, Legislative Document 388, provide for the raising of money by taxation for a private purpose in violation of

Article 1, Sections 6 and 21, and Article IV, Part Third, Section 1, of the Constitution of Maine?

ANSWER: We answer in the negative.

The proposed act attempts to remedy a social problem which is properly a matter of public concern and interest. The increase of traffic congestion upon our highways with its natural accompanying hazards has produced a mounting risk of damage and injury common to all citizens. The whole economy of the state is directly and adversely affected by the presence upon the highways of many financially irresponsible and uninsured motorists. The situation may well be likened to that which existed in the area of industrial unemployment and which resulted in remedial legislation providing for compensation to the unemployed person even though he might be neither indigent nor in straightened financial circumstances. It was clearly recognized that a public rather than a private purpose was thereby served. So here, more is involved than mere redress of a private civil wrong and we are satisfied that the basic and underlying purpose of the proposed legislation is to benefit the people as a whole. The public interest is further served by the incorporation of the funds collected into a trust fund to be held and controlled by the State. See *Crommett, et al.* v. *Portland,* 150 Me. 217; *State* v. *Vahlsing,* 147 Me. 417.

QUESTION (III): Would Senate Paper 167, Legislative Document 388, "An Act Creating a Motor Vehicle Accident Indemnity Fund," if enacted by the Legislature, be constitutional?

ANSWER: In view of the foregoing answers, it is unnecessary to answer this question. We respectfully suggest that the question is so general in form as to lack that precision

necessary to inform the justices of the exact nature of the inquiry.

Dated at Augusta, Maine, this fifth day of May, 1959.

Respectfully submitted:

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

OPINION

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

* * * * * *

QUESTIONS PROPOUNDED BY THE SENATE IN AN ORDER
DATED MAY 7, 1959
ANSWERED MAY 18, 1959

SENATE ORDER PROPOUNDING QUESTIONS
STATE OF MAINE

In Senate, May 7, 1959

WHEREAS, two bills, one entitled "An Act Classifying Certain Waters in Meduxnekeag River Basin," (House Paper 403, Legislative Document 587), the other entitled "An Act Relating to the Classification of Prestile Stream in Aroostook County," (House Paper 661, Legislative Document 954) are pending before the 99th Legislature and it is important that the Legislature be informed as to the validity and constitutionality of the proposed bills; and

WHEREAS, the effect of each Legislative Document is alike in that, if enacted, each would lower the classification (permit the discharge of a greater amount of pollution) of a portion of the respective waters, which waters flow across the international boundary into Canada; and

WHEREAS, it appears to the Senate of the 99th Legislature that the following is an important question of law and the occasion a solemn one; now, therefore, be it

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

1.

Do any of the provisions of House Paper 403, Legislative Document 587, conflict with the provisions of the Treaty Between the United States and Great Britain, relative to Boundary waters Between the United States and Canada, (signed January 11, 1909), in violation of Article VI, Clause 2, of the Constitution of the United States?

2.

Do any of the provisions of House Paper 661, Legislative Document 954, conflict with the provisions of the Treaty Between the United States and Great Britain, relative to Boundary Waters Between the United States and Canada, (Signed January 11, 1909), in violation of Article VI, Clause 2, of the Constitution of the United States.

3.

Would either House Paper 403, Legislative Document 587, "An Act Classifying Certain Waters in Meduxnekeag River Basin," or House Paper 661, Legislative Document

954, "An Act Relating to the Classification of Prestile Stream in Aroostook County," if enacted by the Legislature, be valid and constitutional under the Maine and United States Constitutions?

In Senate Chamber
May 7, 1959
READ AND PASSED
Chester T. Winslow
Secretary

A true copy. Attest
CHESTER T. WINSLOW
Secretary of the Senate

Name: Briggs

County: Aroostook

NINETY-NINTH LEGISLATURE

Legislative Document **No. 587**

H. P. 403 House of Representatives, February 10, 1959
Referred to the Committee on Natural Resources. Sent up for concurrence and ordered printed.
HARVEY R. PEASE, Clerk.
Presented by Mr. Ervin of Houlton.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED FIFTY-NINE

AN ACT Classifying Certain Waters in Meduxnekeag River Basin.

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

R. S., c. 79, § 15, amended. Subsection XI under the caption, "Meduxnekeag River Basin" of section 15 of chap-

ter 79 of the Revised Statutes, as enacted by section 4 of chapter 426 of the public laws of 1955, is repealed and the following subsections enacted in place thereof:

'XI. Meduxnekeag River, main stem, from the bridge at gravel pit entrance just upstream of the compact area in Houlton to a point 1,500 feet downstream from the Highland Avenue Bridge—Class C.

XII. Meduxnekeag River, main stem, from a point 1,500 feet downstream of the Highland Avenue Bridge to the international boundary—Class D.'

Transmitted by Director of Legislative Research pursuant to joint order.

NINETY-NINTH LEGISLATURE

Legislative Document **No. 954**

H. P. 661 House of Representatives, February 25, 1959

Referred to the Committee on Natural Resources. Sent up for concurrence and ordered printed.

HARVEY R. PEASE, Clerk

Presented by Mr. Jewell of Monticello.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED FIFTY-NINE

AN ACT Relating to the Classification of Prestile Stream in Aroostook County.

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

R. S., c. 79, §15, amended. Subsections II and III under the caption "Meduxnekeag River Basin" of section 15 of

chapter 79 of the Revised Statutes, as enacted by section 4 of chapter 426 of the public laws of 1955, are amended to read as follows:

'**II.** Prestile Stream, segments and tributaries thereof, not otherwise defined, **except the main stem of the Prestile Stream below the bridge at Mars Hill,** above the international boundary—Class B-1.

III. Prestile Stream, main stem, from the bridge at Westfield to the ~~international boundary in the Town of Bridgewater~~ **bridge at Mars Hill**—Class B-2. ~~The provisions of this subsection shall become effective on June 30, 1956.~~'

ANSWERS OF THE JUSTICES

To the Honorable Senate of the State of Maine:

In compliance with the provisions of Section 3 of Article VI of the Constitution of Maine, we, the undersigned Justices of the Supreme Judicial Court, have the honor to submit the following answers to the questions propounded on May 7, 1959.

QUESTION (1): Do any of the provisions of House Paper 403, Legislative Document 587, conflict with the provisions of the Treaty Between the United States and Great Britain, relative to Boundary Waters Between the United States and Canada, (signed January 11, 1909), in violation of Article VI, Clause 2, of the Constitution of the United States?

ANSWER: We answer in the negative.

QUESTION (2): Do any of the provisions of House Paper 661, Legislative Document 954, conflict with the provisions of the Treaty Between the United States and Great Britain, relative to Boundary Waters Between the United States and Canada, (signed January 11, 1909), in violation of

Article VI, Clause 2, of the Constitution of the United States?

ANSWER: We answer in the negative.

The first and second questions relating to L. D. 587 "An Act Classifying Certain Waters in Meduxnekeag River Basin" and L. D. 954 "An Act Relating to the Classification of Prestile Stream in Aroostook County" present identical issues, and may be answered together. "The effect of each Legislative Document (to use the words of the preamble to the questions) is alike in that, if enacted, each would lower the classification (permit the discharge of a greater amount of pollution) of a portion of the respective waters, which waters flow across the international boundary into Canada; . ."

The Meduxnekeag River and Prestile Stream run from Maine into Canada, and thus are "waters flowing across the boundary" under the Treaty. The portions of both streams covered by the proposed legislation are now classified waters by action of the Legislature in 1955. Under L. D. 587, Meduxnekeag River from a point in Houlton to the boundary would be changed from Class C to Class D; and under L. D. 954, the main stem of Prestile Stream from below the bridge at Mars Hill to the boundary would be changed from Class B-2 to unclassified waters. See R. S., c. 79 as amended in 1957, entitled "Water Improvement Commission"; Sec. 2 Standards of classification; Sec. 15 Meduxnekeag River Basin, Par. III, Prestile stream, and Par. XI Meduxnekeag River.

The Treaty is "the supreme law of the land," and we are governed by its items in the event the state law is in conflict therewith. Article VI, clause 2, of the Federal Constitution reads:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof;

> and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

The Supreme Court of the United States has stated the principle in these words:

> "Treaties are to be liberally construed so as to effect the apparent intention of the parties. . . . When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred, . . and as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments. . . . When their meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter and to their own practical construction of it. . ." *Nielsen* v. *Johnson,* 49 S. Ct. 223, 279 U. S., 47, 51.

> "But state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement." *United States* v. *Pink* (N. Y.) 62 S. Ct. 552, 566, 315 U. S. 203.

See also U. S. Code Annotated Constitution, Art. 6, cl. 2, Treaties.

The only provision of the Treaty specifically relating to pollution reads:

> "It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either

> side to the injury of health or property on the other." Art. IV.

This, it should be noted, is a statement of the policy of the governments. No machinery for enforcement is set forth. In practice, questions involving pollution have been referred to the International Joint Commission, established under the Treaty for investigation and report under Article IX, which reads:

> "The High Contracting Parties further agree that any other questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred."

In *Boundary Waters Problems of Canada and the United States*, Bloomfield and Fitzgerald, (1958) on page 20 it is stated:

> "True, pollution is expressly mentioned in paragraph 2 of Article IV which records an agreement between the Parties to the Treaty to the effect that not only boundary waters, but also 'waters flowing across the boundary, shall not be polluted on either side to the injury of health or property on the other.' But this provision does not confer jurisdiction over pollution on the Commission. In fact, the Pollution of Boundary Waters references (Nos. 4, 53 and 55) were brought before the Commission under the power of investigation conferred on it by Article IX."

On the one hand, there are the state statutes dealing with the problem of pollution and the classification of waters,

and the proposed amendments (L. D. 587 and L. D. 954) permitting an increase in pollution. On the other hand, and controlling, there is the Treaty with its stated policy against pollution "on either side to the injury of health or property on the other."

In our opinion there is nothing in either legislative document that conflicts with the Treaty. The People, through the Legislature, in classifying, reclassifying or removing from classification waters of the Meduxnekeag River Basin within the state, in no way create or authorize pollution "to the injury of health or property" in Canada. Whether such injuries result from pollution in Maine is a matter for determination when and if claim thereof is made in proper proceedings.

Injured parties are granted certain rights under Article II of the Treaty, which reads:

> "Each of the High Contracting Parties reserves to itself or to the several State Governments on the one side and the Dominion or Provincial Governments on the other as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters; but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; but this provision shall not apply to cases already existing or to cases expressly covered by special agreement between the parties hereto."

It would not be appropriate in answering the questions submitted to discuss the legal remedies which may be open to injured parties under this Article.

QUESTION (3): Would either House Paper 403, Legislative Document 587, "An Act Classifying Certain Waters in Meduxnekeag River Basin," or House Paper 661, Legislative Document 954, "An Act Relating to the Classification of Prestile Stream in Aroostook County," if enacted by the Legislature, be valid and constitutional under the Maine and United States Constitutions?

ANSWER: We are satisfied the question was asked only with reference to the validity and constitutionality of L. D. 587 and L. D. 954 in light of the Treaty. If we are correct in this view we have, we believe, sufficiently covered the issues in our answers to the first and second questions.

If, however, it was intended that we give an advisory opinion generally upon the constitutionality of the proposed legislation under both the Maine and Federal Constitutions, or either, we must respectfully decline to answer. Such a question would obviously require an opinion, not upon the amendments in classification of waters here proposed, but upon the entire legislative program relating to pollution, classification of waters and other related matters found in R. S., c. 79. The question is too general to be a proper vehicle for such a purpose.

Dated at Augusta, Maine, this eighteenth day of May, 1959.

Respectfully submitted:

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

ALDEN W. SQUIRES, ET AL.
vs.
THE INHABITANTS OF THE CITY OF AUGUSTA,
H. LLOYD CAREY, MAYOR, AND LEO F. DUNN,
TREASURER

Kennebec. Opinion, May 25, 1959.

Municipal Corporations. Police Power. Schools. Education. Transportation. Constitutional Law. Statutory Construction. Appropriations.

The State Legislature, which enacted the various laws relating to the State's educational system intended that no municipality should regulate by ordinance or order any subjects which would affect or influence general education unless permitted to do so by an express delegation of power.

Where the Legislature has not by charter or statute given a municipality by express terms the authority to pass any ordinance providing for the transportation of pupils to or from private schools, no such ordinance may lawfully be enacted as an exercise of the police power.

Under the Constitution of Maine, Art. VIII, the Legislature has full power over the subject matter of schools and education.

The Legislature has seen fit to make conveyance of pupils a component part of the public school program.

Municipalities are subject to the authority of the sovereign and have only those powers which are specifically delegated by the Legislature.

Municipal appropriations, whether from contingent funds or school funds, are derived from taxation, and in order to be legally expended must be made available by lawful appropriation; public funds can only be expended for purposes authorized by law. This may come about by charter or statutory authorization, but authority must be strictly construed.

The Maine Constitution relating to the expenditure of public money for public purposes and to the separation of church and state, carry no more stringent prohibitions than the First and Fourteenth Amendments to the Constitution of the United States.

A municipality may not accomplish by police power that which is repugnant to and in derogation of the established policy of the State in its general scheme or plan for the promotion of education.

ON APPEAL.

This is a bill in equity seeking an injunction. The case is before the Law Court upon appeal from an order dismissing the bill. Appeal sustained. Remanded to the court below for further proceedings in accordance with this opinion.

Goodspeed & Goodspeed,
Charles A. Pierce,
Sanborn & Sanborn, for plaintiffs.

Claude J. Bourget,
Sidney W. Wernick, for defendants.

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

TAPLEY, J. On appeal. A bill in equity was brought by thirteen taxable inhabitants of the City of Augusta against the inhabitants of that city and its mayor and treasurer. The plaintiffs by their bill seek to enjoin the defendants from carrying into effect the provisions of an ordinance and order passed by the Augusta City Council on June 17, 1957 relating to transportation of pupils to and from non-public schools. The plaintiffs further seek to have this ordinance and appropriation order decreed as illegal, invalid, void and of no effect. After a hearing on the bill, answer and replication, the justice below dismissed the bill and from this dismissal the plaintiffs seasonably appealed.

The ordinance and order upon which this litigation is based reads as follows:

"WHEREAS, children residing in the City of Augusta and attending the public schools pursuant

to and in compliance with the compulsory school-attendance laws of the State of Maine, and who reside at distances from the schools rendering their conveyance necessary, are presently afforded, at public expense, conveyance by motor vehicle to and from public schools; and

WHEREAS such conveyance is provided for the conservation of the comfort, safety and welfare of the children thus transported, and

WHEREAS such conveyance is not afforded to children residing in the City of Augusta who are attending schools other than public schools under and in compliance with the compulsory school-attendance laws of the State of Maine and who reside at unreasonable distances from the schools which they attend;

NOW THEREFORE, in order to facilitate attendance at school pursuant to the compulsory school-attendance laws of the State of Maine, by such children for whom such conveyance is not now provided and to assist and protect such children while they are on the highway in order to attend school under the compulsory school-attendance law of the State of Maine,

BE IT ORDAINED BY THE CITY COUNCIL of the City of Augusta, as follows:

ORDERED, That (a) The City of Augusta shall make available conveyance by motor vehicle to any child residing in Augusta (1) who is a pupil of elementary grade attending a non-public school (including a so-called 'parochial' school) pursuant to and in conformity with the compulsory school-attendance laws of the State of Maine, and (2) who resides more than one mile from the said school which such child attends.

(b) Such conveyance shall be so provided as to conserve the health, safety and welfare of the children transported.

(c) The Mayor of the City of Augusta is authorized to make contracts for a period of one year,

> to employ such persons and to take such other and further action as may be necessary to effectuate the matters herein contained.
>
> (d) There is herewith appropriated from the contingent fund of the City of Augusta the sum of $250.00 to be expended for the purposes and matters herein provided during the remainder of the year, 1957."

The pertinent portion of the City Charter of Augusta reads:

> "- - - - - and may ordain and publish such acts, laws and regulations not inconsistent with the Constitution and laws of this state, as shall be needful to the good order of said body politic; - - - - -."
>
> Chap. 75, Sec. 1, P. L., 1919.

The factual aspect of the case is provided by an agreed statement of facts, in addition to which there appears the testimony of the Superintendent of Schools of Augusta. It so happens that the private schools here involved are parochial schools.

The agreed statement of facts explains in great detail the supervision and operation of the parochial schools in Augusta. It is a matter of public knowledge that the parochial schools are controlled and operated by the Roman Catholic Church. They are in effect private schools as distinguished from public schools and in the view which we take of this case are within the same category as any other private schools in the State. These parochial schools meet the standards of compulsory education and the pupils may lawfully attend them in lieu of attendance at public schools.

The appellants contend (1) that the ordinance and appropriation order of June 17, 1957 is illegal and is not authorized by either the statutes of the State of Maine or the Augusta City Charter; (2) that the ordinance and order is in violation of the Constitution of the State of Maine; (3)

that the ordinance and order is in violation of the Constitution of the United States. The contention of the appellees, briefly stated, is that the purpose of enactment of the ordinance and order was to provide transportation for private school children in order to conserve their health, safety and welfare, and that the City Council for the City of Augusta had authority to enact the ordinance and order as an exercise of its police power.

This case resolves itself into a single basic legal issue. Did the council have the authority to enact the ordinance by reason of police power?

It is agreed between the parties that the Legislature has not, either by charter or statute, given the City of Augusta by express terms the authority to pass any ordinance providing for the transportation of pupils to or from private schools.

The State controls the public schools and, to a substantial degree, maintains control and supervision over the private schools of the State. It compels education by providing (Chap. 41, Sec. 92, R. S., 1954, as amended) that every child between the 7th and 15th anniversaries of his birth shall attend some public day school. A child may satisfy this requirement if he obtains equivalent instruction for a like period of time in a private school in which the course and method of study have been approved by the designated educational authorities.

The Constitution of Maine, Art. VIII imposes the duty upon the Legislature to promote the cause of education. This, in effect, is in the nature of a constitutional mandate. In 1876 the then members of the Law Court of Maine had occasion to give their opinion relating to the authority and responsibility of the Legislature on the subject matter of schools and education. This *Opinion of the Justices* is recorded in 68 Me. 582. A pertinent quotation from the opinion is in the following language:

> "In the constitution, it is declared that a general diffusion of education is essential to the preservation of the liberties of the people. By its very language, it would seem that the 'general diffusion of education' was to be regarded as especially a 'benefit' to the people. If so, then the legislature has *'full power'* over the subject matter of schools and of education to make all reasonable laws in reference thereto for the 'benefit of the people of this state.' " (Emphasis ours.)

In further support of the fact that the sovereign has maintained control of schools and education through the years is the following statement by the justices in their opinion:

> "Accordingly, from the first institution of the government to the present day, *the general control of schools,* and the determination of what shall be a suitable provision by the towns for their support, has been fixed by legislative enactment." (Emphasis ours.)

It is important and advisable to review the statutory laws of the State, with the purpose and thought in mind of determining evidence of intention on the part of the State to maintain general control of education, as to both public and private schools. All legislation affecting the system of education in the State is compiled in Chap. 41, R. S., 1954, as amended. The chapter is entitled "Department of Education." We propose to cite such portions of this chapter (Chap. 41) as are pertinent in demonstrating the control and supervision which the State maintains through legislative enactments over the State's educational system.

Regarding the duties of the Commissioner of Education, **Sec. 11, Sub-sec. VII, as amended:**

> "**VII.** To prescribe the studies to be taught in the public schools *and in private schools* approved for attendance and tuition purposes, reserving to superintending school committees, trustees or other officers in charge of such public *or private schools*

the right to prescribe additional studies, and the course of study prescribed by the commissioner shall be followed in all public schools and *in all private schools* approved by the said commissioner for attendance or tuition purposes; provided, however, that upon the approval by the said commissioner of any course arranged by the superintending school committee of any town, or by the trustees or other officers *of any private school,* said course shall be the authorized course for said town *or private school;* provided further, that the basic language of instruction in all schools, public *and private,* shall be the English language; and provided further, that American history and civil government, including the constitution of the United States and the declaration of independence, the importance of voting and the privileges and responsibilities of citizenship, shall be taught in all schools of elementary and secondary grades, both public *and private,* and that American history and civil government shall be required for graduation from all elementary schools, both public *and private.* Nothing in this section shall be construed to prohibit the teaching in elementary schools of any language as such. It is further provided that a course in geography and the natural and industrial resources of Maine shall be taught in at least one grade from 7 to 12, inclusive, in all school systems, both public *and private.*" (Emphasis ours.)

Pertaining to other school functions, we find (Sec. 14):

"- - - - The superintendent of schools in each town shall procure the conveyance of all elementary school pupils residing in his town, a part or the whole of the distance, to and from the nearest suitable school, for the number of weeks for which schools are maintained in each year, when such pupils reside at such a distance from the said school as in the judgment of the superintending school committee shall render such conveyance necessary. *In all cases, conveyance so provided shall conserve the comfort, safety and welfare of*

the children conveyed and shall be in charge of a responsible driver who shall have control over the conduct of the children conveyed. Contracts for said conveyance may be made for a period not to exceed 3 years. Provided, however, that the superintending school committee may authorize the superintendent of schools to pay the board of any pupil or pupils at a suitable place near any established school instead of providing conveyance for said pupil or pupils, when in their judgment it may be done at an equal or less expense than by conveyance. - - - -." (Emphasis ours.)

Sec. 43, as amended:

"Where the distance from the place of temporary residence to the school is more than 2 miles and transportation is deemed advisable by the superintending school committee or school directors, the superintendent of schools shall report the same to the commissioner with such other information as may be required and if so directed by the commissioner *shall procure transportation* for such child or children or, if transportation is inadvisable, board in lieu thereof; - - -." (Emphasis ours.)

Sec. 55: This section requires chest x-ray examinations for all superintendents of schools, supervisors, teachers, school nurses, janitors, *school bus drivers* and persons employed in the preparation of school lunches. This provision specifically applies to both public *and private schools.*

Sec. 92, as amended, is the compulsory education section requiring school attendance of children between 7 and 15 years of age and under some circumstances between the ages of 15 and 17. Under this section a child is not compelled to attend a public school provided that:

"- - - the child obtains equivalent instruction, for a like period of time, *in a private school* in which the course of study and methods of instruction have been approved by the commissioner, or in any

> other manner arranged for by the superintending school committee or the school directors with the approval of the commissioner. Children shall not be credited with attendance *at a private school* until a certificate showing their names, residence and attendance at such school, signed by the person or persons having such school in charge, shall be filed with the school officials of the administrative unit in which said children reside." (Emphasis ours.)

Sec. 101, as amended, concerns itself in part with *transportation of pupils* to free high schools, while Sec. 119 treats *of transportation* to be provided by community school committees. The provisions of Sec. 164 relating to the education of children in unorganized territory provides in part for "*board and transportation* of elementary school pupils." (Emphasis ours.) A careful reading of the provisions of Chap. 41 will demonstrate that the Legislature has established a definite pattern for the creation and growth of the educational system of the State in all its varied and intertwining aspects.

From our study of the laws pertaining to education, we are convinced that the Legislature which enacted the various provisions intended that no municipality should regulate by ordinance or order any subjects which would affect or influence general education unless permitted to do so by an express delegation of power. To determine otherwise would be to disregard the clear intent of the Legislature and invite an interference on the part of any municipality within the State with the State's responsibility and constitutional duty to exert its " 'full power' over the subject matter of schools and of education - - - - -."

The State educational policy cannot and must not be interferred with by any subordinate governing body. *McQuillin-Municipal Corporations,* Vol. 5, Sec. 15.21:

> "- - - Nor, under a general grant of power, can a municipal corporation adopt ordinances 'which in-

> fringe the spirit, or are repugnant to the policy, of the state as declared in its legislation.' It follows that if the state has expressed through legislation a public policy with reference to a subject, a municipality cannot ordain in respect to that subject to an effect contrary to, or in qualification of, the public policy so established *unless there is a specific, positive, lawful grant of power by the state to the municipality to ordain otherwise.*" (Emphasis ours.)

The Legislature has seen fit to make the conveyance of pupils as much a component part of the public school program as the furnishing of text books, employment of teachers, prescribing subjects to be taught, construction and maintenance of school buildings and all other activities which compose a complete educational program.

The City of Augusta is a body politic and has only that authority to act which is given to it by the Legislature, as evidenced by its charter or by statute. The power of a town or city to appropriate money and to pass rules, orders and by-laws was first established in Maine by the provisions of Chap. 114, Sec. 6 of the Laws of Maine 1821. Sec. 6 reads as follows:

> "*Be it further enacted,* That the citizens of any town, qualified as aforesaid, at the annual meeting for the choice of town officers, or at any other town meeting, regularly warned, may grant and vote such sum or sums of money as they shall judge necessary for the settlement, maintenance and support of the ministry, schools, the poor, and other necessary charges, arising within the same town, to be assessed upon the polls and property within the same, as by law provided; and they are also hereby empowered to make and agree upon such necessary rules, orders and bye-laws, for the directing, managing and ordering the prudential affairs of such town, as they shall judge most conducive to the peace, welfare and good order thereof; and to annex penalties for the observance of

> the same not exceeding five dollars for one offence, to enure to such uses as they shall therein direct: *Provided,* They be not repugnant to the general laws of this State."

It is significant to note that there has been no substantial departure from the State's maintenance of authority over towns and cities in 137 years. The revision of the general laws relating to municipalities enacted in 1957 (R. S., Chap. 90A, P. L., 1957, Chap. 405) did no more than to consolidate and codify the powers and duties of municipalities. This statute did not become effective until subsequent to the eflective date of the ordinance concerned in this case. We mention this 1957 legislation for the purpose of noting that there are no provisions contained therein, either expressed or implied, giving authority to the City of Augusta to pass the ordinance and order, had the legislation been in effect at the time of passage. The municipalities are still subject to the authority of the sovereign and have only those powers which are specifically delegated by the Legislature. See *Spaulding* v. *Peabody,* 153 Mass. 129. In *Frankfort* v. *Lumber Co.,* 128 Me. 1, on page 4, the court said:

> " 'A municipal corporation has no element of sovereignty. It is a mere local agency of the State, having no other powers than such as are clearly and unmistakably granted by the law-making power.' "

See *Alley* v. *Inhabitants of Edgecomb,* 53 Me. 446; *Burkett* v. *Young, et al.,* 135 Me. 459.

In the case of *Lunn, et al.* v. *City of Auburn, et al.,* 110 Me. 241, the court in considering the power and authority of the City Council spoke in this manner:

> *"We think it important to now discover the intention of the Legislature, for the intent of the Legislature is the law. --- Further, if the Legislature had intended to confer upon the city council the power it now claims, it certainly would have done*

so by express grant and not by inference from general terms." (Emphasis ours.)

The authority given by the Charter to the City of Augusta to enact ordinances contains this language: "and may ordain and publish such act, laws and regulations not inconsistent with the constitution and laws of this State, as shall be needful to the good order of said body politic." Within the meaning of these words or by force of any statute applicable to municipalities must be found the authority for the City Council to pass the ordinance and order. There is no express authority in the language of the Charter and no reasonable inference can be drawn therefrom that the Legislature granted the City Council the power to enact an ordinance providing for conveyance of school children to private schools, nor do the statutes confer a specific right to do so. The Charter negatives rather than affirms the right because it provides that the City may ordain only such acts and laws as are not inconsistent with the "laws of the State."

The order calls for the appropriation of $250.00 to be paid out of the contingent fund. The purpose of the appropriation is to finance the conveyance of pupils to private schools. Although the appropriation is to be taken from the contingent fund and not school funds, it nevertheless is derived from taxation, and in order to be legally expended, it must be made available by lawful appropriation. Public funds cannot be spent except for purposes authorized by law. This may come about by charter or statutory authorization but the authority must be strictly construed. "The words 'other necessary town charges,' do not constitute a new and distinct grant of indefinite and unlimited power to raise money for any purpose whatsoever, at the will and pleasure of a majority. They only embrace all incidental expenses arising directly or indirectly in the due and legitimate exercise of the various powers conferred by statute."

Opinion of the Justices, 52 Me. 595. See *Gale* v. *The Inhabitants of South Berwick,* 51 Me. 174; *Westbrook* v. *Deering,* 63 Me. 231.

The legal rights of municipalities are well defined as to their scope of authority in matters of raising, appropriating and spending public funds. Their powers and authority are determined within the structure of their Charters or by enabling acts. It is to be noted that the statutes have specifically provided for the expenditures of public money by towns and cities generally. There are numerous provisions providing for the financing of many educational activities, among which is the transportation of pupils in the public schools. There is nowhere to be found in the enabling statutes or in the Charter of the City of Augusta any authority, express or implied, for the Council to appropriate any sums for the conveyance of pupils to private schools.

Counsel for the defendants cite the case of *Everson* v. *Board of Education,* 330 U. S. 1, as applicable to the facts and circumstances of this case. The *Everson* case had its origin in the State of New Jersey *under a statute* authorizing local school districts to make rules and contracts for the transportation of children to and from *schools, including the transportation of school children to and from schools other than public schools,* excepting those schools which are operated for profit in whole or in part. The statute further provides that when any school district furnishes transportation for public school children from any point in an established school route to any other point on such established school route, the transportation shall be supplied to the school children residing in the district other than public school children, excepting those children who attend private schools operated for profit. The appellee (Board of Education of the Township of Ewing), acting in pursuance to the statute, authorized reimbursement to parents of money paid out by them for bus transportation of their children to pri-

vate schools. A portion of this money expended was for the payment of transportation of pupils to the Catholic parochial schools. The appellant contended that the statute and the resolution passed pursuant to it violated both the State and the Federal Constitutions, thereby presenting as an issue the constitutionality of the statute and the resolution. The Supreme Court of the United States, in a divided opinion, found that the statute and resolution were constitutional. We distinguish the *Everson* case from the case now under consideration. In the *Everson* case the State of New Jersey *enacted an enabling statute* specifically authorizing the Board of Education of school districts to provide transportation for all school children, both those attending public and private schools (except those private schools operated for profit). The issue was the *constitutionality* of the *statute* and the *resolution.* It was not, as in the instant case, that the resolution providing the transportation was passed without statutory authorization. This question was not involved in the *Everson* case.

The case of *Nichols* v. *Henry,* 301 Ky., 434, 191 S. W. (2nd) 930, 168 A. L. R. 1385, also cited by the appellees is based as is the *Everson* case on an enabling act and thus is distinguishable from the case at bar.

We are satisfied that a properly worded enabling act, authorizing municipalities to expend funds for the transportation of children to private schools not operated for profit, if one were in fact to be enacted by the Legislature, would meet constitutional requirements. In so saying we recognize that the decision of the Supreme Court of the United States in *Everson* is the law of the land and that the provisions of the Maine Constitution relating to the expenditure of public monies for public purposes and to the separation of church and state, carry no more stringent prohibitions than the First and Fourteenth Amendments to the Federal Constitution. We cannot, however, pass upon

the constitutionality of a statute which thus far has never been enacted by the Legislature. As already noted, we have searched in vain to find any provision of statute or charter authorizing the City of Augusta to appropriate public funds for transportation of children to private schools.

In our view of the case at bar, we do not reach the issue of the constitutionality of the ordinance and order. The decisive issue here is, did the City Council of Augusta have *authority from the Legislature* to enact the ordinance and order? We hold that the State of Maine has never, by enabling legislation or by the terms of the City of Augusta Charter, by express grant or implication, empowered or authorized the City Council to enact such an ordinance and order.

It is contended by the appellees that the ordinance and order as passed by the City Council of Augusta was a proper exercise of police power. There is no question but that the City of Augusta has and has always had authority to exercise police power. "The ordinary form of a city charter granting authority to enact ordinances not inconsistent with the Constitution and laws of the State is a delegation of authority to exercise the police power." *Opinion of the Justices,* 124 Me. 508. We recognize the sound principles of the proper use of police power and the necessity for it. This does not mean, however, that "police power" when assigned as a reason or authority for the enactment of an ordinance is sufficient to give validation to the act. When an enactment is founded on police power, the resultant legislation must stand the test as to whether it is a *proper* exercise of such power or not. McQuillin-Municipal Corporations, Vol. 6, Sec. 24.04:

> "The term 'police power' in a more limited sense, is not conceived to be all governmental power; it does not embrace, for example, the power of eminent domain or the power of taxa-

> tion for revenue and *appropriation of public funds*, - - - -." (Emphasis ours.)

We cannot, however, subscribe to the use of police power when the end result is to defeat the intent of the Legislature. It is not conceivable that the Legislature when it delegated police power to the City of Augusta intended that it be used as authority to permit the passage of an ordinance providing for the conveyance of pupils to private schools and to use public funds for that purpose. The City Council is attempting to accomplish by police power what it is not authorized to do by its Charter or any enabling act of the Legislature, namely, to transport pupils to private schools. McQuillin-Municipal Corporations, Vol. 6, Sec. 24.46:

> "Municipal police power is subject, of course, to limitations, including, of course, those applicable to police power generally. Its exercise must be consistent with the general laws of the State - - - -."

In this instance a use has been made of police power which is repugnant to and in derogation of the established policy of the State in its general scheme or plan for the promotion of education. McQuillin-Municipal Corporations, Vol. 5, Sec. 15.21:

> "- - - Nor, under a general grant of power, can a municipal corporation adopt ordinances 'which infringe the spirit, or are repugnant to the policy, of the state as declared in its legislation.' It follows that if the state has expressed through legislation a public policy with reference to a subject, a municipality cannot ordain in respect to that subject to an effect contrary to, or in qualification of, the public policy so established *unless there is a specific, positive, lawful grant of power by the state to the municipality to ordain otherwise.*" (Emphasis ours.)

In the case of *Fieldcrest Dairies* v. *City of Chicago,* 122 F. (2nd) 132, on page 138, the court had this to say:

> "The authorities are uniform that any ordinance which conflicts with any statute or public policy adopted by the State Legislature is invalid. The rule is aptly stated in 2 McQuillin on Municipal Corporations, 572: 'A Municipal corporation cannot, without special authority, prohibit what the policy of a general statute permits. Nor, on the other hand, can an ordinance permit that which the State's policy forbids. Consequently under a general grant of power, a municipal corporation cannot adopt ordinances "which infringe the spirit, or are repugnant to the policy of the state as declared in its legislation." *It thus follows that if the state has expressed through legislation a public policy with reference to a subject, a municipality cannot ordain in respect to that subject to an effect contrary to, or in qualification of the public policy so established. - - -.*'" (Emphasis ours.)

Since 1821 to the present time the Legislature has been definite and cautious in its delegation of authority to towns and cities. The State has always maintained general control of education, in all its phases, and when use of public funds by towns and cities for school or any other purposes has been permitted, the authorization has been specific and well defined. There has been no uncertainty as to intent. Had the Legislature which enacted the revision of the laws relating to municipalities in 1957, or any Legislature preceding it, intended that municipalities be authorized to pass ordinances providing for transportation of pupils to private schools, it would have said so in clear and unmistakable language. It is not for us to read into the statutes an intent which is obviously not there.

The City Council of the City of Augusta was without legislative authority to enact the ordinance and order providing for the conveyance of pupils of elementary grades

attending non-public schools and the expenditure of public funds for this purpose would be unlawful.

It has come to the attention of the court that the terms of office of the mayor and city treasurer in office at the time of the commencement of this litigation have terminated. The case has been fully briefed and argued. The case should be remanded to the court below to give reasonable opportunity for the appellants to move to join the present mayor and present city treasurer of Augusta as parties defendant, and thereupon, such motion being granted, a decree may be entered in accordance with this opinion.

The entry will be,

Appeal sustained.

Remanded to the court below for further proceedings in accordance with this opinion.

DISSENTING OPINION...SULLIVAN, J., DUBORD, J.

This is an appeal from a *pro forma* decree of a justice dismissing a bill in equity instituted under the authority of R. S. (1954), c. 107, § 4, paragraph XIII, by the plaintiff taxpayers against the City of Augusta, its mayor and its treasurer.

On June 17, A. D. 1957 the City Council and legislative body of the City of Augusta had enacted the following ordinance and order:

> "WHEREAS, children residing in the City of Augusta and attending the public schools pursuant to and in compliance with the compulsory school-attendance laws of the State of Maine, and who reside at distances from the schools rendering their conveyance necessary, are presently afforded, at public expense, conveyance by motor vehicle to and from public schools; and
>
> "WHEREAS such conveyance is provided for the conservation of the comfort, safety and welfare of the children thus transported and
>
> "WHEREAS such conveyance is not afforded to children residing in the City of Augusta who are attending schools other than public schools under and in compliance with the compulsory school-attendance laws of the State of Maine and who reside at unreasonable distances from the schools which they attend;
>
> "NOW THEREFORE, in order to facilitate attendance at school pursuant to the compulsory school-attendance laws of the State of Maine, by such children for whom such conveyance is not now provided and to assist and protect such children while they are on the highway in order to attend school under the compulsory school-attendance law of the State of Maine,
>
> "BE IT ORDAINED BY THE CITY COUNCIL of the City of Augusta, as follows:

ORDERED, That (a) the City of Augusta shall make available conveyance by motor vehicle to any child residing in Augusta (1) who is a pupil of elementary grade attending a non-public school (including a so-called "parochial" school) pursuant to and in conformity with the compulsory school-attendance laws of the State of Maine, and (2) who resides more than one mile from the said school which such child attends.

"(b) Such conveyance shall be so provided as to conserve the health, safety and welfare of the children transported.

"(c) The Mayor of the City of Augusta is authorized to make contracts for a period of one year, to employ such persons and to take such other and further action as may be necessary to effectuate the matters herein contained.

"(d) There is herewith appropriated from the contingent fund of the City of Augusta the sum of $250.00 to be expended for the purposes and matters herein provided during the remainder of the year, 1957."

By the bill in equity the plaintiffs seek to nullify the ordinance complaining that such ordinance can in fact apply only to two existing parochial schools conducted under the auspices of the Roman Catholic Church, that the City enjoys no delegated competency by charter, statute or the constitution to adopt the measure and that the ordinance violates the Constitution of Maine and the Constitution of he United States.

The record consists of the pleadings, decree, and agreed statement of facts and the testimony of the superintendent of the public schools of Augusta. The parochial schools are elementary grade units compositely having 920 pupils, 308 of whom reside a mile or more from their respective schools. Such scholars are formally taught religion and morality as required courses. Such schools are concededly functioning in full compliance with the statutory educational require-

ments of the State and their graduates are accepted to the public high school with plenary approbation. There are no other private schools in Augusta.

The sitting justice concluded that in judicial propriety he should honor precedent and sustain the validity of the ordinance upon the basis of presumptive legality.

The appellants contend that the Legislature by constitutional limitation possessed no authority to delegate to the City of Augusta the sanction to promulgate such an ordinance, that the Legislature had never affected to bestow upon the City such power either by statute or by charter, and that for want of some warranted enabling act of the Legislature the City has acted *ultra vires*. The appellants argue that school 'bus transportation is an integrated school activity and by the municipal charter only the board of education can effect the expenditure of any school moneys. They argue that private schools may be regulated by the sovereign but not subsidized by it and that public funds may not be appropriated for sectarian purposes. They assert that the act violates the Constitution of Maine in that it illegally prefers one religious denomination and provides an appropriation for a private purpose. They protest that the ordinance offends against the Constitution of the United States and that this court should adopt the reasoning of the minority justices contained in a decision of the United States Supreme Court in order to give heed to the censure of the appellants.

In so far as this ordinance makes and dedicates an appropriation for the transportation of non-governmental school children this court cannot, if it would, seriously entertain the protestations from the appellants that the enactment therefore violates the National Constitution. There is unimpeachable auhority to the contrary in the decision of the United States Supreme Court in the case of *Everson* v. *Board of Education* (1947), 330 U. S. 1. In effect the appel-

lants in their brief acknowledge that insurmountable reality but, nevertheless, persist that the decision was a split one and urge that we refrain from conforming with the majority of the highest court in the land. The tradition and the respectful duty of this court have been clearly settled:

> "We shall not repeat the reasoning by which this conclusion is sustained by the Supreme Court of the United States. It is sufficient to say that it is full, and we think satisfactory. But whether satisfactory or not, it must be acquiesced in by the State courts, for the question arises under the federal constitution, and it is the duty of the Supreme Court of the United States to answer it, *and their answer is conclusive upon the State courts.* - -" (Emphasis supplied.)
>
> *State* v. *Furbush* (1881), 72 Me. 493, 496.
>
> "This is a federal question, and if we could have any doubt about it, *we are bound to follow the law as decided by the federal court of last resort.*" (Emphasis supplied.)
>
> *Whitney* v. *Burger* (1886), 78 Me. 287, 295.
>
> "But it seems, by recent decisions of the U. S. Supreme Court *(by which this Court, agreeing or not, is bound)* - - - -"
> (Emphasis supplied.)
>
> *Waterville Realty Corp.* v. *Eastport* (1939), 136 Me. 309, 315.
>
> "- - - - The decision of the Supreme Court of the United States upon the question of the interpretation and application of the commerce clause of the Federal Constitution *is conclusive and binding upon this court.* - - - -" (Emphasis supplied.)
>
> *Higgins* v. *Carr Brothers Co.* (1942), 138 Me. 264, 271.

Cognizant of universal compulsory school attendance the case of *Everson* v. *Board of Education, supra,* renders unavailing the arguments of these appellants that school 'bus transportation is by nature an inherent school activity, that

transportation of private school pupils when publicly supported is a subsidy to the private schools and that public funds when so utilized are thereby applied to a private purpose to the preference of one religion before another and to a sectarian purpose.

The United States Supreme Court said:

> P. 5. "The only contention here is that the state statute and the resolution, insofar as they authorized reimbursement to parents of children attending parochial schools, violate the Federal Constitution in these two respects, which to some extent overlap. First. They authorize the State to take by taxation the private property of some and bestow it upon others, to be used for their own private purposes. This, it is alleged, violates the due process clause of the Fourteenth Amendment. Second. The Statute and the resolution forced inhabitants to pay taxes to help support and maintain schools which are dedicated to, and which regularly teach, the Catholic Faith. This is alleged to be a use of state power to support church schools contrary to the prohibition of the First Amendment which the Fourteenth Amendment made applicable to the states."
>
> P. 7. *"It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose.* Cochran v. Louisiana State Board of Education, 281 U. S. 370; Holmes, J., in Interstate Ry. v. Massachusetts, 207 U. S. 79, 87. See opinion of Cooley, J. in Stuart v. School District No. 1 of Kalamazoo, 30 Mich. 69 (1874). The same thing is no less true of legislation to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools *rather than run the risk of traffic and other hazards incident to walking or 'hitchhiking'."* See Barbier v. Connolly, supra, at 31 (113 U. S. 27, 31 - 32) See also cases collected 63 A L. R. 413; 118 A. L. R. 806. Nor

does it follow that a law has a private rather than a public purpose because it provides that tax-raised funds will be paid to reimburse individuals on account of money spent by them in a way which furthers a *public* program. See Carmichael v. Southern Coal & Coke Co., 301 U. S. 495, 518." (Emphasis supplied.)

P. 18. - - - *"Of course, cutting off church schools* from these *services so separate and so indisputably marked off from the religious function, would make* it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. *State power is no more to be used so as to handicap religions than it is to favor* them." (Emphasis supplied.)

P. 18. "This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements, which the state has power to impose. See Pierce v. Society of Sisters, 268 U. S. 510. It appears that these parochial schools meet New Jersey's requirements. *The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.*" (Emphasis supplied.)

It is to be noted that the United States Supreme Court in the *Everson* case not only affirmed the constitutionality of legislation providing for transportation of private school pupils at public expense under the "child benefit theory" but in upholding such a transportation law against the contention that it violated the First Amendment to the Federal Consitution the court indeed grounded its decision upon the

right of free exercise of religion guaranteed by that First Amendment.

In the case of *Cochran* v. *Board of Education* (1930), 281 U. S. 370, the United States Supreme Court scrutinized a statute of the State of Louisiana supplying from public tax money secular school books free of cost to the school children of that State. Taxpayers of the State had sought to restrain the State officials from furnishing any such books to children attending private schools. The court unanimously affirmed a State court judgment against the taxpayers in a decision by Chief Justice Hughes who said:

> "The contention of the appellant under the Fourteenth Amendment is that taxation for the purchase of school books constituted a taking of private property for a private purpose. Loan Association v. Topeka, 20 Wall. 655. The purpose is said to be to aid private, religious, sectarian, and other schools not embraced in the public educational system of the State by furnishing text-books free to the children attending such private schools. The operation and effect of the legislation in question were described by the Supreme Court of the State as follows (168 La., p. 1020) ;
>
> 'One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. *It was for their benefit, and the resulting benefit to the state that the appropriations were made.* True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. *The schools, however, are not the beneficiaries of these appropriations.* They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state above are

> beneficiaries. It is also true that the sectarian schools, which some of the children attend, instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without result, in an effort to find anything to the effect that it is the purpose of the state to furnish religious books for the use of such children - - - What the statutes contemplate is that the same books that are furnished children attending public schools shall be furnished children attending private schools. That is the only practical way of interpreting and executing the statutes, and this is what the state board of education is doing. Among these books, naturally none is to be expected adapted to religious instruction. The Court also stated, although the point is not of importance in relation to the Federal question, that it was 'only the use of the books that is granted to the children, or, in other words, the books are lent to them.' "
>
> "*Viewing the statute as having the effect thus attributed to it, we can not doubt that the taxing power of the State is exerted for a public purpose.* The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. *Individual interests are aided only as the common interest is safeguarded.*" (Emphasis supplied.)

The ordinance in the instant case is not violative of the Federal Constitution because of the benefit bestowed, the providing of publicly paid 'bus transportation for private school pupils. Some nineteen states now have such laws.

The appellants assail the ordinance as multipliedly infractious of the State of Maine Constitution. Some of their reasons advanced have been distinguished away and refuted by the eminent authority already quoted. The ordinance will be found to prefer no religion. It embraces private schools as a replete category whether conducted as re-

ligious or religiously indifferent institutions. The enactment provides for something physical, not spiritual, mental or educational, to wit, transportation by bus. No church, school or person can receive any direct grant. The indirect aid conferred is to taxpaying parents who already are supporting public school buses and to scholars who are citizens of this State and not second class citizens just because they attend private schools. The ordinance affords an extra curricular public welfare service. It is an exercise of police power much as the supplying of public vaccine, school lunches, public X-ray examinations or dental inspections. The transportation in a measure is a complement and neutralizer of the compulsion imposed by the law of this State upon parents and children that the children attend some standardized school of the parents' designation.

The Kentucky Court of Errors and Appeals in the case of *Nichols* v. Henry (1945), 301 Ky. 434, 191 S. W. (2nd) 930, 934, held:

> "In this advanced and enlightened age, with all of the progress that has been made in the field of humane and social legislation, *and with the hazards and dangers of the highway increased a thousandfold from what they formerly were, and with our compulsory school attendance laws applying to all children and being rigidly enforced,* as they are, *it cannot be said with any reason or consistency that tax legislation to provide our school children with safe trnsportation is not tax legislation for a public purpose. Neither can it be said that such legislation, or such taxation, is in aid of a church or of a private sectarian, or parochial school, nor* that it is other than what it is designed purports to be, as we have stated hereinabove - - - - legislation for the health and safety of our children, the future citizens of our state. The fact that in a strained and technical sense the school might derive an indirect benefit from the enactment, is not sufficient to defeat the declared pur-

pose and the practical and wholesome effect of the law." (Emphasis supplied.)

From a leading law periodical:

"- - - Despite these arguments the fact that the highways are extremely dangerous, especially to children, should be sufficient to induce a court to hold that an effort by the state to protect all children is a valid exercise of police power. *If this is the purpose of the statute providing free transportation, the children may well be considered its true beneficiaries, and any advantage received by the private and parochial schools incidental and immaterial.*" (Emphasis supplied.) 51 Harvard Law Review, 935. (1938.)

In *Board of Education* v. *Wheat,* 174 Md. 314, 199 A. 628, 631 the court upheld the State Constitutionality of a law affording free transportation by the State to private school pupils and said:

"Whether it (the use of public funds) is private within that rule appears to be finally, a question whether it is in furtherance of a public function in seeing that all children attend some school, and in doing so have protection from traffic hazards. School attendance is compulsory, and attendance at private or parochial schools is a compliance with the law. - - - The fact that the private schools, including parochial schools, receive a benefit from it could not prevent the Legislature's presuming the public function."

The Constitution of the State of Mississippi contained the following section (208):

"No religion or other sect or sects shall ever control any part of the school or other educational funds of this state; nor shall any funds be appropriated toward the support of any sectarian school, or to any school that at the time of receiving such appropriation is not conducted as a free school."

The Supreme Court of Mississippi in an elaborate opinion denied a taxpayers' prayer for an injunction to prevent the public officials from granting to private school pupils, in accordance with a State statute, secular books purchased with State tax funds. The court held, *inter alia:*

> "The religion to which children of school age adhere is not subject to control by the state; but the children themselves are subject to its control. If the pupil may fulfil its duty to the state by attending a parochial school it is difficult to see why the state may not fulfil its duty to the pupil by encouraging it 'by all suitable means'. *The state is under duty to ignore the child's creed, but not its need.* It cannot control what one child may think, but it can and must do all it can to teach the child how to think. *The state which allows the pupil to subscribe to any religious creed should not, because of his exercise of this right, proscribe him from benefits common to all.*
>
> - - - - - - - - - -
>
> "Calm reason must not be stampeded by random cries of church or state or sectarian control, or by the din from the conflict of catechism and dogmatism. A wholesome sanity must keep us immune to the disabling ptomaine of prejudice. If throughout the statute there are words which arrest the attention of over-sensitized suspicion and are seen by a jaundiced eye as symptoms of secular control, one may regain composure by viewing the state's book depository as a great public library of books available to all, which sells any book to anybody, and which, subject to reasonable regulation, allows the free use thereof to *any* child in *any* school." (Emphasis supplied.) *Chance* v. *Mississippi State Textbook Rating and Purchasing Board* (1941), 190 Miss. 453, 200 So. 706.

The appellants in the instant case object that the Augusta ordinance is unconstitutional in that the appropriation entailed is a public fund which is to be expended for private purposes. No pains were taken by the appellants to demonstrate that furnishing public bus rides from general

revenues to private or parochial school pupils constitute tax support of a school or church. They leave the assertion without customary amplification and we find ourselves at a complete loss to conjecture what direct aid could possibly result to church or school. The ordinance is an application of police power. It is typical of police power service or public welfare measures adopted by any authority that indirect advantages inure to private citizens and private organizations. Traffic acts, fire, police protection, compulsory vaccination, health ordinances and countless similar regulations of the sovereign, primarily for health and welfare in its public school system are of incidental benefit to private individuals, parents and their children attending public schools and in certain instances incidentally and secondarily of aid to parochial schools. Yet the State or its local divisions are not because of the foregoing resultants reduced to impotency or inhibited from legislating for its own primary safety and welfare.

The instant case is concerned with no attempt by the State or municipality to subsidize a private school.

Appellants combat the ordinance as "unconstitutional in that it prefers one religious denomination." The ordinance is not restricted to parochial schools but legislates concerning public bus rides to *all* private schools. A stipulation of this case states in substance that at the time of the hearing the only private schools in Augusta qualifying for the transportation service were parochial. There may be other private schools at this time or at some future date:

> " 'The motive of the framers to discriminate against a certain class which does not appear from the language of the ordinance or statute will not make the enactment void or unconstitutional.' Soon Hing v. Crowley, 113 U. S., 709. 'Evidence as to the motive of the framers of the law or the influences under which they (sic) are enacted is

> not admissible for the purpose of nullifying an ordinance.' - - -"
>
> *Inhab. of Skowhegan* v. *Heselton* (1917), 117 Me. 17, 20.
>
> "- - - Class legislation, discriminating against some and favoring others, is prohibited, but legislation, which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the (14th) amendment." *State* v. *Phillips* (1910), 107 Me. 249, 256.

The ordinance reveals and our statutes confirm that public school pupils already have public bus transportation available to them. The ordinance essays to supply such a facility for private school pupils as a class.

The ordinance primarily serves a public function and not a religious one. *Everson* v. *Board of Education, supra.*

No church or school is a beneficiary.

> "- - - It was for their (the childrens') benefit, and the resulting benefit to the state that the appropriations were made - - - The schools, however, are not the beneficiaries of these appropriations."
>
> *Cochran* v. *Board of Education, supra.*

The ordinance does not prefer any religion and in fact confers a public benefit without direct aid to religion or school.

Appellants advocate "the wall between church and state," "the separation of church and state," as indispensable to religious equality and freedom. The first of the two expressions was employed by the court in *Everson* v. *Board of Education, supra,* and was in reality a concession to secular humanism. It is a figure of speech. In 1934, Cardozo, J., in *Snyder* v. *Massachusetts,* 291 U. S. 97, 114, had warned against dependence on metaphors:

> "A fertile source of perversion in constitutional theory is the tyranny of labels. - - - -"

Professor Sutherland in *Due Process and Disestablishment,* 62 Harvard Law Review, 1306, 1311 (1919), wrote:

> "The wall of separation is a very satisfying metaphor. It has a fine, tangible, firm sound. No one can doubt where a stone wall is. *But a metaphor is generally more effective as a slogan than usable* as a definition; - - - -" (Emphasis supplied.)
>
> "- - - one mark of naivete of mind being a preference for slogans over solutions." *Prof. Edwin S. Corwin: The Supreme Court as National School Board*

To debate a metaphor, a clarifying definition of terms is mandatory or disputants soon find themselves bereft of a common issue.

Neither in the Constitution of the United States nor in the Constitution of the State of Maine are to be found "the wall beween church and state" or "the separation of church and state" as terms or as requisitions. In the First Amendment to the Federal Constitution and in Article 1, Section 3 of our Maine Constitution the disestablishment of religion is guaranteed together with freedom of religion. "Disestablishment" precludes an official state religion. It does not doom American or Maine society to be godless.

> "- - - No state has had an established religion in the sense of a frankly tax-supported chosen sect since Massachusetts disestablished the Congregational church in 1833." *Sutherland, supra,* P. 1309.

The preamble of both the Federal and Maine Constitutions begins with identical words, "*We the people of*"—Our national and state governments are the people acting in binding and patriotic allegiance through the legal and political instruments of their sovereign societies. Our religions are groups of persons and their clerical superiors.

When we speak of "church" or of "state" we are talking about people, persons, human individuals in composite social groups. Neither the "state" nor the "church" is an objective entity existing by itself somewhere. Our people are singularly and individually citizens both of this State and Nation and generally they are also adherents of a religious faith or other, espoused for himself by each person. They confess and are conscious of no separations or rifts within themselves, no inside walls, real or figurative, no split in personality between the religious and civic ego. They are not all in accord with their fellows upon religious or civic subjects but few will countenance real separations or walls in reference to their compatriots. If we wish to ignore temptations of rhetoric and express the true *modus vivendi* in Maine and America, it is this: we have all solemnly covenanted by our constitutions, and we shall require, that no religion may be preferred before any other by either, people's government and that religious liberty must always obtain for all. Synchronously with these edicts of disestablishment of state religion and of freedom of worship each constitution hastens its guarantee and its blessing to each citizen exhorting him to worship God according to his light, for American society and that of Maine are pluralistic in religion and culture and "religion is the dynamic element in culture." (Prof. Christopher Dawson.) A judicious cooperation between leavens, religious and politic, is therefore constantly indicated. As a practical necessity there must be sponsored and observed the intelligently balanced arrangement availing in the sound policies of well reasoned decisions rather than the perturbed and sweeping application of fearsome "aid to religion" interpretations. Problems there must be but resolvable generally by considerations of degree. Common sense will often suffice. Piety need never be segregated from civic affairs. History is a witness that it never has been, permanently. Piety "buries its undertakers." Our court in *State* v. *Mockus* (1921), 120 Me. 84,

93, demonstrated an admirable appreciation of the golden mean within the subject by enforcing the blasphemy statute.

The United States Supreme Court since revivifying the metaphor of "a wall between church and state" in *Everson* v. *Board of Education, supra,* has veered away from it to the doctrine of emphasis upon cooperation between church and state, so-called, as constitutionally acceptable and right for implementing the exercise of freedom of religion. In the case of *Zorach* v. *Clauson* (1952), 343 U. S. 306, in which the then incumbent Attorney General of Maine filed an effective brief as *amicus curiae,* it was held: (Douglas, J.)

> P. 312. " - - - There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and in all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "So help me God" in our courtroom oaths - - - these and all other references to the Almighty that run

through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.' "

P. 313. *"WE are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary.* We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. *When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of traditions.* For it then respects the religious nature of our people and accomodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement *that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.* Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. *But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.* The government must be neutral when it comes to competition between sects. - - -"

P. 315. - - - - *"We cannot read into the Bill of Rights such a philosophy of hostility to religion."* (Emphasis supplied.)

The instant case is concerned with no attempt by the State or municipality to subsidize a private school.

Appellants protest that the ordinance offends against the principles guiding the framers of the Maine Constitution and against the mandate of separation of church and state as contained in that Constitution. (Art. 1, Sec. 3.) Appellants array excerpts from "Perley's Debates." The theories presently advanced by the appellants are not the policy of the framers of the Constitution who actually disestablished secular orthodoxy along with the state (Mass.) church and in effect allocated both state and religion each to its distinct sphere of activity with cooperation in areas of common interest, e.g., education, marriage, etc., over particular aspects of which each society has authority and in an harmonious exercise of which authority will be found religious liberty. Such a policy is expressed within the Constitution. We reiterate—the framers and the Constitution negate an established church but do not relegate religion or evince hostility to it. The framers and the Constitution are tolerant and typical of the years following the American Revolution. E. E. Y. Hales, eminent English historian, now of the Ministry of Education in London, is authority that theories not wholly unlike those championed by the appellants result from the "Nativist" movement, 1830's - 1850's, contemporaneous with some immigrations.

The product of the sage thinking of the framers and the content of the Constitution are more eloquent and conclusive than the debates in convention.

We have only to read:

> " - - - the legislature are authorized, and it shall be their duty - - - - to encourage and suitably endow, from time to time, as the circumstances of the people may authorize, all academies, colleges and seminaries of learning within the state: provided, that no donation, grant or endowment shall at any time be made by the legislature as to any literary institution now established, or which may hereafter be established, unless, at the time of making

> such endowment, the legislature of the state shall have the right to grant any further powers to, alter, limit or restrain any of the powers vested in, any such literary institution, as shall be necessary to promote the best interests thereof."
>
> *Constitution of Maine,* Article VIII.

In 1820 few if any public schools as we conceive them existed in New England. In Maine the "academies, colleges and seminaries" had, and those extant for the most part have, a religious reference.

We quote a resolve in favor of Waterville College. In 1813 Massachusetts chartered Maine Literary and Theological Institute. In 1818 the name was changed to Waterville College and in 1867 to Colby College. This favorably known institution of learning, in 1828, was sectarian, Baptist.

> "Resolve for the benefit of Waterville College.
>
> Resolved, That there be, and hereby is, granted to Waterville College, to be paid out of the Treasury of the State, the sum of three thousand dollars; in equal annual payments, the first payment to be made on the first day of April next: Provided, That the sum of two hundred and fifty dollars, from the sum hereby granted, shall be appropriated, annually, to the partial or total reduction of the tuition fees of indigent students in said College. (Approved by the Governor, February 18, 1828.)"
>
> *Resolves of Maine,* Vol. 1, P. 797, Chapter XXXV.

Without formal research we note the following resolves: 1829, c. 10, Waterville College, $1000; 1832, c. 100, same $1000; 1831, c. 69, and 1835, c. 63, Maine Wesleyan Seminary, $2000 and $1000; 1833, c. 74, Westbrook Seminary, $1000; 1833, P. 564, Resolve for the Improvement of Colleges in Maine.

Resolves of Maine, 1903, c. 91, P. 37 reads:

> "Resolve in favor of Colby College.
>
> Resolved, That there be and hereby is appropriated the sum of fifteen thousand dollars to be paid to Colby College for the use of said institution to enable it to rebuild and furnish its dormitory destroyed by fire in December last.
>
> Approved March 28, 1903."

The Resolves of 1921, c. 155, 1927, c. 247, 1931, c. 141 granted substantial sums to academies, many of which were religious, and for broad purposes. See R. S., 1930, c. 19, § 105, Par. 2, R. S., 1954, c. 41, §§ 107, 125.

The Revised Statutes of 1954 contain provisions for the payment of public funds to "the trustees of any academy," etc., where there is no "free high school of standard grade" maintained. (Academies have a religious reference.) The so-called Sinclair Act of 1957 contains like provisions. R. S. (1954), c. 41, § 105: P. L., 1957, c. 142, § 3, c. 364, § 59 (special session), c. 443, § 17. See also R. S., c. 90-A, § 12, VII, B, P. L., 1957, c. 405, § 1.

What would the appellants say of the legality of public bus transportation to an academy, of scholars where tuition is paid by the municipality?

> "Money raised for certain purposes. — The voters at a legal town meeting may raise the necessary sums for the support of schools and the poor; - - - *repairing and constructing buildings for academies, seminaries or institutes* with which the town has a contract as provided in section 105 of chapter 41" *(supra)*. (Emphasis supplied.)
>
> R. S. (1954), c. 91, § 100.

Other statutes together with long tradition may be readily cited to manifest that Maine and its Constitution do not regard "the state and religion" as "aliens to each other - -

hostile, suspicious, and even unfriendly." *(Zorach* v. *Clauson, supra.)* R. S., c. 41, § 145, § 146; c. 134, § 33, § 34; c. 92, § 6 V; P. L., 1955, c. 399, §§ 10, 11, G; Preamble to Constitution; Marriage Laws, etc.

In view of the wording of Article VIII of the Maine Constitution and the record of direct grants thereunder by the Legislature for almost one century and a half, to several private religious institutions it is most difficult to conjure a doubt of the constitutionality of a mere publicly financed bus ride for a pupil attending a private or parochial school when such service has been sanctioned by the Legislature.

With the grant of legislative warrant of delegated authority there is no constitutional inhibition in Maine against a municipal ordinance which furnishes from general tax revenues to private school pupils free bus transportation to and from school.

The confusion of the present and like controversies will be greatly dissipated by a repetition here of the principles of some basic legal decisions restating precepts from the natural law antedating and persisting through both constitutions.

In 1923 the United States Supreme Court in the leading case of *Meyer* v. *Nebraska,* 262 U. S. 390 decided that a state law prohibiting the teaching of school subjects in any language other than English and the teaching of a foreign language below the 8th grade was unconstitutional.

> P. 401. "That the State may do much, go very far indeed, in order to improve the quality of its citizens, physically, mentally and morally is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on their tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced

> by methods which conflict with the Constitution — a desirable end cannot be promoted by prohibited means."
>
> P. 400. "- - - His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment." (14th.)

In 1925 in an equally fundamental decision the U. S. Supreme Court in *Pierce* v. *Society of Sisters*, 268 U. S. 510, unanimously ruled that a state law requiring parents under penal alternative to send their children to public schools was unconstitutional because of the 14th Amendment.

> P. 534. "No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.
>
> - - - - - - - - - -
>
> "Under the doctrine of Meyer V. Nebraska, 262 U. S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control - - *The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.*" (Emphasis supplied.)

The two decisions just cited above are to be read as companion cases and affirm the right of parents to control the education of their children, an "unalienable" right.

> "The rights of children to exercise their religion and parents to give them religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and assertion of state power voicing it, have had recognition here, most recently in West Virginia State Board of Education v. Barnette, 319 U. S. 624. Previously in Pierce v. Society of Sisters, 268 U. S. 510, the Court had sustained the parent's authority to provide religious with secular schooling, and the child's right to receive it, as against the state's requirement of attendance at public schools. And in Meyer v. Nebraska, 262 U. S. 390, children's rights to receive teaching in languages other than the nation's common tongue were guarded against the state's encroachment. *It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include separation for obligations the state can neither supply nor hinder.* Pierce v. Society of Sisters, supra. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter."
>
> (Emphasis supplied.) *Prince* v. *Commonwealth of Massachusetts* (1943), 321 U. S. 158, 165.

In 1927 in the case of *Farrington* v. *Tokushige*, 273 U. S. 284, the same highest court decreed that there are definite constitutional limits upon the power of a territory (Hawaii) to regulate private schools and that such is true although the territorial lawmaking body may strongly assert that such regulation is necessary to promote educational welfare.

Since the decision of *Farrington* v. *Tokushige, supra,* a significant development and change have occurred in constitutional law. That opinion was rendered at a time when the first 8 amendments were interpreted as applicable only to the Federal Government. One who found himself aggrieved was not regarded as free to invoke those amend-

ments to the U. S. Constitution in order to deter a State from discriminatory practices. It was necessary for such person to depend upon the generalized provisions of the 14th Amendment. In several decisions the U. S. Government subsequently, however, has decided that the principles of the first 8 amendments do restrain the States as well as the Federal Government, recognizing that those amendments possess the additional quality of being natural rights of the individual, pleadable against the States. (See, *Palko* v. *Connecticut,* 1937, 302 U. S. 319, 326.) Many of the cases involved Jehovah's Witnesses and the court applied the doctrine that the word, liberty, in the 14th Amendment includes liberty in Amendment 1. Some of the vagueness and generality of the 14th Amendment now give way to the specific provisions of Amendment 1 in religious liberty controversies. The U. S. Supreme Court made these important observations and distinctions:

> "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. *The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedom of* speech and of press, of assembly, and *of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears di-*

> *rectly upon the State it is the more specific limiting principles of First Amendment that finally govern the case.*" (Emphasis supplied.)
>
> *Board of Education* v. *Barnette* (1942), 319 U. S. 624, 639.

Freedom of religion and from restraints in the exercise thereof will thus appear as primordial. The status of the parochial school has been secured beyond peradventure.

The foregoing decisions are bastions against possible evolution toward a totalitarian state where children are regimented, indoctrinated and freedom withers and dies. They guarantee diversities which are so characteristic of our Republic.

> "- - - Compulsory unification of opinion achieves only the uniformity of the graveyard."
>
> *Board of Education* v. *Barnette, supra,* P. 641.

When, then, parents in this State and land send their children to private or parochial schools they are not acting by the sufferance of anybody.

When parents, not for better teaching or for desired social prestige but in conscience, are convinced that secular education is not sufficient for their children, schools are required where along with the cultivation of mere intellectual virtues are inculcated knowledge of man's transcendent destiny and efforts to help him attain it. Along with their conviction that children are inseparable from God and not humanistically self-sufficient these parents hold that a comprehensive idea of anything is impossible without reference to the Creator in Whom all things begin, are conserved and end. The State laws can and do properly require of the private and religious schools that they teach the legally standardized secular subjects. Religiously the parents are acting under moral compulsion in patronizing parochial

schools. When to that severe stricture is added the also proper but drastic and well enforced truancy laws of our State (R. S., 1954, c. 41, §§ 91, 92, 94, 95, 97; P. L., 1957, c. 364, §§ 47, 48, 50, 51, 52) then such parents are truly constrained to send their children to religious schools. There are the Charybdis of conscience and the Scylla of penal law. It becomes not an affair of luxury, perversity, social ambition or idiosyncrasy but truly one *de rigueur.*

It is not considerate or fair to exact of such parents that they avail themselves of all of the public school facilities or of none. They are in a position to take very few. They are obliged by our law to place their children physically in school. Since they are economically a cross section of citizens; many of them cannot afford a vehicle. By indirection they may be forced to yield their natural rights and abandon their cherished schools for want of transportation in modern traffic. What then become of the admonitions of the First Amendment to the U. S. Constitution against prohibiting the free exercise of religion and of Article 1, Section 3 of the Maine Constitution against hurting one in his liberty or estate for worshipping God in the manner and season most agreeable to the dictates of his conscience or for his religious professions or sentiments?

> "- - - Freedom of speech, freedom of the press, *freedom of religion* are available to all, not merely to those who can pay their own way." *Murdock* v. *Pennsylvania* (1942), 319 U. S. 105, 111.

When the Legislature passes specific laws relating to public and fewer to private schools the explanation is that some laws it cannot enact for private educational institutions *(Pierce* v. *Society of Sisters, supra)* and others it has no occasion to make.

> "- - - it shall be their (Legislature's) duty to *require* the several towns to make suitable provisions

> at their own expense for the support and maintenance of *public* schools." (Emphasis ours.)
>
> *Constitution of Maine,* Article VIII.

That is a positive mandate and the Legislature has diligently honored it. But if the Legislature has limited its enactments for private schools to proper minimal standards of secular education, compulsory attendance, etc., there is thus justified no implication that the Legislature is callous toward such private schools or altogether impotent. On the contrary, in accord with the spirit and wording of Article VIII, the Legislature must always be gratified with the promotion of learning and "a general diffusion of the advantages of education" through all schools. We cannot infer that the Legislature is opposed to justifiable police power provisions for private school scholars. When the Legislature provides for public school transportation it is not functioning under Article VIII but by virtue of the police power of the Preamble of our Constitution.

Exercise of the police power by the Legislature on behalf of public school children whom it is constitutionally charged with educating in no way by any known rule of reason or legal osmosis precludes, preempts or discredits the exercise by a municipality of its legislative, endowed police power for private school children whose parents must educate them. To hold to the contrary is to maintain that because the Legislature sought to protect public school children while it was conforming with the positive constitutional mandate to educate them it demonstrated by a prohibitory inference that it entertained no humane regard for private school pupils and suspended the police power of the City in this one instance. Such thinking is not only illogical, it is uncharitable.

The Legislature has committed the administration of public school funds and of public school bus transportation

to the supervision and control of the department of education. So it did, as well, by its charter to the City of Augusta. As for bus transportation the allocation to such department was but a matter of convenience. Even to public school pupils transportation is not an inherent, indispensable or integral part of the public schools as such. Bus transportation is not to be apostrophized and given a content of instruction. It is not of the essence of the public school which could and has functioned without transportation. The private and parochial schools have always had to endure without public bus transportation, although the parents of the pupils contribute to support it, and by the very stipulation in this case it is conceded that those private schools educate very well. If public bus transportation is essential to the public, it is for the private school. The Legislature without sensible privation to the public schools could assign the public transportation facility to the police, traffic safety or health department, etc. Transportation acquires no change in nature, no teaching faculties or qualities because it is under the jurisdiction of the education department. Transportation is propulsion, not learning. It is a physical process of moving children through space without appreciable contribution to the education of the children in transitu. Buses carry no black boards or instructing teachers. Bus transportation is an adjunct accommodation entirely in the exercise of police power applied for child safety and health and for school efficiency.

Amongst other challenges to the ordinance in this case, the appellants argue that an appropriation to supply publicly paid transportation for private school pupils is a "school" appropriation. As we have already observed such is true only in a manner of purely convenient reference. Such an appropriation is the exercise of police power and social welfare and not teaching. Appellants contend that the charter of the City of Augusta and the statutes make

no provision for delegating to the City authority to make such a "school" appropriation. That cannot be sound unless the appellants further dispute the rudimentary authority of the City of Augusta to appropriate for public safety, health and welfare.

Police power is a prerequisite of government. Order and police power are correlative terms. Public health, safety and welfare are indispensable to human society and their achievement is the highest duty of government. *R. R. Co.* v. *Commissioners,* 79 Me. 386; *State* v. *Starkey,* 112 Me. 8.

> "This power must be extensive enough to protect the most retiring citizen in the most obscure walks, and to control the greatest and wealthiest corporations. - - - 'This police power of the state extends to the protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the state' Thorpe v. Rutland Railroad Co., 27 Vt. 150 - - -"
>
> *R. R. Co.* v. *Commissioners, supra,* P. 393.
>
> "With the Legislature the maxim of the law 'salus populi suprema lex' should not be disregarded."
>
> *State* v. *Noyes,* 47 Me. 189, 211.

The Legislature by charter delegated to the City of Augusta police power for that community:

> "The inhabitants of the town of Augusta - - - a body politic - - - and as such shall have, exercise and enjoy all the rights, immunities, powers, privileges and franchises, and be subject to all the duties and obligations now appertaining to, or incumbent upon said town as a municipal corporation, or appertaining to or incumbent upon the inhabitants or selectmen thereof; and *may ordain and publish such acts, laws and regulations not inconsistent with the constitution and laws of this state, as shall be needful to the good order of said body politic;* - - - -" (Emphasis supplied.)
>
> P. L., 1919, c. 75, § 1.

The "good order of said body politic" connotes a tranquil disposition of affairs, a multitude reduced in some wise to unity.

We have examined all 37 sections of Augusta's charter. (P. L., 1919, c. 75.) With few exceptions of no moment here, all of the police power delegated to that City is contained in Section 1, *supra,* in the expression, "good order." It is a compelling sequitur, therefore, that "good order" must signify "health, safety and welfare" or that the City was projected into being by the Legislature without the imperative authority of police power. The City of Augusta by its charter received plenary police power for its municipal existence. For sufferable existence the safety, health and welfare of its children are paramount and there is nothing inconsistent with the Constitution or laws of Maine or with the Legislative mind in the weal of children.

Our court in an advisory opinion has said:

> "The ordinary form of a city charter granting authority to enact ordinances not inconsistent with the Constitution and laws of the State is a delegation of authority to exercise the police power." *Opinion of the Justices,* 124 Me. 508, 509.
>
> "- - - The state legislature, in order to obviate the difficulty of making specific enumeration of all powers it intends to delegate to the municipality, usually confers some power in general terms - - - - Special charters are often concluded with a clause conferring general authority to pass all ordinances which may be necessary for the promotion of the health, safety and welfare of the municipality which are not in conflict with the constitution or general laws of the state - - - -"
>
> Rhyne: Municipal Law (1957), P. 72.
>
> "- - - The city is a miniature State, the council is its legislature, the charter is its constitution; and it is enough if, in that, the power is granted in

> general terms, for when granted, it must necessarily be exercised subject to all limitations imposed by constitutional provisions, and the power to prescribe the mode of its exercise is, except as restricted, subject to the legislative discretion of the council. - - -"
>
> *Paulsen* v. *Portland* (1893), 149 U. S. 30, 38.
>
> "The difficulty of making specific enumeration of all such powers as the Legislature may intend to delegate to municipal corporations renders it necessary to confer some power in general terms - - -"
>
> *Porter* v. *Vinzant* (1905), 49 Fla. 213, 38 So. 607, 608.
>
> " - - - A general grant of power to enact all ordinances, in addition to those enumerated, for the promotion of municipal police and sanitary affairs, order, industry, commerce and general welfare, is generally, though not always, considered to give authority to enact ordinances upon all other subjects within the scope of municipal jurisdiction which are not mentioned in the specific enumeration - - - -"
>
> McQuillin: Municipal Corporations, 3rd ed., Vol. 5, § 16.09, P. 173.

There is very doubtful merit in an assertion that when the Legislature granted police power to Augusta it was not "foreseeable" that a time would come when commerce and traffic would make it advisable to exercise such power for the health, safety and welfare of city children.

We have found no authority that police power grants are strictly construed albeit ordinances thereunder must be reasonable.

The general statutes of this State have conferred police power upon all municipalities:

> "Towns, cities, village corporations may make by-laws or ordinances, not inconsistent with law, and

> enforce them by suitable penalties, for the purposes and with the limitations following:
>
> - - - - - - - - - -
>
> II. For establishing police regulations, - - - and preservation of good order - - -
>
> III. Respecting - - - health."
>
> R. S. (1954), c. 91, § 86.

Moneys raised and appropriated for enforcement of police power regulations are authorized by the clause:

> "and for other necessary town charges."
>
> R. S. (1954), c. 91, § 100.

The term, "police regulations" as employed in II, above, is not limited to the "police force";

> " 'Laws and ordinances relating to the safety, comfort, health, convenience, good order, and general welfare of the inhabitants are styled 'police regulations'."
>
> *Dantzler Lumber Co.* v. *Texas Ry. Co.* (1919), 119 Miss. 328, 80 So. 770, 776. See, Words and Phrases, Per. Ed., Vol. 32 A. P. 479.
>
> "Police Regulation. The term is used to define a power which resides in the state. In its primary or narrow sense it refers to the exercise of the police power to protect the health, lives and morals of the people. In its broader acceptation it embraces everything to promote the general welfare; everything essential to the great public needs. In the plural, such provisions of law as are designed to protect the lives, limbs, health, comfort and quiet of citizens and to secure them in the enjoyment of their property; regulations adopted in the exercise of 'police power'."
>
> 72 *Corpus Juris Secundum*, P. 207.

Before the enactment of the Augusta ordinance the 1957 Legislature adopted a revision of the municipal laws, to

take effect in August, 1957. That revision will be effective during the life of the Augusta ordinance and the spending of the money appropriated. It reveals a very liberal attitude toward municipal police power.

In 1955 the Legislature authorized the Attorney General and a committee of his forming to study municipal laws and to report to the 1957 Legislature such changes and amendments as were calculated to consolidate and complete such laws so as "to eliminate archaic and contradictory provisions" and "to make such statutes more readily understandable and useful to the municipalities and persons affected thereby." P. & S., 1955, c. 214.

In 1957 to the 98th Legislature the incumbent Attorney General forwarded a proposed revision of our municipal laws prepared by him and his committee in response to the legislative directive of 1955. With such suggested revision the Attorney General sent a letter to the Legislature advising:

> "The work sheets in this report give a complete explanation of the changes made and the reasons for them - - - -"

Page 40 of those work sheets treating of R. S. (1954), c. 91, § 86, II, III, cited *supra,* is partially reproduced as follows:

> "**II.** ~~For establishing police regulations, for the prevention of crime, protection of property and preservation of good order, and to regulate the use and manner of the use of bicycles in the streets.~~ **Promoting the general welfare; - - - providing for the public safety.**
>
> *Comment:*
>
> This becomes the first and last parts of N S 3 1 A
>
> 'Police regulations' deleted.

This subsection is a general statement of police power. 'Promoting the general welfare,' which includes 'prudential affairs' taken from Sec. 86 I, *is a general statement following the language of the Federal Constitution. Along with 'providing for the public safety,' it expresses a broad general power* which includes 'prevention of crime, protection of property, and preservation of good order.' (Italics added.)

\- - - - - - - - - -

"**III.** ~~Respecting~~ - - - **preventing** ~~infections~~ disease and **promoting** health - - - -"

Comment:

This becomes the middle part of N S 3 1 A."

In accordance with the Attorndey General's model the Legislature enacted a revision as follows:

"**Sec. 3. Police power ordinances.** A municipality may enact police power ordinances for the following purposes:

I. General.

A. *Promoting the general welfare:* preventing disease and *promoting health: providing for the public safety.*" (Emphasis supplied.)

P. L., 1957, c. 405, R. S., c. 90-A.

By appropriating the phrase, "Promoting the general welfare," which occurs in the very preamble of the United States Constitution and serves as the basis of the police power in our National Government the Legislation gave evidence of willing that the police power of municipalities be broad.

The 1957 Legislature granted authority to municipalities to appropriate money for police power:

"**Municipal Finance**

Sec. 12. Purposes for which money may be raised or appropriated. A municipality may raise or appropriate money for the following purposes:

VIII. General.

A. Performing any of the duties required of it by law.

B. Providing for any operations authorized by law which, by their nature, require the expenditure of money."

P. L., 1957, c. 405, R. S., c. 90-A.

"A general welfare or similar clause granting extremely broad power to a municipal corporation, is liberally construed to accord to a municipality wide discretion in the exercise of police power. The cases, indeed, reveal an increasing judicial inclination under such a clause to accord to municipal authorities wider discretion in the reasonable and nondiscriminating exercise, in good faith, of the police power in the public interest. - - - -"

McQuillin: Municipal Corporations, Vol. 6, § 24, 44, P. 535.

For the evaluation of police power ordinances this court has adopted a criterion:

"In Jones v. Sanford, 66 Maine, page 589, (1877) the late Chief Justice Peters, speaking of the authority of the court to pass upon the question of reasonableness of a by-law or local ordinance said: 'This principle does not apply, where that is done by a municipal corporation which is directly authorized to be done by the legislature. But where the power granted is a general one, the ordinance passed in pursuance of it, must be a reasonable one of the power or it is invalid.' "

State v. *Mayo,* 106 Me. 62.

By charter and by statute police power has been delegated to the City of Augusta. It remains for us to estimate the reasonableness or want of it in the ordinance passed.

The presumption is in favor of the ordinance.

"The ordinance, however, should be viewed as a whole, in the light of the purpose for which it was enacted *and with the presumption that it was not the intent of the enacting body to exceed its authority.*" (Emphasis supplied.)

State v. *Brown* (1920), 119 Me. 455, 456.

" - - - Hence, an ordinance which plainly purports to be enacted in the interest of public health, safety or welfare is presumed valid and enacted in good faith, and may be declared invalid only when it clearly appears that the ordinance does not tend in an appreciable degree to that end and that the power to legislate has been exercised arbitrarily in the enactment of an ordinance which is plainly unreasonable. Good faith in the enactment of an ordinance is presumed - - - -"

McQuillin: Municipal Corporations, Vol. 5, Sec. 15.23, P. 109.

As to the burden of proof:

"- - - the burden is on the objecting party to overcome this presumption."

State v. *Small* (1927), 126 Me. 235, 237.

The ordinance is not discriminatory.

" - - - 'Such laws as the act in question have never been regarded as class legislation simply because they affect one class and not another inasmuch as they affect all members of the same class alike, and the classification involved in the law is founded upon a reasonable basis. If these laws be otherwise unabjectionable all that can be required in these cases is that they be general in their application to the class or locality to which they apply, and they are then public in character, and of their propriety and policy the Legislature must judge.' - - -"

State v. *Phillips* (1910), 107 Me. 249, 256.

Discrimination, if any, must be expressed:

" 'The motive of the framers to discriminate against a certain class which does not appear from

> the language of the ordinance or statute will not make the enactment void or unconstitutional.' Soon Hing v. Crowley, 113 U. S. 709 - - -"
>
> *Skowhegan* v. *Heselton* (1917), 117 Me. 17, 20.

The ordinance does not attempt to utilize inaccessible public school appropriations but provides its own appropriation from general tax revenues.

The enactment acknowledges the factor of compulsion in school attendance and the resulting dilemma of parents affected. It humanely consults the safety and health of those elementary school pupils attending non-governmental schools who reside more than a mile from such institutions. The distance fixed is not at all arbitrary but judicious in consideration of city and suburban traffic and the age of the scholars. The avowed interest in the health, safety and welfare of the children is a matter of the worthiest solicitude and of the highest concern to the State of Maine in its most precious product. The apprehension displayed is entirely justified.

> "Further with reference to a test of reasonableness, it variously has been stated that the reasonableness of an ordinance is to be determined in the light of its purpose as an entirety, the remedy in view, and the complexity and dangerous conditions of the modern crowded city; that the court must regard the conditions prevailing in the city or town bearing directly on the subject matter, the object sought to be attained and the need, propriety or desirability of the legislation, and that 'to arrive at a correct decision whether the by-law be reasonable or not, regard must be had to its object and necessity' - - -"
>
> McQuillin: Municipal Corporations, Vol. 5, § 18.06, P. 398.

The Superintendent of the Public Schools of Augusta testified in this case. He ultimately resolved his doubt that school bus transportation is in any considerable degree a

concession to safety apprehension for the children served. As to the motivation of safeguarding health he did not voice such inceptive misgivings. For the reasonableness of the ordinance just health protection would seem ample. *State* v. *Maheu,* 115 Me. 316, 318. However, this court will take judicial notice that safety, these days is a prime justification for the transportation.

> "Facts which all persons of ordinary intelligence are presumed to know, need not be proved. State v. Kelley, 129 Me. 8."
>
> *Torrey* v. *Cong. Sq. Hotel Co.* (1950), 145 Me. 234.
>
> "In determining whether or not there is any credible evidence in a record from which a certain conclusion may be drawn, a court is not precluded from bringing to bear and applying to the problem that sound common sense which is derived from living in a world populated by human beings, and the observation and knowledge of their actions and reactions in and to situations encountered in the ordinary conduct of human affairs. 'Judges are not necessarily ignorant in court of what everybody else, and they themselves out of court, are familiar with; and there is no reason why they should pretend to be more ignorant than the rest of mankind." Applied Enterprises v. Walker, 5 Atl. (2nd) Del. 257, 261. This principle is as applicable to justices of the Law Court as it is to justices at nisi pruis. It is also applicable to referees. It not only may, but should be applied in determining what conclusions should be drawn from existing facts."
>
> *Melanson* v. *Reed Bros.* (1950), 146 Me. 16.

The appellants in their brief quote with approval:

> "Emphasis upon consolidation of rural schools in the past thirty years has made necessary the transportation of pupils *to avoid traffic hazards on the highway,* and indeed to make consolidated schools possible. - - -" (Emphasis supplied.)
>
> *National Education Association Bulletin,* Volume XXXIV, No. 4, December, 1956, P. 188.

The Kentucky Court in 1945 found that in its jurisdiction:

> "- - - the hazards and dangers of the highway" (had) "increased a thousandfold from what they formerly were, - - -"
>
> *Nichols v. Henry* (1945), 301 Ky. 434, 191 S. W. (2nd) 390.

It is a matter of universal information in mechanized America that for a lifetime there has been road improvement throughout by the States and Federal Government. Through their highway departments all States have striven vigorously to eliminate grade crossings, intersections and such in the ever accelerating traffic. So the school authorities and districts as instrumentalities of the States have collaborated for the progressive reduction of highway hazards by the means of programs of school bus transportation. One of the finest practices and customs of the American people is its tender and diligent safeguarding from traffic of most of its school children. In logic and in equity and in distributive justice that public service must be extended to all school children.

In August, 1958 the Chief of the Maine State Police issued a public warning to the public school pupil who missed his school bus.

That official was thus quoted:

> "- - - There are times, for one reason or another, when a youngster will miss the bus. This means, in some instances, that he must walk two or three miles to his home. *Of course, we constantly warn him to walk on the lefthand side of the road, if there are no sidewalks, and to be prepared to scramble into the ditch, if necessary, to avoid being struck by a car.*
>
> "However, we wish, also to warn him against another very real danger. The case files of our criminal bureau carry many records of youngsters who

made the mistake of getting into a car with a stranger. Some of them were never seen again.

"I cannot stress this point too strongly. It is far, far better to walk all the way home than it is to accept a ride from a person you do not know." (Emphasis supplied.)

(*Portland Sunday Telegram,* August 17, 1958.)

The head of our State Police entertains judgments differing somewhat in their emphasis and intensity from those of the Superintendent of Public Schools.

The apprehensions of the Chief of the State Police are foreboding to the children attending standardized non-government schools under moral and legal compulsion and to their parents but those children save for an ordinance similar to the Augusta enactment must "miss the bus" which their parents must help to support.

Our winters are long and cold. Daylight hours are then at a minimum. Sidewalks are often non-existent or impassable for snow and ice. Health is jeopardized. The alertness of children may vary with fatigue, distraction, the quality or state of natural reflexes and with the obliviousness of wholesome play. School hours can leave exhaustion.

Education is the mental training of citizens who are under the disability of infancy. That disability persists although the child is attending a private elementary school.

A national scourge is motor casualties. For 1957 and 1958 these are official statistics of our State which is comparatively small in population amongst other States:

1957

Age Group	*Persons Killed*	*(Pedestrians)*	*Persons Injured*	*(Pedestrians)*	*(Bicycles)*
0 - 4	7	5	268	94	3
5 - 9	13	10	377	184	28
10 - 14	5	3	358	64	56
15 - 19	17	1	929	18	7
	42	19	1932	360	94

1958

0 - 4	15	6	296	77	4
5 - 9	14	7	622	228	41
10 - 14	10	2	401	59	24
15 - 19	18	1	985	22	2
	—	—	——	——	—
	57	16	2304	386	71

The ubiquity in Maine and the nation of the "Slow - - - School" signs is eloquent of the consciousness of the public mind as to the danger lurking for all school children.

It is a not uncommon mistake to judge issues concerning children upon the same premises and by the same standards applicable to adults. Such is true with regard to youngsters walking considerable distances to school in severe climatic conditions and along busy highways.

Children are especial predilections of the police power.

> "The state's authority over children's activities is broader than over like activities of adults.
>
> "- - - A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies - - -
>
> "It is true children have rights, in common with older people, in the primary use, of highways. But even in such use streets afford dangers for them not affecting adults - - -"
>
> *Prince* v. *Commonwealth of Massachusetts* (1943), 321 U. S. 158, 168, 169.

The City of Augusta appears to have acted with considerable reason in its ordinance for child health and safety. The objective and the remedy applied give a sanction to the enactment within the delegated authority of the Legislature whether that sanction be justified as "good order of said body politic," "establishing police regulations - - - and preservation of good order" or "promoting the general welfare" or, in other words, whether we look to the charter or the statutes for its basis.

It would have been very extraordinary if the young Abraham Lincoln or Franklin D. Roosevelt had encountered traffic-hazards on his way to school. Appellants aver that ordinances such as that of Augusta are a new departure in Maine and therefore must be adjudged as wanting in authentication from the Legislature. The ordinance here is novel but that is not a valid indictment, if it is necessary, reasonable and an exercise of police power.

> " - - - Its exercise (the exercise of the police power) must become wider, more varied and frequent, with the progress of society - - -"
>
> *Boston & Maine Railroad Co.* v. *County Commissioners* (1887), 79 Me. 386, 393.

Police power can not be static. It must be adaptable, resourceful and vigilant. The law exists for the people, not people for the law.

> " - - - this power is not something which is rigid and definitely fixed; on the contrary, in its very nature it must be considerably elastic within limits in order to meet the changing and shifting conditions which from time to time arise through the increase and shift of population and the flux and complexity of commercial and social relations. In other words, the police power is dynamic in character; by virtue of fundamental principles, not to be defined with inexorable and mathematical certainty but nevertheless inherent and fundamental in government, it copes with the new as it has with the old and justifies measures in the present that it has not justified in the past. - - - -"
>
> McQuillin: Municipal Corporations, Vol. 6, 3rd ed., § 24.03, P. 445.

The ordinance responds to a purely modern exigency, traffic disasters in alarming arithmetic progression. It conforms to the more sympathetic preoccupancy with mass health. Our age differs from those immediately preceding it because of our acceptance of social concepts as contrasted

with the individualistic attitudes of other times. Rapid developments in social, political and economic life produce an always increasing complexity of society and broaden the social service field. School children have welfare needs not known before. Public welfare measures are indispensable and are now commonly adopted in the more populous States of this day. The law has clearly placed its emphasis on persons rather than property.

From an economic standpoint the ordinance is reasonable. Such is cumulatively true. It is not of prime consequence in view of the human values involved here. The appellants, however, presented testimony estimating the annual cost of the private school transportation supplied by the ordinance at a figure between $7,000 and $8,000. The State Department of Education has records establishing that, without inclusion of certain capital plant charges or debt service costs, the outlay for each of the years, 1957 and 1958, per average daily membership for each public elementary school pupil was $227. Upon multiplication it will appear that, without cost to the city and at an annual saving of $200,000 plus, the private schools are providing standardized and successful secular education to young citizens of Augusta. By its ordinance the city can hardly be adjudged improvident. Of truer consequence and aside from the foregoing the city is worthily endeavoring to conserve the health and safety of one third (308) of a child asset beyond price.

The Augusta city ordinance infringes upon neither the United States nor the Maine Constitution. Sufficient authority has been delegated to the city by the Legislature for enactment of this law, by both charter and statutes. The act is reasonable by all applicable standards. By judicial precedent, by statistics and from common experience of life the act is necessary. It is just and equitable. Under such circumstances there can be no justification for postu-

lating an isolated exception to public safety responsibility, suspending the police power and frustrating the impotent city. By so doing we would be creating bothersome variants in the law. How embarrassing and self conscious for a child citizen trudging to a private school to find himself in throbbing traffic where the policeman must be judiciously discriminating. We take it that the policeman might lead the child. He might carry the child unto "piggybacking." But in a police safety car the officer might not succour the child who has not already been injured, perhaps, for a police car is too closely related and akin to the non-legal school bus. The patrolman in his private car might transport an uninjured child to private school. The child's parents may in their own car. The public school bus is out of bounds for the private school pupil even were his parents to have saved their tax receipts for the current year. Therefore the officer might have to continue walking as must the child. There are no more mounted policemen. Let the child all the while keep the truant officer in mind. We could extend the nondescript situation further. We could wonder more about the status for public bus transportation of the pupil attending a religious academy and whose tuition is paid by the municipality. We can not blame the Legislature which has functioned adequately. There can be no true distinction amongst children as to their eligibility for public bus transportation because some attend private schools which are not tax supported and whose curriculum affords secular education with the eternal verities.

The ordinance has legislative sanction and is valid.

DUBORD, J. (Supplemental Dissent)

The purpose of this supplemental opinion is to pin point and emphasize some of the important aspects of the case before us.

Even though a person may be a judge, his intellect is not impervious to knowledge of matters commonly known by all the people of a community. I am, therefore, not without awareness of the controversy which prevailed in the City of Augusta a few years ago just previous to the enactment of the ordinance now under consideration. This controversy involved the issue of the conveyance of parochial school children, and in order that the citizens of Augusta might have an opportunity to express their opinion upon the issue there was submitted to them the following question:

> "Shall the City of Augusta appropriate funds for transportation of parochial school students?"

It is a matter of public record that on December 10, 1956, upon the question submitted, the people declared its affirmative plebiscite by a vote of 3915 to 2470.

Pursuant to the plebiscite of the people, the City Council of the City of Augusta, solicitous for the safety and welfare of all elementary school children, very wisely enacted an ordinance authorizing appropriations for the conveyance of such children to the private schools of the choice of their parents. This action, on the part of the Augusta City Council, is authorized under the police power of the City of Augusta, both under the provisions of the Augusta City Charter and Chapter 405, Public Laws of 1957.

Then followed the institution of the instant action by thirteen protagonists of the opponents. In order that the names of these thirteen persons may go into the records permanently, and not be lost in the anonymity of a title such as Alden W. Squires, et al. v. The Inhabitants of the City of Augusta, et al., let it be recorded that their names and occupations are as follows: Alden W. Squires, Physician, Veterans Administration, Togus, Maine; Rev. Harvey F. Ammerman, Pastor South Parish Congregational Church, Augusta, Maine; F. Herbert Bailey, Bridge Engi-

neer, State Highway Department; Franklin C. Brawn, Civil Engineer, State Highway Department; Kervin C. Ellis, employed at the Veterans Administration, Togus, Maine; Donald E. Hayward, Dentist, Veterans Administration, Togus, Maine; Trygve Heistad, General Agent Northwestern Mutual Life Insurance Company; Leslie G. Hilton, Bank Examiner; Robert E. Kinsey, General Manager, Gardiner Paper Mills; Albert E. Smith, Director of Sales Promotion, Central Maine Power Company, Augusta, Maine; William W. Sprague, Real Estate and Insurance; Stanley E. Sproul, Lumber Dealer; and Dorothy Tozier, Social Worker, Augusta State Hospital.

I write this opinion with genuine sorrow for the thousands of young innocent boys and girls, who, as a result of the majority opinion will be denied the safety of transportation to the schools which they attend. From any impending result I absolve myself of responsibility.

The instant bill in equity, was instituted largely upon the theory that the ordinance and vote of the City Council of the City of Augusta appropriating money for conveyance of parochial school children was repugnant to the Constitutions of the State of Maine and of the United States of America, in that they constituted a preference of one sect or denomination and purported to be a law respecting an establishment of religion. The Superior Court Justice who heard the bill at the outset, basing his decision on the presumption of constitutionality, dismissed the bill and from this decision the plaintiffs appealed.

The Supreme Court of the United States has said in *Everson* v. *Board of Education,* 330 U. S. 1, that expenditures of public funds for the conveyance of private school pupils is not a violation of the Federal Constitution, nor do such expenditures constitute a preference of one religious sect or denomination. Such an edict constitutes the ultimate law of the land.

As to the assertion that the action of the City Council of the City of Augusta purports to be a law respecting an establishment of religion, such an allegation can be construed only as a plain absurdity.

Our associates who constitute the majority have seen fit to disregard the constitutional issues and have written their opinion upon the theory that the only issue is that of authority of the Augusta City Council under its police power.

If counsel for the appellants are aware of the provisions of the Constitution of Maine which relate to education, the statutes enacted pursuant thereto and the appropriations made by Maine Legislatures throughout the past 139 years in favor of academies and colleges, many of which were founded by religious sects, they have conveyed no such knowledge to the court.

Article VIII of the Constitution of Maine reads in part as follows:

> "A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people; to promote this important object, the legislature are authorized, and it shall be their duty to require the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools; *and it shall further be their duty to encourage and suitably endow, from time to time, as the circumstances of the people may authorize, all academies, colleges and seminaries of learning within the state.*" (Emphasis supplied.)

This constitutional provision, as well as several decisions of the Supreme Court of the United States, dispel the metaphorical fantasy of words such as "the wall between church and state," and "the separation of church and state."

No good American citizen desires to see the State united with any Church. However, we are a nation founded on a belief in God and with an abiding faith in a Divine Power, and certainly not hostile to religion.

Pursuant to constitutional authority, as cited above, the Legislature of Maine enacted what has been Section 100, Chapter 91, R. S., 1954 under which towns were authorized to repair and construct buildings for academies and seminaries. Section 100, Chapter 91, has now been repealed and superseded by Chapter 405, Public Laws of 1957. However, during the many years during which this statute was on our books, towns in Maine appropriated and spent money for direct aid to academies many of which had a religious foundation.

Article VIII of the Maine Constitution imposes a duty on the Legislature to "suitably endow" academies. To endow an academy means to make a gift to that academy and that is exactly what Maine Legislatures have done. Throughout the years money has been appropriated for the direct benefit of academies and colleges. In the volume containing the 1921 Public Laws and Resolves, will be found Chapter 160, which includes a long list of academies which were voted direct financial help, including some Roman Catholic institutions of learning, as well as many others with a religious foundation.

Attention is also called to Section 105, Chapter 41, R. S., 1954, which authorizes superintending school committees to contract with the trustees of academies for the schooling of pupils within their town, when no free high school is maintained. This provision has been carried over into Chapter 364, Public Laws of 1957, known as the Sinclair Act, the constitutionality of which Act was given the stamp

of approval by this court on January 14, 1958. See *Opinion of the Justices*, 153 Me. 469. It is a matter of record that 21 different academies throughout the State of Maine have entered into contracts authorized by the foregoing section of the statutes and many of these academies have a religious foundation and background. Thus, direct financial help is given to institutions which are no less religious in character than are the parochial schools of Augusta.

As late as 1957, the 98th Maine Legislature appropriated $25,000.00 for Higgins Classical Institute to aid in building of a boys' dormitory to replace one which had been destroyed by fire.

Moreover, the same Legislature authorized Aroostook County to expend $10,000.00 for each year of the ensuing biennium for Ricker College.

Higgins Classical Institute was organized under the provisions of Chapter 91 of the 1891 Public Laws and one of its purposes is to promote Christian education.

Ricker College is a successor to Houlton Academy, which was organized by legislative authority in 1839 and among its corporate purposes is the promotion of piety and religion.

The record of these two institutions is outstanding in the field of education. There is no evidence of any opposition to these expenditures for such worthwhile purposes. However, the appropriations do constitute direct aid to institutions of learning which have a religious foundation. These facts are included in this opinion for the enlightenment of those who are without knowledge that such expenditures of public funds for direct aid to institutions of learning founded by religious sects are authorized and countenanced by the constitutional and statutory provisions of our State.

Perhaps the foregoing information may serve as a basis for contemplation on the part of those who fear that the conveyance of parochial school children at public expense violates the nebulous doctrine of separation of church and state.

In the light of constitutional and statutory authority in reference to such appropriations, how can it be argued that expenditures for the conveyance of little children to parochial schools is an unlawful diversion of public funds? No particular church or sect receives money, nor other gain therefrom. The children themselves are the only recipients of the accruing benefits. In any event the Supreme Court of the United States has furnished the answer and has said that such expenditures are lawful and constitutional.

The majority opinion recites that a municipality is without power to expend public funds for the conveyance of elementary school pupils from any other source except from public school appropriations. This conclusion is reached because they say the matter of conveyance of school children has been made a component part of the educational program by being included in a chapter of the statutes relating to education. Such reasoning is based upon an unsound premise and is unconvincing. It is impossible to operate schools without school buildings, teachers, text books and the necessary equipment, but schools can be operated, and have been operated without conveyance of the pupils.

Section 14, Chapter 41, R. S., 1954, is the section which directs superintendents of schools to procure the conveyance of elementary school pupils. This section says:

> "In all cases conveyance so provided shall conserve the comfort, safety, and welfare of the children conveyed."

Here is found the reason for conveyance, viz., the comfort, *safety and welfare* of the children, and this is exactly what the Augusta City Council endeavored to do in providing for conveyance of non-public school pupils.

It is a well-known fact, that many municipalities, including the City of Augusta furnish police officers at all schools, including parochial schools, to protect the children from traffic hazards while the pupils are crossing public highways on their way to and from school. What is the difference between spending money from a special appropriation to convey a child to a parochial school, except perhaps in the amount of the expenditure, and spending money appropriated for the police department, to protect parochial school children in the vicinity of the schools which they attend?

One may also ask if the conveyance of elementary school pupils to public schools is not for the protection of such pupils, as specified in the statute, what other purpose can it have?

Supposing there was not included in the chapter of our Revised Statutes specifically relating to education, a provision providing for the conveyance of elementary school pupils, I wonder if the appellants would argue, with any degree of vigor, that a municipality, for the purpose of conserving the safety and welfare of public school children, did not have the power to provide for their conveyance by a special appropriation not connected with a school appropriation?

The Augusta City Council provided in the ordinance before us for consideration, for the conveyance of all elementary school pupils who attend non-public schools, pursuant to and in conformity with the compulsory school attendance laws of the State of Maine; and in spelling out the

reason for the ordinance, the very words of Section 14, Chapter 41 were used viz., "to conserve the comfort, safety and welfare" of the children so transported.

The charter of the City of Augusta, in my opinion, authorizes this enactment. The charter gives the City of Augusta, the power "to ordain and publish such acts, laws and regulations not inconsistent with the Constitution and laws of this State as shall be needful to the good order of said body politic."

This court has said in *Opinion of the Justices,* 124 Me. 509:

> "The ordinary form of a city charter granting authority to enact ordinances not inconsistent with the constitution and laws of the State is a delegation of authority to exercise the police power."

The majority opinion cites this quotation with approval. What, one may ask, is there in the instant ordinance which is repugnant or inconsistent with the constitution and laws of our State? We have already seen that the Supreme Court of the United States has said that the expenditure contemplated by this ordinance presents no constitutional inconsistency. That being true, what statutes are there on our books which make the enactment of such an ordinance invalid? The answer is obvious. There are none.

It is pointed out in the main dissenting opinion that there is a tendency on the part of modern day courts to accord to municipal authorities wider discretion in the reasonable and nondiscriminatory exercise of the police power, in good faith, and in the public interest.

What is police power? According to Cooley, Const. 227 it is:

> "The authority to establish, for the intercourse of the several members of the body politic with each

> other, those rules of good conduct and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a corresponding enjoyment by others, is usually spoken of as the authority or power of police. This is a most comprehensive branch of sovereignty, extending as it does to every person, every public and private right, everything in the nature of property, every relation in the state, in society and in private life."

See also Section 942, Volume III, McQuillin on Municipal Corporations:

> "It is a general rule, therefore, constantly applied that appropriate means to the exercise of the police power rest largely within the discretion of municipal authorities, and courts will not interpose unless the means employed amount to an unreasonable and oppressive interference with individual and property rights. Where the relation of the regulation to the police power is fairly debatable, ordinarily the court will not interfere." Section 947, Volume III, McQuillin on Municipal Corporations.

In 1957 the Legislature revised the general laws relating to municipalities. This is Chapter 405, Public Laws of 1957.

Section 3, of this new statute provides that a municipality may enact police power ordinances for the purpose of:

I.

A. Promoting the general welfare; -------- providing for the public safety.

In reference to this subsection the then incumbent Attorney General in his report to the Legislature prior to the enactment of the law said:

> *"This subsection is a general statement of police power. 'Promoting the general welfare,' which in-*

cludes 'prudential affairs' is a general statement following the language of the Federal Constitution. Along with 'providing for the public safety,' it expresses a broad general power."

It is my opinion that the Augusta City Council, if it did not already have the power under its charter, was given direct authority to enact the ordinance now before us for consideration, and to appropriate money to give effect thereto.

In Chapter 405, Public Laws of 1957 under the heading "Municipal Finance," by Section 12, subsection VII, a municipality is given authority to raise and appropriate money for *"providing for any operations authorized by law which, by their nature, require the expenditure of money."*

This section gives the Augusta City Council definite and positive legal warrant to appropriate and expend funds for the administration of the ordinance which was enacted pursuant to its police power specifically delegated and authorized by the City Charter and by section 3, I, A of Chapter 405, *supra*.

The majority opinion says that Chapter 405, Public Laws of 1957 is not a revision, but a mere consolidation. It requires only a cursory study of the 1957 statute to discover that this enactment is not a simple consolidation, but an important revision of the laws relating to the powers of municipalities. Section 100, Chapter 91, R. S., 1954, was the statute which specified the purposes for which municipalities could raise and appropriate money and the last clause of this section read: "And for other necessary town charges."

The majority opinion properly says that public funds cannot be spent except for purposes authorized by law; and then using the last clause of Section 100, Chapter 91, says that the words "other necessary town charges" do not

constitute a new and distinct grant of indefinite and unlimited power to raise money for any purpose whatsoever at the will and pleasure of a majority. Apparently the fact that Section 100, Chapter 91, R. S., 1954 was repealed by Chapter 405, Public Laws of 1957 was overlooked.

I agree thoroughly with the statement of the law to the effect that money derived from taxation, in order to be legally expended, must be made available by lawful appropriations and that public funds cannot be spent except for purposes authorized by law.

However, I am convinced that the provisions of Chapter 405, Public Laws of 1957 cited above definitely and specifically authorize the City of Augusta to appropriate and expend money from a special fund for the conveyance of private school pupils.

The appropriation made by the Augusta City Council and under attack by the appellants herein, was a lawful appropriation. It is not necessary that the legislature specifically denote by statute all of the multiple purposes for which a municipality may raise or expend public funds. Under the broad general police power accorded by its charter, now confirmed by Chapter 405, Public Laws of 1957, the Augusta City Council acted within its delegated authority. The very fact that the Legislature repealed the clause, "and for other necessary town charges," which clause has been limited in the scope of its application, by various decisions of this court, is strong evidence that it was the intent of the Legislature to remove from the prior existing statute, any restriction contained therein.

In the interpretation of statutes there are, of course, certain applicable rules, and the fundamental rule of construction is legislative intent. However, the interpretation of such intent is but the composite opinion of the individual

thinking of those who constitute the court. In other words a statute means what a majority of the court says it means, and it is not difficult to find in the statute before us for consideration, legislative authority for the exercise of police power for the protection and safety of young children who happen to attend a private school, and who like all other children in America are entitled to the equal rights ordained in the Preambles of the Constitution of the United States of America and of the State of Maine.

In the instant case the words of the empowering statute are simple and plain. Interpretation thereof presents no unusual difficulties. Divorced from the specious argument that a municipality cannot provide by special appropriation for the conveyance of elementary school children who attend a private school, because such authority is not included in the body of statutes relating to education, the legislative intent is manifest and clear.

To find legislative authority in support of the ordinance in question we do not have to read words into the statute. All the necessary words are present.

It is assumed that the majority concedes that properly authorized municipal expenditures for the conveyance of pupils to private schools, not operated for profit, are legal and not inconsistent with constitutional limitations or restrictions, and that such expenditures do not constitute direct aid to the religious sect which is operating such schools.

Under the rule laid down by this very court in *Opinion of the Justices,* 124 Me. 509, the Augusta City Council had charter authority, in the exercise of its police power, to enact the ordinance which is now under question. This authority has been confirmed and strengthened by the provisions of Chapter 405, Public Laws of 1957.

The ordinance, and the appropriation made pursuant thereto, are a valid exercise of delegated power.

The majority suggests the need of further legislation. Unfortunately this decision will bring to naught the efforts which seek to conserve the safety and welfare of elementary school pupils in Augusta, and will nullify the laudable efforts of many other communities of our State, which are now providing, without objection, for the conveyance of elementary school pupils who attend private non-profit schools. In the meantime, the consequences, initiated by the plaintiffs herein, will descend on little children. Such a course of action must be without my sanction.

Delay is unnecessary. Substantive and authoritative warrant of law to support the ordinance before us is already in existence.

The bill should be dismissed.

WILFRED PELCHAT
vs.
PORTLAND BOX CO., INC.
AND
U. S. FIDELITY & GUARANTY CO.

Cumberland. Opinion, June 8, 1959.

Workmen's Compensation. Partial Incapacity. Burden of Proof.

In an employer petition to reduce compensation because of diminished incapacity, an employer need not offer evidence of specific job opportunities which the employee is capable of performing since the burden of going forward falls upon the employee to show that he has used reasonable efforts to obtain such work, once the employer has established a partial capacity to work.

Although the burden of proof rests upon the moving party, there is no burden to offer an employee work or to prove some particular kind of work is available which he could perform.

The term "light work" is broad enough in its scope to include many types of work "ordinarily available" in the community.

An employee may not impose unnecessary or improper limitations upon his own employability.

ON APPEAL

This is a petition to reduce compensation before the Law Court upon appeal from a decree of the Superior Court sustaining the Industrial Accident Commission.

Appeal denied. Decree affirmed.

Allowance of $250.00 ordered to respondent, Pelchat, for expenses of appeal.

Benjamin L. Berman,
John J. Flaherty, for plaintiff.

Forrest E. Richardson, for defendant.

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

WEBBER, J. The decree below confirming a decision of the Industrial Accident Commission has reduced the compensation of the appealing employee Pelchat. This action was taken on a petition for review filed by the employer and is based on a finding by the Commission that Pelchat's partial incapacity to work and earn wages has diminished to a present level of fifty per cent of his capacity prior to his accident. The issue is whether or not there was any evidence to support the finding.

The medical testimony supports a finding that the employee is sufficiently recovered from the injury to his foot so as to have at least fifty per cent of normal capacity and in particular to be able to perform "light work." It was strongly urged by medical witnesses that engaging in "light work" would benefit the employee's physical condition and would have therapeutic value. The medical witnesses were of opinion that the injured employee entertained a genuine but mistaken fear of actively using his foot and for that reason preferred to remain for the most part immobile with the foot elevated.

As illustrative of what was meant by "light work," the attending physician expressed the opinion that Mr. Pelchat could carry dry lumber weighing 15 to 20 pounds, but could not be expected to carry green lumber weighing about 85 pounds. The physician included as "light work" physical labor which would involve more use of the foot, walking and standing, even though some discomfort might be entailed, in order to improve both motion and circulation. He recognized some limitation in climbing ladders or walking on rough ground but in general felt that Mr. Pelchat could perform any type of work requiring standing, walking or

lifting. There was other medical testimony substantially to the same effect.

The petitioning employer offered no evidence of specific job opportunities or of the wages which might be earned from "light work." Following what has apparently become accepted practice, the Commission, having found a fifty per cent incapacity, applied this percentage to the original earning capacity in order to determine the rate of weekly compensation as fixed by statute. The employee, while conceding that there was medical evidence to support a finding of fifty per cent partial incapacity, contends that there was no evidence as to what work was available to him or what wages such work would produce. He therefore insists that the petitioner wholly failed to sustain its burden of proof.

A review of the cases suggests at once that any appearance of conflict is largely dissipated if we keep in mind the distinction between the burden of proof and the burden of going forward with evidence. We are satisfied that this was the distinction which our court had in mind in *Connelly's Case* (1923), 122 Me. 289. The language of the opinion has such direct bearing on the problem before us that we quote from it at length. In this case the employee had been receiving compensation on the basis of total incapacity. A petition for review brought by the insurance carrier was denied by the Commission on the ground that the employee still could not perform the same work which he was doing at the time he was injured, or even work of the same nature. In reversing the decision of the Commission, the court held that this was not the proper test and pointed out that the subsequent partial capacity to perform work and earn wages was not limited "to the same kind of employment in which he was engaged at the time of the injury." The Commission in its decree had pointed out that medical evidence had been submitted that the employee was sufficiently recovered to engage in some "light work," but

had noted that no evidence had been furnished showing the particular nature of any "light work" available to the employee, nor any evidence that the employer could or would furnish him with any such work. Quite significantly, we think, the state of the evidence as thus described closely and almost exactly parallels that before us in the instant case. After reiterating the rule which has always obtained in Maine that the burden of proof rests and remains upon the moving party to establish the grounds upon which his petition is based, Mr. Justice Wilson, speaking for an unanimous court, went on to say at page 292:

> "When a petitioner for review has shown an ability to do such work as is ordinarily available in the community in which the injured employee resides, and the kind of work suggested by the physician testifying in this case was 'driving a team or working around a place,' he has sustained the burden upon him as the moving party in a petition of the kind now before us. It then, we think, becomes the burden of the employee to meet this by showing he has used reasonable efforts to obtain such work and failed *by reason of his injury.* * * *
>
> If he fails to use reasonable efforts to find work such as he could perform or insists that he could not perform it, if available, no burden rests upon the petitioner to offer him work or *to prove that some particular kind of work is available which he could perform.*" (Emphasis supplied.)

It is obvious that the court was here thinking of more than the petitioner's burden of proof. The opinion clearly indicates the nature of evidence which, when presented by the petitioner and accepted and believed by the factfinder, will cause the burden of going forward with contrary or offsetting evidence to shift to the adversary. If such contrary evidence is not forthcoming, both the petitioner's

burden of proof and his initial burden of going forward with evidence have been satisfied.

The court assumed correctly that the term "light work" as commonly used and understood and as illustrated by the medical witness is broad enough in scope to include many types of work "ordinarily available" in any community. The court saw no practical need for requiring the petitioning employer to parade before the Commission a procession of employment officers, personnel directors and others who may know of specific job openings which involve only "light work" and who can indicate the wages being offered therefor. If the employee has diligently and in good faith made reasonable efforts to find "light work," he is or should be in a better position than the petitioner to know whether there is anything available that he can do and what he could earn thereby. It is neither unreasonable nor unfair to allow the burden of going forward with evidence to shift to him, once the employer has made out what amounts to a prima facie case.

Applying the rule laid down in *Connelly's Case,* which we deem controlling here, to the facts of the instant case, we find that the petitioner offered evidence which obviously satisfied the Commission that the injured employee had at least a fifty per cent capacity to work and earn and that he could and should for his health's sake perform "light work." As illustrated by the medical witnesses, the term "light work" could by reasonable inference mean to the Commission any type of work requiring mental or physical activity or both so long as the work did not involve the climbing of ladders, frequent or constant walking on rough ground, or the pushing, pulling or lifting of heavy loads. To meet the burden of going forward with evidence which then devolved upon him, the employee described his own efforts to find employment. The Commission could very properly conclude that he had not made reasonable efforts in good faith

to secure employment. By his own admission he sought only a position in which he could work entirely or at least for the most part in a seated position with his leg elevated. The Commission could properly find that he thereby imposed an unnecessary and improper limitation upon his own employability and that his consequent failure to find "light work" was attributable not to his injury, but to his exaggerated concern for keeping his injured foot immobile. Upon the whole evidence, therefore, the Commission could properly conclude that the petitioning employer had sustained its burden of proof.

Other cases which have been called to our attention require only brief comment. In *Ray's Case* (1922), 122 Me. 108, 110, the court defined "incapacity for work" to include not merely want of physical ability to work but lack of opportunity to work, and permitted an employee to show in support of claimed "incapacity" a "general disinclination on the part of persons requiring help to employ maimed or crippled men when sound men are available." The employee in the instant case offered no such evidence. The opinion pointed out, however, that "loss of wages due to the workman's fault subsequent to the accident or to his illness not connected with the accident does not entitle him to greater compensation. The same is of course true of loss occasioned by general business depression."

Milton's Case (1923), 122 Me. 437, emphasized that the employer was under no obligation to furnish remunerative employment to the injured employee as a prerequisite to showing diminished incapacity.

St. Pierre's Case (1946), 142 Me. 145, supports the proposition that the burden of proof on a petition never shifts and cannot be made to do so by any artificial device or order of the Commission. In this case on a petition for review by the employer, the Commission terminated compen-

sation entirely and forced the employee to make sustained efforts to work, establish an earning capacity or lack of one, and *then file his own petition for compensation.* This in effect shifted the burden of proof (not to be confused with the burden of going forward with evidence) on a petition from employer to employee. The opinion further reaffirms the principle that in determining ability to earn, the Commission may properly consider the willingness of an employee to return to work and his diligence in seeking employment, or the lack of it. The court properly remanded the case to the Commission to determine on the basis of evidence not unlike that before us, the extent of partial incapacity.

In *Shoemaker's Case* (1947), 142 Me. 321, a petition of the employee for further compensation had been denied by the Commission for insufficient proof of the extent of diminished incapacity. The Commission, however, while apparently recognizing that some partial incapacity existed, had failed to determine the extent of it. Its reason for such a decision was that the employee had failed to submit evidence of "a fair trial of her ability to work" to "fairly demonstrate a real working incapacity" as erroneously ordered by the Commission upon a prior petition for review brought by the employer. The court followed *St. Pierre's Case, supra,* in pointing out the error on the first petition, and was critical of the Commission for adding to the normal burden of proof of the employee an artificially and improperly imposed "yardstick." The case was remanded to the Commission to determine as an essential fact either that there was no proven partial incapacity, or otherwise the extent of partial incapacity shown. It is only necessary here to note that the holding in *Shoemaker's Case* in no way conflicts with the basic rules set forth in *Connelly's Case, supra,* which we deem dispositive of the issues before us.

Eleanora Gagnon's Case (1949), 144 Me. 131, holds that where an accidental injury, which would not alone produce

total incapacity, does so in combination with a preexisting illness, the accident must be held responsible for total incapacity. That issue obviously bears no relation to the one before us. There was no evidence presented that the employee was able to perform any remunerative work whatever.

As already noted, we are satisfied on examination of the record before us and the law applicable thereto that there was sufficient evidence to support the finding and decision of the Commission fixing the extent of partial incapacity in terms of weekly compensation. The case has, however, raised issues of law of sufficient importance to warrant an allowance to the employee for costs and counsel fees to be paid by the petitioners pursuant to R. S., 1954, Chap. 31, Sec. 41. The entry will be

Appeal denied. Decree below affirmed. Allowance of $250 ordered to respondent Pelchat for expenses of appeal.

ANTHONY FARINA AND ERNEST G. FARINA,
D/B/A FARINA BROTHERS CO.
vs.
THE SHERIDAN CORPORATION

Androscoggin. Opinion, June 12, 1959.

Accord and Satisfaction. Checks. Tender. Acceptance.

When the tender of return of an overpayment, less a cross claim for extras present not a clear and concise presentment of conditions for acceptance but in their ambiguity and lack of clarity, pose questionable terms and conditions as to exactly what was meant and understood or should have been understood, there is factual problem for jury determination.

Larsen v. *Zimmerman*, 153 Me. 116, distinguished.

The principles of accord and satisfaction under R. S., 1954, Chap. 113, Sec. 64, require a tender on the part of the debtor in satisfaction of a particular demand and that the creditor accept it as such.

ON EXCEPTIONS AND MOTION FOR NEW TRIAL.

This is an action of assumpsit before the Law Court upon exceptions and motion for a new trial. Exceptions overruled. Motion for new trial denied.

Frank W. Linnell, for plaintiff.

John G. Marshall, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ. WEBBER, J., concurring specially. WILLIAMSON, C. J., dissenting and joined by SULLIVAN, J.

TAPLEY, J. On exceptions and motion for a new trial. The action is in assumpsit and was tried before a jury at the March Term, 1957 of the Superior Court for the County of Androscoggin. The verdict was in the sum of $808.43.

The defendant filed a plea of general issue, with brief statement of special matter of defense alleging accord and satisfaction. The plaintiffs were general contractors holding a general contract for certain construction work for the United States Government on a project at Limestone, Maine. The contract included the erection of steel buildings. The defendant was in the business of selling and erecting prefabricated steel buildings and, as a subcontractor under the plaintiffs' general contract, agreed to furnish and erect certain prefabricated steel buildings in accordance with the requirements of the government and with specifications contained in its subcontract. There arose during their relationship disputes between them concerning a claim for extras advanced by the defendant. These disputes never were resolved by mutual negotiations. The amount of the disputed claims for extras were in the sum of $813.43. During the course of the controversy the plaintiffs, intending to pay the balance due on the contract, mailed a check to the defendant, on December 20, 1954, in the sum of $8538.09. This check did not include the disputed amount of $813.43. The sum of $8538.09 constituted an overpayment of the balance due under the contract by $2214.39. The defendant discovered this overpayment and wrote to the plaintiffs calling their attention to the overpayment and, after deducting $813.43, the amount of the claim for extras, enclosed a check for $1400.96, the amount of the overpayment, less the disputed $813.43. The plaintiffs by this action seek to recover this amount of $813.43.

Exceptions were taken by the defendant to the admission of certain testimony allowed by the presiding justice over objections and to the overruling of a motion by the defendant for a directed verdict. A motion for a new trial was addressed to the Law Court by defendant after a jury verdict favoring the plaintiffs.

The real issue between the parties is one of accord and satisfaction.

The record of the case develops certain uncontroverted facts which we propose to consider in chronological order. On November 4, 1954 the defendant communicated with the plaintiffs in writing, requesting balance of the contract price in as much as the work had been completed and approved. In this letter the plaintiffs were advised that in addition to the balance due on the contract price there was an additional sum claimed for extras. There was enclosed an itemized statement covering the extras which amounted to $813.43. The plaintiffs on November 8, 1954 answered by denying their responsibility for any extras. The next communication was from the defendant to the plaintiffs acknowledging receipt of the balance due under the original contract, advising of the overpayment and remitting a check for $1400.96 which was the amount the defendant determined was due the plaintiffs after having deducted the amount of $813.43 for extras claimed. The check on its face was payable to the order of "Farina Brothers." On the left hand side of the check there was space provided for notations. At the top of this space were printed the words "NO RECEIPT NECESSARY IF INCORRECT PLEASE RETURN" and underneath these printed words, in handwriting, "in full." On the reverse side of the check appears the words "For deposit only to the account of FARINA BROTHERS CO." In addition to the check there is in evidence a deposit slip in the name of Farina Bros. Co. showing deposit of check from Sheridan Corp. in the amount of $1400.96.

The defendant took it upon itself to return the overpayment, less its claim for extras, by sending a check to the plaintiffs with the notation of "in full" accompanied by a letter.

Chap. 113, Sec. 64, R. S., 1954, becomes pertinent. It reads:

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

The principles of accord and satisfaction require a tender on the part of the debtor in satisfaction of a particular demand and that the creditor accepts it as such. *Fogg* v. *Hall, et al.*, 133 Me. 322; *Crockett, Applt.*, 130 Me. 135. Counsel for the defendant cites with confidence the case of *Larsen* v. *Zimmerman*, 153 Me. 116, a case of fairly recent date determined by this court. Counsel for the plaintiffs, with frankness, admits that unless the facts of the instant case can be distinguished from those of the *Larsen* case, the decision in the *Larsen* case should prevail here. The *Larsen* case was before the Law Court on exceptions to the acceptance of a referee's report. A transcript of the evidence taken before the referee was not a part of the record. There was a disputed claim arising from the construction of a house. The check delivered by Zimmerman to Larsen in the sum of $1000.00 bore the printed words "By endorsement this check is accepted in full payment of the following account" and below this was written "Final." There was also in print the following words "If incorrect Please return. No other receipt necessary." The check bore the endorsement of "Oskar Larsen." This court referred to the findings of the referee when it said, on page 119:

> "The findings 'It does not appear, however, that such intent was made clear to the plaintiff prior to his receipt of the check,' and 'There is no evidence that the parties discussed the offer of $1000.00 in final settlement,' are facts accepted by us at their full value. The error of law lies in the

> conclusion of the referee that to complete an accord and satisfaction the check was not evidence in itself sufficient without more to establish the intention of the defendants and the plaintiff in giving and receiving the check."

We also said, on page 118:

> "The record before us does not include a transcript of the oral testimony. From the report of the referee and the bill of exceptions it plainly appears that no evidence entered the case relating to the sufficiency of the asserted accord and satisfaction apart from the findings stated above from the bill of exceptions. To these facts—and in particular to the check with its terms and conditions—the referee erroneously applied the pertinent rules of law."

To summarize the facts in the *Larsen* case, (1) an agreement between the parties to build a house; (2) a disputed claim arising from the construction of the house; (3) a check for $1000.00 paid by Zimmerman to Larsen by means of a check marked "final;" (4) the acceptance of the check by Larsen. This court determined under these circumstances that the wording on the check expressed the intent of the debtor to offer full satisfaction of the debt by tendering the check and that by accepting the tendered check Larsen accepted the offer and thereby accord and satisfaction was accomplished. This transaction involved one claim, namely, the disputed price charged for the construction of the house.

The instant case involves an entirely different set of facts. In the first place the transaction involved two claims, one for the overpayment of the contract and the other a claim for extras about which there was a dispute. The evidence not only involves the check but also a letter advising plaintiffs that defendant has a claim for extras, an itemized statement detailing the extras, a communication from de-

fendant to plaintiffs returning the overpayment, less the deduction for extras, other correspondence bearing on the subject and, in addition to all of this, some verbal testimony. Thus the factual aspects of the *Larsen* case as compared to those of the case at bar are distinguishable.

The crux of this case is whether the defendant made known to the plaintiffs in a clear and convincing manner its intention of deducting the claim for extras from the amount of money in its possession belonging to the plaintiffs and, further, did the plaintiffs understand the conditions of acceptance or were they of such character that they should have understood them?

The evidence not only involves the check but also correspondence concerning the check, the claim for extras and other matters bearing on the controversy. The principle of accord and satisfaction and the requirements of its proof (under Chap. 113, Sec. 64, R. S., 1954) are well explained in the case of *Fuller* v. *Smith,* 107 Me. 161, wherein the court on page 165, said:

> "Under this statute an accord and satisfaction is an executed agreement, whereby one party gives and the other receives, in satisfaction of a demand, liquidated or unliquidated, some money or other valuable consideration, however small. No invariable rule can be laid down as to what constitutes such an agreement, and each case must be determined largely on its own peculiar facts. The agreement need not be express, but may be implied from the circumstances and the conduct of the parties. It must be shown, however, that the debtor tendered the amount in satisfaction of the particular demand, and that it was accepted by the creditor as such."

There is involved in the *Fuller* case an acceptance of a check which was accompanied by a letter purporting to explain what the check was in payment of. The intention of

the debtor, as evidenced by the phraseology of the letter, became material and the court, on page 168, spoke as follows in relation to this letter:

> "The effect of a written instrument construed as an independent piece of evidence, apart from any other fact or circumstance, may be quite different from the effect of the same instrument when interpreted in the light of the circumstances and conduct of the parties from which the instrument arose. The letter which accompanied this check does not stand alone to be construed, as to its effect upon the plaintiff, apart from other facts and circumstances. Its effect upon the plaintiff, in contemplation of law, is the effect which it would have had upon a reasonable fair minded person in his then situation, and in ascertaining that situation consideration must be given to the previous circumstances and conduct of the parties in relation to the subject matter of the letter as well as to the language of the letter."

In the instant case the correspondence is of such a nature that its meaning becomes material in determining if the conditions imposed by defendant were clear and understandable or not. If this correspondence, taken in conjunction with the notations on the check, raises no ambiguities and conveys the intent of the defendant in such manner that the plaintiff knew or should have known that the acceptance of the check was in full satisfaction of the disputed claim, then there would be no jury question. Conversely, if the correspondence was couched in language which caused uncertainty as to meaning, then there would be a question for the triers of fact.

We feel it important to include in this opinion that correspondence affecting the status of the check. The president of the defendant corporation, on November 4, 1954, wrote to the plaintiffs:

"Farina Brothers
429 Watertown Street
Newton 58, Massachusetts

Att: Ernest Farina

Re: Limestone AFB, Maine — Contract No. DA-19-016-ENG - 3037 Job #114.

Dear Mr. Farina:

We have received information from the U. S. Army Engineers at Limestone that our buildings have been approved and they are now in use and therefore, we respectfully ask you to pay us the balance of our contract price immediately.

This will not be a payment in full because we added some additional material at the request of the United States Army Engineers and in accordance with their drawings for extras, which we are asking you to claim in our behalf. We also have a claim against you for $360, which was our labor cost for repairing the corner sheets damaged by your crane operator while excavating, for the floor of these buildings. Also, one Purlin which you requested Mr. Hodgkins to order to replace one which you damaged in the amount of $5.00. It may very well be that you have insurance that would cover this damage and I would like to have you let me know if you have. (Emphasis supplied.)

The U. S. Army Engineer on the job requested us to caulk the buildings and this was done but later they said they would not have had us do this because the specifications did not call for this work, inasmuch as our buildings were mortised at the eaves where the wall sheets and the eave sheets join. We had 140 hours additional work on this at $2.00 an hour, making a total of $280.

After the Corps of U. S. Army Engineers agreed to permit us to use the 6" door channels, they reduced our contract and your contract $2100. This was deducted from our contract but in place of

this the Corps of U. S. Army Engineers required us to use additional angle irons in each end bay on eight of these buildings. This was not in the original plans but in the modified plans finally approved by the Corps of U. S. Army Engineers. The angle irons for this work was purchased by us from the T. W. Dick Company in Gardiner, Maine, amounting to $21.70, plus freight of $2.73, and the labor on this was welding, one welder and helper, two days, at $9.00 an hour, a total of $144. *These items, except for the damage that your excavator did, should be in the form of a claim against the U. S. Army Engineers, and after having been paid you will reimburse us.* (Emphasis supplied.)

We might add also that we did extra work in putting in additional girts between the door frames and the columns but we have made no charge for that.

We appreciate your willingness to cooperate with us in bringing this matter to a final conclusion and trust you will pay us the balance on the contract and then take up the matter of the extras afterwards.

Cordially and sincerely,

SHERIDAN CORP.

John G. Marshall

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jgm;lja John G. Marshall

enc. President"

Enclosed with the letter was an itemized statement for extras amounting to $813.43.

The defendant corporation, on February 11, 1955, sent the plaintiffs a letter of the following tenor:

"Farina Brothers
429 Watertown Street
Newton 58, Massachusetts

Att: Ernest Farina

Re: Limestone Air Base

Dear Mr. Farina:

Upon my return to the office today, the treasurer of the Sheridan Corporation has called my attention to the fact that we have received from your company sums totaling $65,451.39. This represents a payment in excess of the original contract in the amount of $2214.39.

This last payment came during my absence and during the absence of our treasurer and only recently was called to our attention. *However, we have a claim against your company for $813.43 in accordance with our letter to you of November 4, 1954. I asked you in that letter to make a claim against the U. S. Army Engineers for the amount of $280 and for the labor and materials on the last three items in that bill.* Consequently, we are deducting that amount of $813.43 and remitting to you today a check in the amount of $1400.96.

(Emphasis supplied.)

The reason that I am writing this letter now is because this is the first day that I have had an opportunity to do so since returning to *me* office and I tried to call you on the telephone this afternoon but your office reported that you were not in.

Very truly yours,

SHERIDAN CORP.

John G. Marshall

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jgm;lja
enc.

John G. Marshall
President"

When the defendant sent the check, the letter of transmittal referred to the letter of November 4, 1954 and for all intents and purposes incorporated by reference that letter and the terms it contained. In the letter of November 4th, the defendant corporation wrote to Farina Brothers, "This will not be a payment in full because we added some additional material at the request of the United States Army Engineers and in accordance with their drawings for extras, *which we are asking you to claim in our behalf.*" (Emphasis supplied.) Incidentally, the amount which the defendant corporation asked of the plaintiffs "to claim in our behalf" amounts to $448.43.

In analyzing the contents of letters dated November 4, 1954 and February 11, 1955, can it be said that the conditions tendered by the defendant to the plaintiffs were concise, clear and without ambiguity or were they vague and uncertain?

Some evidence of the lack of understanding of the conditions imposed by the check and letter of transmittal is found in the verbal testimony of Mr. Ernest Farina, one of the plaintiffs, and we quote, in part, his testimony:

"MR. LINNELL: When you got that letter and the check do you remember seeing the notation on the check 'in full'?

A. Yes, I do.

Q. What did you do?

A. I called up the Sheridan and, in the absence of Mr. Marshall, I spoke with Miss Austin, the treasurer of the Sheridan Corporation.

Q. What was the nature of the conversation you had with Miss Austin?

A. To explain why the check wasn't in a larger sum; in the full amount.

Q. Do you mean you asked Miss Austin to explain?

A. Yes.

Q. What explanation did you get?

A. She was instructed by Mr. Marshall that was what she was to send to my company.

Q. What did you tell Miss Austin?

A. I told her so far as I was concerned it was not to be considered payment in full. I also retained Mr. Pompeo."

The letters of November 4, 1954 and February 11, 1955, and the telephone conversation with an officer of the company, taken in conjunction with the check, present not a clear and concise presentment of conditions on the part of the defendant to the plaintiffs for the acceptance of the check but, in their ambiguity and lack of clarity, pose questionable conditions and terms, thereby presenting a factual problem as to exactly what was meant by the defendant and what was understood or should reasonably have been understood by the plaintiffs. This factual problem constituted a jury question. *Bell* v. *Doyle,* 119 Me. 383, at 387, "- - - - - accord and satisfaction is a question of fact to be submitted to the jury, - - - - unless the testimony is such that only one inference or finding can be made."

The defendant seeks to show error on the part of the presiding justice in allowing the answer to a question asked of one of the plaintiffs pertaining to his understanding of the meaning of the letter which accompanied the check. The presiding justice in allowing the answer was correct. The plaintiffs' understanding of the nature of defendant's proposal in the letter accompanying the check was relevant. *Fuller* v. *Smith, supra.* If, as here, the plaintiffs assert they did not understand that an unqualified condition was attached, it is still open to the other party to show that the language used was so clear that plaintiffs cannot reasonably deny their understanding.

The cause was properly submitted to the jury. The record discloses sufficient evidence to support the verdict. *Young v. Hornbrook, Incorporated,* 153 Me. 412.

Exceptions overruled.
Motion for new trial denied.

WEBBER, J. (CONCURRING OPINION)

I concur in both the opinion and the result. I would add only that if the letter accompanying the check had contained any of the language usually employed when a full and final settlement of all disputed claims is intended, I think all would agree that *Larsen* v. *Zimmerman,* 153 Me. 116, would be controlling. On the contrary, however, the covering letter creates doubt as to the writer's intention. Is it intended merely to exert pressure on the plaintiffs to make claim against the U. S. Army Engineers for and on behalf of the defendant? May it properly be inferred that if that is done, the whole matter will be open for further negotiation and adjustment and does the use of the word "*today*" in its context imply that subsequent developments may produce a different result tomorrow? Or does this letter make the intention to effectuate a full, complete and final settlement, binding under any and all conditions, so clear that a reasonable man could not construe it otherwise? In my view the correspondence only served to muddy the waters. With doubt thus created, the plaintiffs properly made inquiry as to just what was intended. The reply made by an official of defendant's company was equivocal and uninformative, whereby defendant's intention was veiled in even greater mystery. All of these factors, so completely unlike the clear and unmistakable expression of intention in *Larsen,* made this a case for determination by a jury.

DISSENTING OPINION, WILLIAMSON, C. J.

I would sustain the motion for new trial.

The following facts, in addition to those stated in the opinion of the court, seem to me of significance.

(1) The itemized statement enclosed with defendant's letter of November 4, 1954, was in the form of a bill rendered by the defendant to the plaintiffs for six numbered items, with amounts stated totalling $813.43.

(2) On November 8, 1954, in reply to the defendant's letter of November 4, the plaintiffs wrote the defendant denying liability on all claims, except one item for $5, and refusing to make any claim against the government.

As I read the record, the only permissible inference points to an accord and satisfaction.

First: The $1400 check sent by the defendant to the plaintiffs with the letter of February 11, 1955, was offered only on condition that it be taken in full payment. In substance, we have here the every day situation in which the debtor deducts a disputed item from his creditor's bill and remits the balance in full settlement. The unusual feature in this case lies in the fact that the plaintiffs' claim comes from an admitted overpayment on the contract price given and received by the parties in error and first discovered by the defendant. The opportunity to withhold the disputed claim from moneys admittedly due the plaintiffs arose from this error. The application of the general principles of accord and satisfaction are not of course altered by this fact.

Second: The condition, i.e., that the check must be taken in full payment, ought reasonably to have been understood by the plaintiffs, and hence they are bound thereby.

The plaintiffs obviously did not intend to receive the $1400 check in full payment. Mr. Farina, one of the plaintiffs, said to the Treasurer of the defendant corporation, on receiving the check, "so far as I was concerned it was not to be considered payment in full." There is in the record, how-

ever, no evidence to warrant a finding that the defendant waived the condition on which the check was sent. The conversation between Mr. Farina and the Treasurer clearly constituted no change in the position of either the plaintiffs or defendant.

The law gave the plaintiffs the choice of accepting the check on defendant's terms or of returning it. The plaintiffs chose neither permitted course, but denied the condition and cashed the check. They cannot, in my opinion, properly complain that they were bound by the condition of acceptance in full payment. See 6 Williston, Contracts §§ 1854, 55, 56 (rev. ed.) ; Corbin on Contracts §§ 1279, 80.

I am authorized to state that Mr. Justice Sullivan concurs in this dissenting opinion.

JOHN H. GANNETT ET AL.
vs.
OLD COLONY TRUST CO., TRUSTEES, ET AL.

Kennebec. Opinion, June 23, 1959.

Wills. Trusts. Words and Phrases. Issue. Intent. Adopted Children. Moot Questions.

The word "Issue" does not have such a fixed and limited meaning that it cannot vary with the intention of a testator who uses it.

While the court as a matter of judicial policy refrains from deciding issues prematurely, it has never been questioned that the court has the power to act in an appropriate case before a contingency occurs.

ON REPORT.

This is a petition for interpretation of a will before the Law Court upon report. Case remanded for a decree in ac-

cordance with this opinion. The costs and expenses of the guardian *ad litem* and each of the parties, including reasonable counsel fees, to be fixed by the sitting justice after hearing, and paid out of assets in the estate.

Sanborn & Sanborn, for plaintiffs.

Bingham, Dana & Gould (Boston, Mass.),
John E. Wiley,
Brooks Brown, for defendants.

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

WEBBER, J. On report. Plaintiffs seek interpretation of the will of the late Guy P. Gannett, and specifically that portion of the will which reads as follows:

> "The trust shall end upon the death of the last of Jean, John and Madeleine Jean and the trustees shall pay over the principal of the trust at that time by right of representation to *my issue* then living." (Emphasis ours.)

The problem arises from the fact that whereas Jean is the natural daughter and Madeleine Jean the natural granddaughter of the testator, John is his adopted son. Moreover, John has children now living and who were living when the testator executed his will. If issue of John survive the stated contingency, will they qualify as takers (by right of representation) in the capacity of "issue" of the testator? We answer in the affirmative.

The word "issue" does not have such a fixed and limited meaning that it cannot vary with the intention of the testator who uses it. Within the four corners of the will itself may be found substantial indication that when the testator employed the phrase "my issue" he intended to include the issue of his adopted son. He established three equal life

estates, one of which was for the benefit of "my son, John H. Gannett." The testator's failure to make any distinction between his adopted child and his natural children is significant. Moreover, in event of John's death, his issue were to take his share of the income for the duration of the trust which might easily continue for many years thereafter. It would appear most unlikely that the testator would thus provide income benefits for the issue of his adopted child which might be long extended, but in the next breath would cut them off completely from any share in the corpus. Any apparent inconsistency at once disappears if we but recognize that the testator thought of John as though he were a natural son and of John's issue then living as though they were the natural grandchildren of the testator. That such was his intention is fully confirmed by evidence of the circumstances existing at the time the will was made. The will was prepared for the testator by a competent attorney who was, however, unfamiliar with the testator's family circumstances and totally unaware of John's status as an adopted child. The testator's concern as expressed to his scrivener was for his "grandchildren" in which category he obviously included John's children toward whom he felt as great a love and affection as he entertained for those of his blood. The words "my issue" were selected by the scrivener in ignorance of any problem of adoption. They were adopted by the testator as words which would effectuate his intention to place the share of each of his children, including John, in the line of that child by right of representation. We are satisfied that any exclusion of John's issue from a share of the corpus was furthest from the testator's thought and purpose.

Seldom indeed is litigation involving the interpretation of a will conducted in such an atmosphere of family unity and affection as is apparent here. There is neither conflict nor dispute and all agree that in every aspect of family life

and family finances the testator regarded John as his natural son and treated him and the natural children with perfect equality. The quality of evidence so unselfishly furnished by those who have the most to lose cannot be lightly disregarded. It is apparent that in this case the testator, if he had been aware of any possible ambiguity in the use of the words "my issue," would have substituted therefor the words "their issue" in order clearly to effectuate his intention. The will as written should be so construed.

The guardian *ad litem,* in faithful discharge of his duty to bring to the attention of the court every possible adverse contention, has suggested that the court should not decide the questions raised in advance of the happening of contingencies which make it necessary to do so. If, for example, John should ultimately die without issue, no problem involving the interpretation of the words "my issue" would ever arise. That the court has on occasion refrained as a matter of judicial policy from prematurely deciding issues has been recognized. *Fiduciary Trust Co.* v. *Brown,* 152 Me. 360. It has never been questioned, however, that the court has power to act in an appropriate case before a contingency occurs. *Haseltine* v. *Shepherd,* 99 Me. 495, 503. We are satisfied that this is such a case. If decision must await the death of the last of John, Jean and Madeleine Jean, the court will lose the benefit of the testimony of the very persons who can best describe the circumstances which existed when the testator made his will. The scrivener, also, might then be unavailable to explain how the phrase "my issue" happened to be used. A decision now will eliminate the risk of a great injustice which might conceivably result if the court were compelled to act years hence in an evidentiary vacuum. Justice requires that we eliminate unnecessary delay. The entry will be

Case remanded for a decree in accordance with this opinion.

The costs and expenses of the guardian ad litem and each of the parties, including reasonable counsel fees, to be fixed by the sitting justice after hearing, and paid out of assets in the estate.

S. DWIGHT HOWARD ET AL.

vs.

CITY OF SACO

York. Opinion, June 24, 1959.

Service of Process. Waiver. Appearance. Abatement. Jurisdiction. Rules of Court 5. Order of Court.

Rule 5 of the Rules of Court require that pleas or motions in abatement, or to the jurisdiction, in actions originally brought, must be filed within two days after the entry of the action.

The service of a complaint in accordance with statutory direction but without the sanction of any court order is effectual when the respondent appears generally and the court has jurisdiction over the subject matter of that category of cases to which the controversy belongs with the power and authority to compel respondent's attendance.

Law is a practical science and rules must not impede or thwart justice.

ON EXCEPTION.

This is a statutory appeal from an award of compensation before the Law Court upon exception to the dismissal of the appeal. Exceptions sustained.

Chester D. Cram, Jr., for plaintiff.

George E. Brickates, for defendant.

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

SULLIVAN, J. The municipal officers of Saco formally expropriated some land of the complainants situated within the corporate limits of that City as a public parking place for motor vehicles and assessed the amount of compensation awarded. R. S. (1954), c. 96, §§ 29, 34 and 39; c. 89, § 42.

As to the amount of the award the complainants seasonably initiated appeal procedure by their signed complaint copies of which were attested by a deputy sheriff who effected service and notice in accordance with statutory direction but without the sanction of any court order.

The complaint with return of service and notice was entered at the Superior Court for the County of York to which the matter had been addressed, and at the proper term thereof. The respondent City thereupon filed its general appearance.

During the next term of court following the return term the cause was assigned to be tried at the subsequent and third term after entry. On the third day of the last mentioned term the respondent City presented to the court its motion that the action be dismissed for want of proper order of service and because the complaint was not legal process emanating from any court.

That motion was granted by the presiding justice and complainants excepted. Those exceptions are now before us.

The Superior Court held in the county where the condemned land lay had jurisdiction over the subject matter

of that category of cases to which the controversy here between the complainants and respondent belongs. Such court had personal jurisdiction over the respondent municipality in that the court had the power and authority to compel the attendance of the City at court. R. S. (1954), c. 96, §§ 29, 34 and 39; *West Cove Grain Co.* v. *Bartley* (1909), 105 Me. 293, 299.

The respondent City appeared generally and suffered three terms of the Superior Court for York County to eventuate and conclude before challenging the jurisdiction of that forum at the fourth successive term.

> "Pleas or motions in abatement, or to the jurisdiction, in actions originally brought in this court, must be filed within two days after the entry of the action, the day of the entry to be reckoned as one, and if alleging matter of fact not apparent on the face of the record, shall be verified by affidavit."
>
> *Rules of Court, 5,* 147 Me. 466.

The instant proceeding is new, i.e., "originally brought." *Williams et al., Petitioners* (1871), 59 Me. 517, 518.

Maine Bank v. *Hervey* (1842), 21 Me. 38, was a case of illegal service of a writ. This court said at page 46:

> "In this case it does not appear, that the District Court had not jurisdiction over the parties and the subject matter of the suit. The contrary may justly be inferred. The rules of that Court must govern its practice; and they required, that pleas in abatement should be filed before the new entries were called. And this plea in abatement was filed too late. The motion could not avail the defendant, because, as before stated, his general appearance to the suit cured the defect of service and precluded him from making the objection. - - - -"

The following quotation exemplifies a sensible and just rule:

> "- - - A general appearance will undoubtedly cure a defect in the service. A party litigant may ordinarily waive a want of compliance with the law in any process against him when that want relates to matters established for his benefit, and that waiver may be shown by acts, *or a neglect to act,* as well as by words. *As a general rule that which is incidental or tends to show that the present action cannot be maintained through any defect in the process, but has no effect upon the merits of the controversy between the parties, must be taken advantage of in abatement, or a waiver will be conclusively inferred.*" (Italics supplied.)
>
> *Fuller* v. *Nickerson* (1879), 69 Me. 228, 240.

In *Look* v. *Watson* (1918), 117 Me. 476, 478 the court said:

> "- - - A general appearance waives defects in service and want of jurisdiction over the defendant's person but does not relieve the plaintiff from the burden of proving the allegations of his writ."

In *Dow* v. *March* (1888), 80 Me. 408, 409, a case where service was defective and defendant failed to appear, the court in refusing judgment to the plaintiff took occasion to observe:

> "The cases are entirely different from this, in which it has been held, as in Snell v. Snell, 40 Maine, 307, that an appearance, though special, cures a defective service, unless seasonable plea or motion be made after appearance to take advantage of the defect. A defendant in such case waives an insufficient service, if he appears to object to it, but fails to make his objection as required by the rules of court, and his appearance stands for all purposes. The presumption is that he assents to service, and appears generally, having taken no steps to indicate to the contrary."

We note the following authority:

> "The suit before us is assumpsit, and is a transitory action. The writ was made in the wrong

> county. The defendant omitted to plead in abatement, or to move a dismissal of the action, till the time prescribed by the rules of this Court had elapsed. Rules of Court, 37 Maine, 569. He thereby waived the privilege conferred by the statute." *Webb* v. *Goddard* (1859), 46 Me. 505, 509.

Undoubtedly the complaint in the present case necessitated an order of court for both service and notice to implement it before its process by the complainants. Only the court could compel the appearance of the respondent and the Legislature patently intended that the court in its responsible discretion dictate the details as to the places of posting of notice.

> "Unless authorized by statute in direct terms, or by clear implication, the complaint or petition in any civil proceeding should have thereon an order of court as to service before it can be served. - - -" *Wyman* v. *Woolen Co.* (1905), 100 Me. 546, 548.

The complaint without court precept when served upon the respondent fully communicated the asserted grievance of the complainants, the tribunal invoked and the time and place of the court session at which redress would be sought. The Superior Court for York County possessed full authority of jurisdiction. The respondent unaffected by any constraint of a court order nevertheless elected to supply its general appearance upon the docket. Long after the time allotted and limited by court rule the respondent sought to reclaim the technical defense it had forfeited. Under such circumstances the impulsion of justice becomes firm. Complainants normally have the common right to a court hearing and the respondent could have no fixed objection to the fair judgment of the court. Respondent seeks to formalize rather than to defend. Formality is at best only auxiliary. Adjective rules of procedure are necessary for the administration of substantive law. But such rules must not impede or thwart justice. They must, as far as humanly possible

in the preservation of good order, facilitate it. Law is a practical science. The dearth of a preliminary court order commanding the presence before the court of this respondent which spontaneously submitted itself to the proper jurisdiction of the court in response to an adequately informative complaint and appeared in the court for several months thereafter in attendance thereon must be regarded as dispensable for the purposes of realizing rectitude between the opponents in this litigation. No offense to public policy can result. The sensible conclusion is that the exceptions of the complainants be sustained and that these parties resolve their controversy upon the merits.

Exceptions sustained.

WILMA J. WAGNER, PETITIONER FOR LEAVE TO ENTER APPEAL FROM DECISION OF JUDGE OF PROBATE IN RE ESTATE OF FRANK E. WAGNER

Cumberland. Opinion, June 25, 1959.

Probate Appeal. Bonds. R. S., 153, Sec. 34.
Exceptions. Rules of Court 40.

Rule 40 of the Revised Rules of the Superior and Supreme Judicial Courts is intended to provide the machinery to accomplish the results contemplated by R. S., 1954, Chap. 106, Sec. 14 for establishing the truth of exceptions when they are disallowed by the presiding justice.

The expression "exceptions do not lie" does not always mean that exceptions may not be taken and perfected since the expression is often used as synonymous with the statement that exceptions cannot be sustained.

While an exception to a ruling of a single justice requiring an exercise of discretion is not to be sustained unless there has been an

abuse of discretion or unless the sitting justice has plainly or unmistakably done an injustice, the only way that an alleged abuse of discretion by a single justice can be reached is by exceptions.

Sawyer v. *Chase*, 92 Me. 252; *Goodwin* v. *Primes*, 92 Me. 355; *Graffam* v. *Cobb*, 98 Me. 200, 206, overruled, so far as they are construed to mean that exceptions may not under any circumstances be taken to a finding of a single justice upon a matter involving judicial discretion.

Exceptions to a finding by the presiding justice that failure to perfect an appeal was due to accident must be overruled where the evidence justifies the finding.

The chief test as to what is a proper exercise of judicial discretion is whether in a given case it is in furtherance of justice.

ON EXCEPTIONS.

This is a petition to file a probate appeal. The case is before the Law Court upon a petition to establish the truth of exceptions after a granting of the appeal and a refusal to allow exceptions.

Motion to dismiss overruled. Truth of exceptions established. Exceptions overruled. Case remanded to Supreme Court of Probate.

Arthur A. Peabody, for plaintiff.

James A. Connellan,
James R. Desmond, for defendant.

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

DUBORD, J. This is a petition seeking to establish the truth of exceptions under the provisions of Section 14, Chapter 106, R. S., 1954 and Rule 40 of the Revised Rules of the Supreme Judicial and Superior Courts. It is further prayed if the truth thereof be established, that the excep-

tions be heard as if duly filed and brought up to this court with the petition.

The chronology of procedure leading up to the instant issue is as follows:

One Frank E. Wagner died testate in St. Petersburg, Florida, leaving a widow, Wilma J. Wagner, and as his only heir at law, a son, residing in Portland, Maine, named Franklin A. Wagner.

The widow filed ancillary proceedings for the probate of the purported will of Frank E. Wagner, as a foreign will in the Probate Court in Cumberland County. The son entered his appearance against the allowance of the said purported foreign will on the ground that Frank E. Wagner was domiciled in the State of Maine, and that any will offered for probate in this State should be offered in original domiciliary proceedings. Upon hearing before the Judge of Probate for the County of Cumberland, the contentions of the son were sustained and the petition for ancillary probate of the will dismissed.

Thereupon, the widow attempted to appeal from the decision of the Probate Court, in accordance with Sections 32 and 33, Chapter 153, R. S., 1954, which provide in substance that within 20 days from the date of the proceeding appealed from, the appeal must be claimed and a bond and reasons for appeal filed. The appeal failed because the bond was not approved by the Judge of Probate within the 20 day period. Thereafter, the widow filed a petition with the Superior Court acting as the Supreme Court of Probate, seeking authority under the provisions of Section 34, Chapter 153, R. S., 1954, to file a late appeal. In her petition she alleged that she was without fault and that the failure to file and perfect the appeal within the 20 day period arose from accident, and that justice required a revision.

To this petition the son seasonably filed his objections. The matter was heard upon an agreed stipulation of facts and in substance it was the contention of the petitioner that the reason her appeal had not been properly completed within the statutory period was that a fire in the office of her attorney had so interferred with the conduct of his business as to prevent the perfection of her appeal.

The presiding justice of the Superior Court sitting as the Supreme Court of Probate found as a fact that the petitioner was without fault and that the failure to complete the appeal with the approval of the bond was due to accident. He also found that justice required a revision and thereupon entered a decree that the widow be allowed to enter and prosecute an appeal with the same effect as if it had been entered in accordance with the provisions of Section 33, Chapter 153, R. S., 1954.

To this ruling, the son seasonably attempted to take and file exceptions. The reasons for these exceptions were twofold and as follows:

> "1. That the Presiding Justice erred in finding 'that the basic reason for the failure to obtain the approval of the Judge of Probate of the sum of the bond within the twenty day period was from accident not the fault of the petitioner' because as a matter of law, there is not any evidence to sustain such a finding.
>
> "2. That the Presiding Justice erred in finding 'as the term 'revision' is used in said section 34, it is found as a fact that the decree of the Probate Court, in justice, requires revision, or review', because said finding is an abuse of discretion, it being based upon no evidence whatsoever."

The presiding justice refused to allow the exceptions on the ground that exceptions do not lie to the ruling complained of and gave as his authority for such action on his

part, the decisions in *Sawyer* v. *Chase,* 92 Me. 252, and *Bodwell-Leighton Company* v. *Coffin & Wimple, Inc.,* 144 Me. 367.

The son then filed the petition now before us seeking to establish the truth of his exceptions and his petition is addressed "To the Honorable Justice of the Supreme Court of Probate for the County of Cumberland."

Thereupon, the widow filed a motion that the petition to establish the truth of the exceptions be dismissed for the reason that the Supreme Court of Probate is without jurisdiction to entertain the petition.

The motion to dismiss specifically questions the procedure on the part of the petitioner in addressing herself to the Supreme Court of Probate instead of directly addressing herself to the Supreme Judicial Court sitting as a Court of Law.

It seems essential that the issue raised by the motion to dismiss be first disposed of.

The procedure for establishing the truth of exceptions when they are disallowed by the presiding justice is covered by Section 14, Chapter 106, R. S., 1954 and Rule 40 of the Revised Rules of the Superior and Supreme Judicial Courts.

The portions of Section 14, Chapter 106 which are pertinent to the issue are as follows:

> "When the court is held by 1 justice, a party aggrieved by any of his opinions, directions or judgments in any civil or criminal proceeding may, during the term, present written exceptions in a summary manner signed by himself or counsel, and when found true they shall be allowed and signed by such justice; - - - - - - - - - . If the justice of the supreme judicial court or of the superior court disallows or fails to sign and return the exceptions or alters any statement therein, in

> either civil or criminal proceedings, and either party is aggrieved, the truth of the exceptions presented may be established before the supreme judicial court sitting as a court of law, upon petition setting forth the grievance, and thereupon, the truth thereof being established, the exceptions shall be heard and the same proceedings had as if they had been duly signed and brought up to said court with the petition. The supreme judicial court shall make and promulgate rules for settling the truth of exceptions alleged and not allowed."

Pursuant to Legislative authority granted by Section 14, Rule 40 was adopted and the portions of that Rule pertinent to the instant issue are as follows:

> "A party desiring to establish before the Law Court the truth of exceptions presented to a justice at *nisi prius* and not allowed by him shall within ten days after notice of refusal to allow them *file in the court where they were taken* (emphasis supplied) his petition supported by affidavit and setting forth in full the bill of exceptions presented and all material facts relating thereto, and give a copy thereof to the opposite party or his attorney of record.
> "The case thus made shall be entered and heard at the next law term upon certified copies as in other cases. If the truth of the exceptions be established they will be heard and judgment rendered thereon as if originally allowed."

In *Colby* v. *Tarr, et al.*, 140 Me. 128, 131; 34 A. (2nd) 621; this court said that:

> "The Rule is obviously intended to provide machinery to accomplish the result contemplated by statute. It specifically outlines procedure whereby a party claiming to be aggrieved by non-action on his exceptions for 10 days may frame an issue which will disclose his grievance and have it determined at the next ensuing law term. It is clearly limited to cases where exceptions have not been allowed."

It is unnecessary for us to determine whether or not a petition to establish the truth of exceptions may be addressed directly to the Supreme Judicial Court sitting as a court of law, but compliance with the Rule which provides for filing the petition in the court where the exceptions were taken would seem to indicate the proper procedure. Suffice it for us to say that it appears that the petitioner has proceeded in accordance with the provisions of the statute and the supporting Rule of Court, and that the procedure adopted by him is in conformity with authorized procedure.

The motion to dismiss is, therefore, overruled.

Having disposed of the motion to dismiss, the next issue for determination is whether or not the presiding justice was correct in ruling that the petitioner had no right to file exceptions because a matter of judicial discretion was involved.

To reach a decision on this issue it is necessary to give consideration to the cases cited by the presiding justice as authority for his ruling, viz., *Sawyer* v. *Chase, supra; Bodwell-Leighton Company* v. *Coffin & Wimple, Inc., supra.*

Before approaching the issue itself, it seems necessary and advisable to state that apparently confusion has arisen in court decisions in the use of the expression "exceptions do not lie." It appears to have been assumed, in some cases at least, that this expression means that exceptions may not be taken and perfected, and it seems proper to point out that there is a strong distinction between preclusion against the filing of exceptions by a litigant and his success in having these exceptions sustained. In many decisions the court, in overruling exceptions has used the expression "exceptions do not lie" as synonymous with a statement that the exceptions cannot be sustained.

There are, of course, instances where a statute or a rule specifically precludes the taking of exceptions. For ex-

ample, Rule 17 provides that when a motion for a new trial is addressed to the presiding justice no exceptions lie to his decision. Here the rule means that exceptions may not be taken. However, while an exception taken to a ruling of a single justice requiring exercise of judicial discretion is not to be sustained unless there has been an abuse of discretion or unless the sitting justice has plainly and unmistakably done an injustice, the only way that an abuse of discretion on the part of a single justice can be reached is by exceptions.

Section 14, Chapter 106, *supra,* definitely provides that when a party is aggrieved by any of the opinions, directions or judgments of a single justice in any civil or criminal proceeding, written exceptions may be presented in a summary manner.

> "In all cases at law when court is held by a single justice his opinions, directions or judgments may be attacked by exceptions. See R. S., Chap. 94, Sec. 14. (Now R. S. Chap. 106, Sec. 14.) Such directions, judgments or opinions may be attacked only for errors in law." *Sears, Roebuck & Co.* v. *Portland, et al.,* 144 Me. 250, 256; 68 A. 2d. 12.

> "The distinction between the right to a review of a final decision of the court below by the Law Court on appeal and the right to a review of such decision on exceptions is not merely one of nomenclature and procedure. Not only is the procedure different, but the scope of inquiry by the Law Court is different. Exceptions reach only errors in law. Exceptions when taken to findings of fact by a single justice must attack such findings because of, and reach only errors in law. There is no error in law in a finding of fact by a single justice unless such fact be found without any evidence to support it. Examples of the application of this rule by this court may be found in cases where we have applied it to the decision of a single justice hearing a case at law without the intervention of

> a jury. - - - - - - -; to a decree of divorce, *Bond v. Bond,* 127 Me. 117, 129; 141 A. 833; and to the decree of a Justice of the Superior Court sitting as the Supreme Court of Probate, *Cotting v. Tilton,* 118 Me. 91, 94; 106 A. 113. The rule has been so universally applied by this court that citation of further authorities is unnecessary." *Sears, Roebuck & Co.* v. *Portland, et al., supra.*

The right to except to errors of law is equally well established when the single justice is sitting as the Supreme Court of Probate. See *Cotting* v. *Tilton, supra; In Re Hooper Estate,* 136 Me. 451; 12 A. (2nd) 417; *Waning, Applt.,* 151 Me. 239, 252; 117 A. (2nd) 347; *Thibault, Applt.* v. *Est. Fortin,* 152 Me. 59, 66, 67; 122 A. (2nd) 545.

This court has decided many times that when a decree or ruling rests on the judicial discretion of the court its decision may not be successfully reviewed unless an abuse of discretion is shown or there is error of law.

In *State* v. *Hume,* 146 Me. 129; 78 A. (2nd) 496, it was held that in the absence of anything tending to show that judicial discretion was not properly exercised, a ruling based on such discretion is not subject to valid exceptions. It naturally follows that improper exercise of judicial discretion may be attacked by exceptions.

> "The chief test as to what is or is not a proper exercise of judicial discretion is whether in a given case it is in furtherance of justice. If it serves to delay or defeat justice it may well be deemed an abuse of discretion." *Charlesworth* v. *Express Co.,* 117 Me. 219, 221; see also *State* v. *Bobb,* 138 Me. 242; *Bourisk* v. *Mohican Co.,* 133 Me. 207; *State* v. *Hume,* 146 Me. 129, 134; 78 A. (2nd) 496.

See also *McDonough* v. *Blossom,* 109 Me. 141, 145; where the court said:

> "There are cases which hold that the discretion of the court in refusing or granting a continuance is

> not subject to exception, but the great preponderance of the cases are to the contrary, where there has been a clear abuse of the discretion to the prejudice of the moving party."
>
> "The exercise of a judicial discretion by a justice who is given by law authority to determine questions in his discretion cannot be reviewed by an appellate court, unless it is made to appear that the decision was clearly wrong or that it was based upon some error in law." *Augusta Water District* v. *Augusta Water Company,* 100 Me. 268, 270.

Manifestly, there is no other way to question erroneous exercise of judicial discretion than by exceptions.

> "And it is well settled that judicial discretion must be exercised soundly according to the well established rules of practice and procedure, a discretion guided by the law so as to work out substantial equity and justice. It is magisterial, not personal discretion. When some palpable error has been committed or an apparent injustice has been done, the ruling is reviewable on exceptions. *Charlesworth v. American Express Company,* 117 Me. 219, 103 A. 358; *Fournier (Hutchins) v. Tea Company,* 128 Me. 393, 148 A. 147. It is when judicial discretion is exercised in accordance with this rule that it is final and conclusive. *Chasse v. Soucier,* 118 Me. 62, 63, 105 A. 853." *American Oil Co.* v. *Carlisle,* 144 Me. 1, 10; 63 A. (2nd) 676.

In the instant case the first proposed exception attacks the ruling of the presiding justice upon the theory that there was no evidence to support his finding. This exception is based upon a finding of fact. The second proposed exception attacks the decree upon the theory that judicial discretion was improperly exercised because not based on any evidence at all. This was the situation faced by the court in *First Auburn Trust Company* v. *Baker,* 134 Me. 231; 184

A. 767; and the same situation presented in *Sard* v. *Sard,* 147 Me. 46; 83 A. (2nd) 286.

Up to this point, of course, we are not concerned with the merits of the exceptions, but are merely called upon to determine whether or not the presiding justice should have allowed the exceptions. Upon authority of abundant decisions of this court directly applicable to the procedure now before us, we see no reason why the exceptions should not have been allowed and it is our opinion that the petition should be granted and the truth of the exceptions established in accordance with the provisions of Section 14, Chapter 106, and Rule 40.

A study of the decision in *Sawyer* v. *Chase, supra,* with particular attention given to the language used, would seem to indicate that the presiding justice had sound reason for believing that exceptions cannot be taken to an exercise of judicial discretion on the part of the presiding justice sitting in the Supreme Court of Probate. In the *Sawyer-Chase* case, the court dismissed the exceptions, but only after it had applied the rules adhered to by this court that findings of fact by a single justice are conclusive when supported by adequate evidence, and that rulings based on judicial discretion may not be disturbed unless such rulings serve to delay or defeat justice.

However, the court went on to use this expression: "The exceptions were improvidently allowed and must be dismissed." Standing alone this expression would seem to be authority for a finding that a ruling based on judicial discretion is not subject to exceptions. The word "improvidently" probably was used as a synonym for "thoughtlessly." Its use was undoubtedly inadvertent.

A decision similar to that in *Sawyer* v. *Chase, supra,* was made in *Goodwin* v. *Prime,* 92 Me. 355, and both of these cases are cited in *Graffam* v. *Cobb,* 98 Me. 200, 206. Insofar

as these decisions may be construed as meaning that exceptions may not under any circumstances be taken to a finding of a single judge upon a matter involving exercise of judicial discretion, they are overruled.

The case of *Bodwell-Leighton Company* v. *Coffin & Wimple, Inc., supra,* is not in point because in this case there was involved an attempt to take exceptions to the overruling by the presiding justice of a motion for a new trial, such action being precluded by provisions of Rule 17.

Having ruled that the truth of the exceptions is established, we pass now to consideration of the merits of the exceptions.

In a case involving a petition for leave to enter a late appeal from a decree of a Judge of Probate, this court said in *First Auburn Trust Company* v. *Baker,* 134 Me. 231, 233; 184 A. 767:

> "As prerequisite to the maintenance of the petition the petitioner is required to prove that, from accident, mistake, defect of notice or otherwise without fault on its part, it omitted to claim or prosecute its appeal. This is a distinct element, essential of proof. If shown, then the presiding Justice must proceed to the second necessary element, that 'justice requires a revision.' The first element rests upon a finding of fact. The second calls for the exercise of judicial discretion, based upon facts."

The situation relating to the exceptions filed in the instant case is similar to that in the case of *First Auburn Trust Company* v. *Baker, supra,* and also *Sard* v. *Sard, et al.,* 147 Me. 46, 83 A. (2nd) 286.

The first exception attacks a finding of fact upon the basis that there was no evidence to support the finding. The second exception is addressed to an alleged error in judicial discretion upon the theory that the ruling was based upon entire lack of evidence.

This court has held in many opinions that the findings of the Justice in the Supreme Court of Probate in matters of fact are conclusive if there is any evidence to support them. *Cotting* v. *Tilton,* 118 Me. 91, 94; 106 A. 113; *In Re: Hooper Estate,* 136 Me. 451, 453; 12 A. (2nd) 417; *Edward* v. *Estate of Williams,* 137 Me. 210, 214; *In Re: Waning, Applt.,* 151 Me. 239, 252; 117 A. (2nd) 347; *Thibault, Applt.* v. *Est. Fortin,* 152 Me. 59, 66; 67 A. (2nd) 545.

The presiding justice found as a matter of fact that the failure to perfect the appeal was due to accident, not the fault of the petitioner. After a study of the record, we are of the opinion that the ruling of the presiding justice was justified by the evidence. The first exception must, therefore, be overruled.

As to the second exception, which attacks the exercise of judicial discretion, this court has pointed out in numerous opinions that the chief test of what is or is not the proper exercise of judicial discretion is whether in a given case a ruling is in furtherance of justice. See *Marston* v. *Dingley,* 88 Me. 546; *Augusta Water District* v. *Augusta Water Company, supra; McDonough* v. *Blossom,* 109 Me. 141, 145; *Bourisk* v. *Mohican Company,* 133 Me. 207; *First Auburn Trust Company* v. *Baker, supra; American Oil Company* v. *Carlisle, supra,* and *State* v. *Hume, supra.*

Careful examination of the record convinces us that there was a proper exercise of judicial discretion. The second exception must be overruled.

The entries will be:

Motion to dismiss petition overruled.

Truth of exceptions established.

Exceptions overruled.

Cause remanded to Supreme Court of Probate.

EMPLE KNITTING MILLS, APLT.

vs.

CITY OF BANGOR, ALLEC M. WESCOTT, HAZEN C. EMERY AND JAY E. ALLEY, ASSESSORS, APPELLEES

Penobscot. Opinion, June 26, 1959.

Taxation. Inventory. Average Amount. Statutory Construction.

The fundamental rule in the construction of a statute is legislature intent.

The provision of R. S., 1954, Chap. 91-A, Sec. 3 providing for the "average amount" formula as method of determining the tax upon "personal property employed in trade" based upon the "average amount kept on hand *for sale*" during the year is equally applicable to the finished products as well as materials which make up the finished product. The legislature did not intend that only goods ready *for sale* should be assessed on the average amount formula and remaining property assessed on an "on hand" April 1, basis.

ON REPORT.

This is an appeal from a denial of a tax abatement before the Law Court on report. Judgment for the City of Bangor in the amount of $6573.35 without interest and with costs of court assessed at $50.00.

Gerald E. Rudman, for plaintiff.

Abraham J. Stern, for defendant.

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

SIDDALL, J. On report. This case originated in the Superior Court for Penobscot County and comes here on an agreed statement of facts and stipulations. The record shows that the appellant, a Maine corporation having its

place of business at Bangor, was in 1957 and prior thereto engaged in the business of manufacturing knit wear. The appellees are the City of Bangor, and its duly appointed and qualified Assessors for the year 1957. For the year prior to April 1, 1957, the appellant had on hand in the City of Bangor a constantly fluctuating quantity of raw materials consisting of yarns, findings, buttons, etc., and partially finished and finished knit goods. Appellant duly submitted a list of all of its taxable property in the City of Bangor, averaged for the year next prior to April 1, 1957. The Assessors assessed a tax on the appellant's personal property set forth above based on the value of the property on hand on April 1, 1957.

Appellant duly filed a written application for abatement of so much of its 1957 tax as exceeded the amount which would have been due had the valuation been based on average inventory. The application for abatement was denied, and an appeal was taken to the Superior Court.

It was stipulated by the parties that all procedural requirements have been duly and seasonably complied with or waived. It was further stipulated that the only issue upon this appeal is whether or not appellant's inventory hereinbefore described was taxable on the basis of the amount on hand on April 1, 1957, or on the average amount kept on hand during the preceding year.

(1) If the former, judgment is to be entered for the City of Bangor for Eight Thousand Three Hundred Twenty-two Dollars and Eighteen Cents ($8,322.18), without interest but with costs of court, in the agreed amount of Fifty Dollars ($50).

(2) If the latter, judgment to be entered for the City of Bangor in the amount of Six Thousand Five Hundred Seventy-three Dollars and Thirty-five Cents ($6,573.35),

without interest but with costs of court, in the agreed amount of Fifty Dollars ($50).

The pertinent provision of the statute applicable to this case is contained in Sec. 3, R. S., Chap. 91 A, which reads as follows:

> "Real estate and personal property taxable; personal property employed in trade; taxable year.—All real estate within the state, all personal property of residents of the state, and all personal property within the state of persons not residents of the state is subject to taxation on the 1st day of each April as hereinafter provided; and the status of all taxpayers and of such taxable property shall be fixed as of that date; *provided, however, that personal property employed in trade shall be taxed on the average amount kept on hand for sale during the preceding taxable year, or any portion of that period when the business has not been carried on for a year. The taxable year shall be from April 1 to April 1.* (1955, c. 399, Sec. 1.)" (Emphasis ours)

Under the stipulation the parties are in agreement that the personal property in question was taxable in the City of Bangor, and we are therefore not concerned with the question of the situs of the property for the purpose of taxation. Our problem is to determine the correct method of valuation.

Prior to 1919 all personal property was assessed to the owner in the town where he was an inhabitant on the first day of April. However, in 1919 the legislature amended the law relating to the taxation of personal property by providing that personal property employed in trade should be taxed on the average amount kept on hand for sale during the preceding year. This amendment is now a part of R. S., Chap. 91 A., Sec. 3. The appellant claims that its personal property was of such a nature that it should have been taxed

under the "average amount" formula set forth in said Sec. 3.

Was the personal property which was the subject of taxation in this case *employed in trade* within the meaning of the statute? It undoubtedly was. In *Gower* v. *Jonesboro*, 83 Me. 142, 145, 21 A. 846, in defining this term as used in what is now R. S., Chap. 91 A, Sec. 9, Par. I, relating to taxation of personal property, our court said:

> "The appropriate meaning of 'trade,' as used in the statute, as defined by Bouvier, embraces 'any sort of dealings by way of sale or exchange; commerce; traffic.' Webster, Trade."

See also *Farmingdale* v. *Berlin Mills Co.*, 93 Me. 336, 338, 339, 45 A. 39. This term is applicable to a manufacturer of articles of trade as well as to a wholesale or retail dealer in such articles.

The appellant was engaged in the business of manufacturing merchandise for sale. The finished product, the unfinished product and all materials which were kept on hand for the purpose of ultimate incorporation into the finished merchandise were *employed in trade* within the meaning of the statute.

The statute further provides that such property employed in trade shall be taxed on the average amount *kept on hand for sale* during the preceding taxable year. Was any or all of the personal property taxed to the appellant *kept on hand for sale* within the meaning of the statute?

The fundamental rule in the construction of a statute is the legislative intent. It is the intent as expressed in the statute but interpreted with reference to the apparent purpose and subject matter of the legislation. See *State* v. *Gaudin*, 152 Me. 13, 16, 120 A. (2nd) 823; *Hunter* v. *Totman*, 146 Me. 259, 265, 80 A. (2nd) 401; *Craughwell* v. *Trust Company*, 113 Me. 531, 95 A. 221.

"The literal meaning of the language employed in a statute should be followed only when the policy and intent of the Legislature is implemented by such construction. *Georgetown* v. *Hanscome,* 108 Me. 131." *N. J. Gendron Lumber Co.* v. *Inhabitants of Hiram,* 151 Me. 450, 455.

It is the duty of the court to interpret the language of a statute so as to carry out the obvious purpose which the legislature had in mind. *Steele* v. *Smalley,* 141 Me. 355, 357, 44 A. (2nd) 213.

A construction should be avoided which leads to a result clearly not within the contemplation of the legislature or which leads to a result which is absurd, even though the strict letter of the law may have to be disregarded. *Ashland* v. *Wright,* 139 Me. 283, 29 A. (2nd) 747.

In *N. J. Gendron Lumber Co.* v. *Inhabitants of Hiram,* 151 Me., *supra,* the court in discussing the purpose of the "average amount" formula made the following statement:

> "We do not consider, however, that the 'average amount' formula is inapplicable merely because the lumber is not employed in trade in the town where it is taxable. The Legislature in enacting the formula has not so limited it and to construe the statute so narrowly would, we think, defeat the purpose which was intended. What was that purpose? As a practical matter, assessors cannot and do not ordinarily take inventory on each April 1st, nor does the taxpayer for that matter. The property is in trade and as purchases are made and sales occur, the inventory fluctuates. If the average is to be used, the taxpayer feels no necessity to reduce inventory before April 1st. Conversely, he feels free to increase inventory before the effective tax date if market conditions indicate the advisability of such action. The result, based upon an average, more realistically and less artificially reflects his holdings of personal property as a basis of measuring his public obligation."

The finished merchandise was clearly personal property kept on hand for sale within the meaning of the statute, and should have been valued under the "average amount" formula. A question arises as to the taxable status of the remaining personal property. Strictly speaking, such property was not kept for sale in the usual course of the business of the appellant. However, it was kept for eventual incorporation into the merchandise to be sold. Applying the principles of construction set forth above, it seems to us that the purpose of the legislation establishing the "average amount" formula, as set forth in *Gendron Lumber Co.* v. *Inhabitants of Hiram, supra,* was to establish a reasonable and sensible formula equally applicable to the finished product and to the materials which make up the finished product. We do not believe the legislature intended that a tax on the goods ready for sale should be assessed on the "average amount" formula, and that a tax on the remaining personal property inventory should be based upon the value of such property on hand April 1st. An interpretation which would allow such a method of taxation would lead to an absurd result not within the contemplation of the legislature.

All of the personal property of the appellant should have been assessed on a valuation based on the average amount kept on hand during the taxable year from April 1, 1956, to April 1, 1957.

In accordance with the stipulation of the parties, the entry will be

Judgment for the City of Bangor in the amount of Six thousand five hundred seventy - three dollars, thirty-five cents without interest and with costs of court assessed at fifty dollars.

FARM BUREAU MUTUAL INSURANCE CO.
vs.
GEORGE F. KELLEY

Androscoggin. Opinion, July 7, 1959.

Negligence. Parked Vehicles.
R. S., 1954, Chap. 22, Sec. 83. Traveled Ways.

The *traveled part* of a way under R. S., 1954, Chap. 22, Sec. 83 is not limited to the southerly half of a road when the northerly half is obstructed by parked automobiles and a requested instruction to such effect is properly refused under the facts of the instant case.

ON EXCEPTIONS.

This is a negligence action before the Law Court upon exceptions to the refusal of the presiding justice to give certain instructions.

Berman & Berman, for plaintiff.

Robinson, Richardson & Leddy, for defendant.

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

TAPLEY, J. On exceptions. The case was tried before a jury in the Superior Court, within and for the County of Androscoggin. Defendant requested an instruction to be included in the charge of the presiding justice to the jury. The requested instruction was refused and the defendant took exceptions to the refusal. The case involves the collision of two motor vehicles which took place on Cushing Street, a public street in the City of Auburn. The accident happened on the morning of January 7, 1958. Plaintiff, through its agent and servant, was operating its motor vehicle in an easterly direction along Cushing Street, while

the defendant was operating his car in a westerly direction on Cushing Street. The only two witnesses to the accident were Mr. Walker, driver of plaintiff's car, and Mr. Kelley, the defendant. They do not agree as to each other's actions immediately preceding the impact but there is no disagreement as to the presence of parked cars and trucks on the street and that the northerly half of the west bound lane was blocked at the point of accident. On the northerly side of the street is a curbing, while the southerly side of the street is bordered by a gravel shoulder. On the morning of the accident there were cars parked in the area on the graveled shoulder between the edge of the macadam and a fence. Pleasure cars were parked along the curbing on the northerly side, with a large tractor and trailer tank unit double-parked. Easterly of the parked pleasure cars was a truck parked at right angles to the northerly curbing with its front end at or near the center line of Cushing Street. The two cars collided at a point between the truck, which was double-parked, and the southerly edge of the macadam road. This area lies south of the parked truck and on the southerly side of the middle of the wrought way which would be on plaintiff's right and defendant's left as the cars approached each other. A rule of the road statute is involved. This statute is Sec. 83, Chap. 22, R. S., 1954 and reads:

> "**Teams Meeting Shall Turn to Right:**—When persons traveling with a team are approaching to meet on a way, they shall seasonably turn to the right of the middle of the *traveled part* of it so that they can pass each other without interference. When it is unsafe, or difficult on account of weight of load to do so, a person about to be met or overtaken, if requested, shall stop a reasonable time, at a convenient place, to enable the other to pass." (Emphasis supplied.)

The defendant requested the following instruction:

> "You are instructed that the *traveled part* of the road in this case is that part of Cushing Street to

> the south of the parked vehicles that have been described by the parties as being present at or near the point of accident." (Emphasis supplied.)

The presiding justice refused to give this instruction, and to this refusal the defendant excepted. The requested instructions, in essence, becomes a definition of the words "traveled part" of the way as used in Sec. 83, Chap. 22, R. S., 1954 and when applied to the circumstances of the instant case means that portion of the road between the parked vehicles and the edge of the road.

The presiding justice in his charge informed the jury of the existence of the statute (Sec. 83, Chap. 22, R. S., 1954) and explained the effect of its violation as evidence of negligence. The charge as given appears satisfactory to both parties as lack of exceptions testify.

The statute was passed by the Legislature at a period when teams were the principal mode of transportation. It is reasonable to suppose that the legislators who enacted this rule of the road were not cognizant of the fact that the statute would be subject to construction under road and traffic conditions as obtain in this case where the temporary parking of motor vehicles causes a diminishing of the width of the wrought portion of the way. This statute of ancient vintage is now applicable to the operation of motor vehicles on our public highways. *Bragdon* v. *Kellogg*, 118 Me. 42.

If the words, *"traveled part"* of the highway, as used in the statute, mean that portion of the road which is bounded by the curbing on the one side and the graveled shoulder on the other, then the presiding justice properly refused the requested instruction. On the other hand, if under the circumstances of this case the *traveled part* applies to that portion of the highway between the double-parked truck and the southern edge of the macadam road which, incidentally, was practically that portion south of the center line, then

the presiding justice was in error in refusing to give the instruction.

In the case of *Palmer* v. *Barker,* 11 Me. 338, decided in 1834, the court was concerned with a law of the road statute which required travelers to keep " 'to the right of the centre of the travelled part of the road.' " The court said, on page 339:

> "The design of the law is to prevent travellers, when going on the road in opposite directions from obstructing each other, or so interfering as to produce injury or expose them to danger."

Winter v. *Harris,* 23 R. I. 47, construes a statute similar to the one in the instant case. The accident concerned the collision of two carriages being driven on a public street toward each other. The street at the place of the accident was 40 feet wide from curb to curb, 24 feet and 8 inches of the width was paved with cobblestones and the remainder was macadamized. The macadamized portion was favored by users of the street but the whole width was in good order and condition for traveling. The plaintiff claimed that she was traveling on the right hand side of the center of the macadamized part of the road which was commonly and habitually used by travelers, and that it was this portion that constituted the "traveled part of the road as used in the statute - - -." The court said, on page 54:

> "We think that the weight of both reason and authority favors the construction that the traveled part of Broad street at the time and place of the accident, was the whole width from curb to curb, and it is admitted that the plaintiff's buggy, at the time in question, was on the left of the centre of said traveled part as thus construed."

The entire paved area of a street must be considered in determining the position of the center line. *Fuson* v. *Cantrell,* 166 S. W. (2nd) 405 (Tenn.). In *Elswick* v. *Charleston*

Transit Co., 36 S. E. (2nd) 419, (W. Va.), the question of the location of the "center of the highway" was involved. The court, on page 426, said:

> "Here, Washington Street, as this record discloses, was well established on the ground, the outer boundaries being the north and south curbs of the street. The fact that the southern third of the street at times may have been used for parking purposes does not serve to confine the width of the street to the remaining two-thirds lying to the north thereof."

Clark v. *The Commonwealth,* 4 Pick. 125 (Mass.), treats of a statute comparable in its terms to the one under discussion. The court said of the statute, on page 126:

> "By 'the travelled part' of the road is intended that part which is usually wrought for travelling. A traveller is not obliged, because a track happens to have been made on one side of the part so wrought, to turn to the right of the centre of this track. If he turns to the right of the centre of the wrought part, so that there is room on the wrought part for the other traveller to pass, it is sufficient, - - - -."

In *Jaquith* v. *Richardson,* 8 Metcalf 213 (Mass.), the court in its opinion made reference to the ruling in *Clark* v. *The Commonwealth, supra,* by saying, on page 216:

> "We have no doubt of the correctness of the ruling in that case, and that the revised statutes are to receive a similar construction. But the circumstances there considered are different from those in the case at bar, and they do not control it. We are now called upon to apply the law, which is a most beneficial one, and conducive to the safety and convenience of all the inhabitants of the Commonwealth, to a state of the public road, when, from the season of the year, and the quantity of snow on the ground, the wrought path was obscured from the eye, and the travelled and beaten

> path was on the right of the centre of the wrought path. And here we cannot doubt but that the path then beaten and travelled by those passing and repassing on the way, with their sleds and sleighs, was one of those roads contemplated by the framers of the statute, and within its spirit and purview, and that the wrought part is not, for the time being, the travelled path to which the law of the road is restricted; but that the law is as well applicable to the path, as actually travelled upon the snow, as it is to the wrought part in different seasons of the year."

The *Jaquith* case had no quarrel with the ruling in the *Clark* case as it was applied to the circumstances there obtaining but due to the fact that the *Jaquith* case was concerned with a roadway which was for the most part obscured from the eye by fallen snow, the court determined that the path beaten and traveled by those passing and repassing on the way had established the *traveled way* to which the provisions of the statutes would apply. See *Lahiff* v. *McAloon* (Minn.), 189 N. W. 435.

There are no cases in this jurisdiction which can be cited as defining that portion of Cushing Street south of the parked vehicles as being the *traveled part* of the way as the term is used in Sec. 83, Chap. 22, R. S., 1954. The statute was enacted many years ago and under circumstances of traffic conditions much different than prevail today. The provisions of the statute, however, that require approaching traffic to seasonably turn to the right of the middle of the road in order that vehicles may pass each other without collision and damage, constitute a sound and reasonable rule of the road under present day traffic conditions. We have cited rulings of other jurisdictions based on similar statutes which determine that under ordinary circumstances the traveled portion of the way is that part of the way wrought for that purpose and commonly used as such or so constructed that it could be used. Where the wrought portion

of the way customarily used for traffic is obscured from view by fallen snow and traffic has beaten a path or track on it, then that portion becomes the *traveled part* of the way within the intent and purview of the statute.

The circumstances of this case present entirely different conditions. In the case at bar the narrowing of the normal width of Cushing Street was occasioned by the parked automobiles and trucks to the extent of obstructing at one point an entire one-half of the wrought way. According to the testimony, the jury could have found that the defendant drove his vehicle on his left hand side of the road to clear the first parked truck then returned to his own side of the road until he reached the double-parked trailer truck, at which time he swung again to his left continuing along on what would ordinarily be the plaintiff's side of the highway to a point where the cars collided. Upon this factual aspect of the case, the defendant urges that the provisions of Sec. 83 apply and that the presiding justice was in error in not instructing the jury that the traveled part of the way was that portion of the road south of the parked cars. The narrowing of the highway was not caused by fallen snow, but its width was diminished by the presence of parked cars. It is common knowledge that motorists are continually confronted with problems of proper operation of motor cars in face of traffic conditions created by parked vehicles. The statute was enacted for the purpose of regulating horse drawn vehicles at a time when automobiles were unheard of. There were no macadam or cement roads with gravel shoulders—there were no markings dividing the traveled portions, but only gravel or dirt roads bearing the evidence of travel as made by the passing and repassing of horse drawn vehicles. In time, and by use, a *traveled part* of the way was established by distinct tracks upon the face of the earth. In winter when the snows came, the *traveled part* was created in the same manner although possibly not on

the same part of the road. The Legislature in its wisdom saw the advisability of regulating the use of teams on this kind of way. From this type of road has developed the modern highway and in place of the horse and buggy we have the automobile. Certainly the framers of the statute could never have foreseen its application to the circumstances in this case. The parked cars on the northerly side of Cushing Street, along with the double-parked tank truck and the truck that was protruding into the street, constituted a mere temporary occupancy of the street. They themselves were making use of a portion of the "traveled part" of the way. They by their presence for a comparatively brief time did not change in any manner the *traveled part* of the way as it existed previous to their presence on the road. The parked vehicles did not in any way affect or change the *"traveled part"* of the way but did create a traffic condition which required extra care and caution on the part of the motorists driving in this area.

We are of the opinion and so hold that under the circumstances of this case the words of the statute "traveled part" are not limited in application to that portion of Cushing Street to the south of the parked vehicles. The presiding justice properly charged as to the rule of the road statute (Chap. 22, Sec. 83, R. S., 1954) according to the factual aspect of the case and his refusal to give the requested instruction was not error.

Exceptions overruled.

LESTER M. BRAGDON, TRUSTEE
UNDER INDENTURE OF TRUST OF
AMELIA SHAPLEIGH, ET AL.
vs.
MARY G. WORTHLEY, ET AL.

York. Opinion, July 15, 1959.

Wills. Trusts. Taxation. Federal Estate Tax. Contribution. Executors. Trustees. Beneficiaries. Inter vivos Donees.

The doctrine of equitable contribution is applicable to Federal Estate Taxes since Congress intended that the entire estate tax should be paid out of the estate as a whole and applicable state law as to the devolution of property at death should govern the distribution of the remainder and the ultimate impact of the Federal Tax.

A trustor or testator may designate any portion of his estate from which the Federal Estate Tax should be paid.

The intention to change the application of the rule of equitable contribution should be clearly expressed.

Where a careful examination of the language used in a trust indenture limits the payment of taxes to assets which passed under the trust and no other, the trustee is entitled to equitable contribution from inter vivos transferees for a proportionate share of the tax paid on their behalf.

ON REPORT.

This is a bill in equity seeking contribution from *inter vivos* transferees for a proportionate part of Federal Estate Taxes. Decree to be made in accordance with the opinion.

Waterhouse, Spencer & Carroll,
Hutchinson, Pierce, Atwood & Allen, for plaintiffs.

Edward S. Titcomb, for defendants.

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

DUBORD, J. This case comes to us on report. On May 22, 1950, Amelia Shapleigh, by means of an *inter vivos* indenture of trust, conveyed to Lester M. Bragdon and herself certain assets for the ultimate benefit of a number of persons named therein. She also executed her last will and testament under date of January 8, 1951. She died with this will still in force on March 17, 1952. Under the provisions of the will she bequeathed and devised the residue of her estate to the co-trustee or successor trustee or trustees, under the indenture of trust dated May 22, 1950.

Between May 22, 1950 and the date of her death, she made various other *inter vivos* gifts to some of the beneficiaries of the original trust agreement. These *inter vivos* gifts, not included in the original indenture, amounted to $112,710.33.

After the payment of her debts, funeral charges and expenses of administration properly chargeable against her testamentary estate, there was left only the amount of $578.16. Manifestly, this amount was not large enough to permit the executor to pay the inheritance and estate taxes. Pursuant to the provisions of the will, this balance passed to the plaintiff, Lester M. Bragdon, in his capacity as surviving trustee under the original trust indenture.

Because of the fact that Amelia Shapleigh had retained a life estate in the property conveyed in trust, as well as power of revocation, and for other reasons based upon the Internal Revenue Code, all of the assets formerly owned by Amelia Shapleigh which passed to the parties to the litigation (not including Lester M. Bragdon) were deemed includible in her estate for purposes of the assessment of the Federal Estate Tax. This tax amounted to $78,329.25.

Under the provisions of Section 2002 of the Internal Revenue Code, it is provided that the Federal Estate Tax shall be paid by the executor. However, another section of the

Internal Revenue Code imposes a lien for the entire tax upon any part of the property transferred to *inter vivos* trustees and makes any transferee of trust property personally liable for such tax to the extent of the value of the property received by such transferee. Moreover, while a duty is imposed by federal law on the executor, in the first instance, to make and file the estate tax return, a similar duty is placed upon the recipient of any portion of the taxable estate if the executor is unable to make a complete return. As a result of the situation which developed, not only was the surviving trustee the only person in a financial position to pay this tax, but he was also liable under the law to make such payment.

During her lifetime, Amelia Shapleigh had adopted a son, named John B. Shapleigh. This adopted son filed an appeal to the Supreme Court of Probate within and for the County of York from the allowance of his adoptive mother's will, and he also instituted proceedings in equity seeking to set aside the trust indenture of May 22, 1950, as well as other *inter vivos* gifts, transfers and property dispositions made by Amelia Shapleigh to the trust beneficiaries who are involved in the instant proceedings. This litigation was compromised and the various beneficiaries under the trust contributed certain sums towards an amount paid to the adopted son. The agreement of settlement has no bearing upon the issue before us but there is a pertinent paragraph therein which authorizes the surviving trustee to pay all taxes assessed against the assets of Amelia Shapleigh subject, however, to the right of any transferee to oppose any claim for contribution.

Pursuant to the liability imposed upon him by law and authority given in the foregoing agreement of compromise with the adopted son, the surviving trustee paid, from the assets of the original trust, the entire amount of the Federal Estate Tax, *viz.*, $78,329.25.

He then brought a bill in equity seeking contribution from the *inter vivos* transferees for their proportionate part of the Federal Estate Tax brought about by reason of the receipt by them of assets which were not a part of the original trust *corpus* created by the indenture of May 22, 1950.

It is this matter which is before us on report.

It is the contention of the trustee that liability for equitable contribution exists both under the provisions of the trust as well as under principles of equity and good conscience. He admits liability for taxes insofar as assets in his trust are concerned.

He seeks to recover money judgments from the following persons in the amount set opposite each name.

Sylvea Bull Smith	$ 2,349.41
Alice M. Bartlett	1,230.62
Patricia Smith Langdon	1,230.62
Olea C. Smith	1,230.63
Stephen B. Smith	1,230.63
Shapleigh Smith	1,230.63
James F. Meader	1,230.63
Sarah Meader	1,230.63
Mary G. Worthley	12,732.22

The correctness of the foregoing figures is not questioned by the defendants.

The trustee also prays, that in the event the *inter vivos* transferees are found to be liable for contribution, he be authorized and empowered to satisfy any money judgments obtained to the extent of any funds in his hands, otherwise payable to any such transferee.

All but two of the beneficiaries have joined as parties plaintiff. This they did without waiving any of their rights and all the plaintiff beneficiaries seek a determination of the issue, which is whether or not the surviving trustee is

entitled to pro rata contributions towards the payment of the Federal Estate Tax, based upon the value of assets received by any of the transferees, which assets were includible in the taxable estate of Amelia Shapleigh, but which did not pass by virtue of the original trust indenture.

The two defendants deny liability. It is their contention that the surviving trustee is directed by the provisions of the indenture of trust to pay the taxes for which contribution is sought. Subsequent consideration will be given to the pertinent provisions of the indenture.

We give consideration first to the general principles applicable to the doctrine of equitable contribution.

In Lawrence on Equity Jurisprudence, Volume 2, Section 742, it is stated:

> "Where two or more voluntarily assume a common burden, under such circumstances that they ought to bear it in equal proportions, or in some other definite proportions, between themselves, any one or more who, not being a volunteer under principles already considered, is required to pay more than his or their fair share of the common obligation, is to that extent relieving any other co-obligor who by reason of the payment bears less than his fair share, and in the absence of circumstances creating a counter-equity those so relieved may be subject to the equitable remedy of contribution."

In Whitehouse (single volume) Equity Jurisdiction, Pleading and Practice in Maine, in Section 137, we find:

> "The equity for contribution arises wherever one of several parties who are liable to a common debt or obligation discharges the same for the benefit of all. It is not founded on a contract but on the general principle of justice and its application is most frequently seen in the case of sureties."

Pomeroy on Equity Jurisprudence (5th Ed.) in Volume 2, Section 411, has this to say:

> "Finally, the most important doctrine, perhaps, which results from the principle, Equality is equity, is that of contribution among joint debtors, co-sureties, co-contractors, and all others upon whom the same pecuniary obligation arising from contract, express or implied, rests. This doctrine is evidently based upon the notion that the burden in all such cases should be equally borne by all the persons upon whom it is imposed, and its necessary effect is to equalize that burden whenever one of the parties has, in pursuance of his mere legal liability, paid or been compelled to pay the whole amount, or any amount greater than his proportionate share. No more just doctrine is found in the entire range of equity; and although it is now a familiar rule of the law, it should not be forgotten that its conception and origin are wholly due to the creative functions of the chancellor."

In Volume 2 of Pomeroy's Treatise on Equitable Remedies in Section 915, we find the following:

> "When there are two or more parties bound in the same degree by a common burden, equity demands, as between themselves, that each shall discharge a proportionate share, and when one of such parties has actually paid or satisfied more than his fair share of the burden, he is entitled to a contribution from each and all of the others similarly bound, in order to reimburse him for the excess paid over his share, and thus to equalize their common burden."
>
> "The principle of contribution is equality in bearing a common burden. The general rule is that one who is compelled to pay or satisfy the whole or to bear more than his just share of a common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them payment of their re-

spective shares." 13 Am. Jur., Contribution, § 3, Page 6.

While this case, in which the trustee is seeking equitable contribution from *inter vivos* transferees for a pro rata part of the full Federal estate tax is one of novel impression in this State, the doctrine of equitable contribution has been frequently applied by this court.

In *Williams* v. *Coombs,* 88 Me. 183, 186, contribution was granted to one tenant in common for necessary repairs upon the common property for which repairs he had paid. In *Kimball* v. *Tate,* 75 Me. 39, real estate owned by a decedent had been partitioned among the decedent's heirs by commissioners on the assumption that the decedent was upon his death the owner of one particular parcel of property. Subsequent to the partition a stranger to the decedent ejected the particular heir to whom that particular parcel of real estate had been partitioned. The ejected heir then successfully maintained a bill in equity against his fellow heirs for contribution to make up his loss.

In *Maine Trust & Banking Co.* v. *Southern Loan and Trust Company,* 92 Me. 444, a creditor of the defendant corporation maintained a creditor's bill to force contribution by stockholders of the insolvent defendant corporation toward the payment of its debts and such contribution was imposed ratably upon the stockholders.

Actions at law also have frequently been maintained successfully in Maine to enforce the same right of contribution. Such actions at law have been brought in assumpsit and have involved situations of joint contractors or joint makers of a note. See *Rollins* v. *Taber,* 25 Me. 144, 151, *Powers* v. *Gowen,* 32 Me. 381; *Paradis, Appellant,* 134 Me. 333, 337, 339; 186 A. 672. This court in such actions at law has also applied the doctrine of contribution between joint judgment

debtors in contract where one has paid the entire judgment. See *Stevens* v. *Record,* 56 Me. 488, 489, where it was said:

> "When one of several judgment [debtors] *ex contractu* pays the whole amount, he may recover contribution of the others . . . The suit is the ordinary one for contribution where one has paid under legal compulsion, for another, what was the duty of the latter to pay."

The principle of contribution has frequently been applied in the situation of co-sureties. For such suits for contribution brought by one co-surety against one or more other co-sureties, see *Howe* v. *Ward,* 4 Me. 195, 200; (1st Ed.) *Davis* v. *Emerson,* 17 Me. 64 (in which case the plaintiff, who had paid an execution on a note for both the debt and court costs, recovered a pro rata part of both from his co-surety); *Smith* v. *Morrill,* 54 Me. 48, 54; *Godfrey* v. *Rice,* 59 Me. 308, 312; and *Danforth* v. *Robinson,* 80 Me. 466.

It is clear that the doctrine of equitable contribution has long been recognized in this State. Now what of its applicability in respect to the Federal Estate Tax?

The Internal Revenue Code makes no specific provision for apportionment of Federal Estate Tax, except in relation to two particular kinds of property to the extent included in the taxable estate, namely, insurance proceeds and property subject to a power of appointment. In the instant case we are not concerned with these two exceptions.

In *Riggs* v. *Del Drago,* 317 U. S. 95, 63 S. Ct. 109 (1942), the United States Supreme Court said:

> "We are of opinion that Congress intended that the federal estate tax should be paid out of the estate as a whole and that the *applicable state law* as to the devolution of property at death *should govern* the distribution of the remainder and *the ultimate impact of the federal tax . . .*" (Emphasis supplied.)

The *Riggs Case* involved the validity of a New York State apportionment statute in face of an argument that it was repugnant to the Federal Estate Tax law and therefore unconstitutional under the Supremacy Clause. This contention was specifically rejected with the holding quoted above that "the applicable *state* law" should govern "the ultimate impact of the federal tax." As the Indiana Court said in *Pearcy* v. *Citizens' Bank & Trust Co. of Bloomington,* 121 Ind. App. 136; 96 N. E. (2nd) 918, at 923 (1951):

> ". . . the net effect of *Riggs v. Del Drago, supra,* is that the states may legislate on the subject of apportionment of estate tax only because Congress has not done so in the Federal Estate Tax Act. *By the same token, there is nothing in the Act of Congress to hamper the state courts, in the exercise of their jurisdiction over the administration and settlement of estates, from applying equitable rules whereby, as the result of case law, equitable apportionment of this tax is accomplished in each estate."* (Emphasis supplied.)

See also Annotation in 16 A. L. R. (2nd) 1282:

> "The Federal estate tax, as its name indicates, a tax upon the estate as a whole and is payable by the executor or administrator, but how its burden is to be apportioned as among the beneficiaries of and persons interested in the taxed estate is a question to be determined by the law of the jurisdiction in which the estate is being administered. In other words, the ultimate impact of the Federal estate tax is governed by the applicable state law."

See the long list of cases supporting the same principle in 37 A. L. R. (2nd) 170, 171.

See also *In re Gallagher's Will,* 57 N. M. 112, 255 P. (2nd) 317, 320; 37 A. L. R. (2nd) 149, 156:

> "The Supreme Court of the United States has declared in Riggs v. Del Drago, 1942, 317 U.S. 95, 63 S. Ct. 109, 87 L. Ed. 106, 142 A.L.R. 1131, that the

federal estate tax provisions do not describe who shall ultimately bear the brunt of the payment of the tax, but the matter is one for local control. The opinion in Hooker v. Drayton, 1943, 69 R.I. 290, 33 A. (2nd) 206, 209; 150 A.L.R. 723, gives a concise resumé of the matter prior to and under the Del Drago case:

" 'The fact that the statute provides that the tax is to be paid by the executor before distribution of the estate has led to some confusion in that certain state courts have construed it as a mandate of Congress charging the tax upon the decedent's residuary estate. (Citing cases.) But at least since 1922 the interpretation of the Treasury has been that it was not interested in the incidence of the burden of the estate tax. See Art. 85, Regulation 63, and subsequent regulations. And it was held by the Federal Circuit Court of Appeals of the 2d Circuit in 1923 that 'so far as the words of this statute are concerned, the United States does not care who ultimately bear the weight of this tax; it announces the sum and demands payment from the executors; if the legatees and devisees cannot agree as to the burden bearing, the state courts can settle the matter.' Edwards v. Slocum, 287 F. 651, 653, affirmed 264 U.S. 61, 44 S. Ct. 293, 68 L. Ed. 564.' "

There seems to be a conflict of opinion as to whether the law of decedent's domicil is or is not controlling upon the issue of apportionment of estate taxes. See 16 A. L. R. (2nd) 1282. However, this issue is not presented in this case. Since Amelia Shapleigh, the decedent on account of whose death the Federal Estate Tax arose, was a Maine resident and all the *inter vivos* transferees are Maine residents or have submitted themselves to the jurisdiction of this court, it is the law of this state which is controlling here.

As was pointed out in the case of *In re Gallagher's Will, supra,* confusion arose in the development of applicable law

because of a misconception that Federal law required that the Federal Estate Tax should be borne by the probate residue. Such misconception was specifically repudiated in 1942, by the decision in *Riggs* v. *Del Drago, supra,* and since then, it has been held in most jurisdictions that the burden of estate taxes must ultimately be borne by every part of the taxable estate and that every beneficiary must pay a pro rata share of the tax. 37 A. L. R. (2nd) 169, 171.

See this Annotation for cases cited from Delaware, Florida, Georgia, Indiana, Kentucky, Louisiana, New Mexico and Pennsylvania. See also, *McDougall* v. *Central National Bank of Cleveland,* 157 Ohio St. 45, 104 N. E. (2nd) 441; *Carpenter* v. *Carpenter,* 364 Mo. 782; 267 S. W. (2nd) 632; *Traders National Bank of Kansas City* v. *U. S.,* 148 F. Supp. 278, affirmed 248 F. (2nd) 667.

In *Trimble* v. *Hacher's Ex'rs,* 295 Ky. 178; 173 S. W. (2nd) 985, 989, the court said:

> "There may arise many cases, as seems to be the case here, where the personal representative is without funds to pay the heavy estate taxes upon the estate created by the revenue law. The inclusion in such gross tax estate of the value of property passing under power of appointment, or gifts in contemplation of death, would frequently create that situation. The personal representative who has paid, or is to pay the tax out of the true estate, should have the right of subrogation to the position of the sovereign which has received its tax, and to collect from those against whom the tax might have been, under certain circumstances, enforced under the provisions of the federal law had not the tax been promptly paid, or later paid as a debt against the residue."

In 37 A. L. R. (2nd) 172, we find the following statement:

> "The reason why the foregoing doctrine of contribution is applicable with respect to the federal

> estate tax is that the tax is imposed upon the estate as a whole, the lien of the tax extends to every asset of the taxable estate, and the government may seize any part of the taxable estate or enforce payment against any part of the estate. The tax is thus a common burden and is no more the obligation of one than of the other obligors. If, therefore, one of the obligors pays all or more than his share of the common obligation, he should be permitted to have contribution from the others."

The principle of equitable contribution in respect to Federal Estate Taxes has been applied in many cases. See *In re Mellon's Estate,* 347 Pa. 520, 32 A. (2nd) 749; *Kapnek* v. *Kapnek,* 38 N. J. Super. 268; 118 A. (2nd) 701; *Carpenter* v. *Carpenter, supra.*

Bearing in mind that Section 6324 of the Internal Revenue Code makes any transferee who receives property included in the gross estate personally liable for the tax to the extent of the value of the property received, we are convinced that the Federal Estate Tax in the instant case was the joint and several obligation of all of the *inter vivos* transferees; and that each is liable to the plaintiff for his proportionate share of the tax unless exonerated by a different intent expressed by Amelia Shapleigh, either in her will or in the trust indenture.

It is undoubtedly the law that the testator or trustor may designate any portion of his estate from which the Federal Estate Tax should be paid.

> "It is universally recognized the testator has the right by his direction to make the federal estate tax payable from any portion of his estate he may designate. In the annotation following the report of Riggs v. Del Drago, supra, at 142 A.L.R. 1135, it is stated, at p. 1140:
>
> " 'That a testator has the right by testamentary provision to place the burden of estate taxes where

> he wishes seems to be unquestioned. Indeed, the Federal estate tax statute makes provision for the exercise of such a prerogative. The problem of the courts is to ascertain the intent of the testator, and when this is done, to effectuate that intent through its decrees.'" *In re Gallagher's Will*, 255 P. (2nd) 317, 321.

An examination of the will of Amelia Shapleigh indicates that it contains no direction concerning taxes. We pass, therefore, to consideration of the trust agreement and the provisions contained therein relating to the payment of taxes.

We find these provisions as subparagraph (a) (b) and (c) of the Eighteenth paragraph of the indenture.

> "(a) The surviving Trustee or Trustees, or his or their successor or successors, shall first cause all property of the trust estate to be inventoried and appraised as of the date of death of said Amelia Shapleigh.
>
> "(b) The surviving Trustee or Trustees, or his or their successor or successors, shall prepare and file, in due course, any and all estate tax and inheritance tax returns required to be made to the Federal and state authorities *with respect to the trust estate and any gifts made therefrom, and shall pay all Federal or State estate taxes which may be found due on account of the property in this present trust,* (emphasis supplied) whether the same shall be assessed directly upon the trust, or indirectly in any probate proceedings upon the estate of said AMELIA SHAPLEIGH, and shall further pay all State inheritance taxes upon the several individual gifts hereinafter made.
>
> "(c) The following gifts shall then be made from the property remaining in the trust after the payment of all necessary expenses and the ascertainment and payment of any and all taxes in any way due on account thereof or in any way connected therewith:" (Then follows a list of the beneficiaries to whom payments shall be made.)

The plaintiff contends that these paragraphs specifically and particularly prescribe that the trustee shall be liable to pay the taxes only on assets which passed by virtue of the trust indenture; and he argues further that by implication the trustee is directed not to pay taxes on other *inter vivos* gifts outside of the trust.

The defendants argue that circumstances surrounding Amelia Shapleigh and some of the beneficiaries, before and at the time of the execution of the will and of the trust indenture, show an intention on the part of Amelia Shapleigh that all taxes should be paid from the corpus of the trust.

The Supreme Court of the State of Washington has passed upon a similar issue in the case of *In re Heringer's Estate,* 38 Wash. (2nd) 399; 230 P. (2nd) 297. In that case the will involved provided that the executor should pay all costs and expenses incident to the probate of the estate, including federal estate and inheritance taxes payable with reference to any of the devises or bequests therein made. It was held that this latter provision "by inference, directs the executor not to pay such taxes out of the assets of the estate with reference to any property which does not pass by devise or bequest."

The foregoing case of *In re Heringer's Estate,* was cited and approved by the New Mexico Supreme Court in *In re Gallagher's Will, supra.*

See also the Rhode Island cases of *Hooker* v. *Drayton,* 69 R. I. 290, 33 A. (2nd) 206, and *Industrial Trust Co.* v. *Budlong,* 77 R. I. 428, 76 A. (2nd) 600, 604. In the last case, the court said at Page 604:

> "In our opinion an examination of the language used in that clause shows clearly that while he directed his executor to pay all taxes from his residuary estate such payment apparently was

> only for the following express and limited purpose, namely, 'to the end and with the effect, as far as possible, that the bequests and devises, other than of the residue hereinafter in this will contained, as well as any sums payable under any insurance policy or policies to named beneficiaries, may be exonerated therefrom and be received by the several beneficiaries without deduction * * *.' The clause contains no reference to payment of any taxes which might be imposed by reason of the inter vivos trusts in question."

See also the New Jersey cases of *Vondermuhll* v. *Montclair Trust Co.*, 14 N. J. Super., 300, 81 A. (2nd) 822, and *Montclair Trust Co.* v. *Spadone*, 139 N. J. Eq. 7, 49 A. (2nd) 497, 498, in which latter case the court said:

> "To ascertain the testator's intention with respect to taxes, as in other cases of testamentary interpretation, the whole will is studied and evidence is received of the situation existing at the time the will was made. In the present case, little that is helpful appears beyond this clause in the will: 'I direct * * * that all inheritance taxes be paid out of my residuary estate.' In giving effect to such clauses, the rule has been developed that testator's express direction to pay out of residue a certain tax or part of tax impliedly requires that a different tax or another part of the tax be not paid out of residue but be charged on the property in respect to which it is levied. * * * This rule has been applied where the executor was instructed to pay the state or federal tax, or both, that may be assessed against 'my estate' or 'the share herein given,' or 'gifts herein made,' or 'the bequests or beneficiaries in my will named'; and it has been held that such limited directions impliedly relieved the residuary estate of so much of the tax as was levied with respect to the title of testator's widow as tenant by the entirety or as surviving owner of a joint bank account; to property which was the subject of appointment under a power; to legacies given by codicil, or to inter vivos trusts."

We recognize that Amelia Shapleigh could by direction in the instruments which she executed change the application of the rule of equitable contribution. However, in order to do this, her intention would have to be clearly expressed. We are convinced from a careful examination of the language used in the trust indenture that she limited the payment of taxes by the trustee to assets which passed under the trust and to no other assets. Her language to that effect is clear and it seems to us can bear no other interpretation.

We are, therefore, of the opinion that the position of the plaintiff is well taken and that he is entitled to contribution from all the *inter vivos* transferees in accordance with the amount set forth in his bill. Money judgments in such amounts may be entered, however, without interest and without costs. The trustee is also authorized and empowered to satisfy any such money judgment or judgments to the extent of any funds in his hands payable to any such transferee. We also hold that the costs and expenses of each of the parties, including reasonable counsel fees, shall be fixed by the sitting justice after hearing and paid by the trustee.

Decree to be made by the sitting justice below in accordance with this opinion.

WALLACE CLOUTIER
vs.
ADRIEN O. ANCTIL, TREASURER OF
THE CITY OF LEWISTON

Androscoggin. Opinion, August 8, 1959

Muncipal Corporations.
Mandamus. *Pensions.*
Statutory Construction.

The fundamental rule in construing legislative acts is to ascertain the intent of the legislature and give effect thereto. In doing so, all parts of the legislative act must be taken into consideration.

ON EXCEPTIONS.

This is a petition for a Writ of Mandamus before the Law Court with stipulations and upon exceptions. Exceptions overruled. Peremptory writ to issue as ordered.

Philip Isaacson, for plaintiff

William Hathaway,
Louis Scoltno & William Hathaway, for defendants

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

SIDDALL, J. Petition for a writ of mandamus to compel the Treasurer of the City of Lewiston to pay to the petitioner a pension granted to him by the Police Commission of Lewiston.

The case was heard by a justice of the Supreme Judicial Court upon an agreed statement of facts. The parties agree that on and before April 17, 1959, the petitioner was a member of the Police Department of the City of Lewiston and had made application for a permanent disability pen-

sion based on the allegation that he became permanently disabled while in the discharge of his duty as a member of such department. On April 17, 1959, at a duly held meeting, the Police Commission of said city investigated and passed upon the application and being satisfied that he had become permanently disabled and that his disability was incurred in the discharge of his duties as a member of the Police Department granted a permanent disability pension to him. The Police Commission notified the respondent Treasurer that it had determined (1) that the petitioner was a member of the Police Department, (2) that he had become permanently disabled as a result of the discharge of his duties, (3) that it had granted to him a disability pension provided for in the Charter of said city, such pension to become effective as of May 15, 1959, and that the weekly pay of the petitioner as of said date was $77.50. The petitioner on May 15th retired from membership in said department. The Board of Finance requested that the Police Commission furnish it with all records pertaining to the disability of the petitioner. This request was refused on the grounds that the Charter did not authorize such action. On May 25th said Board ordered the respondent Treasurer not to make payment to the petitioner. The parties agree that if the petitioner is entitled to receive his pension, he should have been paid such pension beginning May 15, 1959. Demand was made upon the respondent Treasurer for payment and payment was refused. The pension plan in question was noncontributory. An appropriation for pensions was included in the annual budget of said city. The preliminary proceedings were waived, and it was stipulated that in the event that the case is resolved in favor of the petitioner, a peremptory writ of mandamus is to issue.

The justice hearing the case ordered the issuance of a peremptory writ of mandamus commanding the respondent

Treasurer in his said capacity to pay out of the pension funds of said city to the respondent a regular monthly pension computed from the 15th day of May, 1959, in accordance with the grant of the Police Commission. Exceptions of the respondents were duly taken and allowed, the respondents claiming by their exceptions that such order was erroneous as a matter of law.

The issue in this case is whether or not the Board of Finance had the legal right to withhold the pension granted to the petitioner by the Police Commission.

The pertinent provisions of the Charter of the City of Lewiston with which we are concerned are as follows:

> Article XI, Sec. 21. Retirement; permanent disability. Any member of the Lewiston police department who shall have arrived at the age of 65 years in active service, or any member who while in the performance of duty has become permanently disabled, or any police officer of the city who was a member of the police department at the time of the enactment of chapter 37 of the private and special laws of 1917 and who thereafterwards, but prior to the enactment of chapter 8 of private and special laws of 1939, arrived at the age of 65 years, while in active service, shall be retired and shall be entitled to a pension equal to ½ of the pay which such member received at the time of his retirement or permanent disability.
>
> If a member of the Lewiston police department should die, whether he is retired or on active duty, as a result of injury received in the line of duty, his widow, or, if none, his minor child or children shall continue to receive the pension he was receiving at the time of his death. If on active duty, the compensation or pension shall be ½ of the pay the member was receiving at the time of his death. Such pension or compensation will be paid subject to the following conditions:

I. The widow shall receive such compensation or pension until she dies or as long as she remains a widow.

II. If no widow survives, a pension or compensation of the same amount shall be paid to the guardian of his child until that child reaches the age of 18 years. When two or more children under the age of 18 are the survivors, such pension or compensation shall be divided pro rata, and the pro rata share due each child shall be paid to the guardian of that child until the child shall reach the age of 18 years.

Article XI, Sec. 22. Pensions, application for. When application is made for pension because of permanent disability while in active service, or while on authorized leave, the applicant shall satisfy the commission that he is permanently disabled and that his disability was incurred in the discharge of his duties as a member of the department.

Article XI, Sec. 23. Granting of pensions. The commission shall investigate and pass upon all matters pertaining to the pensions of policemen, in accordance with the provisions of this charter, and shall have authority to grant such pensions as provided herein.

Article XI, Sec. 24. Payment of pensions. The pensions specified in this charter shall be paid monthly by the city treasurer and no pension shall be allowed unless application therefor shall have been approved by the commission.

Article VIII, Sec. 4. General supervision over finances. The board of finance shall have general supervision and full control over the several departments of the city so far as it relates to their financial transactions, records and auditing and to the receiving and disbursement of moneys.

The fundamental rule in construing legislative acts is to ascertain the intention of the legislature and give effect

thereto. In so doing, all parts of the legislative act in question must be taken into consideration. These principles are so well recognized that the citation of authority to support them is unnecessary.

Obviously the Charter was prepared with great care and skill. A careful reading of the entire document satisfies us that it was the intention of the legislature to bestow broad authority upon the Board of Finance. The respondents in their brief cite numerous sections of the Charter to indicate the extensive power given to such Board. Many of these sections specifically provide that the acts of various officials of the city in financial transactions are subject to the approval of the Board. The framers of the Charter exercised extreme care in order to clearly set forth and define the duties and responsibilities of the Board of Finance. The same degree of care was taken in specifying the duties and responsibilities of the Police Commission, particularly in relation to proceedings before it on pension applications. No provision is made for an appeal from the acts of the Police Commission in granting pensions, and we find no provision in any part of the Charter which either directly or indirectly authorizes the Board of Finance to review or override in any way the findings of the Police Commission in granting pensions. The fact that such extreme care was taken in the preparation of the Charter leads us to the conclusion that if the legislature had intended to establish a veto power in the Board of Finance over the acts of the Police Commission, it would have done so by the use of unmistakable language. As fittingly stated by the justice hearing the case, it is significant that the phrase "subject to the approval of the Board of Finance," which appears with great frequency in the Charter in appropriate places where what may be termed financial decisions are involved, is omitted in that part of the Charter relating to police pensions.

The respondents claim that this is a financial transaction over which the Board has general supervision under Article VIII, Sec. 4 of the Charter. We do not consider that the decision of the Police Commission in this case was basically financial in nature. Under the stipulations we must assume that the weekly pay rate of the petitioner while a member of the department had been approved by the Board of Finance as provided by the Charter. The responsibility of the Police Commission was to determine as a fact finding body whether or not the petitioner was eligible for a pension under the terms of the Charter. If he met the necessary requirements he was entitled to a pension. The computation of the amount of such pension then became merely a matter of mathematics, the exact amount to be determined under the formula set forth in the Charter. The Police Commission after hearing found that the petitioner was eligible for a pension, and so notified the respondent Treasurer, together with information as to the amount of petitioner's pay on the effective date of the pension. There is no dispute as to the amount of petitioner's pay on such date. All of the requirements of the Charter having been complied with and the Police Commission having lawfully granted a pension to the petitioner, it became the duty of the defendant Treasurer under the provisions of Article XI of Sec. 24 to pay such pension monthly. The decision of the Police Commission was not subject to review and the Board of Finance had no authority to stop the payment of the pension.

The order of the justice hearing the petition was proper.

Counsel have notified the court that the petitioner died on the 26th day of July, 1959. The order meets the changed condition. The petitioner's estate is entitled to receive the pension granted to the date of petitioner's death. After his death the pension automatically continues and is paid

to the person or persons qualified to receive it under the provisions of Sec. 21 of the Charter.

The entry will be

Exceptions overruled. Peremptory writ to issue as ordered.

THEOLA COOK

vs.

COLBY COLLEGE AND LIBERTY MUTUAL INSURANCE CO.

Kennebec. Opinion, August 14, 1959

Workmen's Compensation. Eyes. Loss of use. Industrial Blindness. Disfigurement. Presumed Incapacity.

The removal of an eye with 3 3/10% of normal vision when such removal results from a compensable accident is not the "loss of an eye" within the schedule of injuries of Sec. 13 of the Workmen's Compensation Act entitling the claimant to compensation for presumed total incapacity for 100 weeks since the words "loss of an eye" referred to in Section 13 of the Act means removal or enucleation of an eye useful in industry with at least 1/10 of normal vision, with glasses.

The basic purpose of the Act is to provide compensation for loss of earning capacity from actual or legally presumed incapacity to work arising from accidents in industry.

The relationship of *loss* to *loss of use* in terms of presumed total incapacity has been established since 1929. It is a further recognition that it is *loss of use* not loss or removal in itself that brings about loss of earning capacity.

The words "with glasses to 1/10 of normal vision" is the legislative standard for industrial blindness.

This is a petition for compensation for presumed total incapacity. The case is before the Law Court upon appeal

from a pro forma decree of the Superior Court. Appeal sustained. Compensation under Section 13 of the Workmen's Compensation Act denied. Allowance of $250 ordered to petitioner for expenses of appeal.

Bird & Bird for plaintiff.

Robinson, Richardson & Leddy for defendant.

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

WILLIAMSON, C. J. This workmen's compensation case is before us on appeal from a pro forma decree in the Superior Court affirming the decision of the Industrial Accident Commission.

The issue is whether the Commission correctly held that the removal of an eye with 3 3/10% of normal vision resulting from a compensable accident was the "loss of an eye" within the schedule of injuries of Section 13 of the Workmen's Compensation Act entitling the claimant to compensation for presumed total incapacity for 100 weeks.

The facts are not in dispute. The parties stipulated and agreed:

> "- - - that on April 20, 1957, just prior to her accident the Petitioner had a vision of not more than 20/400 in the right eye that was injured. This is three-and-three-tenths per cent vision or a loss of vision of 96.7 per cent.
>
> "- - - that this amount of vision is much less than that needed for the capable performing of the ordinary functions of an eye. Light perception such as the Petitioner had enabled her only to distinguish the movements of objects within a radius of five or six feet of her but she was not able to distinguish what the objects were.

> "- - - that the Petitioner on April 20th, 1957, received an industrial accident to the right eyeball in question which necessitated its removal. . . "

We assume the parties intended to describe the permanent condition of the eye prior to the accident, and the extent of the vision "with glasses".

Without question, the claimant prior to the accident was practically blind in her right eye. The eye served no useful purpose to her in industry and was in the condition known as "industrial blindness".

The claimant has received compensation for her *actual* total incapacity from the date of the accident to her return to her regular work at regular pay, a period of ten weeks. All medical and hospital expenses, so far as is known to the Commission, have been paid by the employer or its insurers. These facts, however, have no bearing on the right to compensation for presumed total incapacity for 100 weeks if the injury comes within the schedule, except as the employer or insurance carrier may be entitled to credit for payments made.

No one belittles the severity of the injury to the claimant, or questions her right to compensation for actual total or partial incapacity. It should be noted, however, that there is no provision in our Act for an award for disfigurement.

The Workmen's Compensation Act (R. S. c. 31, § 13) reads:

> "**Sec. 13. Compensation for specified injuries; permanent impairment.** — In cases of injuries included in the following schedule the incapacity in each such case shall be deemed to be total for the period specified; and after such specified period, if there be a total or partial incapacity for work resulting from the injury, the employee shall receive compensation while such total or partial incapacity

> continues under the provisions of sections 11 and 12 respectively. The specific periods during which compensation for presumed total incapacity is to be paid because of the injuries hereinafter specified shall be as follows: For the loss of a thumb, 50 weeks. (Provision for other members). For the loss of an eye, or the reduction of the sight of an eye, with glasses, to 1/10 of the normal vision, 100 weeks. (1)
>
> For the total and permanent loss of hearing in one ear, 50 weeks.
>
> * * * * * * * * * *
>
> In all other cases of injury to the above-mentioned members or eyes where the usefulness of any physical function thereof is permanently impaired, the specific compensable periods for presumed total incapacity on account thereof shall bear such relation to the periods above specified as the percentage of permanent impairment due to the injury to such members or eyes shall bear to the total loss thereof; and the commission upon petition therefor by either party shall determine such percentage."

The position of the Commission is found in the findings and decision in these words:

> "Did she have an eye to lose from a legal standpoint? . . . we find that she did have an eye prior to this accident and that as a result of this accident she lost it. The removal of her eye was a serious loss to her, as the sight which remained in that eye such as it was constituted a precious possession. It was admittedly not a good eye, but the law in question does not state the eye must be perfect, nor does it refer to any limitations for an impaired eye. The petitioner's eye was not entirely blind, sightless or dead. She could distinguish darkness from light and could get the shadow of

(1) This clause unchanged from original enactment of Workmen's Compensation Act in Laws 1915, c. 295, § 16, except addition of "or for diplopia" in Laws 1957, c. 252, since this case arose, and changes in amount.

> objects within five or six feet from her and this we hold to be of value. She was also able to avoid the inconvenience, discomfort and cosmetic loss of wearing an artificial eye. She had a right to hope that with the advancement of medical science the sight in her eye might in the future be improved. The fact of being able to distinguish darkness from daylight had some value over a completely dead eye. The fact of being able to distinguish the shadow of objects within six feet of her, even though she could not tell what the objects were, we hold to be of some value from a safety standpoint and a value above and beyond that of a completely blind eye. In other words she had something of value present prior to this accident, and as a result of the accident she has lost it. She has sustained the 'loss of an eye.' "

We interpret the words "loss of an eye" in the scheduled injuries of Section 13 to mean the removal or enucleation of an eye useful in industry with at least 1/10 of normal vision, with glasses. In short, an eye in the condition of industrial blindness is not an "eye" within the schedule. It follows that the Commission erred in granting compensation for presumed total incapacity for a scheduled injury. In reaching this conclusion we are mindful of the legislative injunction that "In interpreting this act (the Commission) shall construe it liberally and with a view to carrying out its general purpose." R. S., c. 31, § 30.

The basic purpose of the Workmen's Compensation Act is to provide compensation for loss of earning capacity from actual or legally presumed incapacity to work arising from accidents in industry. *Fennessey's Case,* 120 Me. 251, 113 A. 302. "In compensation, unlike tort, the only injuries compensated for are those which produce disability and thereby presumably affect earning power." Larson, *Workmen's Compensation,* § 2.40.

The function of the eye is sight or vision. Without vision, or without any efficient vision, the eye as an organ serves no useful purpose. Loss of earning capacity comes from loss of use, not from loss in the sense of removal of the eye.

The Legislature has recognized that the real injury which the Workmen's Compensation Act is designed to meet is blindness from industrial accident, not removal or enucleation of the eye as such. In Section 13 the measure of presumed total incapacity is identical "for the loss of an eye, or the reduction of the sight of an eye, with glasses, to 1/10 of the normal vision, . . "

The theory of the scheduled injuries is that the claimant "has sustained a distinct loss of earning power in the near or not remote future." *Clark's Case,* 120 Me. 133, 137, 113 A. 51. Specified periods of presumed total incapacity designed to express the opinion of the Legislature upon the seriousness of the different types of loss are established, thereby facilitating the administration of the Act. Loss and loss of use of an eye to the extent noted are given equal weight, i.e., a presumed total incapacity of one hundred weeks, and thus are made equivalents.

"Loss" in the schedule means the severance or removal of a member, as a leg, or of an eye, and not loss of use from the partial or total permanent impairment of a leg or reduction in sight. The distinction between "loss" and "loss of use" has been maintained since the adoption of the Act. *Merchant's Case,* 118 Me. 96, 106 A. 117. Without doubt all scheduled injuries could be defined in terms of loss of use, but such has not been the history of the Act. Indeed, from 1915 to 1919 the only loss of use provisions in the schedule related to reduction of vision and loss of hearing.

In 1919 the Legislature first enacted the last paragraph of Section 13, *supra,* providing for periods of presumed

total incapacity proportionate to loss of use of members. Laws 1919, c. 238, § 16. The paragraph was amended in 1929 to include loss of use of the eye, thus covering a partial loss of use not reached by the scheduled item on reduction of vision. Laws 1929, c. 300, § 13. See *McLean's Case,* 119 Me. 322, 111 A. 383; *Clark's Case, supra.*

The relationship of *loss* to *loss of use* in terms of presumed total incapacity has thus been completely established since 1929. It is a further recognition that it is *loss of use,* not loss or removal in itself that brings about loss of earning capacity.

In the words "with glasses, to 1/10 of the normal vision," the Legislature adopted a reasonable standard of industrial blindness. In our view the Legislature intended thereby that "eye" under the schedule must be an eye useful in industry. Whether industrial blindness may be reached as a fact with more than 10% vision, is not in issue. The statute does no more than establish that an eye with 10% or less vision is legally industrially blind.

The present decision is foreshadowed in *Borello's Case,* 125 Me. 395, 134 A. 374. The employee suffered loss of all efficient vision of an eye which prior to the injury had 64% vision. It was urged unsuccessfully that the compensation under the schedule should be proportionate to the percentage of normal vision lost by the accident, or 64% of the specified compensation.

The court said, at p. 396:

> "The compensation provided for in Section 16 (the schedule of injuries is now Section 13) of the Act is not necessarily based on the presumption that the injured workman previously had a normal arm, leg, hand, or eye. If he had an arm, leg, hand, or eye capable of performing the ordinary functions of such members, even though its normal efficiency was impaired, and as a result of an in-

> jury the arm, leg, or hand is severed, or the sight of an eye is reduced to or below one tenth of the normal vision, he would be entitled to compensation for total incapacity for the specified period fixed in Section 16.
>
> "What percentage of normal vision above one tenth, it is necessary for an employee to have, so that if reduced by injury to or below one tenth, he can be said, within the meaning of Section 16, to have lost an eye, it is not now necessary to determine.
>
> "The Commission was clearly right in holding that a loss of all efficient vision of an eye, previously sixty-four per cent normal, entitled the petitioner to compensation as 'for the loss of an eye.' *Purchase* v. *G.R.R.*, 194 Mich., 103; *Hobestis* v. *Columbia Shirt Co.*, 186 N.Y., App. Div., 397."

On the facts *Borello's Case* involved loss of use or reduction in sight, and not the loss or removal of an eye. The interpretation of the scheduled injuries section by the court, although it is broader in scope than necessary for the decision, is entitled to great weight. For over three decades the interpretation has remained unchallenged in the courts. The court firmly determined that an eye within the schedule must have the capability of performing its ordinary function of sight and that an eye with 10% or less of normal vision with glasses was a lost eye. Usefulness in industry was accepted as the standard of eye under the schedule. Neither the removal of a totally blind eye nor the removal of an eye with vision useful to the individual but not in industry bring a case within "the loss of an eye" in the schedule.

On the view taken by the Commission, the door is open for double compensation under the scheduled injury section. Such a result is plainly contrary to the purpose and intent of workmen's compensation and does not flow from

the construction we place upon the section. We may illustrate with assumed injuries to an eye, either normal or defective, but useful in industry, as in *Borello's Case.* If such an eye is lost, i.e., removed in an industrial accident, the employee is entitled to compensation for presumed total incapacity of 100 weeks. No one would suggest that the employee should receive additional compensation under the schedule for reduction in vision. Loss in this case obviously includes loss of use.

In the event of two accidents, the first resulting in loss of sight to, say 3% plus vision as here, and the second resulting in enucleation, the claimant on the Commission's theory would be entitled to 200 weeks of presumed total incapacity. The Legislature in our view did not intend such a result.

The reason for claimant's reduction in sight to the injured eye to below 10% of vision is neither given in the record nor is it material. The decisive factor in applying the scheduled injury section was the condition of the eye at the time of the accident. See *Lawson* v. *Suwanee Fruit & Steamship Co.*, 336 U. S. 198, 69 S. Ct. 503.

The cases on removal of an eye under a scheduled injury cannot be reconciled. Compensation has been awarded for removal of a sightless eye in *Riegle* v. *Fordon,* 273 App. Div. 213, 76 N.Y.S. (2nd) 523, affirmed 298 N.Y. 560, 81 N.E. (2nd) 101; *McKenzie* v. *Gulf Hills Hotel,* 221 Miss. 723, 74 So. (2nd) 830; *Blair* v. *Armour and Company* (Mo.) 306 S.W. (2nd) 84, and denied in *Crown Woodworking Co.* v. *Goodwin* (N.H.) 128 A. (2nd) 918, and *Iacone* v. *Cardillo,* 208 F. (2nd) 696 (2nd Cir.). There has been recovery where there was partial sight in *Kraushar* v. *Cummins Construction Corp.*, 180 Md. 486, 25 A. (2nd) 439, and *McCadden* v. *West End Building & Loan Association,* 18 N.J.M. 395, 13 A. (2nd) 665, and where the eye was of

practical use in *Florida Game & Fresh Water Fish Com'n* v. *Griggers* (Fla.) 65 So. (2nd) 723. The test of industrial usefulness or conversely industrial blindness was discussed or applied in *Iacone* v. *Cardillo, supra,* and *Powers* v. *Motor Wheel Corp.,* 252 Mich. 639, 234 N.W. 122, 73 A.L.R. 702. A statutory standard of vision was applied in *In re Green's Case,* 335 Mass. 302. 139 N.E. (2nd) 520, but not in *Old Dominion Stevedoring Corp.* v. *O'Hearne,* 218 F. (2nd) 651 (4th Cir.).

Certain cases require comment. In *Purchase* v. *Grand Rapids Refrigerator Company,* 194 Mich. 103, 160 N.W. 391, 392, cited by our court in *Borello's Case, supra,* the Michigan Court in holding there was loss of an eye, said:

> "The Legislature has not attempted a definition, or made a declaration, applicable to the case at bar, except in terms of the loss of an eye. It has not specified a normal eye, although it may be concluded that the law refers to an eye which performs in some degree the functions of a normal eye. A mere sightless organ might perhaps be considered no eye at all. The claimant has lost an eye, although an infirm one. It was not wholly useless as an eye. On the contrary, the testimony is that he could with it distinguish light and see approaching objects. As a result of the injury, there was disability, and the disability is 'deemed to continue for the period specified, and the compensation so paid for such injury shall be as specified. . . .' "

Under our statute, and not so far as it appears from the opinion in Michigan, there is a standard of vision equivalent to the loss of sight. In later cases the Michigan Court has applied the industrially useful test. Indeed, it does not appear that the Court intended otherwise in *Purchase, supra.* See *Powers* v. *Motor Wheel Corp., supra.*

In *In re Green's Case, supra,* the claimant in the first accident suffered a reduction in vision below the statutory

standard, stated by the court to be a condition of "industrial blindness," and had recovered full specified compensation equivalent to that available for loss or removal of an eye. The eye subsequently became blind and as a result of the second accident was enucleated. On these facts the Massachusetts Court denied an award for specific compensation for enucleation of an eye under the schedule.

The court said, at p. 522:

> "In determining the amount of specific compensation payable under the act reduction of vision to 20/70 of normal is considered as the equivalent of the removal or total loss of use of the eye. Pizzano's Case, 331 Mass. 380, 382, 119 N.E. 2d 390. The amount of compensation provided in such case is not only the same as that payable for loss of an eye or for total loss of its use but is also made a standard for determining the proportional compensation payable for partial reduction in vision. Doubtless the reason for uniformity in the prescribed payments for reduction of vision, loss of the eye and loss of its use is that in all of these instances the effect on the employee is essentially the same, namely, blindness. The reduction in vision to 20/70 of normal results in a condition known as 'industrial blindness.' . . . In the present case the removal of the employee's eye by enucleation resulted in no additional incapacity for labor, except for the disfigurement, and for that he is given compensation. He has been fully compensated for the injury incurred in 1945, which caused his blindness, in accordance with the statute then in force and further payment for the surgical removal of the blind eye would result in double compensation for the same loss. We think that the words 'by enucleation' are merely descriptive of a means by which the total loss of sight may be affected . . . and after an award of compensation for such loss are not intended to authorize the payment of further specific compensation."

In *Old Dominion Stevedoring Corp.* v. *O'Hearne, supra,* the U. S. Court of Appeals, in refusing to hold that 20% visual efficiency was not a standard of industrial blindness while adopting the useful eye test, said at p. 653:

> "The second contention centers around the finding of the Commissioner that the claimant only possessed visual efficiency of 20 per centum in the injured eye prior to the accident. Section 908(c) of the Act provides that compensation for loss of 80 per centum or more of the vision of an eye shall be the same as for the loss of the eye; and it is argued that within the meaning of the Act, an eye with only 20 per centum visual efficiency is industrially blind and for its total loss no compensation can be allowed. We do not think that this can be inferred from the Act."

The case differs from the case at bar in that the 10% of normal vision with glasses of our Act is a recognized standard of industrial blindness. See, for example, *Shaw* v. *Rosenthal* (Ind.) 42 N.E. (2nd) 383; *Kinzie* v. *General Tire & Rubber Co.* (Ind.) 134 N.E. (2nd) 212. See also 99 C.J.S. *Workmen's Compensation* § 316; 58 Am. Jur., *Workmen's Compensation* § 290; annot. 142 A.L.R. 822, supplementing annot. in 8 A.L.R. 1324, 24 A.L.R. 1466, 73 A.L.R. 706, and 99 A.L.R. 1499; Longshoremen's and Harbor Workers' Compensation Act and cases, 33 U.S.C.A. § 901 *et seq.*

In summary, we hold that an "eye" within the phrase "loss of eye" in the schedule of injuries is an eye that is industrially useful, or, in other words, not industrially blind, and further, that by definition the statute establishes that an eye with vision of 1/10 or less of normal vision with glasses, is in a condition of industrial blindness. The claimant is therefore not entitled to compensation for presumed total incapacity under the schedule.

The entry will be

Appeal sustained. Compensation under Section 13 of the Workmen's Compensation Act denied. Allowance of $250 ordered to petitioner for expenses of appeal.

PEPPERELL TRUST CO.
vs.
LIDA E. MEHLMAN ET AL.

Cumberland. Opinion, August 25, 1959

Mortgages. Foreclosure. Entry. Counsel Fee.

The writ of entry with conditional judgment is designed to foreclose a mortgage and establish the amount secured thereby. There are two judgments: first on the title by the jury or with agreement of the parties, by the court; and secondly on the amount, by the court.

The amount due for attorney's fees is to be found in the light of equity and good conscience; and a Bar Association schedule of fees for commercial collections is unreasonable and unjust in the instant case.

The word "expense" when used in mortgages is broad enough to include reasonable counsel fees.

Admissibility in evidence of Bar Association schedule of fees not decided.

Court allowance of fees as in will or receivership cases not decided.

Where the mortgage in a foreclosure proceeding fails to offer evidence from which the court may find a "reasonable attorney's fee" the court properly refuses to include an attorney's fee in a conditional judgment even though the note and mortgage provide for the payment of collection expenses.

ON EXCEPTIONS.

This is a writ of entry before the Law Court upon exceptions. Exceptions overruled.

Lausier & Donahue, for plaintiff

Harvey & Harvey, for defendant

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

WILLIAMSON, C. J. On exceptions. The mortgagee objects to the refusal of the Court to include an attorney's fee in a conditional judgment issued on a writ of entry to foreclose a real estate mortgage.

On July 6, 1955, Lida E. Mehlman the defendant and Gordon H. Mehlman her husband, since deceased, mortgaged certain real estate in Cumberland County to the plaintiff bank to secure a demand note for $10,500. The note and mortgage contain the following provisions:

> "Demand, protest, notice of dishonor, and all other requirements necessary to hold them are hereby waived, by each and every maker of this Note. It is further agreed that all costs and other expenses attendant to enforcing payment of this Note shall be paid by the maker and (or) endorser of this Note".
>
> * * * * * * * * * * *
>
> ". . . shall pay to said grantee - - - all expenses, if any are incurred, of foreclosure of this mortgage, together with all costs and other expenses attendant to enforcing payment of this note with interest on said sums - - -"

In May 1957 Mrs. Mehlman sold the property to defendant Stanley C. Zaprzalka who agreed with the bank to make monthly payments of a stated amount on the mort-

gage debt. The position of the defendant Sophie V. Zaprzalka is not clear on the record. We may fairly assume she is the wife of Stanley C. Zaprzalka and a grantee with him from Mrs. Mehlman.

On August 13, 1958, the bank directors voted that the note in question "be delivered to the bank's attorneys for collection." On August 22, 1958, without notice to Mrs. Mehlman the bank commenced an action on the note in the Superior Court in York County and a writ of entry to foreclose the mortgage in the Superior Court in Cumberland County.

Shortly thereafter Mrs. Mehlman sought to pay the amount overdue of $192 and to continue with the mortgage payments. In late September the bank refused the offer, informing her "that since the action was already started that we could not accept the check, that it would have to be cleared through the office of our attorneys, and I (the treasurer) returned the check and the deed to her that day."

Under date of September 29, 1958, the attorneys for the bank wrote Mrs. Mehlman that "the total amount (of legal expenses) as of today is $1,037.64 which are in conformity with the fee schedule of the York County Bar Association."

The writ of entry with conditional judgment is designed to foreclose a mortgage and establish the amount secured thereby. R. S., C. 177, §§ 9, 10, 11. There are two judgments: first, on the title, by a jury or, with agreement of the parties, by the court; and secondly, on the amount, by the court. *Ladd* v. *Putnam*, 79 Me. 568, 12 A. 628.

The amount due is found in the light of equity and good conscience. The court in *Eugley* v. *Sproul*, 115 Me. 463, 99 A. 443, said at p. 466:

> "Under a similar statute in Massachusetts, practically identical with our own, and another provi-

> sion of a more general nature, it was held that these special provisions as to the judgment give to the special writ of entry nearly all of the attributes of a suit in equity. ."
>
> * * * * * * * * * *
>
> "Since redemption is an equitable right, it can be claimed by a mortgagor, only on terms of his paying all that is just and equitably due under the mortgage, even though the debt should not be recoverable at law, being barred by the statute of limitations. . . The sum required for the redemption of the mortgaged premises is the same in a suit by the mortgagor to redeem as it would be in like circumstances in a suit by the mortgagee to foreclosure."

See also 59 C. J. S. *Mortgages* § 534(c).

The mortgagee is bound by the amount so determined, for example, in an action on the note. *Fuller* v. *Eastman,* 81 Me. 284, 17 A. 67.

The presiding justice ruled that the note and the mortgage did not include attorney's fees. We reach a like result with him in the outcome of the case but by a different path.

There is no public policy against the provisions of the note and mortgage. Whatever expenses may reasonably and properly come within the language used should and ought to be included in a conditional judgment on the mortgage. In our view the language used fairly includes reasonable attorney's fees incurred by the mortgagee in protecting his position. It is well understood that the services of an attorney are necessary to foreclose a mortgage by means of a writ of entry and conditional judgment.

In *Haczela* v. *Krupa et al,* 219 Mass. 261, 106 N.E. 1004, the Massachusetts Court said on a sale under a mortgage, " '. . . including all costs, charges and expenses incurred or sustained by him. . . in relation to the said property.'

Whatever rightly may be included under 'expenses' in this connection is a part of the debt secured by the mortgage. 'Expense' is a word of somewhat varying significance. But when used in mortgages, it has been held to be broad enough to include reasonable counsel fees." See also *Graves* v. *Burch* (Wyo.) 181 P. 354, 5 A.L.R. 1216; *Leventhal* v. *Krinsky*, 325 Mass. 336, 90 N.E. (2nd) 545, 17 A.L.R. (2nd) 281; *Citizens Nat. Bank* v. *Waugh*, 78 F. (2nd) 325 (4th Cir.), 100 A.L.R. 939; 10 C.J.S. *Bills and Notes* § 108; 7 Am. Jur. *Bills and Notes* §§ 138-142; 37 Am. Jur. *Mortgages* § 599; R. S., c. 188, § 2V (Uniform Negotiable Instruments Act).

In certain other methods of foreclosure under the statutes, $25 paid in full or partial discharge of an attorney's fee may be included in the amount required to redeem. R. S., c. 177, § 6. There is no such provision in foreclosure by writ of entry. The provision of a fee of $25 in certain types of mortgage foreclosure does not deny the right of the parties to contract for payment of a reasonable fee.

The plaintiff bank in argument seeks to include reasonable attorney's fees incurred by it in the conditional judgment and argues that the fee schedule of the York County Bar Association is material evidence thereon.

The fee schedule reads in part:

"COMMERCIAL COLLECTIONS.

Definition—Commercial collections are claims against merchants or professional men, or others in business as opposed to RETAIL COLLECTIONS, which are claims against consumers.

"The Schedule of Recommended Uniform Rates of the Commercial Law League of America shall apply as follows:

18% on the first $ 500.00
15% on the next $ 500.00
10% in excess of $1,000.00"

The total collection fee on the amount here involved would amount to $1037, or over 10% of the mortgage debt. Such a fee is, in our view, unreasonable for the services performed. The bank's attorney did no more than commence foreclosure of a mortgage by one of the statutory methods. The foreclosure in this instance presented so far as we are aware no unusual problems. Neither title nor amount of mortgage debt are questioned in the action, except insofar as the attorney's fees are concerned.

There is nothing whatsoever to indicate that the mortgaged property was worth less than the debt, or that the bank was of the opinion that a deficiency would result on foreclosure. In short, there is no suggestion that the property on completion of foreclosure (if there were no payment) would not pay the bank in full, or that the attorney in any reasonable likelihood would be forced to secure and collect a deficiency judgment. *Flint* v. *Land Co.*, 89 Me. 420, 36 A. 634; *Mann* v. *Homestead Realty Company*, 134 Me. 37, 180 A. 807.

The attorney was engaged by the bank to foreclose a mortgage, not to collect a commercial debt. The argument of the plaintiff bank goes further than the record. We find in the record no suggestion of a claim for fees, except for $1037, based solely upon the collection rates in the Bar schedule. There is not the slightest evidence of a reasonable fee, for example, for bringing the writ of entry to a successful conclusion, or for bringing an action on the note.

The Bar schedule (assuming without deciding its admissibility) added nothing to the determination of a reasonable fee for foreclosure. The bank would have gained nothing from its admission, and lost nothing from its exclusion.

We need not determine whether the court without evidence on its own observation of services performed could

have allowed an attorney's fee, as in a receivership or will case. In the case at bar, as we have indicated, the bank sought only to include a commercial collection fee. The bank, and we may fairly assume its counsel, were not interested in establishing a fee on any other basis. It is not the obligation of the court to go beyond the plain request of the plaintiff.

The presiding justice, in the reasons for his decision, said:

> "Certain it is in this case that it seems highly unjust to impose an obligation to pay an additional one thousand dollars as 'cost and expense' on the collection of a demand note with demand waived and with the default in payment by a transferee of the property and without notice to the maker.
>
> "We hold therefore that the controversial phrase does not include attorney's collection fee. ."

We assume, without intimating an opinion thereon, that the defendants gained no advantage from the fact that the default was by the transferee and that no notice was given to Mrs. Mehlman, the maker of the note.

As we read the record, the all important fact is that the bank has failed to offer evidence from which the presiding justice could have found a reasonable attorney's fee for services to the bank in the foreclosure of the mortgage. It would be unreasonable and unjust to base such fees upon a schedule for commercial collections.

The entry will be

Exceptions overruled.

FIRST PORTLAND NATIONAL BANK, EX'R., APPLT.
and
CATHERINE MORRILL DAY NURSERY, APPLT.
IN RE WILL OF ELINOR S. MOODY
(TWO CASES)

Cumberland. Opinion, August 25, 1959

Wills. Witnesses. Interest.

A provision in a will "requesting" the executor "to pay to each of the signers, as witnesses, of . . . (the) will, the sum of Five Dollars each, as a token of appreciation" is not precatory and renders the will invalid under R. S., 1954, Chap. 169, Sec. 1.

Note: P. L., 1957, Chap. 302, has since amended R. S., Chap. 169, Sec. 1.

It is the fact of the benefit, direct or contingent, not the measure of its value, which controls.

The intention of the testator governed by the usual rules of construction must determine whether the gift is precatory.

Under the facts of the present case the intention of the testator is essential to the determination of the validity of the will.

Where word of desire or request are addressed to an executor, they are more often regarded as mandatory.

ON EXCEPTIONS.

This case is before the Law Court upon exceptions to a decision denying probate of a will. Exceptions overruled. Counsel for proponents and contestants are entitled to counsel fees and expenses from the estate to be approved by the Judge of Probate.

Josiah H. Drummond.
Hutchinson, Pierce, Atwood & Allen, for plaintiff

Robert W. Donovan, for City of Portland
Jacob Agger, for Edward Blossom

Edward A. Newman, for Fred & George Pillsbury
Arthur A. Peabody for Josephine Dyer & Marion Grace Hammond

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

WILLIAMSON, C. J. An instrument purporting to be the last will and testament of Elinor S. Moody who died in February 1956 was disallowed and denied probate as her will by the Judge of Probate, it appearing that "the three witnesses to said will are beneficially interested therein and therefore are incompetent as subscribing witnesses."

The case is before us on exceptions to the decree of the Supreme Court of Probate affirming the decree of the Judge of Probate.

The will reads in part:

> "I also request my Executor to pay to each of the signers, as witnesses, of this my last Will, the sum of Five Dollars each, as a token of appreciation."

The statute in effect at the time of attestation in April 1954 and until amended in 1957, reads:

> "A person of sound mind and of the age of 21 years and a married person, widow or widower of any age may dispose of his real and personal estate by will, in writing, signed by him, or by some person for him at his request and in his presence, and subscribed in his presence by 3 credible attesting witnesses, not beneficially interested under said will." R. S., c. 169, § 1.

The statute was enacted in P. L., 1859, c. 120, and remained without material change until P. L., 1957, c. 302. The Legislature then removed the "beneficial interest" test going to the validity of the entire will and in substance

provided that a gift to a witness is void, except that the witness may take no more than he would have been entitled to receive as an heir had the testator died intestate.

In the instant case, however, the harshness of the statutory provision set forth above is not softened by the later action of the Legislature. We are compelled to decide the issue on the statute as it existed in 1954, and not on the statute as amended in 1957. *Richburg, Appellant,* 148 Me. 323, 92 A. (2nd) 724; *Castine Church, Appellant,* 91 Me. 416, 40 A. 325; 94 C.J.S., *Wills* § 185; 57 Am. Jur. *Wills* § 308 *et seq.*

The proponents urge in brief: (1) that the "request" to the executor is precatory and not mandatory, or (2) that if mandatory, the $5 gift is too trivial to be considered a gain of appreciable pecuniary value sufficient to destroy the competency of the witnesses.

For convenience we turn first to the second objection. The law on the point is settled. "It is the fact of the benefit, direct or contingent, and not the measure of its value, which controls." *Richburg, Appellant, supra,* in which an executor who witnessed the will and whom the testator directed "to dispose of my clothing and other personal articles and effects as he (the executor) in his sole discretion may deem best" was held beneficially interested, and the will invalid. If the will before us had read, "I give $100 to each of the witnesses," no one would contend that the will was valid. We cannot draw a line of value between the clothing of *Richburg* and the $5 of the instant case, or the $100 of the supposed case. If the "request" was mandatory, the will fails. The case must be decided on the first issue. *Cox, Appellant,* 126 Me. 256, 137 A. 771, 53 A.L.R. 208; *Look, Appellant,* 129 Me. 359, 152 A. 84; 68 C. J., *Wills* § 323.

On the decisive issue of whether the testatrix commanded the executor to make the gifts (mandatory), or left with

the executor the choice and determination of whether the gifts should be made (precatory), we must seek the intention of the testatrix by the usual rules of construction. Whether this will is valid is determined by the character of the "request". If the "request" is a command, then the statutory rule operates to destroy the competency of the witnesses and hence the validity of the will.

The contestants are in error in urging that we do not seek the intention of the testator in determining the validity of a will. Under the circumstances of this case, in our opinion it is essential that we do so. The statute may prevent the giving effect to the intention, but that does not deny the need of finding the intention.

The testatrix intended to make a valid will and to make certain gifts to charities and other beneficiaries. The $5 gift to each witness was of minor importance in the planning of her estate. She would have preferred to have the $5 gift to each witness fail than to have her entire will declared invalid. It would be absurd to believe that the testatrix had intended otherwise.

The test, however, is whether her intention was to give a "beneficial interest" to each witness. If so, her intention to make a valid will is made of no avail by the statute defining the competency of witnesses. The statute prevents the carrying out of intention. The situation with respect to the Rule against Perpetuities is analogous. See *Singhi* v. *Dean,* 119 Me. 287, 110 A. 865. In the case of a will with two witnesses, we have an intention to make a will that cannot be carried out against the plain provision of the statute. Here the intention is found in construction of the instrument and not by simple inspection, but the principle is the same. The formalities in executing a will must be complied with or there is no will entitled to probate.

We have noted that the testatrix directed her executor (1) to care for her animals, to advertise for a home for

them, and to pay a sum to the persons providing such a home; (2) to arrange for perpetual cemetery care of two lots with markers; (3) to sell real estate and personal property and distribute cash to named charities; (4) to pay Miss X $100 if she "shall be the person to locate my animals" in homes. She requested that no bond be required of her executor.

We cannot escape the conclusion, however, that the testatrix intended each witness should receive $5, and that by her will she was instructing the executor to make payment. Where words of request or desire are addressed to an executor, they are more often regarded as mandatory. 95 C.J.S., *Wills* § 602; 69 C. J., *Wills* § 1132; 1 Page on Wills §§ 91, 319 (Third Lifetime Ed.). The case does not fall within the principle stated in *Towle* v. *Doe,* 97 Me. 427, 433, 54 A. 1072, in these words:

> "If two constructions may be put upon a provision in a will, one of which will violate an inflexible rule of law and the other not, the construction which will not offend the rule is to be adopted by the court."

See also *In Re Lawrence's Estate* (Cal.) 108 P. (2nd) 893; *In Re Hurlburt's Estate,* 64 N.Y.S. (2nd) 575 (Surr. Ct.). The executor cannot keep the gifts. It is a fiduciary which cannot gain for itself at the expense of the estate. In our view there is nothing here to take the case out of the general rule. The purpose of the testatrix is that each witness receive $5 and without such payment the purpose cannot be carried out. Schouler, Wills § 866. Cf *Jordan* v. *Jordan,* Me. 150 A. (2nd) 763.

We can find no satisfactory reason why the testatrix should have left this relatively unimportant matter to the judgment and discretion of the executor. On the proponents' theory, the executor had the obligation of determining whether the gift should be made. What test should it

apply? Had not the testatrix already, in making her will, decided that the witnesses whom she should secure to witness her will were entitled to a stated token in appreciation?

We are satisfied that the testatrix charged the executor with the payment of the $5 to each witness, that such was her intent, and that the request was neither more nor less than a soft spoken but well understood command.

Our responsibility is set forth plainly by the court in *Fitzsimmons* v. *Harmon*, 108 Me. 456, 458, 81 A. 667:

> "The statute (quoted above) thus clearly prescribes the method of transmitting property by will, which the court is not at liberty to ignore, although in particular instances the actual intention and desire of a person respecting the disposition of his property may be defeated by adhering to the rule prescribed."

The case is another in the long list of examples of harsh results flowing from what Schouler called the "heedlessness of a testator".

The witnesses were beneficially interested and therefore incompetent. The decision denying probate was correct.

The entry will be

Exceptions overruled.
Counsel for proponents and contestants are entitled to counsel fees and expenses from the estate to be approved by the Judge of Probate.

STATE OF MAINE
vs.
ROSARIO A. BUSSIERE, APLT.

Androscoggin. Opinion, October 1, 1959.

Criminal Law. Lotteries. Scheme of Chance.

R. S., 1954, Chap. 139, Sec. 18 relating to lotteries, etc., does not dispense with the three essential elements of a lottery, namely (1) prize (2) chance (3) consideration. (See also P. L., 1959, Chap. 310 passed after this case.)

A merchant, in order to stimulate legitimate business, may legally give away cash awards, by means of a drawing, under circumstances in which no person is required to pay money or make purchases for the right to participate.

The better view requires that a valuable consideration be risked by a participant before criminal action lies.

The consideration necessary to support a lottery violation must be something more than a mere detriment to the participant or a benefit to the promoter; a person must risk or hazard something of value, however small, with the hope or opportunity of obtaining a larger sum by chance.

The amendment to the lottery law by the addition of the words "scheme or device of chance" does not disclose any intention by the Legislature to eliminate the three essentials of the crime of lottery, or to create any new offense.

ON REPORT.

This is charge for violation of the lottery law. The case is before the Law Court upon report. Judgment for the respondent.

Gaston M. Dumais,
Philip M. Isaacson, for plaintiff.

Willis A. Trafton, for defendant.

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

SIDDALL, J. On report. The agreed statement of facts shows that defendant was found guilty in the Lewiston Municipal Court on a complaint charging that on the 4th day of December, 1958, he was unlawfully concerned in a certain "lottery, scheme and device of chance" by giving away a ticket purporting and designed to entitle a person to a chance of drawing and obtaining a prize and thing of value to be drawn in said lottery, scheme or device of chance. The defendant is a supermarket proprietor in Lewiston. He caused to be put into operation at his supermarket a copyrighted plan bearing the name of "Goodwill Cash Night." On each shopping day for a week preceding and on Thursday, December 4, 1958, a registration desk was located inside the supermarket but not within the shopping or display area. The public was invited to register by signing registration sheets on the desk. The name and address of the registrant was placed on the card. Upon so doing each registrant was presented with a qualification card entitling him to participate in "Goodwill Cash Night." Upon registration the name of the registrant was transcribed onto two cards, one filed alphabetically and the other numerically. A stub with a number corresponding to that given the name of the registrant was put into a drum, and from this drum a stub was drawn. The person whose assigned number corresponded with the number on the withdrawn stub became the winner of the prize. In order to receive the prize on the spot, the winner was required to present himself on the platform within three minutes after the announcement of his name. If he did not present himself within such time, however, he could report to the store manager in person before 8:45 p.m. and claim the award. If he was found properly qualified, he would be paid the award on the platform the following Thursday night upon

properly identifying himself to the judges who were chosen at that time. The parties stipulated that no payment, purchase, or consideration of any kind was required to become registered and to participate in Goodwill Cash Night, so called. Under the plan a drawing was held in the parking lot adjacent to the defendant's store at 7:45 p.m. each Thursday. On the night of December 4, 1958, at approximately 7:45 p.m. in the parking lot outside defendant's supermarket a public drawing was held to determine the winner of the weekly award. The master of ceremonies prior to the drawing of the prize explained the general nature of the plan and also made reference to the business being conducted by the defendant, calling attention to some of the merchandise on sale at defendant's store. Judges were chosen from the audience. A person from the audience drew from the revolving drum a stub containing a number. This number corresponded with the number serially given to one of the registrants. The name of such registrant was announced as the winner. The winner was present and received a cash award of $100.

In the Lewiston Municipal Court the defendant was found guilty of the offense charged and appealed to the Superior Court of Androscoggin County, and this case comes here on report from that court.

The statute under which the complaint in this case was made is set forth in R. S., 1954, Chap. 139, Sec. 18, and reads as follows:

> "**Sec. 18. Lotteries and schemes of chance; printing of tickets prima facie evidence.** — Every lottery, policy, policy lottery, policy shop, scheme or device of chance, of whatever name or description, whether at fairs or public gatherings or elsewhere, and whether in the interests of churches, benevolent objects or otherwise, is prohibited; and whoever is concerned therein, directly or indirect-

ly, by making, writing, printing, advertising, purchasing, receiving, selling, offering for sale, giving away, disposing of or having in possession with intent to sell or dispose of, any ticket, certificate, share or interest therein, slip, bill, token or other device purporting or designed to guarantee or assure to any person or to entitle any person to a chance of drawing or obtaining any prize or thing of value to be drawn in any lottery, policy, policy lottery, policy shop, scheme or device of chance of whatever name or description; by printing, publishing or circulating the same, or any handbill, advertisement or notice thereof, or by knowingly suffering the same to be published in any newspaper or periodical under his charge or on any cover or paper attached thereto; or who in any manner aids therein or is connected therewith, shall be punished by a fine of not less than $10 nor more than $1,000, to be recovered by complaint or indictment to the use of the county, and he may further be punished by imprisonment for 30 days on the 1st conviction, 60 days on the 2nd conviction and 90 days on the 3rd conviction. All lottery tickets or materials for a lottery, procured for that purpose, shall be disposed of as provided in section 13, excepting that all personal property used for prizes in any such lottery or device of chance shall be ordered forfeited and turned over to an officer to be sold by him and the proceeds paid into the treasury of the county where seized. The printing, advertising, issuing or delivery of any ticket, paper, document or material representing or purporting to represent the existence of, or an interest in a lottery, policy lottery, game or hazard shall be prima facie evidence of the existence, location and drawing of such lottery, policy lottery, game or hazard, and the issuing or delivery of any such paper, ticket, document or material shall be prima facie evidence of values received therefor by the person or persons, company or corporation who issues or delivers or knowingly aids or abets in the issuing or delivering of such paper, ticket, document or material. (R. S. c. 126, Sec. 18.)"

Since this case arose, this statute has been amended by the addition of the following paragraph:

> "This section shall not prohibit the awarding of a prize or thing of value as the result of a drawing of a signed slip or certificate where there is no monetary consideration required from the signatory in order to participate in the drawing." P. L., 1959, Chap. 310.

This case is one of novel impression in this state. The court is called upon to determine whether or not a merchant in order to stimulate a legitimate business may legally give away cash awards, by means of a drawing, under circumstances in which no person is required to pay money or make purchases for the right to participate in the drawing.

The State contends that:

1. The Legislature intended to exclude consideration as an element of the crime of *lottery.*
   (a) If consideration is a necessary element of such crime, that any consideration sufficient to support a simple contract is adequate.
2. That the Legislature intended to prohibit *schemes of chance* whether consideration was or was not present.

The respondent contends that the State must prove as an essential element of its case the parting of money or money's worth for the chance of gain.

In the instant case the court must be satisfied that the plan in question is a *lottery, scheme, or device of chance* prohibited by the terms of the statute. Once the plan is brought within the meaning of the statute, then its provisions are very broad as to those persons who may be liable to punishment for participation therein. The giving away of a ticket entitling a person to a chance of drawing

a prize becomes a crime only if the prize is drawn in a *lottery, scheme, or device of chance.*

We shall discuss the issues in this case in the following order: (1) Is the plan a lottery within the meaning of the statute; (2) Is the plan a scheme of chance prohibited by the statute?

Legislatures have been reluctant to attempt to define the term "lottery." This reluctance is probably due to the fact that a precise definition will enable ingenious and unscrupulous persons to attempt to devise some plan which may not be within the letter of the definition given but which nevertheless is within the scope of the mischief which the law seeks to remedy. Our Legislature has not defined the term, and we do not find any precise definition in any of our decisions. However, it is generally agreed among the authorities that there are three essential elements necessary to constitute a lottery: (1) prize, (2) chance, and (3) consideration. *Federal Communications Commission* v. *American Broadcasting Co.,* 347 U. S. 284, 98 L. Ed. 699; *State* v. *Big Chief Corporation,* 64 R. I. 448, 13 A. (2nd) 236; *Goodwill Advertising Company* v. *Amusement Corporation,* 133 A. (2nd) 644 (R. I.); *State* v. *Eames,* 87 N. H. 477, 183 A. 590; *Commonwealth* v. *Wall,* 295 Mass. 70, 3 N. E. (2nd) 28; 34 Am. Jur. 647 and cases cited; 54 C. J. S. 845 and cases cited. See also the following annotations: 57 A. L. R. 424; 103 A. L. R. 866; 109 A. L. R. 709; 113 A. L. R. 1121.

It is conceded that the first two elements are present in the instant case. The defendant contends that a pecuniary consideration is an essential element of a lottery. The State contends that no consideration is necessary, but if it should be decided that consideration is necessary, that any consideration sufficient to support a simple contract is adequate.

The lottery statutes in many states, by express provision, require a pecuniary consideration as one of the elements of the crime.

Courts in some jurisdictions have held that any consideration necessary to establish a simple contract is sufficient. Among the decisions so holding are the following: *Commonwealth* v. *Lund,* 142 Pa. 208, 15 A. (2nd) 839; *Maughs* v. *Porter,* 157 Va. 415, 161 S. E. 242; *Barker* v. *State,* 56 Ga. App. 705, 193 S. E. 605; *Furst* v. *A. & G. Amusement Co.,* 128 N. J. 311, 25 A. (2nd) 892; *Affiliated Enterprises, Inc.* v. *Waller,* 1 Terry (Del.) 28, 5 A. (2nd) 257; *The State of Nebraska ex rel.* v. *Grant,* 162 Neb. 210, 75 N. W. (2nd) 611; *Regez* v. *Blumer,* 236 Wis. 129, 294 N. W. 491; *Lucky Calendar Co., Inc.* v. *Mitchell H. Cohen,* 19 N. J. 399, 117 A. (2nd) 487. These cases, most of which are theatre "Bank Night" cases, hold that a consideration is present either in the detriment to a participant who is obliged to register for the chance of winning a prize, or in the benefit accruing to the promoter in increased business. We note that many of these cases have an element nonexistent in this case in that some of the participants actually paid a pecuniary consideration in the form of an admission price, usually to a theatre engaged in operating the "Bank Night" scheme, which admission price gave such participants an advantage, or a seeming advantage, over those persons who had not paid such an admission fee.

In other jurisdictions, in criminal proceedings under lottery statutes, what appears to us to be the better view requires that a valuable consideration be risked by a participant before criminal proceedings will lie. *Ex parte* Gray 23, Ariz. 461, 204 Pac. 1029; *Cross* v. *People,* 18 Colo. 321, 32 Pac. 821; *Commonwealth* v. *Wall, supra; State* v. *Big Chief Corporation, supra.* Accord: *Federal Communications Commission* v. *American Broadcasting Co., supra; Goodwill Advertising Co.* v. *Amusement Corporation, supra.*

In New Jersey it has been held that a consideration is not an element of the crime of lottery under the statutes of that state. *Lucky Calendar Co., Inc.* v. *Cohen, supra.* The State strenuously urges us to adopt this view.

The question of whether or not consideration is a necessary element of a lottery, and if so, what form such consideration must take, is an issue not before directly passed upon by our court. In those cases which have reached this court under our lottery statutes, the element of pecuniary consideration obviously was present and did not become an issue in the case.

In the case of *State* v. *Googin,* 117 Me. 102, 102 A. 970, the court inferred that a pecuniary consideration might be a necessary element of a lottery. The complaint in that case was brought under the provisions of R. S., 1916, Chap. 130, Sec. 18, now 1954 Chap. 139, Sec. 18. The defendant was the proprietor of an automatic vending machine. Upon depositing a nickel the operator would receive a package of gum, and at times the machine would deliver, in addition to the gum, so called "trade checks" in varying amounts, each having a trade value of five cents. The court held that the operation of the machine was a violation of the lottery statute, and in referring to the interpretation of R. S., 1916, Chap. 130, Sec. 18, said:

> "In *Lang v. Merwin,* 99 Me. 486, an interpretation has been given of the statute in this language: 'It would seem from these to have been the intention of the legislature to prohibit every *pecuniary* transaction in which pure chance has any place. . . . .' " (Emphasis ours.)

The parties in this case have stipulated that no payment, purchase, or consideration of any kind was required to become registered and to participate in "Goodwill Cash Night." The State concedes that no participant was required to pay money or make purchases from the promoter

in order to take part in the plan. Under the facts of the instant case all participants were on an equal basis with non paying a consideration, however small, for the privilege of having an advantage or seeming advantage over any other. We are satisfied that under the plan operated by the defendant in this case, free participation by all was an absolute reality and not a fiction. The case of the State must stand or fall on the right of the defendant under the plan used in this case to give away, for the purpose of advertising his merchandise, such sums of money as he deems he can afford, to people who part with no money for the privilege of participation in the plan, and whose only risk is that of exposing themselves to normal sales pressure of the promoter.

We cannot go along, under the facts in this case, with those jurisdictions which hold that consideration is not an element of lottery, or with those jurisdictions which hold that consideration is necessary, but may consist in anything which is a detriment to a participant or a benefit to the promoter. We feel that the plan of the defendant lacks one element which is the source of all evil connected with lotteries or gambling; that of a person risking or hazarding something of value, however small, with the hope or opportunity of obtaining a larger sum by chance.

The State also argues that any scheme in which chance is a predominating element is illegal in the State of Maine; that the words "policy, policy lottery, policy shop, scheme, or device of chance" were either intended to serve as an aid in defining a lottery, or are a recital of additional offenses in the nature of a lottery. The complaint charges the defendant with being "concerned with a certain lottery, scheme, or device of chance" and we are concerned with the meaning of these words only.

A brief history of some phases of legislation involving lotteries may be of some benefit in determining the meaning of these words.

In the early years following our separation from the Commonwealth of Massachusetts certain lotteries for the purpose of raising public or semi-public funds were authorized by our Legislature. In 1821 our Legislature made it an offense for any person within the state to sell, give, or otherwise dispose of tickets, or part of any ticket, in any lottery not authorized by the laws of this State or of the United States. Laws of Maine, 1821, Chap. XXVIII, Sec. 2. Later the exemption as to lotteries authorized by Congress or by the State was removed from our laws. The first appearance of the words "scheme or device of chance" is in legislation relating to lotteries enacted by virtue of P. L., 1855, Chap. 173, Secs. 1 and 5. Sec. 1 provides that it shall be an offense for any person "to make or aid in making any lottery or scheme for the distribution of any property, real or personal, or any right, interest or claim therein by any mode depending upon chance, raffle, or lot." Sec. 5 makes unlawful and a common nuisance "every lottery, scheme, or device of chance, in the nature of a lottery, by whatever name it may be called." In the Revision of 1857, Chap. 128, Sec. 3, "Every lottery, scheme, or device of chance, of whatever name or description, is prohibited and declared a nuisance;" and penalties are provided for being connected in any way with such lotteries, schemes, or devices of chance. The Legislature later prohibited lotteries, schemes, or devices of chance, of whatever name or description, at fairs or public gatherings whether in the interests of churches, benevolent organizations or otherwise. P. L., 1877, Chap. 176. In 1895 the words "policy lottery" and "policy shop" were added. P. L., 1895, Chap. 66.

In our early history a number of lotteries were authorized by the Legislature. See Chap. CCXIX Private Laws of 1823 relating to granting a lottery to the Cumberland and Oxford Canal Corporation in the sum of Fifty Thousand Dollars for the purpose of enabling it to make and

complete a canal. Chap. CCCCXXXI Private Laws of 1826, authorizing a lottery to raise Twenty-five Thousand Dollars to encourage steam navigation in the state. Chap. CCCCXXX Private Laws of 1826, authorizing a lottery to raise Four Thousand Dollars for erection of a bridge.

The Legislature in enacting these laws set forth in detail the method of conducting the authorized lotteries and the rules for disposing of tickets and drawing prizes.

The classic lotteries in vogue in these early days looked to advance cash payments by the participants as the source of its profits. The three elements of prize, chance, and valuable consideration were obviously present.

Did the addition of the words "scheme or device of chance" eliminate any of the essential requirements of a lottery? We think not.

In *State* v. *Willis*, 78 Me. 70 decided in 1885, the respondent was indicted for nuisance for participating in a "lottery, scheme, or device of chance." Defendant demurred. Our court said:

> "There is no contradiction in the terms. They are descriptive of only one thing — the pleader trying to describe the offense by as apt a word as possible. The word lottery has no technical meaning. A lottery is nothing more or less than a scheme or device of chance."

We do not believe that it was the intention of the Legislature in adding these words to the lottery law to eliminate the elements of prize, chance, or valuable consideration as essential to the crime of lottery, or to establish a new crime in which any of these elements are eliminated.

We feel that it is more reasonable to believe that it was the intention of the Legislature to bring clearly within the terms of the statute schemes possessing all of the essential

elements of a lottery, but devised to evade the law by ingeniously disguising or concealing one or more of those elements.

In order to constitute a crime under the statute in question, three elements must be present, *viz.:* (1) prize, (2) chance, and (3) a consideration having a pecuniary value paid directly or indirectly by some participant. Under the facts in this case the third element is not present, and the defendant cannot be found guilty of the crime charged.

According to the stipulation the entry will be

Judgment for the Respondent.

STATE OF MAINE
vs.
GEORGE FLEMING

Penobscot. Opinion, October 13, 1959.

Municipal Courts. Fish and Game. Process. Jurisdiction.

Process issued by the recorder need not contain a statement accounting for the absence of the judge under the Private and Special Laws 1947, Chap. 85, Sec. 1. The general laws provide that the signature of the recorder of the court "shall be sufficient evidence of his authority without in any way accounting for the absence of the Judge of said court." R. S., 1954, Chap. 108, Sec. 6.

Grounds of objection not set forth in the bill of exceptions cannot be considered by the Law Court even though argued at the oral argument.

ON EXCEPTIONS.

This is a criminal charge of night hunting before the Law Court upon exceptions to the refusal to grant a motion to

dismiss. The case is before the Law Court after jury trial, verdict and sentence. Exceptions overruled. Judgment for the State.

Orman G. Twitchell, for plaintiff.

Peter Briola, for defendant.

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

DUBORD, J. This case is before the court on respondent's exceptions to a denial of a motion to dismiss for alleged lack of jurisdiction.

Upon complaint of an Inland Fish & Game Warden, addressed to the Lincoln Municipal Court, the respondent was charged with the violation of Section 77, Chapter 37, R. S., 1954, *viz.,* unlawful hunting in the night time. Upon this complaint, the recorder of the Lincoln Municipal Court issued a warrant. The respondent was apprehended by the Inland Fish & Game Warden and was found guilty in the Lincoln Municipal Court. He appealed to the Superior Court within and for the County of Penobscot. On the first day of the term, the respondent attacked the jurisdiction with the filing of a motion to dismiss the proceedings.

The denial of the motion was followed by a jury trial, a verdict of guilty, and imposition of sentence.

The motion alleges in substance that the complaint and warrant do not establish a basis for jurisdiction, for the reason that neither have allegations conforming with the provisions of the statute establishing the Lincoln Municipal Court or with the provisions of Section 3, Chapter 108, R. S., 1954, as amended by Section 45, Chapter 405, P. L., 1955. The Lincoln Municipal Court was established by Chapter 85, Private and Special Laws of 1947.

The powers of the recorder are set forth in Section 1, Chapter 85 as follows:

> "The recorder and the judge shall have equal authority in criminal cases to hear and draft complaints, administer oaths, take bail and sign all processes or commitment. All processes issued by the recorder in criminal matters shall bear the seal of the court and be signed by him, and they shall have the same effect as though signed by the judge.
>
> "When the judge is absent from the court room, or is interested, or if the office of the judge is vacant, it shall be the duty of the recorder and he shall have authority to exercise all powers of the judge."

The amendment to Section 3, Chapter 108 reads as follows:

> "In case of the absence, sickness or disqualification of a judge of a municipal court, or in the event of a vacancy in the office of said judge, or at any other time at the request of said judge in order to expedite business, the recorder shall have the same powers as said judge, ..."

It is the contention of the respondent that in order for the process issued by the recorder to be valid there must be contained therein a statement accounting for the absence of the judge.

In the light of the provisions of Section 6, Chapter 108, R. S., 1954, we find no legal support for this contention. Section 6 provides that:

> "The signature of the recorder or clerk of any municipal court to a complaint, warrant, mittimus, writ or other document, purporting to come from the court of which he is recorder or clerk, shall be sufficient evidence of his authority to issue the same, *without in any way accounting for the absence or presence of the judge of said court.*" (Emphasis supplied.)

Section 6, Chapter 108 was originally enacted as Chapter 51, P. L. of 1907, and while the enactment of the statute creating the Lincoln Municipal Court postdates the original enactment of the foregoing section, we find no inconsistency as between the provisions of the special act setting up the Lincoln Municipal Court and the provisions of the general law.

Moreover, all doubts are resolved by the fact that by Section 2, of Chapter 140, Private and Special Laws of 1953, all municipal court charters were amended by incorporating therein provisions similar to those found in Section 3, Chapter 108, R. S., 1954.

Counsel for the respondent, in his argument addressed to this court, also contends that the process is invalid because of failure to comply with the provisions of Section 2, Chapter 85, Private and Special Laws of 1947, the act creating the Lincoln Municipal Court. This section provides in part as follows:

> "All writs and processes shall be in the name of the state and bear the teste of the judge or of the recorder acting as judge, under the seal of the court."

There is no such allegation in respondent's motion to dismiss nor is this point contained in the bill of exceptions. The respondent is, therefore, precluded from pursuing this argument. A bill of exceptions must state the grounds of exceptions in a summary manner, and a bill of exceptions must show what the issue was and how the excepting party was aggrieved. *Jones* v. *Jones,* 101 Me. 447; 54 A. 815; *Heath et al, Applt.,* 146 Me. 229, 233; 79 A. (2nd) 810.

The entry will be:

Exceptions overruled.

Judgment for the State.

ANNE C. MARINO, PETR.
vs.
DOMINICO MARINO, RESPT.

Cumberland. Opinion, October 26, 1959.

Separate Support.
R. S., 1954, Chap. 166, Sec. 43.
Full Faith and Credit. Constitutional Law.
Const. U. S., Art. 4, Sec. 1.
Appeal. Exceptions.

Exceptions do not lie to orders and decrees under R. S., 1954, Chap. 166, Sec. 43 whether the case originates in the Municipal Court, Probate Court, or Superior Court. The only remedy of an aggrieved party is by appeal.

The Law Court has no jurisdiction to consider exceptions to a decree under R. S., 1954, Chap. 166, Sec. 43.

ON EXCEPTIONS.

This is a bill of exceptions before the Law Court under R. S., 1954, Chap. 166, Sec. 43. Exceptions dismissed.

Julian G. Hubbard, for plaintiff.

Albert Knudsen, for defendant.

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

SIDDALL, J. On exceptions. This is a petition for separate support and maintenance of the petitioner brought under the provisions of R. S., 1954, Chap. 166, Sec. 43. At the hearing on the petition, the respondent claimed that the marriage between him and the petitioner had been dissolved by decree of divorce in the State of Nevada. The presiding justice found that the decree of the Nevada Court was a valid decree and entitled to full faith and credit in the State

of Maine under the provisions of Article IV, Sec. 1, of the Constitution of the United States. The petition for support was denied, and the petitioner filed exceptions to the action of the presiding justice in denying the petition.

The issues presented in the instant case are as follows:

(1) Is the case properly before this court on respondent's exceptions?

(2) If so, is the Nevada divorce decree entitled to full faith and credit in the courts of the State of Maine by virtue of Article IV, Sec. 1 of the Constitution of the United States?

The petition in this case was brought under the provisions of R. S., 1954, Chap. 166, Sec. 43. That portion of this section relating to review of decisions thereunder reads as follows:

> "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."

The case of *Kelley, Appellant,* 136 Me. 7, 1 A. (2nd) 183, was brought before the Law Court on exceptions in a proceeding under R. S., 1930, Chap. 74, Sec. 9, as amended by P. L., 1933, Chap. 36. The subject matter of R. S., 1930, Chap. 74, Sec. 9, is now contained in R. S., 1954, Chap. 166, Sec. 43. The statutory method provided for review was the same at the time the proceedings were instituted in the *Kelley* case as it was at the time the instant case was initiated. That method in each instance was by appeal. In the *Kelley* case the court held that the statute was binding on the court and that the case could be reviewed by appeal only and not by exceptions.

In the recent case of *Duhamel* v. *Duhamel,* 154 Me. 391, the court in interpreting the review provisions of R. S., 1954, Chap. 166, Sec. 19 (proceedings for custody and support of children) and Sec. 43 used the following language:

> "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."

Exceptions do not lie to orders and decrees under Sec. 43, whether the case originated in a Municipal Court, a Probate Court, or in the Superior Court. The only remedy of an aggrieved party is by *appeal.* This court, therefore, has no jurisdiction in the proceeding before us, and it becomes unnecessary to consider any other issue raised in the case.

The entry will be

Exceptions dismissed.

DAVID C. HINDS
By GUARDIAN
vs.
JOHN HANCOCK MUTUAL LIFE INSURANCE CO.

Kennebec. Opinion, October 27, 1959.

Insurance. Accidental Death. Suicide. Evidence. Presumption. Privilege against Self-Incrimination.

In suits on insurance policies which insure against death as a result of "bodily injuries effected solely through external violent and accidental means" the plaintiff has the burden of proof as to accident whereas in suits upon policies which insure against death with a proviso avoiding the policy "if the insured dies by his own act" the defendant from the inception has the burden of proof as to suicide which is raised as an affirmative defense.

There is an affirmative presumption of "accident" arising from the negative presumption "against suicide."

Disputable presumptions are not themselves evidence nor are they entitled to be weighed in the scales of evidence. They perform the office of locating the burden of going forward with evidence, but having performed that office, they disappear in the face of countervailing evidence. They compel a finding of a presumed fact in the absence of contrary evidence.

Disputable presumptions—persistence or disappearance as a matter of law: Wherever no countervailing evidence is offered, or that which is offered is but a scintilla, or amounts to no more than a speculation and surmise, the presumed fact will stand as though proven and the jury will be so instructed; when evidence contrary to the presumption comes from such sources and is of such a nature that rational unprejudiced minds could not reasonably or properly differ as to the non-existence of the presumed fact, the presumption will disappear as a matter of law.

If the insured does a voluntary act, the natural, usual, and to be expected result of which is to bring injury upon himself, then a death so occurring is not accidental.

The absence of a suicide motive *alone* will not suffice under the facts of the instant case to support a plaintiff's verdict or take the case to the jury.

When the privilege against self-incrimination is claimed, the ruling should not be to exclude the question, if otherwise proper, but to grant or refuse the request. Art. I, Sec. 6, Const. of Maine.

As to each question the court must determine whether the answer to that particular question would subject the witness to "real danger of x x x crimination."

ON EXCEPTIONS AND MOTION FOR NEW TRIAL.

This is an action upon an insurance policy. The jury returned a verdict of double indemnity. The case is before the Law Court upon exceptions. Exceptions overruled. Motion for new trial overruled if plaintiff within 30 days from the filing of this mandate, remit all in excess of $9,000; otherwise motion sustained and new trial granted.

Niehoff & Niehoff,
Lewis L. Levine, for plaintiff.

Locke, Campbell, Reid & Hebert, for defendant.

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

WEBBER, J. Plaintiff is beneficiary of an insurance policy covering the life of his late father, Donald Hinds. The policy provides for payment of a death benefit of $9,000 and, in addition thereto, of a like sum in the event the death of the assured should be due to bodily injuries sustained solely through "violent, external and accidental means." Suit was brought in behalf of plaintiff, a minor, by Emily Hinds, his mother and legal guardian. It is not disputed that the death of the assured being shown, the plaintiff is entitled to recover the ordinary death benefit of $9,000. The jury, however, awarded double indemnity as reflected by a verdict of $18,000. Issues are raised both by general motion and exceptions.

At the outset it was stipulated that an analysis of the blood of the decedent, Donald Hinds, made shortly after his death, disclosed an alcoholic content of .267% by weight. During the presentation of the plaintiff's case, it was shown by competent medical and other testimony that the assured was found slumped unconscious in a chair at his kitchen table late in the evening; that he was removed to a hospital and died there without regaining consciousness; that the cause of death was a gunshot wound inflicted by a revolver fired while in contact with the skin in the region of the right temple; that the bullet pursued approximately a horizontal course through the head from right to left; that decedent was a "big man" over six feet tall and weighing about 200 pounds; that he was fifty years old and apparently in good health; that on a table at his right side were a revolver and an opened package of bullets; that there were present no cloths or other gun cleaning paraphernalia; that there were no outward or visible signs of any violent scuffle, quarrel or other disturbance on the premises; and that there were empty whiskey bottles near the decedent's body. The family physician, first to arrive at the scene, found Emily Hinds holding her husband's head. He described her as appearing confused and in a state of shock. Social and business friends gave testimony tending to negative any apparent motive for suicide. A medical expert stated that one in the decedent's state of intoxication would be confused, with his reactions markedly slow and his pain sensation diminished; that he would be unable to think clearly but would not be unconscious and would be able to "navigate" although not very steadily. Not one of the witnesses had ever before seen the decedent in this stage of intoxication. Emily Hinds, although inferentially an eye witness to the tragedy, was not called by the plaintiff.

On this posture of the evidence, as will be shown, the plaintiff at the close of his main case had by no means

offered sufficient proof of death by "accidental means." However, no request was made to the court to direct a verdict and we are satisfied that the election by counsel for the defendant to go forward with evidence stemmed largely from the uncertainty heretofore existing in this jurisdiction as to the evidentiary status of presumptions. We will have occasion to discuss this problem later in the opinion. Attention should first be given, however, to the evidence offered by the defendant.

The witness first called in defense was Emily Hinds. At the very beginning of her examination, she was asked if she was the widow of Donald Joseph Hinds. She then replied, "I refuse to *testify,* on the advice of counsel, on my constitutional right that it might tend to incriminate me." (Emphasis supplied.) She was then asked, "Do you consider that you would be incriminated by being the wife of Donald Joseph Hinds?" At this point the jury was ordered to retire and colloquy then ensued which resulted in a ruling by the presiding justice that the pending question and all further questions of this witness were *excluded* because of her claim of privilege. Defendant's counsel took no exception nor did he pursue the matter further with this witness. He next called a police officer who had investigated the death on the evening of its occurrence. This witness identified the gun which he had observed on the kitchen table as being a 22 caliber automatic pistol, designed to fire long rifle bullets. He testified that the broken box of ammunition scattered about the table contained short rifle bullets. The full box originally contained 50 cartridges, all of which were accounted for. The officer counted 47 cartridges on the table and found three in the gun, one of which had been fired. He further noted what appeared to be a few business papers scattered on the table. He noted the presence on the floor beside the table of two empty bottles, each designed to contain a fifth of a gallon of whiskey. He was

permitted to testify that on the evening in question he had a conversation with Emily Hinds as to the events leading up to the shooting of her husband but, upon objection by the plaintiff, was not allowed to state the substance of that conversation. Thereupon, in the absence of the jury, the defendant made an offer to prove by the witness that Emily Hinds freely and voluntarily described to him the events of the evening which culminated when the decedent held the gun against his right temple and pulled the trigger. This proffered evidence was rejected by the court as hearsay. At this point the evidence on both sides was closed and the case submitted to the jury, with what result we have already noted.

In the case of *Cox* v. *Life Insurance Co.*, 139 Me. 167, involving suit on a policy covering accidental death, our court recognized that the burden of proving accident rested upon the claimant throughout the trial and never shifted. The distinction is clearly made in *Watkins* v. *Prudential Insurance Co.* (1934), 315 Pa. 497, 173 A. 644, 95 A. L. R. 869, 875, as "between suits on insurance policies like the one here sued on, which insure against death as a result 'of bodily injuries effected solely through external, violent and accidental means' and suits on those policies which insure against death but which contain a proviso avoiding the policy if the insured dies by his own act." As the court there pointed out, in the former situation the plaintiff has the unremitting burden of proof as to accident, whereas in the latter situation the plaintiff need only prove death while the defendant has from the inception the burden of proof as to suicide which is there raised as an affirmative defense. So in the case before us, the death of the insured person by violent and external means was conceded. The defendant by its pleadings having raised the issue, it remained for the plaintiff to prove by a fair preponderance of the whole evidence that those means were also accidental. *Headlee* v.

New York Life Ins. Co. (1943), 12 N. W. (2nd) (S. D.) 313, 315; *Ryan* v. *Metropolitan Life Ins. Co.* (1939), 206 Minn. 562, 289 N. W. 557.

The plaintiff in the first instance was aided by the so-called presumption against suicide. This presumption stems from and is raised by our common knowledge and experience that most sane men possess a natural love of life and an instinct for self-protection which effectively deter them from suicide or the self-infliction of serious bodily injury. It is commonly recognized that there is an affirmative presumption of death by accidental means which arises under appropriate circumstances from the negative presumption against suicide. Whether and to what extent the presumption persists in the face of contrary evidence is a matter of great and even decisive importance in the instant case.

Although a small minority of states adhere to an opposite view, it is now almost universally held that disputable presumptions are not themselves evidence nor are they entitled to be weighed in the scales as evidence. Rather are they recognized as "rules about evidence." They may be distinguished from inferences in that an inference is *permissible*, whereas a presumption is *mandatory*. They compel a finding of the presumed fact in the absence of contrary evidence. They perform the office of locating the burden of going forward with evidence, but having performed that office they *disappear* in the face of countervailing evidence. 20 Am. Jur. 170, Sec. 166; Wigmore on Evidence, 3rd Ed., Vol. IX, Page 286, Sec. 2490 *et seq.;* Anno. 103 A. L. R. 185; 158 A. L. R. 747; 12 A. L. R. (2nd) 1264; *New York Life Ins. Co.* v. *Gamer* (1938), 303 U. S. 161, 58 S. Ct. 500, 114 A. L. R. 1218; *Tyrrell* v. *Prudential Ins. Co. of America* (1937), 109 Vt. 6, 192 A. 184; *Jodoin* v. *Baroody* (1948), 95 N. H. 154, 59 A. (2nd) 343; *Duggan* v. *Bay State St. Ry. Co.* (1918), 230 Mass. 370, 119 N. E. 757; *Moroni* v. *Brawd-*

ers (1944), 317 Mass. 48, 57 N. E. (2nd) 14; *Hill* v. *Cabral* (1938), 62 R. I. 11, 2 A. (2nd) 482; *Smith* v. *Tompkins* (1932), 52 R. I. 434, 161 A. 221; *Carson* v. *Metropolitan Life Ins. Co.* (1956), 165 Ohio St. 238, 135 N. E. (2nd) 259.

The minority view that the presumption is itself evidence or has evidentiary weight has its adherents among the courts, some of which have felt constrained to that result by judicial interpretation of applicable statutes. *Smellie* v. *Southern Pacific Co.* (1931), 212 Cal. 540, 299 P. 529; see *Speck v. Sarver* (1942), 128 P. (2nd) (Cal.) 16; *Wyckoff* v. *Mut. Life Ins. Co. of N. Y.* (1944), 147 P. (2nd) (Or.) 227; see *Lewis* v. *N. Y. Life Ins. Co.* (1942), 124 P. (2nd) (Mont.) 579; *Allison* v. *Bankers Life Co.* (1941), 230 Iowa 995, 299 N. W. 889; *Mutual Life Ins. Co. of N. Y.* v. *Maddox* (1930), 128 So. (Ala.) 383. No statute exists in Maine declaring that disputable presumptions are themselves evidence.

Although our own court has never found it necessary to contribute any extended academic discussion to the plethora of words which have been written on this controversial subject, we find no satisfactory indication from the language used, confusing though it may be, that our court has accepted the principle that presumptions are themselves evidence. In *Moriarty's Case,* 126 Me. 358, 361, the court first referred to the presumption against suicide as having "probative force," but in the next breath spoke of it as serving "in the place of evidence, until prima facie evidence is adduced by the opposite party." In *Henderson* v. *Berce,* 142 Me. 242, the presumption was "destroyed" by competent evidence. In *Eisenman* v. *Austen, Ex'r.,* 132 Me. 214, 215, our court used the phrase "a mere presumption" with the evident intention of emphasizing the contrast between a presumption and evidence. And in *Benson* v. *Town of Newfield,* 136 Me. 23, 30, the court, speaking of the presumption that public officials have properly performed their duties,

stated: "Still, it is *only* a presumption and may be rebutted by the introduction of evidence." (Emphasis supplied.) So also in *Hill* v. *Wiles,* 113 Me. 60, the treatment accorded the presumption was inconsistent with any concept that a presumption is itself evidence. Although we find no indication that the issue has ever been carefully considered, we are aware that in a few of the older cases there are expressions by way of dicta which suggest a contrary view. See *Knowles* v. *Scribner,* 57 Me. 495, 498; *Ellis* v. *Buzzell,* 60 Me. 209; and *Decker* v. *Somerset Ins. Co.,* 66 Me. 406. Each of these cases holds that one asserting a claim or an affirmative defense in a civil case which in effect charges criminal conduct need only prove it by a preponderance of the evidence. Proof beyond a reasonable doubt is required only in criminal cases. In determining whether evidence preponderates, the factfinder must of course scrutinize it in the light of common sense and common experience including the relative unlikelihood of criminal conduct. *Colby* v. *Richards,* 118 Me. 288. Gratuitous expressions seeming to accord presumptions evidentiary weight in the scales were at best superfluous and at worst incorrect. We now hold unequivocally that presumptions serve their allotted procedural purpose but are not themselves evidence.

A far more difficult and troublesome question arises, however, in determining what quantum or quality of evidence is required to cause a rebuttable presumption to disappear. Conversely, to what extent will such a presumption persist in the face of contrary evidence? And who is to evaluate that evidence, the trial judge or the jury? It is at this point that courts have gone their several ways and too often semantics have been substituted for logic. On the one hand is the risk that the jury may be confused by instructions relating to presumptions and may misapply them, especially by according to presumptions artificial evidentiary weight in the scales which they do not possess. On the other hand

is the concern expressed by many writers of opinion and texts that if the presumption be regarded purely as a procedural tool *in the hands of the trial judge,* he will have in effect usurped the province of the jury as factfinder in determining the weight and credibility of such evidence as tends to negative the presumed fact. Efforts to reconcile these two desirable objectives have produced both compromise and confusion.

Many courts have adopted what is usually referred to as the Thayer theory of rebuttal which provides that disputable presumptions (other than the presumption of legitimacy) fall as a matter of law when evidence has been introduced which would support a finding of the non-existence of the presumed fact. This rule has the virtue of uniformity and won approval in the American Law Institute, Model Code of Evidence, Rules 703 and 704. In the foreword of the Model Code, Professor Edmund M. Morgan, the reporter and a recognized authority in the field of evidence and procedure, makes this excellent analysis of the several views (page 55):

> "As to the other consequences of the establishment of the basic fact, save only the basic fact of the presumption of legitimacy, the opinions reveal at least eight variant views, of which the following are the most important:
>
> 1. The existence of the presumed fact must be assumed unless and until evidence has been introduced *which would justify a jury in finding the non-existence of the presumed fact.* When once such evidence has been introduced, the existence or non-existence of the presumed fact is to be determined exactly as if no presumption had ever been operative in the action; indeed, as if no such concept as a presumption had ever been known to the courts. *Whether the judge or the jury believes or disbelieves the opposing evidence thus introduced is entirely immaterial.*

In other words, the sole effect of the presumption is to cause the establishment of the basic fact to put upon the party asserting the non-existence of the presumed fact the risk of the non-introduction of evidence which would support a finding of its non-existence. This may be called the *pure Thayerian rule,* for if he did not invent it, he first clearly expounded it.

2. The existence of the presumed fact must be assumed unless and until evidence has been introduced which would justify a jury in finding the non-existence of the presumed fact. When such evidence has been introduced, the existence or non-existence of the presumed fact is a question for the jury unless and until *'substantial evidence' of the non-existence of the presumed fact has been introduced. When such substantial evidence has been introduced, the existence or non-existence of the presumed fact is to be decided as if no presumption had ever been operative in the action.* Thus if the basic fact, by itself or in connection with other evidence, would rationally support a finding of the presumed fact, the existence or non-existence of the presumed fact is a question for the jury; if the basic fact is the only evidence of the presumed fact and would not rationally justify a finding of the presumed fact, the judge directs the jury to find the non-existence of the presumed fact. *Unfortunately the cases which support this rule do not define substantial evidence: it is certainly more than enough to justify a finding; sometimes it seems to be such evidence as would ordinarily require a directed verdict.* * * *

3. The existence of the presumed fact must be assumed *unless and until the evidence of its non-existence convinces the jury that its non-existence is at least as probable as its existence.* This is sometimes expressed as requiring evidence which balances the presumption.

> 4. The existence of the presumed fact must be assumed unless and until the jury finds *that the non-existence of the presumed fact is more probable than its existence.* In other words the presumption puts upon the party alleging the non-existence of the presumed fact both the burden of producing evidence and *the burden of persuasion of its non*-existence. This is sometimes called the Pennsylvania rule." (Emphasis supplied.)

Professor Morgan and his distinguished colleague, Professor John M. Maguire, have never concealed their preference for some form of the fourth of the foregoing variants which would involve the shifting of the burden of *persuasion* at least as to certain classifications of presumptions, if not as to all. See Maguire on Evidence, Common Sense and Common Law, page 187; Model Code of Evidence, page 57; Morgan, Some Problems of Proof, page 81; Morgan, Presumptions and Burden of Proof, 47 Harvard Law Review 59; Morgan and Maguire, Looking Backward and Forward at Evidence, 50 Harvard Law Review 909, 913. This concept was finally approved by both the American Bar Association and the American Law Institute in 1954 and appears as Rule 14 of the Uniform Rules of Evidence promulgated by the National Conference of Commissioners on Uniform State Laws. That rule is as follows:

> "Rule 14. *Effect of Presumptions.* Subject to Rule 16, and except for presumptions which are conclusive or irrefutable under the rules of law from which they arise, (a) if the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption continues to exist *and the burden of establishing the non-existence of the presumed fact* is upon the party against whom the presumption operates, (b) if the facts from which the presumption arises have no probative value as evidence of the presumed fact, the presumption does not exist when evidence is introduced *which*

> *would support a finding of the non-existence of the presumed fact,* and the fact which would otherwise be presumed shall be determined from the evidence exactly as if no presumption was or had ever been involved." (Emphasis supplied.)

Jones on Evidence, 5th Ed., Vol. 4, page 1903 (see Comment, page 1904).

It will be noted that the proposed rule classifies presumptions, applying the Thayerian Rule to those situations where the presumption is raised out of expediency and the basic facts have no tendency to prove the presumed fact, and applying the so-called Pennsylvania Rule to those situations where the basic facts have probative value as evidence of the presumed fact. Thus far, obviously, the rule remains virtually untried and we have no adequate information available as to the extent to which it may have found favor with the courts. In *Alliance Assurance Co.* v. *U. S.* (1958), 252 F. (2nd) 529, 535, the court specifically adopted Rule 14 and held that the burden of persuasion was shifted by the presumption of negligence of a bailee. In doing so, the court felt constrained to attempt to distinguish the case of *Commercial Molasses Corp.* v. *New York T. Barge Corp.* (1941), 314 U. S. 104, 62 S. Ct. 156, in which the presumption was said to disappear in the face of evidence "sufficient to persuade that the non-existence of the (presumed) fact * * * is as probable as its existence." The latter rule, it will be noted, is the third of Morgan's variants as stated above.

If we have, as we believe, because of the conflicting expressions and the lack of any definitive announcement in our own opinions, some freedom in determining what procedural effect we will assign to disputable presumptions, some examination of the cases which have employed the several variants may be helpful.

In the leading case of *New York Ins. Co.* v. *Gamer, supra,* the court, without reviewing the evidence, pronounced that

portion of it which was adverse to the presumption (of death by accidental means) to be "sufficient to sustain a finding that the death was not due to accident" in accordance with the Thayerian concept. It held that upon the introduction of this quantum of evidence, the presumption disappeared as a matter of law and should not have reached the jury. Mr. Justice Black, dissenting, first criticized the majority for its application of Montana law which in his view required that the presumption persist until the contrary evidence " '*all* points to suicide * * * with such certainty as to preclude any other reasonable hypothesis.' " He then expressed his concern over the method of determination by saying: "The *jury*—not the *judge*—should decide when there has been 'substantial' evidence which overcomes the previous adequate proof."

It has frequently been stated that a disputable presumption disappears in the face of "substantial countervailing evidence" and the case is thereafter in the hands of the jury free of any presumption. As previously noted, what is meant by "substantial," however, is not always clear. In *Alpine Forwarding Co.* v. *Penn. R. Co.* (1932), 60 F. (2nd) 734, another case which has been often cited, L. Hand, J. held that the determination as to whether the evidence contrary to the presumed fact is "substantial" is always and solely for the trial judge, and that in a properly conducted trial the presumption will never be mentioned to the jury at all. The same writer, speaking for a divided court in *Pariso* v. *Towse* (1930), 45 F. (2nd) 962, although satisfied that the unqualified denials of the presumed fact by the defendant and her somewhat interested nephew should cause the presumption to disappear as a matter of law, felt constrained by his interpretation of applicable New York law to hold in effect that the denials of a party corroborated by an interested witness are not such "substantial" evidence as will cause the disappearance of the presumption as a

matter of law. The credibility of these defense witnesses therefore became an issue for the jury. Swan, J., dissenting, was not satisfied that New York law required such a result. Contrast *Bradley* v. *S. L. Savidge, Inc.* (1942), 123 P. (2nd) (Wash.) 780, in which it was held immaterial whether the evidence came from interested or disinterested witnesses.

The New York court in *Chaika* v. *Vandenberg* (1929), 252 N. Y. 101, 169 N. E. 103, concluded that the presumption did not disappear in the face of the uncorroborated but uncontradicted denial of an interested party, but rather the credibility of such witness became an issue for the factfinder. Thus is presented a negative element in the definition of what constitutes "substantial" evidence. Cf. *Gaudreau* v. *Eclipse Pioneer Div. of Bendix Air Corp.* (1948), 61 A. (2nd) (N. J.) 227; *Barwick* v. *Walden* (1944), 32 S. E. (2nd) (Ga.) 401.

The often cited case of *McIver* v. *Schwartz* (1929), 50 R. I. 68, 145 A. 101, involved the uncorroborated denial of the defendant which was not believed by either the trial judge or the jury. Affirming the principle that a presumption disappears as a matter of law in the face of "any credible evidence to the contrary," the court upset a jury verdict for the plaintiff. It would appear that "any credible evidence" here meant "any believable evidence even though not in fact believed by anyone."

Reaching an opposite conclusion, however, at least with respect to certain classes of presumptions, are such cases as *O'Dea* v. *Amodeo* (1934), 118 Conn. 58, 170 A. 486; *Koops* v. *Gregg* (1943), 130 Conn. 185, 32 A. (2nd) 653; and *United States* v. *Tot* (1942), 131 F. (2nd) 261, 267, which seem to require that the requisite contrary evidence must be in fact believed and any question of veracity raises an issue for the factfinder. The latter opinion voices the

criticism which has often been made of the pure Thayerian rule that a presumption should not fall merely because words are uttered which nobody believes. "A gentle tapping on a window pane will not break it; so a mere attempt to refute a presumption should not cause it to vanish, if it is of any value at all." *Hildebrand* v. *Chicago, B. & Q. R. R.* (1933), 17 P. (2nd) (Wyo.) 651, 657. See Anno. 5 A. L. R. (2nd) 196 and cases cited reflecting the diversity of opinion on this subject.

O'Dea v. *Amodeo, supra,* established an elaborate classification of disputable presumptions with a prescribed rebuttal requirement for each classification. It does not appear that this method of approach has won any substantial following, perhaps because of the practical difficulties which might arise in applying the rule on a case by case basis in the trial courts.

Amid so much confusion there is the natural temptation toward over-simplification. Nevertheless, if the presumption is to be a useful procedural tool in the hands of the trial court, relative simplicity is a desirable goal. In the article in 47 Harvard Law Review 59 already cited, Professor Morgan has made a thorough and helpful analysis of this troublesome problem. As he points out, rebuttable presumptions have been created "(a) to furnish an escape from an otherwise inescapable dilemma or to work a purely procedural convenience, (b) to require the litigant to whom information as to the facts is the more easily accessible to make them known, (c) to make more likely a finding in accord with the balance of probability, or (d) to encourage a finding consonant with the judicial judgment as to sound social policy." Although the purposes for which presumptions are raised might properly and logically affect the method of their rebuttal, the writer, while suggesting that they should be permitted to shift the burden of persuasion, sees no serious or insurmountable objection to the establish-

ment of a single procedural rule that a disputable presumption persists until the contrary evidence persuades the factfinder that the balance of probabilities is in equilibrium, or, stated otherwise, until the evidence satisfies the jury or factfinder that it is as probable that the presumed fact does not exist as that it does exist. We view the adoption of such a rule as a practical solution of a confusing procedural problem. In establishing the vanishing point for presumptions, it provides more certainty than do the varying definitions of "substantial countervailing evidence." It has also the virtue of reserving to the factfinder decisions as to veracity, memory and weight of testimony whenever they are in issue. In essence, the proposed rule recognizes that when an inference has hardened into a presumption compelling a finding in the absence of contrary evidence, it has achieved a status which should not vanish at the first "tapping on the window pane." It recognizes that "surely the courts do not raise such a presumption merely for the purpose of making the opponent of the presumption cause words to be uttered." We agree with Mr. Morgan that our objective should be to devise a "simple, sensible and workable" plan for the procedural use of disputable presumptions and are satisfied that the suggested rule achieves that end.

Such a rule gives to the presumption itself maximum coercive force short of *shifting the burden of persuasion.* Although we are keenly aware that there is severe criticism by respected authority of the widely accepted rule that the burden of persuasion on an issue never shifts, that rule has been thoroughly imbedded in the law of this state. An unbroken line of judicial pronouncements to this effect are to be found in our opinions. We would be most reluctant to make a radical change in the accepted rule unless forced to do so by some compelling logic. We feel no such compulsion here. Logic compels the conclusion that a mere procedural device is not itself evidence. But beyond that there seems

to be a certain amount of judicial latitude which permits the court to determine how a disputable presumption, necessarily artificial in its nature, can best perform a useful function in forwarding the course of a trial. As already noted, it seems pointless to create a presumption and endow it with coercive force, only to allow it to vanish in the face of evidence of dubious weight or credibility. Neither does it seem to us necessary, in order to bring some order out of chaos, to overrule all precedent and permit the presumption to shift the burden of persuasion from him who first proposes the issue and seeks to change the *status quo*. These considerations prompt us to adopt the foregoing rule which seems to us a satisfactory middle course.

In our review of many opinions on this subject, we have discovered no more careful or accurate an analysis than is contained in a dissenting opinion by Mr. Justice Traynor appearing in *Speck* v. *Sarver, supra,* at page 19. Endorsing the view which we take of the effect of rebuttable presumptions as the "sounder one," he states: "Once such evidence (contrary to the presumed fact) is produced and believed, the jury should weigh it against any evidence introduced in support of the facts presumed and decide in favor of the party against whom the presumption operates if it believes that the non-existence of the facts is as probable as their existence. Nothing need be said about weighing the presumption as evidence."

With respect to the presumption against suicide in particular, Mr. Justice Taft concurring in *Carson* v. *Metropolitan Life Ins. Co., supra,* said: "There may be instances where the only evidence produced or introduced to rebut the presumption against suicide is evidence which the jury may quite properly disbelieve in exercising its function as trier of the facts and judge of the credibility of the witnesses. In such an instance, if the rule is as broadly stated as is suggested * * * then incredible evidence or evidence

having no weight whatever could be effective in making the presumption against suicide disappear. Obviously, that would be unreasonable.

"There may therefore be instances where it will be necessary for the trial court to mention the presumption against suicide in charging a jury, even though it is erroneous to advise the jury * * * that that presumption may be weighed as evidence."

The rule for which we have expressed preference does not, as we interpret it, mean that the persistence or disappearance of a disputable presumption may never be resolved as a matter of law. Whenever no countervailing evidence is offered or that which is offered is but a scintilla, or amounts to no more than speculation and surmise, the presumed fact will stand as though proven and the jury will be so instructed. On the other hand, when the contrary evidence comes from such sources and is of such a nature that rational and unprejudiced minds could not reasonably or properly differ as to the non-existence of the presumed fact, the presumption will disappear as a matter of law. Where proof of the presumed fact is an essential element of the plaintiff's case, he would suffer the consequence of a directed verdict. Such would ordinarily be the result, for example, when evidence effectively rebutting the presumption is drawn from admissions by the plaintiff, evidence from witnesses presented and vouched for by the plaintiff, or from uncontroverted physical or documentary evidence.

Regardless of the view taken of the procedural effect of the presumption of death by accidental means, courts have not failed to be impressed by undisputed evidence of physical facts negativing accident. In *Mitchell* v. *New England Mut. Life Ins. Co.* (1941), 123 F. (2nd) 246, the court, noting a contact wound and the horizontal course of the shot, concluded that "the nature of the wound itself bars any reasonable hypothesis of accident." See also *Gem City Life*

Ins. Co. v. *Stripling* (1933), 168 S. E. (Ga.) 20; *McMillan* v. *Gen'l American Life Ins. Co.* (1940), 9 S. E. (2nd) (S. C.) 562; *Long* v. *Metropolitan Life Ins. Co.* (1956), 90 S. E. (2nd) (S. C.) 915; *Carroll* v. *Prudential Ins. Co. of America* (1940), 125 N. J. L. 397, 15 A. (2nd) 810. Upon facts bearing a striking similarity to those of the instant case, the court held in *Travelers Ins. Co.* v. *Wilkes* (1935), 76 F. (2nd) 701, that a verdict for the plaintiff beneficiary could not be sustained. In that case the decedent died as the result of a contact wound in the right side of his head made by a gun found at his side. The course of the bullet was about horizontal but slightly upward. There were no indications of a struggle. The decedent's financial condition, although not good, was not desperate, and he was apparently living happily with his wife. Three empty whiskey bottles were found in the room where he was killed. The court concluded that on this evidence of undisputed physical facts, a finding of death by accidental means could not reasonably be made.

Bearing in mind the sage admonition of Chief Justice Clark, dissenting in *McDowell* v. *Norfolk S. R. Co.* (1923), 186 N. C. 571, 120 S. E. 205, that too much technical and procedural "hair splitting" may impede the orderly course of litigation, let us turn to the facts before us. Applying the above stated rules of law to the facts of the instant case, it becomes at once apparent that the verdict of the jury was erroneous. As has been noted, the plaintiff undertook to satisfy his burden of proof, that is, the risk of nonpersuasion, that the death was caused by violent, external and accidental means. In the initial stages of the presentation of the plaintiff's case, there was undisputed and conclusive evidence that the means of death were both violent and external. Momentarily, as to the required proof of accidental means, the plaintiff was aided by the presumption, and the burden of going forward with evidence (as distin-

guished from the burden of proof) on this element of the case at once shifted to the defendant. This burden, however, could be as well satisfied by evidence adduced from plaintiff's witnesses as from those produced by the defendant. As the presentation of the plaintiff's main case proceeded, evidence of physical facts, emanating from the plaintiff's own witnesses and never disputed, clearly depicted an intentional, self-inflicted injury resulting in death. This evidence must be assessed in the light of inherent probabilities. Most significant is the fact that this was a *contact* wound at the right temple. Moreover, the course of the bullet on a horizontal plane through the head conclusively completes the picture of a fatal shot fired from a revolver held at and against the right temple and in a horizontal position. It is apparent that this evidence tends effectively to rule out any reasonable likelihood that there was an accidental discharge of the firearm while being cleaned or handled by either the decedent or his wife. The only reasonable inference is that the decedent placed a loaded revolver against his right temple and pulled the trigger. It matters not whether in so doing he intended to take his own life or was performing a grossly negligent and dangerous act reasonably calculated to produce grievous bodily harm or death. Where a shooting is the natural and probable consequence of the acts of the decedent, the result which should have been anticipated can hardly be termed an accident. *Beckley Nat. Exchange Bank* v. *Provident Life & Accident Ins. Co.* (1939), 2 S. E. (2nd) (W. Va.) 256; *Aetna Life Ins. Co.* v. *Little* (1920), 146 Ark. 70, 225 S. W. 298; *Mutual Life Ins. Co.* v. *Sargent* (1931), 51 F. (2nd) 4. We think the definition employed in *Lickleider* v. *Iowa State Traveling Men's Ass'n.* (1918), 166 N. W. (Iowa) 363, 366 is entirely accurate. "It may be, and it is true, that if the insured does a voluntary act, the natural, usual, and to be expected result of which is to bring injury upon himself, then a death so occurring is not an accident in any sense of

the word, legal or colloquial * * *. To illustrate, A may be foolhardy enough to believe that he can leap from a fourth story window with safety, and, trying it, is killed. * * * In no proper sense of the word is A's death accidental or caused by accidental means * * *." In *U. S. Mutual Acc. Ass'n* v. *Barry* (1889), 131 U. S. 100, 121, 9 S. Ct. 755, the court said: "* * * If a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means." This case and its definition were approved in *Westman's Case*, 118 Me. 133, 141. Whatever the thought processes of the decedent may have been when he placed a loaded revolver at right angles against his temple and pulled the trigger, the tragic results of that act can hardly be said to have been unusual, unexpected or unforeseen.

We note the negative evidence suggesting the absence of any apparent motive for self-destruction. The explanation of the decedent's conduct may well lie in his state of voluntary intoxication. Whatever may have been the reason for his act, we are satisfied that apparent absence of motive *alone* will not suffice under circumstances such as these to support a plaintiff's verdict or even to take the case to the jury. This is so because men without apparent motive do commit suicide and what prompts a man suddenly to succumb or appear to succumb to an access of depression or despair is usually a secret locked in the recesses of his mind. Evidence tending either to demonstrate or negative any motive for self-destruction is always properly received in a case of this sort, but as already noted cannot *alone* suffice against undisputed physical evidence all pointing toward a voluntary act, the natural consequence of which was self-

destruction. See *N. Y. Life Ins. Co.* v. *Trimble* (1934), 69 F. (2nd) 849, 851; *Pilot Life Ins. Co.* v. *Boone* (1956), 236 F. (2nd) 457, 463; *Inghram* v. *National Union* (1897), 103 Iowa 395, 72 N. W. 559.

The evidence offered by the defendant did no more than to bolster the evidence of physical facts which, uncontradicted and unexplained, conclusively destroyed any presumption against the intentional self-infliction of the fatal wound. The plaintiff failed to offer any further evidence tending to show that the decedent met his death other than by his own hand, even though the burden of going forward with evidence on this element of the case had shifted back again to him. Having lost the benefit of the presumption, he was left with nothing to support his theory of accident but the merest surmise and conjecture conjuring up the most unlikely possibilities. Such speculation will not suffice for evidence. With the evidence complete, there was then but one possible verdict which the jury could properly return, and that for the defendant as to the claim for double indemnity.

Why then did the jury reach a verdict so obviously contrary to the evidence? We think the explanation may be found at least in part in the sequel of unusual developments which started when Mrs. Hinds first claimed the privilege against self-incrimination. As these events occurred, two exceptions were noted by the defendant which are now before us, and since this case may be retried, some discussion of the rather novel issues raised may be profitable.

It must be noted at the outset that the witness made her claim of privilege, not as to the particular question then asked, but as to giving any testimony whatever. As previously emphasized, she declined to *"testify."* When another question was asked, after some colloquy with the court, the pending question and *all further questions* of the

witness were excluded. The questions, when viewed as cross-examination, were entirely proper. The witness, although not technically a party to the suit, was so identified in interest with the minor plaintiff, her son and ward for whom she had instigated the action, that her hostility to the defendant could fairly be assumed. The ruling when such privilege is claimed should not be to *exclude* the question if it is otherwise proper and admissible, but merely to grant or refuse the request that the witness not be compelled to answer. See *Gendron* v. *Burnham,* 146 Me. 387, 407. 58 Am. Jur. 54, Sec. 53, states the applicable rule. "The mere fact that the answer to a question might incriminate the witness does not render the question improper, because it is the privilege of the witness to refuse to answer it." Such a request will be honored by the court only when it is satisfied that the danger is real and not fancied or fabricated by the witness, and that the answer, if given, might tend to incriminate the witness. The court must be satisfied that the claim of privilege is made in good faith. 58 Am. Jur. 70, Sec. 81. The witness should not be accorded the privilege as to all further testimony but may properly be expected to claim the privilege on a question by question basis. As was said in *Rogers* v. *U. S.* (1950), 340 U. S. 367, 71 S. Ct. 438, 442: "As to each question to which a claim of privilege is directed, the court must determine whether the answer *to that particular question* would subject the witness to a 'real danger' of * * * crimination." (Emphasis supplied.) Only thus can the examining counsel be afforded a fair opportunity to draw from the witness answers and information which can be given without any incriminating effect whatever. See *Apodaca* v. *Viramontes* (1949), 53 N. M. 514, 212 P. (2nd) 425. Such a process may sometimes be tedious and time consuming, but fortunately the claim of privilege is infrequently made in the trial of civil cases.

Some latitude must be afforded to opposing counsel to show evidence of bad faith on the part of a witness claiming privilege, and the court must be vigilant to pursue any indications of bad faith before granting the privilege. This great constitutional safeguard against self-incrimination was never intended to be used as a means of avoiding the disclosure of the truth by witnesses who only pretend a fear of proving themselves guilty of crime. As stated in 58 Am. Jur. 53, Sec. 50: "It is essential to the existence of the right not to testify that the danger to be apprehended be real and appreciable, with reference to the ordinary operation of law, in the ordinary course of things, not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. The law does not permit a witness arbitrarily to hide behind a fancied or intangible danger to himself." In the instant case the questions asked were seemingly innocuous. By claiming the privilege when she did, the witness suggested a fear of self-incrimination as to some crime involving her marital status. She was merely asked if she was the wife of the decedent. The fact that she then requested privilege not to testify at all suggests that she may have been making the claim prematurely and without particular reference to the pending question. It may well be that an explanation by the court of the nature of the privilege might have allayed her fears, if indeed any existed, as to the possible results of revealing whether or not she was the wife of the decedent. This would seem to have been a proper case for discreet and cautious examination by the court to ascertain whether any "real danger" of incrimination actually existed.

As has been noted, counsel for the defendant mistook his remedy and abandoned his right to ask further questions of the witness. Instead, he proffered the evidence of the police

officer to whom Mrs. Hinds had related the events of the evening. This he did on the theory that since the best evidence was not available to him, he had a right to resort to secondary hearsay evidence. No case has been called to our attention which recognizes the right to introduce hearsay evidence under such circumstances as these. Whether a valid argument could be made in support of such a position need not be decided here. The defendant had laid no proper basis for the introduction of such evidence in any event. He at no time asked the witness to relate the events of that evening and it cannot now be known with certainty whether or not she would have claimed any privilege as to such a question. If the court erroneously ruled in advance that defendant was precluded from asking such a question, the defendant took no exception to such ruling. We can see at once that if such a question had been asked and a claim of privilege then asserted, the testimony of the officer might properly have been received by the court in the absence of the jury on the issue of the good faith of the witness in claiming privilege. The narrative of events which she gave to the officer suggested no wrongful act on her part. The proffered testimony of the officer, however, would have thrown no light on the good or bad faith of the witness in refusing to answer a question relating only to her marital status. We must constantly bear in mind that no other questions were asked of the witness. Since no proper basis was laid for the introduction of the excluded portion of the officer's testimony, the two exceptions taken in connection with that exclusion must be overruled.

Returning now to the developments in this trial which may have confused the jury, we note the situation which existed when the evidence closed. The jury had heard the only apparent eye witness to the tragedy refuse to "testify," claiming the protection of Art. I, Sec. 6 of the Constitution of Maine. They had seen that action apparently sustained

by the court and acceded to by the defendant. They had no knowledge of the contents of the offer of proof made by the defendant in connection with the proffered testimony of the officer. It is not unreasonable to suppose that the jury may have mistaken these developments for evidence and may have somehow drawn the erroneous inference that Mrs. Hinds had shot her husband. Although no such inference could properly be drawn from her refusal to answer, the impression that such an inference might be raised could easily have been created in the minds of the jury by one of the instructions given by the court. After reminding the jury that a witness had claimed privilege, the court said: "Now such an invocation of the constitutional provision against self-incrimination is not to be taken lightly and a person who invokes that privilege must be assumed to do so in good faith." No further explanatory instructions were given in this connection. Without more, the jury might have understood that they were free to draw such inferences as they chose from the act of the witness in claiming privilege. Obviously it would not have been proper for the jury to have speculated or conjectured that the witness had committed any particular crime, or especially that the witness had shot her husband.

The presiding justice gave the jury to understand that in claiming the privilege, the witness was presumed to have done so in good faith. We know of no such presumption. So many persons have claimed the privilege in recent years for reasons based upon political convictions or upon their personal philosophy as to the proper scope of inquiry and examination rather than upon any honest fear of self-incrimination, that the probabilities that might otherwise have tended to support such a presumption have been greatly diminished. In fact, resort to this great constitutional heritage has been so abused and misused that the claim of privilege is now too often popularly and vulgarly referred

to as "taking the fifth." If we are to preserve this safeguard for posterity, courts will do well to make no assumptions but rather to make proper inquiry to ascertain as nearly as may be in each case whether or not the privilege is sought in good faith. Doubtless, in this case, the court below had in mind the rule that the acts of men outside the courtroom are ordinarily presumed to have been performed in good faith. This rule, however, has no application to the events of a trial which takes place in the presence of court and jury. The jury is itself witness to the acts and demeanor of those who appear before it and needs the aid of no presumption in determining whether a witness as a participant in the trial is acting in good faith. This situation seems to us analogous to that which was before the court in *Mullaney* v. *C. H. Goss Co.* (1923), 122 A. (Vt.) 430, 432. With respect to the testimony of witnesses before a jury, the court said: "It trenches upon the exclusive province of the jury to determine the credibility of witnesses and the weight to be given to their testimony. The law recognizes no presumption that persons testify truly, and not falsely." The instruction certainly suggested to the jury that the act of claiming privilege was itself a piece of evidence for their consideration. Although no exception was taken to the instruction as given, we think it tended to mislead the jury into drawing the erroneous inference that since Mrs. Hinds claimed the privilege against self-incrimination, she must have shot her husband. We can conceive of no other theory which the jury might have entertained which could rationally explain a verdict so manifestly wrong.

One further factor plays a part in this case and may not be disregarded. As already noted, it is highly improbable that a contact wound on a horizontal plane at the temple was inflicted as a result of clumsy or accidental handling of the gun by Mrs. Hinds. If the act were hers, it would in

the absence of explanation appear to fall into the category of wrongful and criminal conduct. Such conduct is never assumed but must be proven by evidence, in a civil case, which is full, clear and convincing. The total absence of such evidence in this case left no room for inference and could not be compensated for by conjecture.

In conclusion, then, the plaintiff had the burden of persuasion throughout to prove death by violent, external and accidental means. At the close of all the evidence there was an uncontradicted showing by strong evidence of physical facts drawn from disinterested witnesses presented by the plaintiff that death was self-inflicted and non-accidental. The plaintiff, not the defendant, needed the aid of supporting testimony from Mrs. Hinds if he was to satisfy his burden of proof. The plaintiff was left with no proof of accident whatever. Only one verdict was possible and that for the plaintiff in the sum of $9,000.

The entry will be

Exceptions overruled. Motion for new trial overruled if plaintiff within 30 days from filing of this mandate remit all of the verdict in excess of $9,000; otherwise motion sustained and new trial granted.

ROLLANDE F. DIONNE
vs.
RAYMOND J. DIONNE

Aroostook. Opinion, October 30, 1959.

Divorce. Evidence. Stipulation of Parties.

A divorce decree may not by stipulation be predicated upon so much of the legally admissible testimony as was given by certain witnesses in a previous jury trial in a suit brought by the libelee against the mother of the libelant for alleged alienation of affections, since such testimony involves different issues and deprives the court of the opportunity to make inquiries of the parties involved. Such procedure against public policy.

ON EXCEPTIONS.

This is a libel for divorce for the cause of alleged intoxication, abusive treatment and cruelty. Specifications were ordered. By stipulation testimony was admitted in this libel which was taken from a previous suit by the libelee against the libelant's mother for alienation of affections. The divorce was granted and the case is before the Law Court upon exceptions. Exceptions sustained.

George B. Barnes,
Roland A. Paige, for plaintiff.

Albert M. Stevens, for defendant.

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

SIDDALL, J. On exceptions. This is a libel for divorce heard in the Superior Court for Aroostook County. The libel alleged gross and confirmed habits of intoxication, cruel and abusive treatment, and extreme cruelty. Upon

libelee's motion for specifications as to acts of cruel and abusive treatment and extreme cruelty the libelant was ordered to file specifications, and in compliance therewith confined her allegations on these grounds to one act, to wit: that the libelee struck her with his fist on May 10, 1955. By stipulation the case was submitted on so much of the legally admissible testimony as was given by certain witnesses in a previous jury trial in a suit brought by the libelee against the mother of the libelant for the alleged alienation of the affections of the libelant. The court specifically found that there was insufficient evidence to authorize the granting of a divorce on the ground of gross and confirmed habits of intoxication or on extreme cruelty and granted the divorce for the cause of cruel and abusive treatment. The court also awarded to the libelant the custody of the five children of the parties and ordered the libelee to pay Seventy-five Dollars per week for the support of such children together with a nominal sum payable annually as alimony to the libelant. Exceptions were taken by the libelee. For reasons hereinafter stated it is unnecessary to set forth the nature of these exceptions.

A divorce can be granted only upon the causes authorized by law and upon satisfactory proof. Because of the interest of the state in maintaining and preserving the marriage relation, it virtually becomes a third party in all divorce proceedings.

> "The State having a most important interest in the marriage relation is a party to the divorce proceeding just as much as the parties themselves, and, not like other contracts, the contract of marriage cannot be dissolved by the mere consent and agreement of the parties, . . ." *Monahan* v. *Monahan*, 142 Me. 72, 46 A. (2nd) 706.

See also *Sheffer* v. *Sheffer*, 136 Mass. 575, 56 N. E. (2nd) 13; *Linquist* v. *Linquist*, 137 Conn. 165, 75 A. (2nd) 397; *Smith* v. *Smith*, 69 R. I. 403, 34 A. (2nd) 726; NELSON,

DIVORCE AND ANNULMENT, Vol. 1, p. 17 (2d ed. 1945); 17 Am. Jur. 262; 27 C. J. S. Divorce Sec. 8b.

We believe that the interest of society in proceedings affecting the matrimonial relation, and especially those involving the custody of children, require that such proceedings be conducted in an atmosphere in which the attention of the court is directly centered upon the issues of the case before him, and under circumstances in which he may make such inquiries of the parties and other witnesses as he may deem necessary. We are aware of the fact that it is sometimes necessary to take depositions of witnesses, and in no way infer that such depositions in divorce cases do not constitute proper evidence for the court to consider.

The instant case was heard upon the record of certain testimony presented in another proceeding in which the issues involved were not the same. Although the same justice who heard the divorce case presided at the trial of the other proceeding, he was concerned in that previous trial with the issues of that case only, and not with the problems of a marriage dissolution or the custody of children. The stipulation between the parties in the case now before us effectively precluded the court from making inquiries which he might have made had the evidence in the instant case been taken out at the time of hearing. The stipulation contemplated the reception of no evidence except that provided for therein, and virtually prevented the court from requesting an investigation by the Bureau of Social Welfare as to the fitness of the respective parents to have the custody of the minor children, as provided by R. S., 1954, Chap. 166, Sec. 69. Furthermore, although it is apparent that the stipulation in this case was made in good faith and was not collusive, there is always some danger that continued practice along the lines followed in this case might in some case lead to collusion or omission or concealment of pertinent facts.

In the interest of public policy, and for the reasons set forth herein, the exceptions of the libelee are sustained. The entry ordered in this case is based solely upon the grounds discussed in this opinion, and is without prejudice to either party as to the merits of the case in the event of any further hearing on this libel.

The entry will be

Exceptions sustained.

OXFORD PAPER CO., APPLT.
vs.
ERNEST H. JOHNSON
STATE TAX ASSESSOR

Oxford. Opinion, October 30, 1959.

Taxation. Exemptions. Tangible Personal Property. R. S., 1954, Chap. 17, Secs. 2, 4. Regulations. Mercury. Loss of Identity in Manufacture.

The State Tax Assessor may not by regulation so limit the exemption of R. S., 1954, Chap. 17, Secs. 2 and 4 and P. L., 1955, Chap. 144 which applies to tangible personal property "consumed, destroyed, or loses identity in manufacture" so that such property must have "a normal life expectancy of less than one year" to be considered as "expendable" as "consumed or destroyed" to qualify for exemption.

Mercury used or dissipated in the manufacture of paper (annually 7% of a 35 ton reservoir) is "consumed or destroyed - - - in the manufacture of tangible personal property" within the meaning of the Act's exemptions even though the loss or survival of any particular atom or molecule of mercury can not be known and by any practical theory has an endurance of 14 years in the fabrication process.

ON APPEAL.

This is a petition for tax abatement before the Law Court, after appeal, upon report. Appeal to Superior Court sustained. Judgment for appellant for $841.00 without costs. Tax abated to that amount. Case remanded to Superior Court for decree in accordance with this opinion.

Theodore Gonya, for plaintiff.

Ralph Farris,
Richard A. Foley, for defendant.

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

SULLIVAN, J. The State Tax Assessor levied a use tax against Oxford Paper Company, a resident corporation, which thereupon petitioned him to reconsider and abate such impost. The Assessor declined. The Paper Company paid the tax under protest and appeal to the Superior Court. The parties have in writing agreed upon the facts which in their turn induce issues of law. The case is before this court upon report for a final determination of the controversy.

The subject matter of the tax was a quantity of the chemical element, mercury, purchased without the State at retail sale during the years 1956 and 1957 by the Paper Company for use within the State in the manufacture for sale, of paper. The appellant contends that the mercury was exempt from tax within the language and intent of R. S. (1954), c. 17, §§ 2 and 4, as amended, in as much as that commodity was tangible personal property —

> "- - - which becomes an ingredient or component part of, or which is consumed and destroyed or loses its identity in the manufacture of, tangible personal property for later sale - - -" R. S., c. 17, § 2; P. L., 1955, c. 144.

Paragraphs 11 through 19 of the parties' agreed statement authoritatively recite the significant facts. Because of the chemistry and natural science contained we quote rather than attempt a paraphrase.

> "11. Mercury is a chemical metallic element. Its molecules are monatomic. Any quantity forms a neatly rounded globule. When a globule is subdivided, it breaks up into a number of equally perfect globules, which tend to coalesce when sufficiently near to one another.
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> "12. Mercury is used by Appellant in its manufacturing operations in the production of chlorine and sodium hydroxide, which chemical products are used to bleach or whiten the cellulose fibers from which high quality papers are made. The chlorine and sodium hydroxide are produced for this purpose by an electrolytic process in which an electric current is passed through a solution of brine obtained by dissolving sodium chloride in water. This process is accomplished in a cell known as the Sorensen cell.
>
> "13. In the Sorensen cell there are two chambers which are isolated, one from the other. These chambers are designated, respectively, as the 'decomposing chamber' and the 'denuding chamber'. The electrolysis or decomposition of the sodium chloride into sodium and chlorine takes place in the decomposing chamber. In order to recover the sodium and chlorine separately, it is necessary to remove one from the other, after the decomposition. This separation is accomplished by the use of mercury. The action of the Sorensen cell may be described as follows. Mercury flows through a special seal into the decomposing chamber where it spreads out over the bottom of the chamber and forms one electrode of the cell. Graphite slabs are suspended horizontally an inch or two above the mercury and form the second electrode of the cell. The saturated brine passes slowly through this chamber, forming an electrical bridge between the

mercury and the graphite slabs. When an electric current is passed through the brine, chlorine is evolved as a gas at the graphite electrode and elemental sodium is formed at the surface of the mercury. The chlorine gas is removed from the cell and conveyed to the bleaching process. The sodium forms a loose chemical combination with the mercury, known as an amalgam, and is removed with the mercury continuously, and transferred to the denuding chamber of the cell. There the amalgam of sodium and mercury comes in contact with fresh water and forms sodium hydroxide. The sodium hydroxide is then continuously removed from the denuding chamber and transferred to the bleaching process. The mercury, thus stripped of its sodium content, is returned to the decomposing chamber and the cycle is repeated.

"14. Thus, in the process described, mercury plays a threefold role: (1) as a conductor of electric current and one electrode of the cell, (2) as a temporary reactant with one of the products of decomposition, and (3) as a means of separating one of the products from the other and transporting the same.

"15. In the normal course of daily operation of the process described, some mercury is lost. This occurs in several ways, including evaporation into the atmosphere, permanent chemical combination with contaminents in the cell system, spillage, and absorption in the sodium hydroxide solution. The process thus necessitates a more or less continuous, day to day, replacement of the lost mercury.

"16. Appellant's manufacturing system, as described, requires a level of 70,000 pounds of mercury, approximately, at all times. Of this amount, approximately 5,000 pounds are replaced each year, to replace the loss which occurs as described.

"17. In whatever manner the loss of the mercury occurs, as above described, such loss as to each atom or molecule of the mercury occurs instantaneously.

"18. The Appellant contends that under the exclusion of section 2, of the Sales Act, the mercury purchased by it for use in the process herein described is not taxable. The Appellee contends that the provisions of section 2 of the sales act do not exclude the item from the coverage of the sales and use tax for the reason that 70,000 pounds of mercury was in use in the process hereinbefore described at the beginning of the period of the assessment, and at the end of a year there was still 70,000 pounds of mercury in the trays, the loss, if any, was a day-to-day replacement as described in paragraph 15 of this Agreed Statement of Facts, and the quantity 'consumed or destroyed' would be only a percentage of any mercury purchased, and the exemption in section 2 of the Act granted in paragraph 4 of this statement of facts does not pertain to the procurement of raw materials that does not lose its identity within a year in the manufacture of tangible personal property.

"19. It is intended hereby to submit the issue of taxability to the Court, upon the foregoing facts. If the mercury is subject to tax this appeal shall be dismissed. If not subject to tax, this appeal shall be sustained, and Appellant shall be given credit on its account for the sum of $841.00."

From the foregoing facts it becomes manifest that for this case warrant for any exclusion from the use tax of the mercury purchased must derive from either consumption or destruction or loss in identity of such mercury in the round of manufacture of tangible personal property for later sale. R. S., c. 17, § 2, as amended. Concededly the mercury does not become an ingredient or component part of the manufactured products of the appellant. Reduction in the mass of the appellant's mercury resulting from its use in the manufacturing process must be ascribed to evaporation, chemical combination with contaminants, spillage and flushing away with the sodium hydroxide solution.

In the machinery for converting raw material into paper mercury is constantly maintained by the appellant. 7% by weight of all the mercury thus utilized is lost in the process during a calendar year. That percentage is continuously being "consumed or destroyed - - - in the manufacture of tangible personal property - - -" Consumption or destruction as the terms are employed in R. S., c. 17, § 2; P. L., 1955, c. 144, connotes a loss of matter for practical purposes rather than annihilation.

Presumably to provide operating volume, level or pressure and as a necessary constant in its fabrication technique appellant perpetuates a reservoir of 35 tons of mercury in machine trays replenishing it continually, day by day with additional mercury to replace what becomes dissipated. It cannot be reliably or objectively demonstrated that decreases from loss as they occur are from that quicksilver which has been in the trays for some measured period of time or from additions latterly made. Mercury is continuously added to mercury and the increments are undistinguishably and legitimately commingled and confused with the residue of mercury previously in the trays. The very circumstances here do not permit of our pursuing any particular atom or molecule of mercury through the cycle of the milling process of the appellant and of our knowing its loss or survival. We cannot follow an atomic res, so to speak. As the liquid metal completes each circuit of function there is an unvarying experience of a diminishing return both in volume and in weight. The shrinkage is a daily recurrence and the loss by weight is demonstrable at a fixed 7% or 2½ tons during the span of 1 year. That is the practicality of the situation. If no fresh mercury were so added and adequate flowage could meanwhile be sustained the entire 35 ton aggregate would undergo a progressive diminution, become wholly expended and entirely vanish in 14 years. The equable, unvarying loss of mercury and a com-

plete impossibility of divining from what particles of the mass the waste is suffered permit of only one sensible conception. All mercury purchased for use by the appellant and added to its trays is destined for eventual consumption protracted through 14 years. Such a view is pragmatic and eliminates all abstract speculation.

Much of the perplexity of the instant difficulty has been occasioned by thinking in the term of 1 year and by an insistence that consumption or destruction of the mercury must occur within the abbreviated time of 1 year if the mercury is to merit non-taxability. To execute the provisions of R. S., c. 17 the appellee issued a regulation, R. S., c. 17, § 23, as follows:

> "Tangible personal property which is purchased for use in the manufacture of tangible personal property for later sale, and which has a normal life expectancy of less than one year in the use to which it is applied, will be considered as 'expendable' or as 'consumed or destroyed' within the meaning of the law. The question of whether items are 'consumed or destroyed' must be answered on the basis of the experience of the particular taxpayer making use of them.
>
> "The life expectancy spoken of is physical life expectancy as a usable item. Obsolescence does not enter into the matter. That is to say, an article with a physical life expectancy of well over a year might become obsolete within a few months. Nevertheless, it would not be considered as 'consumed or destroyed' within the meaning of the statute."

R. S., c. 17, as amended, contains no delimitations or fixation of the life expectancy of the tangible personal property in excess of which such property becomes ineligible for exclusion from the use tax.

The Assessor rests the sanction for his regulation quoted above upon the authority of two decisions of this court interpreting R. S., c. 17, *viz.:*

Hudson Pulp and Paper Corporation v. *Johnson* (1952), 147 Me. 444

Androscoggin Foundry Co. v. *Johnson* (1952), 147 Me. 452

In *Hudson Pulp and Paper Corporation* v. *Johnson, supra,* it is said:

> "- - - The assessor by regulation can neither make that which is non-taxable under the Act taxable, nor can he render that which is taxable under the Act non-taxable. It is the Act, not the assessor's regulations which determines taxability." (P. 448.)
>
> "- - - 'We are not charged with responsibility for the economic and social effects of taxation.' - - - If a change in the incidence of the tax is desired either for economic reasons or to simplify the administration of the Act, such change must come from the legislature. It cannot be effected by rule or regulation of the assessor, nor can it be brought about by a decision of this court." (P. 451.)

The court in the *Hudson Pulp and Paper Corporation* case had for its consideration the taxability of certain personal property —

> "- - - rendered useless after varying but relatively short periods of use; the wires having a life of one to four weeks, the wet felts six to ten days and the dry felts up to five months. After these periods the felts and wires become of no use in the paper-making business." (P. 446.)

The court in that case, no doubt, found its problem easier of solution because of the short-lived exhaustibility of the articles consumed but cannot be said to have represented that circumstantial fact of so brisk a consumption as decisive of its judgment of non-taxability.

Again, in *Androscoggin Foundry Co.* v. *Johnson, supra,* we find:

> "- - - No useful purpose would be served by a discussion of the specific use and length of life of *molding sand, refractories, fire clay, steel shot and grit, crucibles and snagging wheels.* All of these articles of tangible personal property are expendibles and have a relatively short use life in the foundry business. As all of these items of property will be consumed or destroyed in the manufacture of personal property for later sale by the purchaser, the purchase of none of these articles is a purchase at 'retail sale' within the meaning of the Act as interpreted by us in the *Hudson Pulp and Paper Corporation* case, supra. The appellant is not subject to a use tax with respect to any of these items. None of them were taxable within the meaning of the stipulation and the use taxes assessed with respect to their purchase must be abated." (P. 454.)

Again we detect no express or implied determination of the court that abbreviated time of consumption is a *sine qua non* of non-taxability. The court only accentuated the short use life of the materials considered as magnifying the rectitude of its specific decision.

The intention of the legislature as expressed in R. S., c. 17 categorically excludes the mercury as the appellant utilizes it from taxability as to the use tax and does so without the imposition of any reservation.

> "The fundamental rule of statutory construction is to ascertain and carry out the legislative intent. The language of the statute is 'the vehicle best calculated to express the intention' but the court will 'look at the object in view.' - -"
>
> *Acheson* v. *Johnson* (1952), 147 Me. 275, 280.

The mercury in so far as its extinction in the fabrication process is determinable by any practical theory has an endurance of 14 years. Comparably it may thus be made to appear as tangible personal property exceedingly long-lived under usage. Yet the mercury is used unceasingly with the

same steadfast daily loss. It occasions a tax problem which due to the graduated properties and varieties of substances and chattels affords us few absolute castes in classification but necessitates a relating of the varying degrees of expendability amongst industrial items. Plainly, however, the mercury has sufficient characteristics in common with the personal property adjudged non-taxable by the *Hudson Pulp and Paper Company* and *Androscoggin Foundry Co.* cases, *supra,* to group itself with such expendables in contradistinction to the factory machines and tanks, etc. Its status is analogous to that of lubricating grease rather than to that of the engine itself. Such being so the Legislature has fixed no time limits as a test or norm of expendability or durability.

The effects of our conclusion upon the incidence of the tax or its administration are not for us to weigh.

> "Our duties are judicial in nature. We must guard against trespassing upon the fields of the legislative and executive branches of government. We are not charged with responsibility for the economic and social effects of taxation. Our task is to ascertain and to give effect to the intention of the legislature."
>
> *Coca-Cola Bottling Plants, Inc.* v. *Johnson* (1952), 147 Me. 327, 332.

The regulation of the Assessor for administrative purposes prescribes a life expectancy stricture which has the virtue of being definite. Some containment of the life expectancy of excludable, usable items for clarity in the law may well be highly desirable if not necessary but it is an enlargement and positive addition to the statute. Let us suppose that as was a fact in *Hudson Pulp and Paper Company* v. *Johnson, supra,* P. 446, a dry felt now in industrial function has a present use life of five months but that a manufacturer should succeed in producing commercially one

which normally survives two years of usage. Would the improved article thereby forfeit its exclusion from the use tax? What time limit can there be? The Legislature has afforded us none and only the Legislature can constitutionally fill the void resulting from such an omission.

In our opinion the appellant has sustained its burden of proving that its transaction in purchasing the mercury is not taxable. R. S., c. 17, § 9.

The entry must be:

Appeal to Superior Court sustained. Judgment for appellant for $841.00 without costs.

Tax abated to that amount.

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

STATE OF MAINE
vs.
FRED OSBORNE

Aroostook. Opinion, November 2, 1959.

Criminal Law. Indictment.

If the meaning of an indictment is clear, the verbal, grammatical, clerical, or orthographical errors are not fatal.

ON EXCEPTIONS.

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

Ferris A. Freme, for plaintiff.

Bishop & Stevens, for defendant.

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

WEBBER, J. In this case the respondent seeks to test by demurrer the wording of a criminal complaint. The issue is raised by exceptions to the overruling of the demurrer by the justice below. The pertinent portion of the complaint reads as follows:

> "Theodore Grindle of Fort Fairfield in the said County of Aroostook, on the 15th day of September, A. D. 1958 in behalf of said State, on oath complains that Fred Osborne of Fort Fairfield, in the County of Aroostook and State of Maine, on the 9th day of September, A.D. 1958, at Fort Fairfield, in the County of Aroostook and State of Maine, did operate a motor vehicle, to wit, a pick-up truck, upon a public way, to wit, Houlton Road, Route 1#A, in said Fort Fairfield, *while under the*

> *influence of intoxicating liquor, . . .*" (Emphasis supplied.)

The respondent contends that the use of the italicized adverbial phrase renders the complaint so uncertain and unprecise as not to inform him adequately of the nature and cause of the accusation. His argument is that the complaint is fatally defective in not employing these words or their equivalent: "while he, the said Fred Osborne, was then and there under the influence of intoxicating liquor." We see no merit whatever in the respondent's contention.

This complaint must be read in the spirit described by the court in *State* v. *LaFlamme,* 116 Me. 41 at 43 wherein it is stated:

> "That rule is this, that if the meaning of an indictment is clear so that the accused is thereby informed of the precise charge which he is called upon to meet, verbal inaccuracies, grammatical, clerical or orthographical errors, which are explained and corrected by necessary intendment from other parts of the indictment, are not fatal.
>
> * * * 'Before an objection, because of false grammar, incorrect spelling or mere clerical errors, is established, the court should be satisfied of the tendency of the error to mislead or to leave in doubt as to the meaning, a person of common understanding, reading not for the purpose of finding defects but to ascertain what is intended to be charged.' *Grant* v. *State,* 55 Ala. 201. In other words there is no reason why the judicial eye should be blind to what the personal eye sees with distinctness."

Does this complaint have any tendency to mislead a respondent who is not merely hunting for technical niceties but has a real purpose "to ascertain what is intended to be charged?" Obviously not.

The word "while" as here used clearly means "at the same time that" and the phrase it introduces modifies the

verb "operate." It is transparently obvious that the meaning to be conveyed is that at the time the respondent operated the motor vehicle, something or somebody, already referred to in the narrative portion of the complaint, was under the influence of intoxicating liquor. Eliminating ridiculous and frivolous possibilities as to the identity of this "something or somebody" it is immediately apparent to a "person of common understanding" that the intended reference is to the named respondent. In short, the complaint as written conveys exactly the same meaning to the ordinary reader as it would have done if the adverbial phrase had merely been transposed to another location and the complaint had read, in part: "* * * that Fred Osborne of Fort Fairfield, in the County of Aroostook and State of Maine, on the 9th day of September A.D. 1958, while under the influence of intoxicating liquor, at Fort Fairfield, in the County of Aroostook and State of Maine, did operate a motor vehicle, to wit, a pickup truck, upon a public way, to wit, Houlton Road, Route 1#A, in said Fort Fairfield * * *."

Whether this demurrer was seriously intended to do more than to delay a trial upon the merits, we cannot say. In any event it was properly overruled.

Exceptions overruled.

STATE OF MAINE
vs.
ROBERT H. MOTTRAM

Cumberland. Opinion, November 3, 1959.

Criminal Law. Larceny.
Evidence. Admissions. Appeal.
Indictment. Amendments. Times. R. S., 1954, Chap. 145, Sec. 14.

The general rule is, that all a party has said, which is relevant to the question involved, is admissible in evidence against him. Accordingly, it was proper for the trial court to permit an officer to testify concerning admissions by the defendant with reference to the alleged stolen automobile.

An appeal from the denial by the trial court of a motion for new trial will be dismissed where the record shows sufficient evidence upon which the jury was justified in returning a verdict of guilty.

An amendment to an indictment which changes the date of an alleged prior conviction from June 15, 1952 to June 17, 1952 is not one of substance within the meaning of R. S., 1954, Chap. 145, Sec. 14, since time was not of the essence of the crime.

Where averment of time concerning a prior conviction is not essential to the identification of the record it is one of form and not of substance.

ON EXCEPTIONS AND APPEAL.

This is a criminal action for larceny alleging prior conviction. The case is before the Law Court upon exceptions and appeal. Exceptions overruled. Appeal dismissed. Motion for new trial denied. Judgment for the State.

Arthur Chapman, Jr.,
Clement B. Richardson, for plaintiff.

Walter Casey, for defendant.

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

TAPLEY, J. On exceptions and appeal. The respondent was convicted of the crime of larceny at the January Term, 1958 of the Superior Court, within and for the County of Cumberland. The indictment upon which he was tried contained two counts, the first count charging the crime of larceny and the second count alleging a former conviction of a felony. The jury in returning its verdict reported a special finding that the State had proven the allegation of prior conviction. The case is before this court on exceptions, seasonably taken and properly perfected, attacking the admission of testimony. A motion for a new trial was filed and, after hearing before the justice below, the motion was denied. Respondent appealed from the denial.

EXCEPTIONS.

Both exceptions relate to the testimony of a State Police Officer and are concerned with the recital by the officer of a conversation he had with the respondent. The first exception has to do with the following testimony:

"Q. In cash?

A. Yes, sir, and that they then went to the Camden National Bank and had a notarized bill of sale made out by Mr. Wadsworth. I think I then questioned Mr. Mottram as to how many cars he had owned in the past two years. He related that he had - - -

MR. HANSCOMB: I object. What does it have to do with this? It is immaterial. What difference does it make? We are concerned with a charge against this man that he stole a certain car.

MR. RICHARDSON: I think the method of transaction and mode of transaction would have some bearing on the present transaction.

THE COURT: I will speak with counsel at the bench, please.

(Bench Conference)

MR. RICHARDSON: Will you read the question, Mrs. Payne?

(The question was read by the Reporter, also the portion of the answer as given)

Q. Why not proceed?

THE COURT: In order to make a ruling we will have to make sure there is a question.

Q. Officer, you have stated you asked Mr. Mottram how many cars he owned in the last year or two?

A. Yes, sir.

Q. Did he tell you?

A. Yes, sir.

MR. HANSCOMB: I object.

THE COURT: Admitted.

MR. HANSCOMB: Exception, please.

THE COURT: Yes.

A. He told me he had owned nine cars in the last two years.

Q. Did you have other conversation about the cars?

A. Yes, sir.

Q. What was the conversation?

A. I asked Mr. Mottram if he had obtained a notarized bill of sale for each of the nine cars he had purchased in the past two years.

Q. What did he say?

A. 'No, sir'.

Q. Did he say if he had for any of the cars he had purchased?

A. No, sir. I further asked him if he had gone to the meticulous manner of going to the bank and having the bill of sale notarized when he purchased a car, and he said 'No'."

The second exception is based on objection to the admission of the testimony contained in the following quotation from the record:

"Q. During the course of the interview did you ask Mr. Mottram if he took the '54 Cadillac to New York State?

A. Yes, sir.

Q. What did he say?

MR. HANSCOMB: I object. It is not material.

THE COURT: Will you read the question, please?

(The question was read by the Reporter)

MR. HANSCOMB: How is it material?

MR. RICHARDSON: It is the vehicle that is charged in this larceny.

MR. HANSCOMB: Mr. Mottram had a bill of sale and was driving a registered vehicle in his own name.

MR. RICHARDSON: This is not the time for argument.

THE COURT: I think I should inquire the purpose of the question.

(Bench Conference)

Q. Sergeant Holdsworth, did you ask this respondent if he drove this 1954 two-tone Cadillac to New York State?

A. Yes, sir; on two different occasions.

Q. Did he tell you when he drove it to New York, if he did?

MR. HANSCOMB: I object.

MR. RICHARDSON: I will rephrase it.

Q. What did he say when you asked if he drove it to New York?

THE COURT: Admitted.

MR. HANSCOMB: Exception, please.

A. I asked him on two different occasions.

Q. Why don't you relate the conversation?

MR. HANSCOMB: I assume my objections and exceptions will go to all this line without my getting up each time.

THE COURT: The record shows your statement.

A. I asked him if he had taken this car to New York State and the first time I asked him he said 'No'. The second time I asked him he said 'Yes'. The reason he said 'No' the first time was that he was not going to get hooked on a federal rap."

The State offered testimony of the State Police Officer for the purpose of presenting for jury consideration a conversation between the officer and the respondent. The conversation pertained to the car that was alleged to have been stolen with the respondent explaining how he came in possession of the automobile. The answers given by the respondent were elicited by questions on the part of the officer. The State attempted to show through statements made by the respondent that of the nine cars he had owned during the last two years the transaction involving the alleged stolen car was the only one in which a bill of sale was notarized.

Objection was made to the admission of some further conversation the respondent had with the officer having reference to the taking of the alleged stolen car to New York State. The respondent's statement to the officer was that he first denied taking the car to New York State but later ad-

mitted doing so. The reason he gave for his denial was that he feared an admission would subject him to a "Federal rap."

The testimony brought to our attention by these exceptions is part of statements made by respondent as a result of inquiries by an investigating officer. These isolated portions, when taken in light of and in conjunction with the rest of the statements made by the respondent, became proper testimony for jury consideration as part of the State's case. "The general rule is, that all a party has said, which is relevant to the question involved, is admissible in evidence against him." *State* v. *Gilman*, 51 Me. 206, at page 223. See 22 C. J. S., Criminal Law, Sec. 730. The relevancy of respondent's statements is apparent.

The presiding justice was not in error in admitting the testimony.

APPEAL

The respondent filed and argued a motion for a new trial which was denied. The motion brings into contention (1) that the evidence was insufficient upon which to base a verdict of guilty; (2) that the presiding justice without right allowed an amendment to the count in the indictment alleging prior conviction; (3) that the State failed to prove the allegation of prior conviction.

It would serve no useful purpose to recite in detail that portion of the record which warranted the factual finding of the jury that respondent was guilty of the larceny of an automobile. A careful review of the record shows sufficient evidence upon which the jury was justified in returning a verdict of guilty. *State* v. *Hudon*, 142 Me. 337. *State* v. *Smith*, 140 Me. 255.

The indictment was returned at the January Term, 1958. On the twenty-sixth day of the term the case was opened

before a drawn jury. Previous to the commencement of the trial, but on the same day, the State presented a motion to amend that portion of the indictment alleging previous conviction. The amendment sought change of date of the prior conviction from the 15th day of June, 1952 to the 17th day of June, 1952. This amendment was allowed by the presiding justice without objection on the part of the respondent. Not only was the amendment allowed without objection but the docket entry reflects the fact that the respondent consented to the amendment.

The allowance of the amendment raises the question as to whether or not the court had the authority to amend the indictment even though the amendment was consented to by the respondent. The Legislature has seen fit to confer upon the court the authority to amend an indictment as to form only. The pertinent part of Sec. 14, Chap. 145, R. S., 1954 reads:

> "- - - - 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."

In order to conform to this statutory authority, the amendment must affect a matter of form and not of substance. The question before us is whether or not the changing of the date in the count in the indictment from the 15th day of June to the 17th day of June is a substantive change or one of form.

> "Amendments to an indictment which in effect change the nature or grade of the offense charged go to the substance of the indictment and cannot be made or ordered by the court. Such amendments would infringe the constitutional right of the accused to a presentment or indictment only by a grand jury; and while the time of the com-

> mission of an offense is ordinarily a matter of form, there are instances in which time becomes a matter of substance, in which event it cannot be made the subject of amendment by the court." 27 Am. Jur., Indictments and Information, Sec. 117, page 677.
>
> "It is the general rule, too, that the courts have the power to authorize amendments correcting erroneous allegations in indictments as to the time of the offense, when time is not of the essence of the crime." 27 Am. Jur., Indictments and Informations, Sec. 118, page 679.

In *State* v. *Bartley,* 92 Me. 422, an allegation of former conviction was attacked by demurrer. The count in general terms alleged that James Bartley had been convicted in the County of Piscataquis as a common seller under the laws for the suppression of drinking houses and tippling shops. The court said on page 426:

> "It must be remembered that the allegation is a material one in charging the commission of the greater offense; — without it the accused could only be convicted and punished for the lesser offense. It is an elementary principle of pleading, both in criminal and civil proceedings, that every traversable material allegation must be laid with some certain time. Here neither the time nor the court nor the term of court of the alleged former conviction is stated. The allegation is material, it is traversable and raises an issue of fact to be determined by a jury if denied by the respondent. In such a case he should be apprised of the time when, as claimed, he had been convicted of another violation of the same statute. The objection is not merely technical nor fanciful. One important issue raised by this allegation is as to the identity of the accused with the person who had been previously convicted, in any case a prosecuting attorney might make a mistake upon this matter of identity; and the accused should be enabled, by an allegation of time, to prepare his defense by showing that he

was not the person named in the record of the previous conviction."

"- - - - the averment of time is altogether formal, unless the time itself be a legal constituent of the offense - - - - and time is not of the essence of the offense except in cases where an act may be innocent if done at one time, but criminal if done at another." *State* v. *Calabrese,* 124 A. 54 (N. J.), at page 55.

Allegation of time is ordinarily a matter of form but under some circumstances it becomes substance. For example, when a date is changed, substituting two dates for the one and thereby charging the respondent with two crimes instead of one, or when the changing of a date creates an offense when the date before being changed does not, then the allegation of time takes on the quality of substance. See 68 A. L. R. Anno., page 936.

" 'Substance' is that which is essential to the making of a valid charge of crime. If the amendment is such that it is not essential to the charging of a crime, then it is not one of substance but one of form." *Souerdike* v. *State,* 102 N. E. (2nd) 367, at page 368 (Ind.).

Under the circumstances of this case, the rule could be stated in this manner: If the averment of date is not essential to the identification of the record of prior conviction, then it is not one of substance but one of form.

The count of prior conviction must, by allegation, notify the respondent that he is charged with a previous conviction of a felony and sentenced thereon to a State Prison. In order to properly prepare his defense, he is entitled to that degree of strictness in description of the record that will inform him of the particular record to be used as evidence.

The indictment in the instant case, as originally drafted, informs the respondent that he,

> "was convicted of a felony in the State of Maine, to wit: on the 15th day of June in the year of our Lord one thousand nine hundred and fifty-two, at the Superior Court in the County of Androscoggin and State of Maine, he was convicted of the crime of larceny of an Automobile of the value of over One Hundred Dollars and was sentenced by the Honorable Arthur Sewall, Justice of the Superior Court, to serve a term of not less than one year nor more than two years in the Maine State Prison, and in pursuance of said sentence was committed to the said Maine State Prison;"

Disregarding for the moment the day of the month as alleged, the respondent from the language of the count must certainly be aware that he was charged (1) with the prior conviction of a felony in the State of Maine; (2) that the conviction occurred in the month of June, 1952 in the Superior Court in the County of Androscoggin and State of Maine; (3) that he was convicted of the crime of larceny of an automobile and was sentenced by a Judge of the Superior Court, to wit, Honorable Arthur Sewall for a term of not less than one year nor more than two years in the Maine State Prison; (4) and that he was committed to State Prison on this sentence. In light of all other identifying information contained in the count, the averment of an exact day of the month is not essential. In view of the detailed information given to the respondent, can it be said that he is misled in the preparation of his defense or that he is not sufficiently informed of what former conviction is referred to? Under these circumstances can it reasonably be determined that the changing of the 15th day to the 17th day of June be anything more than a change in form? We think not. The provisions of Sec. 14, Chap. 145, R. S., 1954 apply and under its authority the presiding justice was not in error in allowing the amendment.

It is to be noted that the question of the allowance of the amendment should have been presented to this court on exceptions and not by appeal. Appeal is not the proper method of review. We feel that although the question is not technically before us, justice requires that we depart from the basic rule and give consideration to the respondent's complaint in order to be sure that the allowance of the amendment did no violence to his right and that he suffered no prejudice thereby. *State* v. *Smith,* 140 Me. 255.

We now consider the adequacy of proof of the allegation of prior conviction. The record in substance discloses that the Clerk of Courts for the County of Androscoggin, by reference to the Superior Court docket for that county, testified that one Robert H. Mottram was convicted of the crime of grand larceny on June 17, 1952 and that on the same day he was sentenced to serve 1 to 2 years in the State Prison. Testimony of the Chief Deputy of Androscoggin County evidences that he was acquainted with Robert H. Mottram and that he was present in the Androscoggin Superior Court on June 17, 1952 when Mr. Mottram was convicted and sentenced for the crime of grand larceny.

The statute providing for additional or enhanced punishment is Sec. 3, Chap. 149, R. S., 1954, and reads as follows:

> "When a person is convicted of a crime punishable by imprisonment in the state prison, and it is alleged in the indictment and proved or admitted on trial, that he had been before convicted and sentenced to any state prison by any court of this state, or of any other state, or of the United States, whether pardoned therefor or not, he may be punished by imprisonment in the state prison for any term of years."

The second count of the indictment is based on Sec. 3. It has nothing to do nor is it concerned with the crime charged in the indictment excepting that if the jury finds as a fact

that the State has proven the allegations under this prior conviction count the court may punish the respondent by sentence of any number of years in the State Prison, providing, of course, he is convicted of the offense charged in the indictment. The jury made a special finding under this count that the respondent had been previously convicted. The respondent argues that the jury erred in its finding because there was insufficient evidence presented to it upon which it could base its finding. The State had the burden of proving beyond a reasonable doubt that Robert H. Mottram was on the seventeenth day of June, 1952 in the Superior Court, within and for the County of Androscoggin, convicted of the crime of grand larceny and sentenced to the Maine State Prison for not less than one nor more than two years. Contention is that the State has failed to prove that Robert H. Mottram was the same Robert H. Mottram who was convicted in June of 1952. In other words, the question of the sufficiency of proof of identity is brought in issue.

There are two distinct lines of authority regarding the effect to be given to identity of persons in proving allegations of prior conviction. One is that identity of name of respondent and the person previously convicted is prima facie evidence of identity and in the absence of rebutting testimony supports a finding of identity of person. The other line of cases holds that identity of name is insufficient. There must not only be proof of identity of name but of person. The jurisdiction of Maine has accepted, with approval, the latter authority. *State* v. *Beaudoin*, 131 Me. 31 at page 34:

> "In State v. Livermore, 59 Mont., 362, 196 Pac., 977, it was held that there must be proof of a former conviction on a charge of second or subsequent offense and the proof must be beyond a reasonable doubt. To the same effect are People v. Price, 6 N. Y. Crim. Rep. 141, 2 N. Y. Supp., 414;

State v. Barnhardt, 194 N. C., 622.; 40 S. E., 435; Byler v. State (1927 Ohio App.), 157 N. E., 421; Thurpin v. Com., 147 Va., 709, 137 S. E., 528.

> "It is not sufficient to merely introduce the record of the conviction of a person bearing the same name as defendant. The identity of the person named in the record and the prisoner must be shown."

In considering proof of prior conviction, our court in *State* v. *Lashus*, 79 Me. 504, on page 506, said:

> "It may be true that so far as the sufficiency and legal effect of the record are involved, a question of law only is presented. But the identity of the defendant on trial, with the person named in the record, is a question of fact. The identity of name is some evidence of identity of person, more or less potent, according to the connecting circumstances, but it is not, certainly in this case, sufficiently conclusive to authorize the court to take it from the jury and treat it as a question of law."

24 C. J. S., Criminal Law, Sec. 1968, on page 1165:

> "The identity of accused as the person formerly convicted must be established beyond a reasonable doubt. While the identity of name is some evidence of the identity of a person, and may in some cases be sufficient to establish such identity, according to the weight of authority, where the state desires to impose a more severe penalty on account of accused having been convicted previously, identity of name is not sufficient to establish the identity of accused with that of the one previously convicted; it must be supplemented by other proof."

Reference is made to 58 A. L. R., page 20; 82 A. L. R., page 372, and 85 A. L. R., page 1104.

The State on the issue of prior conviction presented testimony based on an official record of the Superior Court that

one Robert H. Mottram had been previously sentenced and committed to the Maine State Prison for the crime of grand larceny. It further offered the testimony of a chief deputy of the County of Androscoggin who said he knew Robert H. Mottram; that he was in the courtroom when Mr. Mottram was sentenced and that the Robert H. Mottram concerned in these proceedings was the same person as was previously convicted in Androscoggin County as alleged in the second count of the indictment. This was in substance the evidence on which the jury could and did find that the respondent had been previously convicted. The special finding of prior conviction was justified by the evidence. The presiding justice was exceedingly careful and painstaking in charging the jury as to the law in reference to the count charging prior conviction, thereby giving to the respondent full and complete recognition of his legal rights.

Exceptions overruled.

Appeal dismissed.

Motion for new trial denied.

Judgment for the State.

FLORENCE M. SWASEY ET AL.
vs.
CLARK D. CHAPMAN, CO-EXECUTOR ET AL.

Cumberland. Opinion, November 13, 1959.

Wills. Executors and Administrators. Trusts. Income. Massachusetts Rule. P. L., 1957, Chap. 183, Federal Income Tax.

The controlling rule in the construction of a will is that the intention of the testator *expressed in the will*, if consistent with the rules of law, governs.

In the provisions of a testamentary trust directing the trustees to pay "the entire net income from said trust estate to my wife . . . monthly from the date of my death . . .," the words "net income" mean total or gross income from all sources including specifically income from property which has been used in the payment of debts, legacies and expenses, less proper charges against income.

The income arising in the administration of an estate and not otherwise disposed of passes with the residue.

In the treatment of property used in the payment of estate obligations, the Massachusetts rule regards the residue as being formed at the death of the testator and the property so used is carved therefrom with income being income of the residue. Restatement, Trusts 2nd Sec. 234 (1959).

R. S., 1954, Chap. 160, Sec. 34 as amended by P. L., 1957, Chap. 183 which enacted in substance the Massachusetts rule did not alter the existing law but rather codified it.

The beneficiary of income from a trust ordinarily must bear the burden of federal income taxation and in the absence of a clear intent to the contrary the tax must rest where it falls under federal law.

Stock dividends and stock rights are considered principal under the general rule. Restatement Trusts 2nd Sec. 236.

A court of equity has jurisdiction to interfere and give directions to trustees to the end that the trust be properly carried out. Restatement, Trusts 2nd Sec. 187.

ON REPORT.

This is a bill in equity for construction of a will. The case is before the Law Court upon report and legally admissible evidence. Case remanded for a decree in accordance with this opinion. The costs and expenses of the parties including reasonable counsel fees to be fixed by the sitting justice after hearing and paid out of the principal of the estate by the executors or trustees as may be ordered.

John E. Willey,
J. Fulton Redman,
Ernest L. Goodspeed,
Nathan W. Thompson, for plaintiff.

Robert P. Smith,
Perkins, Weeks & Hutchins,
for Imperial Council, etc.
and for Good Will Home Assn.

Hutchinson, Pierce, Atwood & Allen,
for Clark D. Chapman.

Drummond & Drummond and William B. Mahoney,
for First Portland National Bank.

William H. Payne, Jr., for defendant.

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

WILLIAMSON, C. J. On report. This is a bill in equity for the construction of the will of Perley A. Swasey. The case was heard on bill as amended, answers, replication and proof, and was reported upon so much of the evidence as is legally admissible. The complainants are Florence A. Swasey, widow of the testator, a beneficiary and co-executor under the will, and Perley A. Swasey, Jr., the only son of the

testator and a beneficiary. The respondents are: Clark D. Chapman, co-executor under the will, Good Will Home Association and The Imperial Council of the Ancient Arabic Order of the Nobles of the Mystic Shrine for North America, beneficiaries, sometimes called "the charities," and the First Portland National Bank and William H. Payne, Jr., co-trustees under the will. All parties interested in the estate are before the court.

The will was executed May 24, 1945. The testator died April 28, 1956, and the will was allowed in Cumberland Probate Court on May 15, 1956. The testator was survived by his wife and his only son Perley, Jr. At the time the will was executed the son was about 28 years of age and was then and is now a helpless invalid.

The gross estate was originally inventoried at approximately $1,400,000. The record does not disclose the division of assets between real estate and other property given to Mrs. Swasey and the residue. We may safely assume, however, that the bulk of the estate passes with the residue. Hence the construction and interpretation of the will are of substantial and immediate importance in the administration of the estate and to the beneficiaries.

Mr. Chapman, co-executor, who properly takes no position with respect to the contentions of the parties, points out "the very great practical importance to the orderly and economical conclusion of the executorship of this estate if this court, . . render a definitive decision as to the various questions which are presented by the parties interested." In particular, the co-executor notes the importance of an early decision on the issues relating to disposition of income received by the executors and to the asserted right of invasion of the corpus for benefit of the son with its possible effect upon the federal estate tax.

There are sound reasons for deciding these and certain other issues raised herein at the present time. *Fiduciary Trust Co.* v. *Brown,* et al., 152 Me. 360, 131 A. (2nd) 191; *Gannett, et al.* v. *Old Colony Trust Co.,* 155 Me. 248, 153 A. (2nd) 122.

"The controlling rule in the construction of a will is that the intention of the testator *expressed in the will,* if consistent with rules of law, governs." Chief Justice Fellows, in these apt words, stated the principle controlling in the instant case. *New England Trust Co., et al.* v. *Sanger et al.,* 151 Me. 295, 301, 118 A. (2nd) 760, and cases cited. Recent illustrative cases are *Swan* v. *Swan et al.,* 154 Me. 276, 147 A. (2nd) 140; *Jordan et al.* v. *Jordan et al.,* 155 Me. 5, 150 A. (2nd) 763.

We find the intention of the testator plainly expressed in the will. There is therefore no need to consider other evidence taken at the hearing upon testator's intent.

The pertinent parts of the will read:

> "After the payment of my just debts, funeral charges and expenses of administration, I dispose of my estate, as follows:
>
> "First:—If my wife, Florence M. Swasey, and my son, Perley A. Swasey, Jr., shall both survive me, or if my wife, said Florence M. Swasey, shall survive me, and my said son, Perley A. Swasey, Jr., shall not survive me, I dispose of my estate as follows:—
>
> "A. In either of such events, I give and devise to my said wife, Florence M. Swasey, all real estate which I shall own at the time of my decease, including but not limited to my home and the surrounding parcels of land in said Falmouth, and lots or parcels of land in Portland, in said County of Cumberland, to have and to hold to her and her heirs and assigns forever.

"B. In either of such events, I give and bequeath to my said wife, Florence M. Swasey, all household furniture, furnishings, equipment and supplies, all automobiles, personal ornaments, jewelry and all other goods and chattels, excepting money, which I shall own at the time of my decease.

"C. In either of such events, I also give and bequeath to my said wife, Florence M. Swasey, the sum of one hundred thousand dollars ($100,000.00).

"D. In either of such events, I direct that all inheritance or succession taxes on the devise and bequests to my said wife contained in subparagraphs A, B and C of this first section of my will shall be paid from the residue of my estate.

"E. In either of such events, I give and bequeath all of the rest, residue and remainder of my estate, of every name, nature and description, wherever found and however situated, and however and whenever acquired by me, to my Trustees hereinafter named, and their successors in trust, for the following uses and purposes:—

"(1) I direct that said Trustees shall pay the entire net income from said trust estate to my said wife, Florence M. Swasey, monthly from the date of my death or at such other times as my said wife and said Trustees shall agree, for and during the term of her natural life. I further direct that at the end of any year of the continuance of this trust from the date of my death that the aggregate net income so paid to my said wife shall not amount to the sum of at least thirty thousand dollars, a sufficient additional amount be paid to her from the principal of said trust estate, so that the aggregate payments for said year shall amount to said sum of thirty thousand dollars, unless my said wife shall in writing waive the payment of all or any part of such payment herein directed to be made to her from the principal of said trust estate.

"(2) In directing that all of said net income and such additional amounts as may be necessary to complete the payment of the sum of not less than thirty thousand dollars be paid to my said wife in each year, I am not unmindful of my said son, Perley A. Swasey, Jr. I make no provision for him during the lifetime of my said wife and I create no legal obligation that she shall so do, because I have every confidence that my said wife will in her own discretion and according to her own wishes adequately care for our said son.

"(3) If my said wife and son shall both survive me and if my said son shall survive my said wife, I direct that said Trustees shall from and after the death of my said wife expend such portions of the net income of said trust estate as they in their sole and absolute discretion shall deem to be for the welfare and benefit of my said son, Perley A. Swasey, Jr., during the term of his natural life, and that upon his death said Trustees shall pay the expenses of his last sickness and funeral, including a suitable gravestone for him. I place no limitation whatever upon the amount of net income that my said Trustees may in their sole and absolute discretion so expend for the support, maintenance, comfort, welfare, benefit and enjoyment of my said son. His physical condition will undoubtedly require substantial medical expense and constant attendance, all of which my said Trustees are authorized to provide from said net income without limit. My said Trustees may in their sole and absolute discretion maintain my said son in the residence occupied by him at the decease of my said wife or in such other residence as said Trustees and my said son or his guardian or conservator, as the case may be, shall from time to time agree upon and employ adequate help for the care and maintenance of said residence and for proper attendants for my said son from said net income, all without limit. My Trustees may also, in their sole and absolute discretion pay such sums at such times as they shall determine to my said son, or if

a guardian or conservator shall be appointed for my said son, said Trustees may pay such sums at such times as they shall determine to such guardian or conservator for the welfare and benefit of my said son. The interest of my said son hereunder shall not be anticipated, alienated or in any other manner assigned by him, and shall not be subject to any legal process, bankruptcy proceedings or the interference or control of creditors or otherwise.

"(4) Upon the death of the last survivor of my said wife, Florence M. Swasey, and my said son, Perley A. Swasey, Jr., I give, bequeath and devise all of said trust estate which shall then remain, real, personal and mixed, wherever/found and however situated, both principal and unexpended income, and I direct my Trustees to transfer, convey and deliver the same as follows:—

"(a) Two-thirds thereof to The Imperial Council of the Ancient Arabic Order of the Nobles of the Mystic Shrine for North America, a Colorado corporation, . . for the benefit of the Springfield Unit, located at Springfield, in the Commonwealth of Massachusetts, of the Shriners Hospitals for Crippled Children. The principal sum of this bequest and devise shall be retained and the net income only used for the benefit of said Springfield Unit of said Shriners Hospitals for Crippled Children, excepting that if the Board of Trustees of said corporation having control of said Shriners Hospitals shall determine to do so, all or part of the principal of said bequest and devise may be used for the construction of additional units of said hospital at said Springfield.

"(b) One-third thereof to Good Will Home Association, at Hinckley, in the County of Somerset and State of Maine. The principal sum of this bequest and devise shall be retained and the net income only used for the benefit of said Good Will Home Association, excepting that, if said Association shall determine to so do, all or part of the

> principal of said bequest and devise may be used for the construction of additional units of Good Will Home."

There are identical provisions for the son and the charities in the second section of the will in the event his wife did not survive the testator, and identical provisions for the charities in the third section in the event neither the son nor the wife survived him. In the remaining sections are provisions relating to the executors and trustees.

We turn to the issues raised in the bill. All references herein to the will, unless otherwise noted, will be to the first section, *supra*.

I. *Income during administration.*

Is the widow entitled to the entire gross income from the estate during the period of administration, unimpaired? If not, to what income is she entitled?

In our opinion under E (1) the widow is entitled to the entire net income of the total estate from the death of the testator. We are not at this point concerned with the invasion of principal to meet required annual payments of $30,000 to the widow. By "net income" we mean the total or gross income from all sources including specifically income from property which has been used to pay debts, legacies and expenses, less all proper charges against income.

The income arising in the administration of the estate and not otherwise disposed of passes without question with the residue. Under the plain terms of the will, the widow is entitled to the net income from the residue from the death of the testator. The principle has long been established that in the absence of intention otherwise expressed in the will the beneficiary is entitled to income from date of the testator's death. See *Blair* v. *Blair*, 122 Me. 500, 122 A. 902; *Trust Co.* v. *Dudley*, 104 Me. 297, 72 A. 166; *Weld* v. *Putnam*, 70 Me. 209.

The real point in issue is whether that proportion of the net income derived from property subsequently used in payment of debts, legacies and expenses shall be considered income for the life beneficiary (the Massachusetts rule), or added to the principal of the residue (the New York rule).

In 1957 our Legislature enacted in substance the Massachusetts rule, "unless otherwise expressly provided by the will of a testator dying after the effective date of this act." R. S., c. 160, § 34 as amended by P. L., 1957, c. 183. Mr. Swasey died in 1956 and accordingly the act does not control the present case. We must determine the applicable rule without the benefit of the statute.

The difference in the rules arises from the treatment of the property used in payment of obligations of the estate, as stated above. Under the Massachusetts rule, the residue is formed at the death of the testator and the property so used is carved therefrom. The income is therefore income of the residue. Under the New York rule, such property is not considered to have been part of the residue. New York by statute has adopted in substance the Massachusetts rule.

We are satisfied that the Massachusetts or "income to life beneficiary" rule represents the better view. It gives to the beneficiary income to which he unquestionably would have been entitled had not the property from which it was derived been expended in the administration of the estate. Further, as Professor Scott points out, the rule "has the advantage of being simple and easy to apply." 3 Scott on Trusts § 234.4 (2d ed.). See also *Treadwell* v. *Cordis,* 71 Mass. (5 Gray) 341; *Old Colony Trust Co.* v. *Smith,* 266 Mass. 500, 165 N. E. 657; *City Bank Farmers' Trust Co.* v. *Taylor* (R. I.) 163 A. 734 (Mass. rule); *Wachovia Bank & Trust Co.* v. *Jones* (N. C.) 186 S. E. 335, 105 A. L. R. 1189 (Mass. rule); *Williamson* v. *Williamson* (N. Y.) 6 Paige 298; *Proctor* v. *American Security & Trust Co.,* 98 F. (2nd) 599 (U. S. C. A. D. C.) (New York rule).

The most recent statement of the rule which has come to our attention is found in Restatement, Trusts (2nd) § 234 (1959). We quote at length:

> "Except as otherwise provided by the terms of the trust, if property is held in trust to pay the income to a beneficiary for a designated period and thereafter to pay the principal to another beneficiary,
>
> "(a) where the trust is created by will, the former beneficiary is entitled to income from the date of the death of the testator;"
>
> * * * * * * * * *
>
> Comment g: *"Income on property used in paying legacies, debts and expenses.* If the subject matter of the trust is the residue of the testator's estate, income received by the executor during the period of administration, including income derived from property which is subsequently used in paying legacies and discharging debts and expenses of administration, which has not been applied to the payment of interest on such legacies, debts and expenses, is payable to the trustee, and when received by him is payable to the beneficiary entitled to income.
>
> "In some States it has been held that the income from property used in paying legacies, debts and expenses of administration is to be treated as principal. In some of these States this method of allocation has proved unsatisfactory and the rule has been changed by statute."

The question apparently has not arisen in our court. In the *Blair* case, *supra,* the entire net income of the executors appears to have been included within income of the residue from death of the testator. There is no suggestion of an apportionment of such income between income and principal. In the *Weld* case, *supra,* the court cites with approval the *Williamson* case, *supra,* from New York and Massachusetts cases. There is nothing, however, in the case to sug-

gest that our particular problem was under scrutiny. The issue in both *Blair* and *Weld* was whether income commenced at the death of the testator and not what was included within income.

The 1957 statute did not in our view alter the law, but rather codified in substance the existing law.

II. *Income of widow after administration of estate.*

Three questions are raised by the complainants:

(1) Did the testator intend that the entire net income for his widow be diminished by costs of administration?

(2) Did the testator intend that his widow have at least $30,000 annually free from income tax?

(3) Did the testator intend that stock dividends and stock rights be considered principal or income?

(1) We find no intention on the part of the testator to shift the burden of costs of administration normally charged against income from income to principal. There is nothing to suggest, as we read the will, that the testator sought to alter the effect of rules generally applicable in the administration of trusts. The Probate Court will necessarily from time to time pass upon the proper allocation of expenditures by the trustees between income and principal. We do no more than determine that under the will the net income to which the widow is entitled is the total income of the trust less all expenses properly chargeable against income.

(2) The beneficiary of income from a trust ordinarily must bear the burden of the federal income tax. It is the income of the beneficiary that is so taxed, not the income of the trust. The widow urges that the general rule is not here applicable, and that the testator's intention as expressed in his will places the tax upon the principal of the

trust. We do not agree with this position. We find nothing in the will to indicate any intention on the part of the testator to change the ordinary impact of the federal income tax. Had he intended in some manner, which we need not explore, to shift the burden to the principal of the trust, surely he would have expressed his intention in apt words. The income tax must rest where it falls under federal law.

(3) On the allocation of stock dividends and stock rights between income and principal, we find no intention on the part of the testator to alter the application of the general rules, namely, that they are considered principal. *Thatcher* v. *Thatcher,* 117 Me. 331, 104 A. 515; *Harris* v. *Moses,* 117 Me. 391, 104 A. 703; 3 Scott on Trusts 2d ed. §§ 236.7, 236.9; Restatement, Trusts 2d § 236.

As in our discussion of costs of administration, we do not here determine the result in any given situation. There may of course be facts surrounding a given stock dividend or stock right which would change the allocation between income and principal. In short, what we are here saying is that there is nothing in the will to alter the operation of applicable general rules. See *Moore et al.* v. *Emery et al.,* 137 Me. 259, 268, 18 A. (2nd) 781.

III. *The widow's estate.*

The widow contends (1) that she is entitled to the custody and management of the corpus of the trust estate during her life, and (2) that she is entitled to an absolute estate in the residue. The will, as we read it, plainly does not give an interest or estate of such wide extent to the widow. The residue of the estate is given and bequeathed to trustees.

In the fourth section of the will, the testator named and appointed a bank and an individual as trustees. He directed that the "trust or trusts . . . be at all times administered by

two Trustees, one of whom shall be a corporation and the other of whom shall be an individual." The testator proceeded in the fifth section to give to his trustees "not in limitation of the ordinary powers of trusteeship but in addition thereto, the following powers:—" relating to the management of the trusts. In particular, he urged the trustees to hold shares of The Warner & Swasey Company and American Telephone and Telegraph Company "without creating any legal obligation to so do."

The first beneficiary of the trust under E (1) is the widow to whom the trustees are directed to "pay the entire net income from said trust estate" during her life. To this point surely the widow gained no more than a life interest in the income.

There follows the direction for invasion of the principal (unless waived by the widow) to meet the required aggregate payment to the widow of at least $30,000 annually. The testator thus created a "floor" of $30,000 on the cash his widow should be entitled to receive each year, first from income and the balance from principal. The testator chose, as he had the power to choose, to place a limit, namely $30,000 less net income, on the right of the trustees to draw on the principal for payment to the widow. To this point we find the widow was given the net income for life plus a limited right to invade the principal. This is the extent of her interest in the trust property.

In E (2) the testator explained the reason for making no provision for his son during his widow's life. The gift under E (1) was made with his son in mind and with "every confidence that my said wife will in her own discretion and according to her own wishes adequately care for our said son." The widow gains nothing from E (2).

Upon the death of the widow the provisions for the son during his life come into operation under E (3). On the

death of the widow and son the charities under E (4) take "all of said trust estate which shall then remain . . . both principal and unexpended income."

It is argued that in view of the right to invade the principal (E (1)) and the gift of "all of said trust estate which shall then remain, ." the widow thereby acquired an absolute estate in the property free from trust and free from any interests of the son and the charities. On behalf of the widow it is said that by reason of the right to invade principal under E (1), the entire estate was placed at disposal of the widow. Undoubtedly the entire estate is subject to repeated annual withdrawals, but only to the limited extent stated in the will. The widow may not demand more from the trustees, and the trustees may not give to her more from the estate than the amount required to meet the stated $30,000. Right to draw on principal to a limited extent each year is not the right of disposal of principal generally.

The argument is further made that "which shall then remain" in E (4) also gives to the widow, entitled to the income, the right to unlimited disposal of the principal. Obviously on this theory the provision for the son after his mother's death would have no certainty whatsoever. The situation before us differs widely from the typical gift of a small estate to the widow with whatever remains to the children. In such a case the right to dispose of the principal is recognized in application of the principle that the intent of the testator controls. *Stewart* v. *Stewart,* 148 Me. 421, 94 A. (2nd) 912, heavily relied upon by the widow, presents a like situation within the framework of a trust for use and benefit of testator's son, with "the same or what remains" to his grandson.

In the case at bar we have the carefully drawn trust, the direction to pay net income to the widow, and the right to use principal to a limited extent only. There are the gifts

over, after the widow's life interest, for the benefit of their helpless son during his life. The intent of the testator stands forth in the will in straightforward words and without ambiguity. The widow takes the net income for life with a limited right to draw on principal and no more under Clause E.

IV. *The son's estate.*

As in the case of the other beneficiaries, we are asked to determine what estate, legal or equitable, the son acquired under the will. In the brief of counsel for the widow, the issues are stated substantially in these words: (a) After the death of his mother did the testator intend his crippled helpless son to have an absolute estate? (b) Did the testator intend that the corpus of his estate should be invaded without limit, with limit, or not at all, for the welfare and benefit of his crippled helpless son after the death of the mother?

The interests of the son under the will are found in E (3), which will become operative if and when the son shall survive his mother. The construction of this provision of the will is requested at this time to enable the executors to properly carry out their duties, particularly with respect to the federal estate tax. It is readily understood that this tax is of very substantial consequence to the estate and to the beneficiaries and ought to be determined in the near future.

The issues do not center upon the precise obligations of the trustees in the exercise of their wide discretionary authority in the expenditure of net income for the "support, maintenance, comfort, welfare, benefit and enjoyment of my said son." See *Murray, Appellant,* 142 Me. 24, 45 A. (2nd) 636; *Alford* v. *Richardson,* 120 Me. 316, 114 A. 193. The net income can be spent only for the benefit of the son. Any unexpended income will pass to the charities under E (4). The testator threw about his son the protection of

a prohibition against anticipation or alienation by his own will or in *invitum.*

The courts will be open to direct the trustees and to guard the interest of the son.

> ". . when trustees, who are vested with the exercise of a discretion, fail to properly exercise that discretion either from lack of good faith or because of a misunderstanding of the scope of the trust and their powers and duties therein, a court of equity has jurisdiction to interfere and give directions to the end that the trust may be properly carried out." *Woodward* v. *Dain,* 109 Me. 581, 583, 85 A. 660.

See also Restatement, Trusts (2nd) § 187; 2 Scott on Trusts § 187.2 (2nd ed.).

The chief point in issue is whether the trustees may in the exercise of their discretion invade the corpus of the estate for the welfare and benefit of the invalid son. The argument for invasion hinges upon the meaning of the language quoted below from E (3) and E (4).

> "My Trustees may also, in their sole and absolute discretion pay such sums at such times as they shall determine to my said son, or if a guardian or conservator shall be appointed for my said son, said Trustees may pay such sums at such times as they shall determine to such guardian or conservator for the welfare and benefit of my said son, ." (E (3)).

> ". . I give, bequeath and devise all of said trust estate which shall then remain, real, personal and mixed, wherever/found and however situated, both principal and unexpended income, . ." (E (4)).

In our view the sentence from E (3) relates back to the several provisions on net income. It touches authority in the expenditure of net income, and not authority to draw

on the principal of the trust for the benefit of the son. It may well be convenient for all concerned that the trustees make payments from the net income directly to the son, or to his guardian or conservator, for payment of, let us say, the usual recurring living and household expenses. The provision is designed to relieve the trustees of responsibility in this type of situation. If the testator had intended to reach the result sought in behalf of the son, namely, that the trustees could invade the principal of the trust for his benefit, we may reasonably believe the testator would have so expressed his purpose in apt words.

It is further urged that the gift to the charities in E (4), and in particular the words "which shall then remain," point irresistibly to a right of invasion on the part of the trustees, and also to an absolute estate in the son free from trust. We do not agree with this contention. It is unnecessary to repeat the discussion under "the widow's estate" on this score. The principles stated in *Stewart* v. *Stewart, supra,* are no more applicable here than in the case of the widow.

The interest of the son under his father's will is found within the trust under Clause E, and more particularly under E (3). This interest cannot be extended under E (4). In short, there is a valid trust, with net income plus limited principal for the widow for her life, and thereafter with net income in hands of trustees for benefit of the son for his life, and with the remainder to charities at the end of the life interests.

V. *The estates of the charities.*

Obviously under E (4) the charities take every interest in the residue not taken by or for the benefit of the widow and son. There is no occasion here to consider the particular terms and conditions of the gifts.

We have sought to find and give effect to the intention of the testator expressed in his will. There is in this instance no prohibition of law against carrying out this intention. See *First Portland Nat. Bank, Exr. Applt. et al., In re will of Elinor S. Moody* (August 26, 1959), 154 A. (2nd) 165. It is not our province to pass judgment on the wisdom or lack of wisdom of the testator's disposition of his property.

The will of the testator controls. We must not write a new will for him. These are familiar and well understood principles of law. It is in their application that difficulties so often arise.

The entry will be

> *Case remanded for a decree in accordance with this opinion. The costs and expenses of the parties including reasonable counsel fees to be fixed by the sitting justice after hearing and paid out of the principal of the estate by the executors or trustees as may be ordered.*

BERNICE E. TINKER
vs.
ROBERT M. TREVETT

Penobscot. Opinion, November 17, 1959.

Negligence. Intersection. Stop Signs. Collision. Due Care.

Where the evidence can not justify as a matter of law a finding that the defendant was in the exercise of due care, or that the plaintiff was contributorily negligent, it is error to direct a verdict.

Failure to obey a stop sign is itself evidence of negligence.

A stop sign, such as appears in the instant case, is prima facie lawfully established, R. S., 1954, Chap. 22, Sec. 88.

Skidding alone is not negligence. Failure of plaintiff to see an approaching car when vision is unobstructed is not contributory negligence as a matter of law when factual questions still remain such as: What should plaintiff have observed with reference to defendant's truck as it advanced? Where was plaintiff when she should have seen that defendant's truck was out of control? Was plaintiff negligent in not avoiding the collision? Was plaintiff already committed to the intersection when she should have known defendant's car was out of control?

ON EXCEPTIONS.

This is a negligence action before the Law Court upon plaintiff's exceptions to an order of the trial court, directing a verdict for defendant. Exceptions sustained.

Wendell R. Atherton, for plaintiff.

Eaton, Peabody, Bradford & Veague, for defendant.

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

WILLIAMSON, C. J. In this accident case a sedan operated by the plaintiff and a truck operated by the defendant

collided in a street intersection in Bangor. Exceptions to the direction of a verdict for the defendant are sustained.

The issues are whether a jury would be warranted in finding that the defendant was negligent and the plaintiff was in the exercise of due care. In directing the verdict the presiding justice ruled that as a matter of law either the defendant was in the exercise of due care, or the plaintiff was guilty of contributory negligence, or both.

Under the familiar rule we take the evidence with its inferences in the light most favorable to the plaintiff. *Ward* v. *Merrill,* 154 Me. 45, 141 A. (2nd) 438.

The jury could have found as follows:

The intersection is formed by West Broadway, running north and south, and Lincoln Street, running east and west. A stop sign on Lincoln Street controlled traffic entering West Broadway from the west. The plaintiff approached the intersection from the north on West Broadway and the defendant from the west on Lincoln Street.

The accident took place on a cold clear winter morning. The streets were covered with hard packed snow and ice, and in particular Lincoln Street, to use defendant's words, "It was very icy. It was as icy as it could be, I believe."

The defendant proceeding at about 20 miles per hour entered Lincoln Street from Webster Street, a block west of the scene of the accident. Lincoln Street has a descending grade which becomes steeper a short distance from Webster Street.

The defendant lost control of his truck on Lincoln Street. He tried without success to check its slide by application of the brakes, and when about 100 feet from the intersection on realizing that he could not stop at the stop sign, he attempted to turn the truck into the ditch. He continued,

however, to slide down the hill into the intersection colliding with the plaintiff's sedan. Brake marks were observed by the police for a distance of 150 feet to the point of impact.

The cars collided in the southwest quarter of the intersection. The damage to the plaintiff's sedan included damage to the right front fender and wheel with dents on the right rear fender. The front end of defendant's truck was damaged. The front of the sedan had almost reached the south line of the intersection when the crash occurred.

In our view of the record, the issue of defendant's negligence or due care was clearly for the jury to determine.

First, the defendant failed to obey the statute in not stopping at the stop sign. R. S., c. 22, § 89. The violation of statute was in itself evidence of negligence. There is no merit in the suggestion that there was no evidence introduced to prove the lawful establishment of the stop sign. No such evidence was required. The statute provides that a stop sign, such as this, is to be taken as prima facie lawfully established, and there was not the slightest shred of evidence to indicate otherwise. R. S., c. 22, § 88.

Second, the explanation given by the defendant of his failure to obey the traffic laws did not demand a finding of due care. Skidding alone does not prove negligence. The surrounding circumstances may, however, supply the facts which justify such a finding. *Marr* v. *Hicks,* 136 Me. 33, 1 A. (2nd) 271.

In the instant case the jury could well consider the defendant's speed, the downgrade, the icy condition of Lincoln Street, and the application of brakes. These would be among the important factors in determining whether the defendant in sliding out of control into an intersection guarded by a stop sign, failed to meet the standard of the reasonably prudent man under the circumstances. Cf. *Cox* v. *Sinclair,* 153 Me. 372, 139 A. (2nd) 835.

We turn to the issue of plaintiff's due care. The plaintiff's own version is in substance that she approached the intersection at not over 20 miles per hour; that when about a car length away she glanced at Lincoln Street in both directions; that she observed nothing and continued into the intersection, seeing the defendant for the first time just before the collision.

It is plain that the defendant was in plaintiff's sight when the plaintiff's sedan was more than a car length north of the intersection. The vision of neither plaintiff nor defendant was obscured to the extent suggested by the plaintiff's testimony.

We may properly ask, however, what the plaintiff should have observed with reference to defendant's truck as it advanced on Lincoln Street. Where was she when she should have seen that the truck was out of control and would slide without stopping into the intersection? Was she negligent thereafter in not avoiding the collision?

From our study of the record, we cannot say as a matter of law that the fact the defendant's car was sliding out of control into West Broadway should have been known to the plaintiff by observation from West Broadway until after she was committed to entering the intersection. *Crockett* v. *Staples,* 148 Me. 55, 89 A. (2nd) 737.

Morrissette v. *Cyr,* 154 Me. 388, an intersection case in which we approved the direction of a verdict for the defendant, differs from the case at bar. There the plaintiff with no stop sign against the defendant entered a street intersection when he should have observed the defendant approaching from the right a short distance away and at a high rate of speed.

In sustaining the exceptions to the direction of a verdict for the defendant, we in no way indicate what the finding

of a jury should be. Our opinion goes no further than to hold that the issues of liability on this record were issues of fact for the jury to decide.

The entry will be

Exceptions sustained.

STATE OF MAINE
vs.
FRANK C. DAVIS

Cumberland. Opinion, November 23, 1959.

Criminal Law. Physical Evidence. Offer of Proof.

It was error for the trial court to refuse to permit defendant in a driving under the influence case, to disclose his feet to the jury, where defendant sought to explain that his unsteadiness was due to disease and physical impairment of his feet.

Under the foregoing conditions it was error to refuse an offer of proof and rule upon materiality of the evidence.

ON EXCEPTIONS.

This is a criminal action for driving a motor vehicle while under the influence of intoxicating liquor. The case is before the Law Court upon exceptions. Exceptions sustained.

Arthur Chapman, Jr.,
Clement R. Richardson, for State.

John Platz,
Bernard T. Hopkins, for defendant.

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

DUBORD, J. The respondent was tried in Cumberland Superior Court before a jury and found guilty of the crime of operating a motor vehicle on a public way while under the influence of intoxicating liquor.

Part of the evidence adduced by the State was that of the arresting officer, who testified that immediately after his arrest the respondent "swerved" and "staggered" when requested to walk. The respondent admitted an unsteady manner of walking, but contended it was due to physical impairment of his feet brought about by disease and several operations. Through his counsel he requested permission to disclose his feet to the jury. The request was denied and exceptions taken.

Counsel for the respondent then requested permission of the court to make an offer of proof in the absence of the jury, with reference to the condition of respondent's feet. The court denied the request and ruled on the materiality thereof without first hearing the evidence. To this ruling, the respondent also excepted, and the case is before this court on these exceptions.

Manifestly, it was impossible for the court to rule advisedly upon respondent's request to disclose his feet without first listening to respondent's offer of proof.

> "An offer of evidence is intended to inform the court what the party making the offer intends to prove, so that the court may rule intelligently upon the objections to questions which have been asked, and may be necessary in order to preserve an exception to a ruling of the trial court excluding evidence." 53 Am. Jur., Trial § 99, Page 88.
>
> "The Court is entitled to know * * * before exclusion, all the grounds of admissibility. That he may rule advisedly." *Booth Brothers & Hurricane Island Granite Company v. Smith,* 115 Me. 89, 93; 97 A. 826; *Brown v. McCaffrey, et al.,* 143 Me.

221, 226; 60 A. 2d. 792; *Labbe v. Cyr,* 150 Me. 342, 349; 111 A. 2d. 330.

"An offer of proof stands in the same position as a pleading and it must be made in order to advise the trial court so that it may rule advisedly and in order to preserve an exception to the exclusion of the offered evidence." 88 C. J. S., Trial § 73, Page 179.

"Where an offer of proof is necessary, it is error for the trial court to refuse an opporttunity to counsel to state what he proposes to prove by the evidence offered." 88 C. J. S., Trial § 73, Page 179.

It is our opinion that the presiding justice was in error in his rulings. Counsel for the State has filed no brief, and with a commendable spirit of assuring this respondent a fair trial has conceded that the presiding justice erred in refusing to allow the respondent to make the proposed offer of proof.

The entry will be:

Exceptions sustained.

FRED T. HURLEY, JR.
vs.
CHARLES E. TOWNE ET AL.

Somerset. Opinion, November 30, 1959.

Torts. False Imprisonment. Physicians. Insanity. Witnesses. Immunity.

The role and function of examining physicians in lunacy proceedings are those of a witness and as such witness the certifying physician enjoys an absolute privilege from tort liability for pertinent recitals, and this rule applies even though such recitals are false and made with malice.

ON EXCEPTIONS.

This is an action of false imprisonment before the Law Court upon plaintiff's exceptions to the sustaining of a demurrer. Exceptions overruled.

G. M. Davis,
Bird & Bird, for plaintiff.

Locke, Campbell, Reid & Hebert, for defendant.

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

SULLIVAN, J. This is an action in false imprisonment. The declaration and specifications thereunder aver that the plaintiff was sane but that his wife addressed to the municipal officers a complaint that he was insane and should therefore be confined in a State Hospital; that the municipal officers upon the written certificate of the defendants who are physicians committed the plaintiff to an insane hospital as an emergency case; that later the municipal officers conducted a hearing and with a certificate of the plaintiff's insanity signed by the defendant doctors made plaintiff's

commitment indeterminate; that the defendants throughout falsely certified without having examined the plaintiff; that the plaintiff was wrongfully detained in the insane hospital, 40 days and seeks damages.

The defendants demurred contending that the declaration and its specifications are insufficient at law in that the defendants as to both the detention and indeterminate commitment proceedings were witnesses whose certificates were pertinent and that the plaintiff's detention was the act of municipal officers who functioned with judicial immunity.

Plaintiff joined in the demurrer which was sustained by the presiding justice. We here entertain the exceptions of the plaintiff to such a ruling.

> "- - - By interposing a general demurrer the defendants admit all facts well pleaded, and the only issue is whether in the language used the plaintiff has stated a legal cause of action. - - -"
> *Brown* v. *Rhodes* (1927), 126 Me. 186, 187.
>
> "- - - A general demurrer admits all facts well pleaded, and challenges their sufficiency in law upon which to maintain the action. And the only issue is whether in the language used the plaintiff has stated a legal cause of action. - - -"
>
> *Inman* v. *Willinski* (1949), 144 Me. 116, 118.
>
> See, also, *Richards Co.* v. *Libby* (1943), 140 Me. 38, 40.

For the decision of this case we must, therefore, hypothesize that the defendants made no examination of the respondent and falsely certified his insanity.

Plaintiff in his declaration and specifications assigns sections 103, 104, 105, 106, 113 and 114 of chapter 27, Revised Statutes of Maine (1954), legislative acts for the hospitalization of the insane, and alleges that as a result of the conduct of the physician defendants the plaintiff was both

temporarily and indeterminately committed to a State Hospital for the Insane. Such statutes as a background make it obvious that plaintiff described commitments of the kinds provided by R. S. (1954), c. 27, §§ 104 and 105. In respect to each commitment a judicial proceeding by the municipal officers with an order of commitment by them necessarily preceded confinement in the State Hospital.

> "The act of committing the plaintiff to the insane hospital was not the act of the defendants, but of the municipal officers, a tribunal organized for that purpose - - - -"
>
> *Pennell* v. *Cummings* (1883), 75 Me. 163, 166.
>
> See also, *Sleeper, Applt.* (1952), 147 Me. 302, 310, 312 as to R. S., c. 27, §§ 104 and 105 (formerly R. S. (1944), c. 23, §§ 105 and 106).

In *Dunbar* v. *Greenlaw* (1956), 152 Me. 270, this court decided upon firm authority that in insanity commitment cases the municipal officers are constituted a judicial tribunal, that the role and function of the examining and certifying physicians in lunacy proceedings are those of a witness and that as such witnesses the certifying physicians enjoy an absolute privilege from tort liability for pertinent recitals.

Although the declaration deemed deficient in *Dunbar* v. *Greenlaw* amongst several averments contained an allegation that the defendant "made a false, pretended and grossly negligent examination," this plaintiff distinguishes the present case in that these defendants did not scruple to make any examination.

Assuming that these defendants falsely certified the plaintiff's insanity without examination of him, the ultimate consequences occasioned or caused to this plaintiff as recited are truly deplorable. Nor does the law scoff or connive at such inhumanity. R. S. (1954), c. 27, § 114 provides a

very stringent criminal penalty which normally is well calculated to supply an adequate deterrent or condign punishment for such an enormity as the plaintiff narrates.

The physician-patient relation between the defendants and plaintiff did not subsist in this case. Defendants were expert, professional witnesses. *Dunbar* v. *Greenlaw, supra.* The defendants made no report to the plaintiff. The falsity and not the insufficiency of their certificates is the ground of this action against the certifying physicians. *Pennell* v. *Cummings,* 75 Me. 163, 167.

The rule of immunity of witnesses for pertinent testimony in our courts is an ulterior doctrine of trenchant public policy. It is an expression and adaptation of the ethical and politic principle of the greater good of the majority.

> "- - - But when called upon, in the progress of a cause, and under the rules of the court, and confining himself to that which rightfully pertains to the case, he is not liable for the testimony he may give. To hold otherwise would tend to intimidate a witness and to deter from a disclosure of the whole truth. He might have no means to prove his statements. He may have been robbed when alone. Should he testify to the fact, in the course of a regular trial of the offender, he would not be liable for his statement. *This is a doctrine of the highest legal policy.*" (Italics supplied.)
>
> *Barnes* v. *McCrate* (1851), 32 Me. 442, 446.
>
> "- - - So in the case at bar, while the law declares that every person shall have a remedy for every wrong, public policy requires that witnesses shall not be restrained by the fear of being vexed by actions at the instance of those who are dissatisfied with their testimony; but if they perjure themselves they may be indicted and punished therefor."
>
> *Garing* v. *Fraser* (1884), 76 Me. 37, 42.

"Comment:

a The function of witnesses is of fundamental importance in the administration of justice. The final judgment of the tribunal must be based upon the facts as shown by their testimony, and it is necessary therefore that a full disclosure be not hampered by fear of private suits for defamation. - - - - For abuse of it, he may be subject to criminal prosecution for perjury and to punishment for contempt."

Restatement of the Law, Torts, § 588.

The Massachusetts Court has stated the rationale of the rule as follows:

"It is more important that the administration of the law in the manner provided should not be obstructed by the fears of physicians that they may render themselves liable to suit, than it is that the person certified by them to be insane or a dipsomaniac or inebriate should have a right of action in case it turns out that the certificate ought not to have been given. The statute provides a penalty for a physician who conspires with any person unlawfully or improperly to commit to any lunatic hospital or asylum a person who is not insane, but goes no further."

Niven v. *Boland* (1900), 177 Mass. 11, 14.

The Tennessee Court in the case of *Dyer* v. *Dyer* (1941), 178 Tenn. 234, 156 S. W. (2nd) 445, 446, 447, reviewed an action of false imprisonment against two physicians who were charged with having made affidavits on which the pronouncement of insanity of the plaintiff and her commitment to the hospital for the insane were based. The statements contained in the affidavits were alleged to have been made "*knowingly, maliciously and falsely*" and to have been the proximate cause of the plaintiff's incarceration in the State Hospital for 21 days. The defendant physicians, as here, demurred. The statute involved was essentially akin to the

Maine laws. The proceedings complained of had transpired before the county court. The Law Court said:

> " 'Applying these principles to this case, the question is not whether the words spoken by the defendant were false and malicious, but were they spoken in a judicial proceeding, and were they relevant and pertinent to the subject of inquiry in that proceeding, or responsive to questions propounded to the defendant by counsel while being examined therein as a witness? If they were, they were absolutely privileged, and the plaintiff's action must fail.' "
>
> "- - - Conceding, as the declaration charges, that error was committed and that plaintiff was thereby wronged, and that the affidavits she complains of were false as she charges, nevertheless, for the reasons above given, supported by authority, no right of recovery of damages exists and the assignment of error must be overruled and the judgment of dismissal affirmed."

In *Mezullo* v. *Maletz* (1954), 331 Mass. 233, 236, the declaration was in tort against a physician who had signed a certificate of insanity. Defendant demurred. The court sustained the demurrer and held:

> "This count (2nd) presents the question whether a physician signing a certificate in a commitment proceeding will be liable in tort if he acts maliciously and in bad faith. In a dictum in the Niven case (Niven v. Boland, supra.) it was intimated that the examining physicians' immunity from liability with respect to their certificate exists 'so long as they act in good faith and without malice.' 177 Mass. 11, 14. In support of this statement the court cited, among others, the case of Hoar v. Wood, 3 Met. 193, in which it was said that defamatory words spoken by a party or counsel in the course of judicial proceedings are not actionable if they are pertinent to the inquiry and 'were spoken bona fide, without actual malice, or intent

to defame the witness.' (page 198). See also Wright v. Lothrop, 149 Mass. 385, 390. But not all of the earlier cases defined the privilege of a witness, party, or counsel with the qualification just mentioned. See, for example, Watson v. Moore, 2 Cush. 133, 138; Rice v. Coolidge, 121 Mass. 393, 395.

"But whatever the law may have been formerly on this subject it is now settled that words spoken by a witness in the course of judicial proceedings which are pertinent to the matter in hearing are absolutely privileged, *even if uttered maliciously or in bad faith.* Laing v. Mitten, 185 Mass. 233, 235. Sheppard v. Bryant, 191 Mass. 591, 592. And this is the prevailing view elsewhere. 12 A. L. R. 1247 et seq. and cases there collected. Prosser on Torts, § 94. Restatement: Torts, § 588. *If a physician signing a certificate is entitled to the privilege of a witness* — and the Niven case so holds — *then it would follow that he does not lose it on proof of malice or bad faith.* We see no sound basis for holding the privilege of such a witness to be absolute so far as defamatory words are concerned but qualified in a case like the present. The reasons for an absolute privilege are quite as strong in the latter situation as in the former. It is important that judges charged with the duty of committing insane persons should have the assistance of medical experts in forming their conclusions. *The privilege is a compromise between competing rights; the right of a person to be free from false statements touching his mental condition, and the right public and private of a thorough investigation when necessary by some tribunal before which the witnesses may speak without fear.* - - - And, as the defendant has argued, the privilege would afford small comfort to the physician if there was a possibility that he would be subjected in every instance to an inquiry as to his motives." (Italics supplied.)

In *Bailey* v. *McGill* (1957), 247 N. C. 286, 100 S. E. (2nd) 860, two physicians were sued for malpractice in the

nature of libel. The plaintiff alleged that he, although sane, had been committed to an insane hospital by the Clerk of the Superior Court upon affidavits of the defendants made by them without examination or, if upon examination, upon one so hasty and superficial as to be totally inadequate and not real or bona fide. The plaintiff related that he had accordingly been confined for 30 days and thereafter discharged as having been sane when committed. The defendants demurred and their demurrer was sustained. The North Carolina statute provided for an examination by two disinterested physicians at the direction of the Court Clerk and their certificates under oath. The clerk was authorized to hold an informal hearing with notice to the respondent, to examine the certificates and any proper witnesses and to order committal where warranted. The court ruled (P. 865) that the authority of the clerk was judicial and said:

P. 866.

> "- - - These two physicians did not institute the proceeding, nor did they, or either of them, have anything whatsoever to do with the institution thereof, according to the complainant's allegations. They were directed by the Clerk of the Superior Court to perform an important duty. In discharging it, they were not engaged in the ordinary practice of their profession. Their role and function in examining plaintiff and signing the affidavits in respect to his mental condition are those of witnesses. These examining physicians did not issue the order of commitment and detention; that was done by the Clerk of Cleveland County.

P. 868.

> "- - - The pertinent affidavits made in this proceeding by direction of the Clerk by Drs. Kenneth H. McGill and Thomas H. Wright, Jr., were absolutely privileged, even if made maliciously or in bad faith. - - -"

As we have observed, *ante,* the falsity and not the insufficiency of the certificates of the physician defendants is the basis of this action. The plaintiff urges that in the instant case no jurisdiction was had for the commitment of the plaintiff because of the lack of an examination by the defendants. Plaintiff in support cites the authority of *Beckham* v. *Cline* (1942), (Fla.), 10 So. (2nd) 419. However, that Florida precedent in its quite humanly understandable conclusion to grant a remedy to the plaintiff, Beckham, concerned indeterminate commitment proceedings and under the Florida statute the only notice afforded to the person allegedly insane is the summons of the examining committee composed of two physicians and a layman. According to the pleadings no notice was given. No examination was had. Yet the committee reported the insanity of Virginia Beckham to the court which innocently based a decree upon the negligent or malicious report and committed her. The commitment decree was later frontally attacked in court and set aside. The court in the tort action which followed held that Virginia Beckham without notice had been denied due process of law, that the physicians were quasi judicial officers and that reporting insanity without notice to the person to be examined and without an examination was to act without jurisdiction and actionable. The Florida Court evolved its theory of actionability from the Florida statute as to notice and from a conception of the insanity examining committee as a court *sui juris.*

In Maine examining physicians in lunacy proceedings do not supply notice to the person to be examined. No notice is required in emergency detention commitment process. *Sleeper, Applt.,* 147 Me. 302, 312. Notice by the municipal officers is mandatory in indeterminate commitment cases. R. S., c. 27, § 104. The defendants in the instant case were witnesses. The defendants did not comprise or constitute a court. *Dunbar* v. *Greenlaw,* 152 Me. 270, 274. They cer-

tified as to an examination and finding, albeit falsely. They must be assumed to have also testified at the indeterminate commitment proceedings. There is no allegation in the declaration or specifications that there was no such testimony. *Dyer* v. *Dyer,* 178 Tenn. 234, 156 S. W. (2nd) 445, 447; *Niven* v. *Boland,* 177 Mass. 11, 13 (West Publishing Co., cases collected, *Appeal and Error,* Key Number, 909 (1)). We must likewise infer that the municipal officers gave notice to the plaintiff.

It is true that in Maine under our statutes, R. S. (1954), c. 27, §§ 105, 106 and 113, physicians' examinations and certificates are jurisdictional as is the testimony of the physicians in respect to R. S., c. 27, § 106. *Naples* v. *Raymond* (1881), 72 Me. 213, 217; *Kittery* v. *Dixon* (1902), 96 Me. 368, 371; *Rockport* v. *Searsmont* (1906), 101 Me. 257, 260. The municipal officers were diligent and dutiful in providing for an examination and certificates. And certificates of examination and a purported finding were supplied to the municipal officers by the defendants. The demurrer constrains us to regard the certificates as false. Nonetheless, the municipal officers had jurisdiction of the subject matter of the lunacy proceedings by dint of the Maine statutes cited. *Eastport* v. *Belfast* (1855), 40 Me. 262. The municipal officers had jurisdiction over the person of the resident plaintiff. The certificates of the defendants were legally sufficient and ostensibly veridical in their content and tenor when rendered. There was a hearing and evidence in the latter proceeding. Mockery of the objective truth did not exclude the certificates from the category of certificates but classified them as certificates of a sort, to wit, false certificates. Falsified evidence from the defendant witnesses did not divest the statutory jurisdiction of the municipal officers. To hold otherwise would result in jeopardy to the municipal officers without justification, *Rush* v. *Buckley* (1905), 100 Me. 322, not to mention the possible hazard to

the blameless hospital superintendent. The municipal officers acted within the bounds of their jurisdiction in their two commitments.

The diagnosis of mental illness is not an exact science. It is an insatiable and demanding specialty never very far from the frontier of the unknown and worthy in its regular pursuit of the dedication of the most skilled human talents. Graduate psychiatrists and psychologists are rationed in number and in available presence in our general population. General practitioners are often obliged in lunacy commitment proceedings to supply a deficiency and an indispensable need for the public weal and the protection of the putatively insane. It is a service ungrudgingly given with many of the characteristics of a draft and frequently with the elements of admirable humanitarianism. It has proved to be a service quite dependable in spite of practical professional handicaps. It can become a rarity if the contingency of tort liability is imposed.

Upon the state of the pleadings in this case the nonfeasance and malfeasance predicated of these defendants are excessively blameworthy and we have no purpose of condoning such. Nor has the law. But for the practical and sound judicial considerations reviewed above this action in tort is not maintainable.

Exceptions overruled.

IN MEMORIAM

SERVICES AND EXERCISES
BEFORE THE SUPREME JUDICIAL COURT
AT PORTLAND, JUNE 3, 1959
IN MEMORY OF
HONORABLE ARTHUR CHAPMAN
Late Justice of the Supreme Judicial Court

Born August 6, 1873 Died January 5, 1959

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

PAUL L. POWERS

President of Cumberland Bar Association

Mr. Chief Justice, Members of the Court,
Members of the Bar, Ladies and Gentlemen:

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 Arthur Chapman, who passed on January 5, 1959.

Mr. Justice Chapman was a prominent and highly respected member of our Cumberland Bar Association for many years and, as an expression of our affection and esteem for him as a Judge, as a lawyer and as a man, we hold these exercises today in his honor.

Mr. Justice Chapman became a member of the Maine Bar in 1902. He was engaged in an active and successful practice of the law for twenty-three years and until he was appointed to our Superior Court in 1925. In 1942 Judge Chap-

man was elevated to our Supreme Judicial Court where he served the people of this state with honor, brilliance and distinction until he retired from the bench in 1945.

The late Judge Chapman was the father of two sons who are members of this Association, very prominent in the legal profession in this state and both of whom have served as County Attorney for this county and have contributed much to our profession—the Honorable Richard S. Chapman who served as County Attorney from 1943 to 1949 and the Honorable Arthur Chapman, Jr., who is our present County Attorney.

The Cumberland Bar Association and all its members, his contemporaries on the bench and everyone who had the good fortune of knowing Judge Chapman, of practicing with him and the pleasant experience of practicing before his court will always remember him as an able, well trained and highly informed lawyer, as a Judge who always tempered justice with mercy and who always showed a great understanding of the frailties of human nature, as an affectionate husband, a devoted father and a sincere, genuine man.

I respectfully move that the Court receive resolutions prepared by our Committee on Memorials to permit justices and former justices of this Court, of our Superior Court and members of the Bar present to offer their expressions to this Court as memorials of their high esteem and sincere affection for Judge Chapman, his contributions to his state, his human understanding of the law and his memory.

With the permission of this Court, Mr. John J. Flaherty, Chairman of our Committee on Memorials will address the Court.

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 the late Justice Arthur Chapman:

RESOLUTIONS

RESOLVED: That in the death of Arthur Chapman, former Associate Justice of the Supreme Judicial Court of Maine, the State of Maine has suffered a profound loss.

RESOLVED: That the wisdom and understanding of Mr. Justice Chapman, so frequently and consistently discernible in his many decisions rendered while a Justice of this Court, will ever be a source of edification, strength and guidance to the members of the Bench and the Bar 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 sorrow.

RESOLVED: That these resolutions be presented to this Honorable Court with the respectful suggestion that they be spread on its permanent record, and a copy thereof be forwarded to Mrs. Arthur Chapman 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: Representing the Bar at this time is the Vice President of our Association, the Honorable Edmund P. Mahoney, who will address the Court at this time. Judge Mahoney.

Address of
EDMUND P. MAHONEY
of the Cumberland Bar

May it please the Court, Judges of our various courts, fellow attorneys, members of the family of the late Judge Arthur Chapman and friends:

Above the portico of the white marble building in our Nation's Capital which is the home of the Supreme Court of the United States, appear the words, "Equal Justice Under Law."

These words, though appropriate in any eulogy of the late Judge Chapman, are especially fitting on this occasion, uttered in the presence of this large number of members of the legal profession, who well knew him to be an ardent defender of Justice and a valiant champion of the law. His deeds serve as mighty proof.

We honor him today within the walls of this Court House, where he for so many years labored as a lawyer and as a Judge, rendering equal Justice to all, regardless of race, creed or station in life.

As an attorney at the Bar, he pleaded before many venerable Judges of the courts of this State and of our Federal Court, until he himself was honored by appointment as a Judge of our Superior Court.

During his long career as a Judge, he occupied the bench of our Superior Court and our Supreme Judicial Court and gave of his patience, his understanding and his wisdom, born of natural ability and gained by hard labor and years of experience.

This assembly, distinguished by the presence of many Judges and fellow attorneys, of those of other professions, of his family and friends and of citizens of various walks of life, is a living testimonial of the esteem in which he was held, as a man, as a lawyer and as a Judge.

Judge Chapman had an interesting and enviable life.

He was born in the City of Deering, now a part of Portland, on August sixth, in the year eighteen hundred seventy-three, son of the late Albion P. and Elizabeth Foss Chapman. He was a graduate of Deering High School and Bowdoin College. During his college years he distinguished himself as an outstanding athlete. He thereafter continued his athletic career as a member of the football team of the old Portland Athletic Club, which was the equivalent of the present day semi-professional team, composed of players from several New England colleges. He was the first football coach of Portland High School.

He taught school in Detroit, Michigan and Stamford, Connecticut.

He served in the Common Council of the City of Portland and became its President. He also served on the Board of Aldermen of the City of Portland.

In the year 1904 he was appointed assistant to the U. S. District Attorney in Maine and served in this capacity until the year 1915 when he was appointed a U. S. Commissioner. He thereafter was appointed to the Superior Court and subsequently to the Supreme Judicial Court of our State.

Throughout his career in government and as a lawyer and as a Judge, he continued to maintain a keen interest in athletics.

It is said by those who knew him during the years of his participation in that field, that he always played the game fairly and squarely. This characteristic followed him through life.

I knew him personally during part of his career as a lawyer and intimately during his entire career as a Judge. I knew him best when he was a Judge of our Superior Court, presiding over the trial of cases, and it is in this respect that I like to think of him.

The law demands of those who are called to the bench an earnest devotion and dedication. Judge Chapman met those demands. He had a keen sense of responsibility in the performance of the duties of his high office.

He was dedicated to his government and had an abiding respect for its laws, for he knew well that they were based on the principles of eternal Justice, the immutable law of God.

In presiding over the criminal sessions of his court, he was ever mindful that law must be enforced with firmness if it is to stand, but with intelligence and Justice, if it is to be respected. He was ready when occasion demanded to temper Justice with mercy.

He was as considerate of the poor, the meek and the unfortunate who came before him, as he was of the mightiest aristocrat in the land. He was ever zealous to safeguard the young attorney making his way in the trial courts of our State, against those of more experience and greater skill, who might seek unfair advantage resulting in unjustice to a party litigant. Equal Justice to all was his creed.

What more does the law require than to do justly, to love mercy and to walk humbly.

His integrity and his loyalty to the State which he served so well for many years, made him an outstanding example of a true, faithful and honorable public servant.

Judge Chapman, on May twenty-third in the year nineteen hundred five, was united in marriage to Agnes Sleeth Fairbrother, who survives him. His death brought to a close a happy married life of nearly fifty-four years. Also

surviving are two sons, Richard S. Chapman, a former County Attorney and Arthur Chapman, Jr., our present County Attorney, both having already distinguished themselves in the law.

With them, we share their loss.

MR. POWERS: It is my pleasure at this time to present to the Court Honorable James P. Archibald, Justice of our Superior Court, who will speak in behalf of the Superior Court at this time.

JUDGE ARCHIBALD

Mr. Chairman:

It is indeed an honor to represent the Superior Court at memorial services for Mr. Justice Chapman, a man whose judicial life was so much a part of the tradition of this Court. While remarks on such occasions as this are prone to lapse into expansive verbiage, I am going to follow the advice of the man we commemorate today. In one of his decisions he wrote: "He who speaks should speak plainly, or the other party may explain to his own advantage." We gather that he had little patience with attempts to distort ordinary words and to depart from the common sense, down to earth, meaning of things. In a dissenting opinion, he once wrote: ". . . words that are as well understood by the common laborer as the college professor and which have no legal meaning different from their common usage . . ." require no technical interpretation. So, in the simple, ordinary speech he respected, let us put on the record for his memorial some of those things that those who follow after should know about Arthur Chapman.

Statistics serve little purpose in weighing the character of a man. But Mr. Justice Chapman rendered such a service to the people of his State, and to the Bench and Bar, that this record should reflect some of those figures. He was appointed to the then Cumberland County Superior Court on March 12, 1925 and served as Resident Justice until Janu-

ary 1, 1930 when the state-wide Superior Court became operative. He was then third in seniority, being junior to Mister Justices Fisher and Worster, although by less than one year. In 1930 he went on the circuit and held *nisi prius* terms in the various counties until November 4, 1942, when he was elevated to the Supreme Judicial Court. Seventeen years, seven months and twenty-two days of trial court service; twelve years, eight months and three days on the circuit; a record of Superior Court duty exceeded only by one Justice, his friend and the guest in his home on every possible occasion, Honorable Albert Beliveau, who served on the Superior Court fifty-one weeks longer than did Mr. Justice Chapman; travelling from Alfred to Caribou, from Calais to Rumford, from Wiscasset to Skowhegan, meeting the people of Maine, presiding at their trials, helping to resolve their problems, bringing dignity and honor to the Bench, seeing to it that each of the thousands who appeared in his Court received that degree of justice which their case warranted. What an opportunity for service! He accepted the challenge with humility. He executed his trust with honor. Although he served with distinction on the Supreme Judicial Court until August 5, 1945, and as an Active Retired Justice until August 8, 1952, a total judicial life of twenty-seven years, four months and sixteen days, I believe that the Superior Court was his first love. We of that Court today are eternally grateful for his life and for the tradition that he helped create. May we resolve to keep alive those tenets of honesty, of integrity, of industry and of humility which his record of service has bequeathed to our Court!

I note that it is proper, in remarks such as these, to inject a few personal observations. It was my happy privilege to visit with Judge and Mrs. Chapman on several occasions in their home. I have listened to his stories of many jury trials; I know of his love for things of real value, for oriental rugs, for antique furniture, for rare glassware, for flowers. I have heard from both of them of their courtship

and marriage, of their life together, of their home, and of their children and grandchildren. I learned that being a distinguished Justice, and the wife of one, never prevented Arthur and Agnes Chapman from living a life filled with divergent interests, from keeping an alert and youthful interest in the affairs of the day. But, and perhaps of fundamental importance, I learned from them—for to those who knew the Chapmans, their life together was certainly a most beautiful blending of personalities—that the search for quality, be it in material things or in people, is a never ending task. Call the end result what you will—quality—basic value—truth—to find it was the passion of these wonderful people. Over a long life Arthur Chapman thus learned to recognize truth; he learned to look beneath the veneer, beneath the dust or faded paint of the surface, to find it. His home, its furnishings and surroundings stand as a symbol of that accomplishment. The love and friendship of thousands of true friends over the length and breadth of Maine is even more symbolic.

The Superior Court today is richer because Arthur Chapman lived. May this search for truth and beauty in the minds and souls of men, which was his goal, be an inspiration to all of us. From his life may we understand that the administration of justice requires such an insight as his. May we apply the lesson of this life in our work from day to day on the Court, and strip away the superficial veneer from each case so that the truth may shine through, and justice be done. Arthur Chapman would wish for no more than that.

MR. POWERS: Thank you kindly, Judge Archibald.

May it please the Court, the speakers selected today by our Committee were those whom the members of the family chose as people for whom Judge Chapman had much affection, respect and admiration. Our present speaker is one such personality, and I know that the family asked us to produce for this assemblage Justice Albert Beliveau today

because of the very close relationship between those two men. It is with much pleasure I present our former Supreme Court Justice, the Honorable Albert Beliveau.

Remarks of
HONORABLE ALBERT BELIVEAU
at Exercises in memory of the late
Honorable Arthur Chapman

May it please the Court, Members of the Bar,
and the Members of the Chapman family:

Death always brings its sorrows and its pain, which is usually limited to the family, or a very small circle of friends. But when it involves a man of such stature as our late friend, that feeling spreads and exists throughout the width and breadth of this State. I know in what esteem he was held, not only by the Members of the Bar, but by the laymen who came before his Court, seeking justice. He was a humble man, but not a meek one; he was humble. He did not pretend to be other than what he was. In my opinion, he was one of the finest individuals I have ever met. He was broadminded. He believed that men were created equal and should be treated as such always. He had no sympathy for those who would label their fellow men, to their detriment, according to their religious, social or economic standing. As a matter of fact, on that score, I have heard him take to task people who were inclined to take that attitude. What I have heard him say on such occasions would amaze most of you. He detested such people.

In this State, as I have said, he created a tremendous reputation, and if I put this on more or less of a personal basis, I hope you will pardon me. It cannot be avoided.

When I came to the Superior Court Bench in 1935, I had known very little of Arthur Chapman. I had tried some cases before him and while I was not always satisfied with the results, after I cooled off, as we always do, or should,

I found he had done what he believed was right and proper under the law and the circumstances.

For some reason, yet unknown to me, we became very good friends. He seemed to take an intense interest in my work on the Superior Court. He loved to talk with me about my problems, to make suggestions, advise, to criticize, and probably, to praise, but not too much. That was not his nature. From then on, that friendship grew and grew until it seemed to become a very part of my existence. That relation was not just between Judge Chapman and Albert Beliveau, but included the two families. I never missed an opportunity to entertain him in my home when he held court in Rumford, and may I say that breaking bread with the Chapmans in their home, talking shop with the Judge for two or three hours on some evenings was always one of the highlights of my visits to Portland.

He was not one to criticize or condemn. He was not one to find much fault with anyone, and if he did, it was because the situation more than warranted it.

I shall prize that friendship, which was typical of the man who made friends wherever he went. This I know from my own knowledge because I followed him on the circuit when I was on the bench and heard much about him for years. That friendship is something that will last as long as I live. The memory of my association with Judge Chapman and Mrs. Chapman will not diminish as time goes on—quite the contrary.

I want to tell you this, my friends, when we heard of the horrible accident, which resulted in his death, there was an atmosphere in our house which might be compared to that involving a very close relative or intimate friend. The suspense from that time until he died is difficult to describe. In our prayers during that period, we prayed the Almighty that He might perform one of His miracles and restore Arthur Chapman to good health and to the bosom of his family.

I do not know what else I can say. This is not a prepared address, but I want to say this to Mrs. Chapman — that in the twilight of her life, she may well take much comfort and happiness in the fact that she lived for so many years under ideal conditions and circumstances with a devoted husband and loving father who stood so high in the esteem of those who knew him, who made his mark in the Judicial system of our State, and whose presence and work on the Courts has, in my opinion, added prestige and respect to our Judicial institutions.

MR. POWERS: Thank you very kindly, Judge Beliveau.

We are honored at this time to have our Federal Bench represented by the Honorable Edward T. Gignoux, United States District Court in Portland.

JUDGE 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 with the Bench and the Bar of the State of Maine in these exercises in memory of the Honorable Arthur Chapman, late Justice of the Supreme Judicial Court of Maine, who died on January 5, 1959 after a distinguished career of over 50 years as a member of the Bar of this State and 27 years on the Bench, including 10 years on this Court.

Others this afternoon have spoken fully of Justice Chapman's personal warmth and kindliness, of his stature as a Judge and of his dedication to the service of his State, his country and his fellowmen. My remarks shall, therefore, be brief.

As a member of the Bar, I was privileged to appear before Justice Chapman on a number of occasions, and am most pleased personally to endorse the respect and affection with which he was regarded by all who knew him. Justice

Chapman exemplified the best of those qualities of humanity, character and intellect which are to be found in a truly great jurist.

And so, on behalf of your brethren on the Federal Bench, I am happy to join in this splendid tribute to the memory of a distinguished public servant.

MR. POWERS: Thank you very much, Judge Gignoux.

May it please the Court, at this time we would respectfully ask the Chief Justice to make such response for the Court as he sees fit.

CHIEF JUSTICE WILLIAMSON

Judge Gignoux, and Members of the Bench and Bar:

This courtroom with its quiet dignity is a worthy place for the administration of Justice. Within these walls for over half a century lawyers and judges have sought the facts and the applicable law in a search for Truth and Justice.

We are all in agreement that Law and the Rule of Law are essential for the continuance and advancement of civilization. It is no small or petty task with which we of the legal profession are charged by society, whether it be at home within our beloved State, or in the broadest reaches of the nation, or in the world at large. The times call for a renewal of our faith in law.

We are met this afternoon to honor the memory of our brother, Arthur Chapman. In his life and character the people of the State, no less than his brothers of the Bar and Bench, have found exemplified over the long years of his service the finest qualities of a lawyer and judge. Justice administered by men such as he is Justice under Law.

We thank the members of the Bar and Bench who have set forth so completely and affectionately the career of our friend. I shall not attempt to review the record in detail.

For twenty years from 1925 to 1945 Justice Chapman served on the Superior and Supreme Judicial Courts. He was entitled fourteen years ago to withdraw from action; however, he preferred to continue as an Active Retired Justice.

He came to the Bench of the Superior Court trained by years of experience at the Bar and as an officer of the Federal Courts. His seventeen years on the Superior Court were fruitful years in the administration of Justice.

In the twelve years on circuit from 1930 on the reorganized Superior Court he made a deep and lasting impression on every member of the Bar from one end of the State to the other. In the early years on the Cumberland Superior Court and later in the brief time upon the Supreme Judicial Court, his day by day and hence the closer contacts were with the Bar at home.

Everywhere—at home, where he was so well known and revered, or in Aroostook or York, we who had the opportunity of appearing in his Court, found in him truly a man who met every measurement of the exacting position of a trial judge. He brought as well to the public in all these terms of court proof of the importance of Justice under Law.

His active service on this Court was brief, running from November 2, 1942 until retirement on August 5, 1945, with seven additional years as an active retired justice ending August 8, 1952.

In reviewing the Maine Reports I have noted that Justice Chapman drew the opinion in twenty-one cases, dissented once in part, and filed one dissenting opinion. The first opinion from his pen was *Colby* v. *Tarr*, 139 Me. 277.

In each of his opinions Justice Chapman gave sound reasons for the decision in plain words readily understood by Bar and Bench. As we all know, the writing of opinions

is one facet only of the work of a Justice of this Court. There are the contribution in conference, the influence of views on associates, the conduct of cases in equity and other judicial work, all of which cannot be depicted in statistics of opinions written.

In every field of judicial effort—both at *nisi prius* and on the appellate court—our brother quickly gained and forever retained the highest respect and admiration of his colleagues.

His craftsmanship in the law was of the highest quality. The experience of years on the Bench brought rich dividends in the dispatch of judicial business. Technical skill alone, however great, does not make a judge. A judge is a man not a machine.

Our brother was marked it seemed to me by his common sense. Justice to him was a very real thing—something to be seen by all who came into his court.

I like the comment in a press account of his life:

> "His judicial philosophy was embodied in a comment he made in 1952 about a judge in another state who had been termed 'brave' for ruling as he did in a case of national importance.
>
> " 'It isn't bravery,' said Judge Chapman. 'That's what a judge is there for. It's his job to understand the issues and the law and to rule according to the law.' "

I would have put it somewhat differently. The man who meets the demands of life without flinching has courage, and this of course was true of Justice Chapman. His point however must not be overlooked. Courage in a judge of itself gives no rank of superiority of approach to judicial problems, or of intellectual standing. Courage is a quality without which a judge does not exist. The lack of courage in a judge would destroy fully his professional standing.

In brief, it should not take courage to make the just decision. It is a fatal weakness to do wrong; but as Justice Chapman pointed out, it is not courage that makes one do the right.

Our brother had what we call "character,"—strength of mind and spirit. All who had the privilege of knowing him during his long and active life counted his friendship as an asset without price.

It was with just pride that he watched his sons follow the path of the law. He leaves to his family a rich heritage of the record of the worthy judge and good citizen.

The familiar lines of John Bunyan are applicable to our brother:

"Who would true valour see
Let him come hither,
One here will constant be,
Come Wind, come Weather."

The resolutions submitted by the Committee of the Cumberland Bar Association of which he was a member are gratefully received by the Court and ordered spread upon the records.

As a further mark of our love and honor for Justice Chapman, the Court will now adjourn.

STATE OF MAINE

SUPREME JUDICIAL COURT

MAINE RULES OF CIVIL PROCEDURE*

MUNICIPAL COURT CIVIL RULES*

Promulgated June 1, 1959

Effective December 1, 1959

MAINE CRIMINAL RULES

Promulgated September 1, 1959

Effective December 1, 1959

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* The Rules as printed include the amendments of September 1, 1959, November 2, 1959 and January 19, 1960. The promulgation orders for amendments and amendments follow the Rules (see page 655).

MAINE RULES OF CIVIL PROCEDURE

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PROBATE RULES

STATE OF MAINE

SUPREME JUDICIAL COURT
MAINE RULES OF CIVIL PROCEDURE
AND
MUNICIPAL COURT CIVIL RULES

All of the Justices concurring therein, the following rules are hereby adopted, prescribed and promulgated for the Municipal and Superior Courts, Supreme Judicial Court, and Supreme Judicial Court sitting as the Law Court, to become effective on the first day of December, 1959, being six months after the date hereof. Said rules shall be recorded in the Maine Reports.

All former rules, except insofar as they relate to criminal cases and matters, are superseded as of the first day of December, 1959.

Dated the first day of June, 1959.

ROBERT B. WILLIAMSON
Chief Justice
DONALD W. WEBBER
WALTER M. TAPLEY, JR.
FRANCIS W. SULLIVAN
F. HAROLD DUBORD
CECIL J. SIDDALL

STATE OF MAINE
Cumb. ss. Clerk of Courts Office
SUP. JUD. COURT
Rec'd. and Filed June 1, 1959
Frederick A. Johnson, Clerk

MAINE CIVIL PRACTICE

I. SCOPE OF RULES—ONE FORM OF ACTION

RULE 1. SCOPE OF RULES

TEXT OF RULE

These rules govern the procedure in the Superior Court and before a single justice of the Supreme Judicial Court in all suits of a civil nature whether cognizable as cases at law or in equity, including appeals to the Superior Court as the Supreme Court of Probate and appeals from a municipal court, trial justice or administrative agency, with the limitations stated in Rule 81. These rules also govern the procedure in the Supreme Judicial Court when sitting as a Law Court. They shall be construed to secure the just, speedy and inexpensive determination of every action.

RULE 2. ONE FORM OF ACTION

TEXT OF RULE

There shall be one form of action to be known as "civil action."

II. COMMENCEMENT OF ACTION: SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

RULE 3. COMMENCEMENT OF ACTION

TEXT OF RULE

A civil action is commenced (1) by the service of a summons and complaint, or (2) by filing a complaint with the

court. When method (1) is used, the complaint must be filed with the court within 10 days after completion of service; but in any case where attachment of real or personal property or attachment on trustee process has been made, the complaint shall be filed not later than 30 days after the first such attachment. If the complaint is not timely filed, the action may be dismissed on motion and notice, and in such case the court may, in its discretion, if it shall be of the opinion that the action was vexatiously commenced, tax a reasonable attorney's fee as costs in favor of the defendant, to be recovered of the plaintiff or his attorney.

RULE 4. PROCESS

TEXT OF RULE

(a) Summons: Form. The summons shall bear the signature or facsimile signature of the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint.

(b) Same: Issuance. The summons may be procured in blank from the clerk and shall be filled out by the plaintiff's attorney as provided in subdivision (a) of this rule. The plaintiff's attorney shall deliver to the person who is to make service the original summons upon which to make his return of service and a copy of the summons and of the complaint for service upon the defendant.

(c) By Whom Served. Service of all process shall be made by a sheriff or his deputy within his county, by a constable or other person authorized by law, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Spe-

cial appointments to serve process shall be made freely when substantial savings in travel fees will result.

(d) Summons: Personal Service. The summons and complaint shall be served together. Personal service within the state shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process, provided that if the agent is one designated by statute to receive service, such further notice as the statute requires shall be given. The court, on motion, upon a showing that service as prescribed above cannot be made with due diligence, may order service to be made by leaving a copy of the summons and of the complaint at the defendant's dwelling house or usual place of abode; or to be made by publication pursuant to subdivision (g) of this rule, if the court deems publication to be more effective.

(2) Upon an infant, by delivering a copy of the summons and of the complaint personally (a) to the infant and (b) also to his guardian if he has one within the state, known to the plaintiff, and if not, then to his father or mother or other person having his care or control, or with whom he resides, or if service cannot be made upon any of them, then as provided by order of the court.

(3) Upon an incompetent person, by delivering a copy of the summons and of the complaint personally (a) to the guardian of his person or a competent adult member of his family with whom he resides, or if he is living in an institution, then to the director or chief executive officer of the institution, or if service cannot be made upon any of them,

then as provided by order of the court and (b) unless the court otherwise orders, also to the incompetent.

(4) Upon a county, by delivering a copy of the summons and of the complaint to one of the county commissioners or their clerk or the county treasurer.

(5) Upon a town, by delivering a copy of the summons and of the complaint to the clerk or one of the selectmen or assessors.

(6) Upon a city, by delivering a copy of the summons and of the complaint to the clerk, treasurer, or manager.

(7) Upon any other public corporation, body, or authority by delivering a copy of the summons and of the complaint to any officer, director, or manager thereof.

(8) Upon a domestic private corporation (a) by delivering a copy of the summons and of the complaint to any officer, director or general agent; or, if no such officer or agent be found, to any person in the actual employment of the corporation; or, if no such person be found, to the registry of deeds of the county in which such corporation was located or in which its last certificate of election of clerk was filed; or (b) by delivering a copy of the summons and of the complaint to any agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of the corporation, provided that any further notice required by the statute shall also be given.

(9) Upon a corporation established under the laws of any other state or country (a) by delivering a copy of the summons and of the complaint to any officer, director or agent, or by leaving such copies at an office or place of business of the corporation within the state; or (b) by delivering a copy of the summons and of the complaint to any agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of the corpo-

ration, provided that any further notice required by the statute shall also be given.

(e) Personal Service Outside State. A person who is domiciled in the state or a person who has submitted to the jurisdiction of the courts of the state may be served with the summons and complaint outside the state, in the same manner as if such service were made within the state, by any person authorized to serve civil process by the laws of the place of service or by a person specially appointed to serve it. An affidavit of the person making service shall be filed with the court stating the time, manner, and place of service. Such service has the same force and effect as personal service within the state.

(f) Service Outside State Personally or by Mail in Certain Actions. Where service cannot, with due diligence, be made personally within the state, service of the summons and complaint shall be made upon any person by delivery to him outside the state either (1) in the manner provided by subdivision (e) of this rule, or (2) by registered or certified mail, return receipt requested, with instructions to deliver to addressee only, in the following cases:

(1) Where the plaintiff has acquired an interest in property or credits of the defendant within the state by attachment or trustee process; or

(2) Where the pleading demands a judgment that the person to be served be excluded from a vested or contingent interest in or lien upon specific real or personal property within the state; or that such an interest or lien in favor of either party be enforced, regulated, defined or limited; or otherwise affecting the title to any property; or

(3) Where the pleading demands a judgment for divorce or declaring a marriage a nullity.

Service by registered or certified mail shall be complete when the registered or certified mail is delivered and the

return receipt signed or when acceptance is refused, provided that the plaintiff shall file with the court either the return receipt or, if acceptance was refused, an affidavit that upon notice of such refusal a copy of the summons and complaint was sent to the defendant by ordinary mail. As amended Nov. 2, 1959, eff. Dec. 1, 1959.

(g) Service by Publication

(1) *When Service May be Made.* The court, on motion upon a showing that service cannot with due diligence be made by another prescribed method, shall order service by publication in an action described in subdivision (f) of this rule, unless a statute provides another method of notice, or when the person to be served is one described in subdivision (e) of this rule.

(2) *Contents of Order.* An order for service by publication shall include (i) a brief statement of the object of the action; (ii) if the action may affect any property or credits of the defendant described in subdivision (f) of this rule, a description of any such property or credits; and (iii) the substance of the summons prescribed by subdivision (a) of this rule. The order shall also direct its publication once a week for 3 successive weeks in a designated newspaper of general circulation in the county where the action is pending; and the order shall also direct the mailing to the defendant, if his address is known, of a copy of the order as published.

(3) *Time of Publication; When Service Complete.* The first publication of the summons shall be made within 20 days after the order is granted. Service by publication is complete on the twenty-first day after the first publication. The plaintiff shall file with the court an affidavit that publication has been made.

(h) Return of Service. The person serving the process shall make proof of service thereof on the original process

or a paper attached thereto for that purpose, and shall forthwith return it to the plaintiff's attorney. The plaintiff's attorney shall, within the time during which the person served must respond to the process, file the proof of service with the court. His filing of such proof of service with the court shall constitute a representation by him, subject to the obligations of Rule 11, that the copy of the complaint delivered to the officer for service was a true copy. If service is made by a person other than a sheriff or his deputy or a constable authorized by law, he shall make proof thereof by affidavit. The officer or other person serving the process shall indorse the date of service upon the copy left with the defendant or other person. Failure to indorse the date of service shall not affect the validity of service.

(i) Amendment. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

Effect of Amendment: The Nov. 1, 1959, amendment changed "may" to "shall" in the fourth line of Rule 4(f) in order to clear up any possible due process doubt.

RULE 4A. ATTACHMENT

TEXT OF RULE

(a) Availability of Attachment. In connection with the commencement of any action under these rules, real estate, goods and chattels and other property may, in the manner and to the extent provided by law, be attached and held to satisfy the judgment for damages and costs which the plaintiff may recover.

(b) Writ of Attachment: Form. The writ of attachment shall bear the signature or facsimile signature of the clerk, be under the seal of the court, contain the name of the

court, the names and residences of the parties and the date of the complaint, be directed to the sheriffs of the several counties or their deputies, and command them to attach the goods or estate of the defendant to the value of the amount of plaintiff's demand for judgment, together with a reasonable allowance for interest and costs, and to make due return of the writ with their doings thereon.

(c) Same: Service. The writ of attachment may be procured in blank from the clerk and shall be filled out by the plaintiff's attorney as provided in subdivision (b) of this rule. The plaintiff's attorney shall deliver to the officer making the attachment the original writ of attachment upon which to make his return and a copy thereof. When the summons and complaint are served upon the defendant as provided in Rule 4, the defendant shall also be served with a copy of the writ of attachment with the officer's endorsement thereon of the date or dates of execution of the writ. Any attachment shall be made within 30 days after the date of the complaint except as provided in subdivision (e) of this rule. [As Amended January 19, 1960, Effective February 1, 1960.]

(d) Attachment on Counterclaim, Cross-Claim or Third-Party Complaint. An attachment may be made by a party bringing a counterclaim, a cross-claim, or a third-party complaint in the same manner as upon an original claim.

(e) Subsequent Attachment. After service of the summons and complaint upon the defendant as provided in Rule 4, the court, on motion without notice, may for cause shown order an additional attachment of real estate, goods and chattels or other property.

RULE 4B. TRUSTEE PROCESS

TEXT OF RULE

(a) Availability of Trustee Process. In connection with the commencement of any personal action under these rules

except actions only for specific recovery of goods and chattels, for malicious prosecution, for slander by writing or speaking, or for assault and battery, trustee process may be used, in the manner and to the extent provided by law, for the purpose of securing satisfaction of the judgment for damages and costs which the plaintiff may recover.

(b) Summons to Trustee: Form. The summons to a trustee shall bear the signature or facsimile signature of the clerk, be under the seal of the court and contain the name of the court and the names of the parties, be directed to the trustee, state the name and address of the plaintiff's attorney, the amount for which the goods or credits of the defendant are attached on trustee process, and the time within which these rules require the trustee to make disclosure, and shall notify him that in case of his failure to do so he will be defaulted and adjudged trustee as alleged. The amount so attached shall not exceed the demand for judgment together with a reasonable allowance for interest and costs.

(c) Same: Service. The trustee summons may be procured in blank from the clerk and shall be filled out by plaintiff's attorney as provided in subdivision (b) of this rule. The plaintiff's attorney shall deliver to the person who is to make service the original trustee summons upon which to make his return of service and a copy thereof for service upon the trustee. The trustee summons shall be served in like manner and with the same effect as other process, except that when a partnership is made a trustee, service on one partner at any place of business of the partnership shall be a sufficient attachment of the property of the defendant in the possession of the partnership. When the summons and complaint are served upon the defendant as provided in Rule 4, the defendant shall also be served with a copy of the trustee summons with the officer's endorsement thereon of the date or dates of service upon the trustee or trustees. Any trustee process shall be served within 30 days after the

date of the complaint except as provided in subdivision (g) of this rule. [As Amended January 19, 1960, Effective February 1, 1960.]

(d) Disclosure by Trustee; Subsequent Proceedings. A trustee shall serve his disclosure under oath within 20 days after the service of the trustee summons upon him, unless the court otherwise directs. The proceedings after service of the trustee's disclosure shall be as provided by law. When a trustee presents himself for examination, notice thereof shall be served upon the attorney for the plaintiff, and upon motion the court shall fix a time for the disclosure to be made. Before the disclosure is presented to the court for adjudication, there shall be minuted upon the back thereof the name of the attorney for the plaintiff, the name of the trustee with the date of the service of the summons upon him, and the docket number of the action.

(e) Adjudication and Judgment. The proceedings for adjudication on the disclosure of the trustee and for the rendition and execution of judgment and the imposition of costs shall be as provided by law.

(f) Trustee Process on Counterclaim, Cross-Claim or Third-Party Complaint. Trustee process may be used by a party bringing a counterclaim, a cross-claim, or a third-party complaint in the same manner as upon an original claim, provided that the trustee resides or, if a corporation, maintains a usual place of business, in the county where the action is pending. If the counterclaim is compulsory under Rule 13(a), the party stating it may use trustee process, even though the trustee does not reside or maintain a usual place of business in the county where the action is pending.

(g) Subsequent Trustee Process. After service of the summons and complaint upon the defendant as provided in Rule 4, the court, on motion without notice, may for cause shown order an additional attachment on trustee process

against the same or an additional trustee, except for wages or salary due the defendant.

RULE 4C. ARREST

TEXT OF RULE

(a) Availability of Arrest. In connection with the commencement of any action under these rules, a capias writ may be used to arrest the defendant only in the manner and to the extent provided by 1954 Revised Statutes, Chapter 120, Section 2, as amended. The court on motion of any party or upon its own initiative may order the defendant to be released from arrest upon such terms and conditions as it deems just, at any time when justice so requires. As amended Nov. 2, 1959, eff. Dec. 1, 1959.

(b) Form and Service. The capias writ shall be obtained and filled out in the same manner as a writ of attachment, service of such writ shall be accompanied by a service upon the defendant of summons and complaint, and return of service shall be made in the same manner as return of service on a writ of attachment. A defendant who has been arrested on a capias writ shall be released from arrest if the complaint is not filed with the court within 10 days after the arrest, and the action may be dismissed on motion and notice as provided in Rule 3. A certificate by the clerk that the complaint has not been so filed shall be furnished on request and shall be sufficient evidence of the fact.

(c) Ne Exeat. An order of arrest may be granted when the plaintiff has demanded and would be entitled to a judgment requiring the performance of an act, the neglect or refusal to perform which would be punishable by the court as a contempt, and where the defendant is not a resident of the state or is about to depart therefrom, by reason of which non-residence or departure there is a danger that such judgment or order will be rendered ineffectual.

Effect of Amendment: The Nov. 2, 1959, amendment rewrote the first sentence of Rule 4C(a) in order to assure the exclusion of any common law right to arrest on mesne process.

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

TEXT OF RULE

(a) Service: When Required. Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, notice of change of attorneys, demand, offer of judgment, designation of record and statement of points on appeal, and similar paper shall be served upon each of the parties, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

(b) Same: How Made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon an attorney who has ceased to represent a party is a sufficient compliance with this subdivision until written notice of change of attorneys has been served upon the other parties. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one

in charge, leaving it in a conspicuous place therein, or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(c) Same: Numerous Defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendant and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing; No Proof of Service Required. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter. Such filing by a party's attorney shall constitute a representation by him, subject to the obligations of Rule 11, that a copy of the paper has been or will be served upon each of the other parties as required by subdivision (a) of this rule. No further proof of service is required unless an adverse party raises a question of notice.

(e) Filing with the Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that a justice may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(f) Backing. On the back of any pleading or other paper required or permitted by these rules to be filed with

the court, there shall appear the name of the court and the county, the title of the action, the docket number, the designation of the nature of the pleading or paper and the name and address of the person or attorney filing it. In any case where an indorsement for costs is required, the name of an attorney of this state thus appearing on the back of the complaint filed with the court shall constitute such an indorsement in absence of any words used in connection therewith showing a different purpose.

RULE 6. TIME

TEXT OF RULE

(a) Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect, but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), 60(b), 73(a) and (d), and 75 (a), except to the extent and under the conditions stated in them.

(c) Unaffected by Expiration of Term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action.

(d) For Motions — Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made an ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits, may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

(e) Additional Time after Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

III. PLEADINGS AND MOTIONS

RULE 7. PLEADINGS ALLOWED: FORM OF MOTIONS

TEXT OF RULE

(a) Pleadings. There shall be a complaint and an answer, and a disclosure under oath, if trustee process is used; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer

contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under Rule 14; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) Motions and Other Papers.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(c) Demurrers, Pleas, Etc., Abolished. Demurrers, pleas and exceptions for insufficiency of a pleading shall not be used.

(d) Pleadings in Actions Appealed from Probate Court. On an appeal to the Superior Court sitting as the Supreme Court of Probate, the appellant shall, within 34 days from the date of the proceeding appealed from, file with the clerk of the Superior Court copies, attested by the register of probate, of the reasons of appeal, the appeal bond, and the petition, account, complaint in equity or other document and the decree thereon which is the subject matter of the appeal. No other pleadings shall be required. As amended Nov. 2, 1959, eff. Dec. 1, 1959.

Effect of Amendment: The Nov. 2, 1959, amendment of Rule 7(d) eliminated reference to the time for serving the reasons of appeal, leaving the matter wholly to statute. R. S., c. 153, § 33 (amended in 1959). It also speci-

fied, consistently with Probate Rule LIII, 151 Me. at 525, the papers to be filed in the Superior Court and prescribed the time for such filing.

RULE 8. GENERAL RULES OF PLEADING

TEXT OF RULE

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence in actions for negligently causing

death or for injury to a person who is deceased at the time of trial, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading To Be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

(g) Pleadings by Agreement. An action may be commenced and issue joined therein, without the filing or service of a complaint and answer, by the filing of a statement, signed and acknowledged by all the parties or signed by their attorneys, specifying plainly and concisely the claims and defenses between the parties and the relief requested. Signing constitutes a certificate that the issues are genuine.

RULE 9. PLEADING SPECIAL MATTERS

TEXT OF RULE

(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, but when so made the party pleading the performance or occurrence has the burden of establishing it.

(d) Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.

RULE 10. FORM OF PLEADINGS

TEXT OF RULE

(a) Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court and county, the title of the action, the docket number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties. The complaint shall be dated. As amended Nov. 2, 1959, eff. Dec. 1, 1959.

(b) **Paragraphs; Separate Statements.** All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of

the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

Effect of Amendment: The Nov. 2, 1959, amendment added the last sentence of Rule 10(a).

RULE 11. SIGNING OF PLEADINGS

TEXT OF RULE

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an atttorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

RULE 12. DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON PLEADINGS

TEXT OF RULE

(a) When Presented. A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, unless the court directs otherwise when service of process is made pursuant to an order of court un-

der Rule 4(d) or 4(g), and provided that a defendant served pursuant to Rules 4(e) and 4(f) outside the Continental United States or Canada may serve his answer at any time within 50 days after such service. A party who is served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense

in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) **Motion for Judgment on the Pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) **Preliminary Hearings.** The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) **Motion for More Definite Statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses. A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) Waiver of Defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

RULE 13. COUNTERCLAIM AND CROSS-CLAIM

TEXT OF RULE

(a) Compulsory Counterclaims. Unless otherwise specifically provided by statute, a pleading shall state as a

counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) Counterclaim Against the State. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the State of Maine or an officer or agency thereof.

(e) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(g) Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-

party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) **Additional Parties May Be Brought In.** When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules if jurisdiction of them can be obtained.

(i) Separate Trials; Separate Judgment. If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) even if the claims of the opposing party have been dismissed or otherwise disposed of.

(j) **Appealed and Removed Actions.** When an action is entered in the Superior Court on appeal or removal from a municipal court or trial justice, any counterclaim made compulsory by subdivision (a) of this rule shall be stated as an amendment to the pleading within 20 days after such entry or such further time as the court may allow. Other counterclaims and cross-claims shall be permitted as in an original action in the Superior Court. Upon the entry of such action in the Superior Court, the clerk shall forthwith notify all parties of the requirements of this subdivision.

RULE 14. THIRD-PARTY PRACTICE

TEXT OF RULE

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defendant as a

third-party plaintiff may cause to be served a summons and complaint upon a person not a party to the action who is or may be liable to such third-party plaintiff for all or part of the plaintiff's claim against him. The person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and his failure to do so shall have the effect of the failure to state a claim in a pleading under Rule 13(a). The third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move for severance, separate trial, or dismissal of the third-party claim; the court may direct a final judgment upon either the original claim or the third-party claim above in accordance with the provisions of Rule 54(b). A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) Orders for Protection of Parties and Prevention of Delay. The court may make such orders as will prevent a

party from being embarrassed or put to undue expense, or will prevent delay of the trial or other proceedings, by the assertion of a third-party claim, and may dismiss the third-party claim, order separate trials, or make other orders to prevent delay or prejudice. Unless otherwise specified in the order, a dismissal under this rule is without prejudice.

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

TEXT OF RULE

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation

of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

RULE 16. PRE-TRIAL PROCEDURE; FORMULATING ISSUES

TEXT OF RULE

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

IV. PARTIES

RULE 17. PARTIES PLAINTIFF AND DEFENDANT; CAPACITY

TEXT OF RULE

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the State of Maine. An insurer who has paid all or part of a loss may sue in the name of the assured to whose rights it is subrogated.

(b) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, conservator, or other like fiduciary, the

representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

RULE 18. JOINDER OF CLAIMS AND REMEDIES

TEXT OF RULE

(a) Joinder of Claims. The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied.

(b) Joinder of Remedies; Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

RULE 19. NECESSARY JOINDER OF PARTIES

TEXT OF RULE

(a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a

joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant.

(b) Effect of Failure to Join. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them can be acquired only by their consent or voluntary appearance; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

(c) Same: Names of Omitted Persons and Reasons for Non-Joinder to be Pleaded. In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted.

RULE 20. PERMISSIVE JOINDER OF PARTIES

TEXT OF RULE

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not

be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

RULE 21. MISJOINDER AND NON-JOINDER OF PARTIES

TEXT OF RULE

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

RULE 22. INTERPLEADER

TEXT OF RULE

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The pro-

visions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

RULE 23. CLASS ACTIONS

TEXT OF RULE

(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.

(b) Secondary Action by Shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath. The complaint shall set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

(c) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. In an action under subdivision (b) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. In all other class actions notice shall be given only if the court requires it.

RULE 24. INTERVENTION

TEXT OF RULE

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action when he has such an interest in the matter in litigation that he may

either gain or lose by the direct legal effect of the judgment therein, whether or not he is a party to the action.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

(d) Intervention by the State. When the constitutionality of an act of the legislature affecting the public interest is drawn in question in any action to which the State of Maine or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General, and shall permit the State of Maine to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality.

RULE 25. SUBSTITUTION OF PARTIES

TEXT OF RULE

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper

parties. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) Incompetency. If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against his representative.

(c) Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

(d) Public Officers; Death or Separation from Office. When any public officer is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within a reasonable time after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue

the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States or of the State of Maine. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object. Where any such officer sues or is sued as such, he may be described as a party by his official title and not by name, subject to the power of the court, upon motion or on its own initiative, to require his name to be added. Unless his name is so added, no formal order of substitution is necessary.

V. DEPOSITIONS AND DISCOVERY

RULE 26. DEPOSITIONS PENDING ACTION

TEXT OF RULE

(a) When Depositions May Be Taken. Any party may take the testimony of any person, including a party, either within or without the state, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after service upon the defendant. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules or in accordance with the laws of the state, United States territory or possession, or foreign country where taken. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Scope of Examination. Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged,

which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. A party shall not require a deponent to produce or submit for inspection any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless the court otherwise orders on the ground that a denial of production or inspection will result in an injustice or undue hardship; nor shall the deponent be required to produce or submit for inspection any part of a writing which reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35(b), the conclusions of an expert.

(c) Examination and Cross-Examination. Examination and cross-examination of deponents may proceed as permitted at the trial under the provisions of Rule 43(b).

(d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the thereof for any reason which would require the exclusion

managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (i) that the witness is dead; or (ii) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (iv) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (v) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(e) Objections to Admissibility. Subject to the provisions of Rule 32(c), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion

of the evidence if the witness were then present and testifying.

(f) Effect of Taking or Using Depositions. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subdivision (d) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

RULE 27. DEPOSITIONS BEFORE ACTION OR PENDING APPEAL

TEXT OF RULE

(a) Before Action.

(1) *Petition.* A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of the state may file a verified petition in the Superior Court in the county of the residence of any expected adverse party; and if there be more than one expected adverse party, some of whom may live in different counties, then the petition may be filed in any county in which an expected adverse party may reside.

The petition shall be entitled in the name of the petitioner and shall show: (i) that the petitioner expects to be a party to an action cognizable in a court of the state but is presently unable to bring it or cause it to be brought, (ii) the subject matter of the expected action and his interest therein, (iii) the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, (iv) the names or a description of the persons he expects will be

adverse parties and their addresses so far as known, and (v) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) *Notice and Service.* The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the state in the manner provided in Rule 4(d) or (e) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d) or (e), an attorney who shall represent them and whose services shall be paid for by the petitioner in an amount fixed by the court, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(b) apply.

(3) *Order and Examination.* If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions

for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) *Use of Deposition.* If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the court by the authority of which it is taken, it may be used in any action involving the same subject matter subsequently brought in any court of this state having cognizance thereof in accordance with the provisions of Rule 26(d) and (e).

(b) Pending Appeal. If an appeal has been taken from a judgment or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in that court. In such case the party who desires to perpetuate the testimony may make a motion for leave to take the depositions, upon the same notice and service thereof as if the action was pending in that court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the Superior Court.

(c) Recording in Registry of Deeds. Any deposition to perpetuate testimony taken before action or pending appeal together with the verified petition therefor and certificate of the officer before whom it was taken shall, within 90 days

after the taking, be recorded within the registry of deeds in the county where the land or any part of it lies, if the deposition relates to real estate; if not, in the county where the parties or any of them reside.

(d) Perpetuation by Action. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

RULE 28. PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN

TEXT OF RULE

(a) Within the United States. Within the state depositions shall be taken before a justice of the peace or notary public or a stenographer appointed as commissioner pursuant to 1954 Revised Statutes, Chapter 117, Section 30. Without the state but within the United States, or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

(b) In Foreign Countries. In a foreign state or country depositions shall be taken (1) on notice before a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or (2) before such person or officer as may be appointed by commission or under letters rogatory. A commission or letters rogatory shall be issued only when necessary or convenient, on application and notice, and on such terms and with such directions as are just and appropriate. Officers may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed "To the Appropriate Judicial Authority in [here name the country]."

(c) Disqualification for Interest. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

(d) Depositions for Use in Foreign Jurisdictions. Whenever the deposition of any person is to be taken in this state pursuant to the laws of another state or of the United States or of another country for use in proceedings there, the Superior Court in the county where the deponent resides or is employed or transacts his business in person may, upon petition, make an order directing issuance of a subpoena as provided in Rule 45, in aid of the taking of the deposition, and may make any order in accordance with Rule 30(d), 37(a) or 37(b) (1).

RULE 29. STIPULATIONS REGARDING THE TAKING OF DEPOSITIONS

TEXT OF RULE

If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions.

RULE 30. DEPOSITIONS UPON ORAL EXAMINATION

TEXT OF RULE

(a) Notice of Examination: Time and Place. A party desiring to take the deposition of any person upon oral examination shall give notice in writing to every other party to the action at least 7 days before the time of the taking of the deposition, but the court on an ex parte application and for good cause shown may prescribe a shorter notice. The attendance of witnesses may be compelled by the use of subpoenas as provided in Rule 45. The notice shall state the

time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party upon whom the notice is served, the court may for cause shown enlarge or shorten the time.

(b) Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, any justice of the Superior Court may make an order that the deposition shall not be taken, or that it may be taken only at some designated time or place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. Upon such a motion the court may also make any other order which justice requires to protect the party or witness from annoyance, undue expense, embarrassment, or oppression and may in its discretion where notice is given of the taking of depositions outside the state and at great distances from the place where the case is to be tried, require the party taking the deposition to pay the traveling expenses of the opposite party and of his attorney where their attendance is reasonably necessary at the taking of said deposition; and where it appears that the witness whose deposition is sought is under the control of the party taking the deposition, the court may require such witness to be brought within the state and his deposition taken there.

A single justice of the Supreme Judicial Court may, in any action pending before him, hear such motion and make any such order. The power of the court under this rule shall be exercised with liberality toward the accomplishment of its purpose to protect parties and witnesses.

(c) Record of Examination; Oath; Objections. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by some one acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise; the court may order the cost of transcription paid by one or some of, or apportioned among, the parties. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, any justice of the Superior Court may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court. Upon demand of the objecting party or deponent the taking of the

deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable. A single justice of the Supreme Judicial Court may, in any action pending before him, hear such motion and make any such order. As amended Nov. 2, 1959, eff. Dec. 1, 1959.

(e) Submission to Witness; Changes; Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 32(d) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) Certification and Filing by Officer; Copies; Notice of Filing.

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then place the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert

name of witness]" and shall promptly deliver or mail it to the clerk of the court in which the action is pending.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) **Failure to Attend or to Serve Subpoena; Expenses.**

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

Effect of Amendment: The Nov. 2, 1959, amendment of Rule 30(d) added the last sentence.

RULE 31. DEPOSITIONS OF WITNESSES UPON WRITTEN INTERROGATORIES

TEXT OF RULE

(a) Serving Interrogatories; Notice. A party desiring to take the deposition of any person upon written interrogatories shall serve them upon every other party with a notice

stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within 15 days thereafter a party so served may serve cross interrogatories upon the party proposing to take the deposition. Within 5 days thereafter the latter may serve redirect interrogatories upon a party who has served cross interrogatories. Within 5 days after being served with redirect interrogatories, a party may serve recross interrogatories upon the party proposing to take the deposition.

(b) Officer to Take Responses and Prepare Record. A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the interrogatories and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the interrogatories received by him.

(c) Notice of Filing. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

(d) Orders for the Protection of Parties and Deponents. After the service of interrogatories and prior to the taking of the testimony of the deponent, the court in which the action is pending, on motion promptly made by a party or a deponent, upon notice and good cause shown, may make any order specified in Rule 30 which is appropriate and just or an order that the deposition shall not be taken before the officer designated in the notice or that it shall not be taken except upon oral examination.

RULE 32. EFFECT OF ERRORS AND IRREGULARITIES IN DEPOSITIONS

TEXT OF RULE

(a) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(b) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(c) As to Taking of Deposition.

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(3) Objections to the form of written interrogatories submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories and within 5 days after service of the last interrogatories authorized.

(d) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

RULE 33. INTERROGATORIES TO PARTIES

TEXT OF RULE

Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 20 days after service upon the defendant, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined.

Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be

used to the same extent as provided in Rule 26(d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. A party shall not file more than one set of interrogatories to an adverse party nor shall the number of interrogatories exceed 30 unless the court otherwise orders for good cause shown. The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

RULE 34. DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING, OR PHOTOGRAPHING

TEXT OF RULE

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

TEXT OF RULE

(a) Order for Examination. In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of Findings. If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If the party examined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial.

RULE 36. ADMISSION OF FACTS AND OF GENUINENESS OF DOCUMENTS

TEXT OF RULE

(a) Request for Admission. After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. If a plaintiff desires to serve a request

within 20 days after service upon the defendant, leave of court, granted with or without notice, must be obtained. Copies of the documents shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder.

(b) Effect of Admission. Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

RULE 37. REFUSAL TO MAKE DISCOVERY: CONSEQUENCES

TEXT OF RULE

(a) Refusal to Answer. If a party or other deponent refuses to answer any question propounded upon oral ex-

amination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to any justice of the Superior Court or to any court having general civil jurisdiction in the place where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

(b) Failure to Comply With Order.

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by any justice of the Superior Court, the refusal may be considered a contempt of court.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made

under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

(c) Expenses on Refusal to Admit. If a party, after being served with a request under Rule 36 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial

or that the admissions sought were of no substantial importance, the order shall be made.

(d) Failure of Party to Attend or Serve Answers. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

VI. TRIALS

RULE 38. JURY TRIAL OF RIGHT

TEXT OF RULE

(a) Right Preserved. The right of trial by jury as declared by the Constitution of the State of Maine or as given by a statute shall be preserved to the parties inviolate.

(b) Waiver. The parties appearing in the action or such of them as appear at the trial or their attorneys of record may waive a jury trial by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record.

(c) Demand for Trial Without Jury. A party who believes that any action or any issue or issues therein is not triable of right by a jury may serve upon the other parties a demand in writing for trial of the action or such issue or issues without jury. Such demand may be indorsed upon a pleading of the party. Any other party within 10 days after service of the demand may serve a counter-demand for jury trial. If no counter-demand is served or if the court after hearing determines that there is no issue triable of

right by jury, the action shall be tried without jury. The court may make such determination on its own initiative and order the action or any issue or issues to be tried without jury.

RULE 39. TRIAL BY THE COURT OR BY ADVISORY JURY

TEXT OF RULE

(a) **Trial by the Court.** Except as provided in Rule 39 (c), all issues of fact not triable of right by a jury shall be decided by the court without a jury, whether or not other issues are submitted to a jury.

(b) **Hearings Outside County.** Any hearings without a jury may be held at such place in any county as the court may appoint; and the clerk in the county in which the action is pending shall transmit the papers in the action to the justice to hear the same, who shall return them after hearing.

(c) **Advisory Jury and Trial by Consent.** In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury, or the court, with the consent of the parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

RULE 40. ASSIGNMENT OF CASES FOR TRIAL; CONTINUANCES

TEXT OF RULE

(a) **Assignment of Cases for Trial.** The justices of the court may by order provide for the setting of cases for trial upon the calendar, the order in which they shall be heard and the resetting thereof. All actions except actions for divorce shall, unless the court otherwise directs, be in order

for trial at the first term of court held not less than 10 days after the service of the last required pleading.

(b) Continuances. A motion for continuance of an action shall be made not later than the opening of the court on the second day of the term in which the action is in order for trial; but if the cause or ground of the motion is not then known, the motion may be made as soon as practicable after the cause or ground becomes known. Whenever an action is continued on such motion, after the time above prescribed, the moving party shall not be allowed any costs for travel and attendance for that term unless the continuance is ordered on account of some fault or misconduct of the adverse party.

(c) Affidavit in Support of Motion. The court need not entertain any motion for a continuance based on the absence of a material witness unless supported by an affidavit which shall state the name of the witness, and, if known, his residence, a statement of his expected testimony and the basis of such expectation, and the efforts which have been made to procure his attendance or deposition. The party objecting to the continuance shall not be allowed to contradict the statement of what the absent witness is expected to testify but may disprove any other statement in such affidavit. Such motion may, in the discretion of the court, be denied if the adverse party will admit that the absent witness would, if present, testify as stated in the affidavit, and will agree in writing, signed by him or his attorney, that the same shall be received and considered as evidence at the trial as though the witness were present and so testified. The same rule shall apply, with necessary changes, when the motion is grounded on the want of any material document, thing or other evidence. In all cases, the grant or denial of a continuance shall be discretionary whether the foregoing provisions have been complied with or not.

RULE 41. DISMISSAL OF ACTIONS

TEXT OF RULE

(a) Voluntary Dismissal: Effect Thereof.

(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(c) and of any statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before commencement of trial of the action, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action; provided, however, that no action wherein a receiver has been appointed shall be dismissed except by order of the court. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this state or any other state or the United States an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the counterclaim shall remain pending for independent adjudication by the court despite the dismissal of the plaintiff's claim. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof.

(1) *On Court's Own Motion.* The court on its own motion and without notice may dismiss any action for want of prosecution at any term commencing more than 2 years

after the last docket entry showing any action taken therein by the plaintiff other than a motion for continuance.

(2) *On Motion of Defendant.* For failure of the plaintiff to prosecute for 2 years or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall upon request make findings as provided in Rule 52(a).

(3) *Effect.* Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision (b) and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, improper venue, or lack of an indispensable party, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim.

(d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

RULE 42. CONSOLIDATION; SEPARATE TRIALS

TEXT OF RULE

(a) **Consolidation.** When actions involving a common question of law or fact are pending before the court, in the same county or a different county, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) **Separate Trials.** The court in furtherance of convenience or to avoid prejudice may order a separate trial in the county where the action is pending or a different county of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

(c) **Convenience and Justice.** In making any order under this rule, the court shall give due regard to the convenience of parties and witnesses and the interests of justice.

RULE 43. EVIDENCE

TEXT OF RULE

(a) **Form and Admissibility.** In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of this state, or under the rules of evidence applied in the courts of this state.

(b) **Scope of Examination and Cross-Examination.** A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of the state or any political subdivision thereof or of a public or private corporation or of an association or body politic which is an adverse

party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief. A witness examined in chief only as to the signature to or execution of a paper may be cross-examined only as to such signature or execution.

(c) Record of Excluded Evidence. In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

(d) Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

(f) Copies of Deeds. In actions touching the realty, attested copies of deeds from the registry of deeds may be received in evidence without proof of their execution where the party offering the same is not a grantee, nor claims as heir, nor justifies as servant of the grantee or his heirs.

(g) Copies of Corporate Records. Copies of any votes or other records upon the books of a corporation or of any papers in its files may, when attested by its clerk, be received in evidence unless it appears that the adverse party has been denied access to the originals at reasonable hours.

(h) Notice to Produce. No evidence of the contents of a writing in the hands of an adverse party will be admitted unless previous notice to produce the writing at trial has been given, nor shall counsel be allowed to comment upon a refusal to produce it without first proving such notice.

(i) Examination of Witnesses. The examination and cross-examination of each witness shall be conducted by one counsel only on each side, except by special leave of court, and counsel shall stand while so examining or cross-examining unless the court otherwise permits. Any re-examination of a witness shall be limited to matters brought out in the last examination by the adverse party except by special leave of court.

(j) Order of Evidence. A party who has rested his case can not thereafter introduce further evidence except in rebuttal unless by leave of court.

(k) Attorneys as Bail or Witnesses. No attorney shall become bail in any civil suit, nor shall any attorney without special leave of court take any part in the conduct before a jury of an action in which he is a witness for his client.

RULE 44. PROOF OF OFFICIAL RECORD

TEXT OF RULE

(a) Authentication of Copy. On official record or an entry therein, when admissible for any purpose, may be evidenced (1) by a document purporting to be an official publication thereof, or (2) by a copy attested as a correct copy by a person purporting to be an officer or a deputy of an officer, having the legal custody of the record. If the office

in which the record is kept is without the state, the copy shall be accompanied by a certificate that such officer or deputy has the custody of the record, which certificate shall be made as follows: (1) by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court; (2) by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the court; or (3) by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in a foreign state or country in which the record is kept, and authenticated by the seal of his office.

(b) Proof of Lack of Record. A written statement signed by a person purporting to be an officer or a deputy of an officer, having the official custody of specified official records, that he has made diligent search of the records of the office and has found therein no record or entry of a specified tenor, is admissible as evidence that the records of his office contain no such record or entry, provided that where the record is kept is without the state, the statement shall b accompanied by a certificate like that required in Rule 4 (a).

(c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence at common law.

RULE 45. SUBPOENA

TEXT OF RULE

(a) For Attendance of Witnesses; Form; Issuance. Every subpoena shall be issued by the clerk under the seal of the court or by a trial justice or a justice of the peace, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, bearing the seal of the court and his signature or facsimile signature, but otherwise in blank, to a party requesting it, who shall fill it in before service.

(b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(c) Service. A subpoena may be served by the sheriff, by his deputy, by a constable, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law.

(d) Subpoena for Taking Depositions; Place of Examination.

(1) Proof of service of a notice to take a deposition as provided in Rules 30(a) and 31(a) constitutes a sufficient

authorization for the issuance of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce designated books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of subdivision (b) of Rule 30 and subdivision (b) of this Rule 45.

(2) A resident of this state shall not be required to travel to attend an examination outside the county wherein he resides or is employed or transacts his business in person or a distance of more than 50 miles, whichever is greater, unless the court otherwise orders. A nonresident of the state may be required to attend only in the county wherein he is served with a subpoena, or within 50 miles from the place of service, or at such other convenient place as is fixed by an order of court.

(e) Subpoena for a Hearing or Trial. Subpoenas for attending at a hearing or trial shall be issued at the request of any party. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the state.

(f) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court in which the action is pending or in the county in which the deposition is taken. Punishment for such contempt shall be in accordance with 1954 Revised Statutes, Chapter 113, Section 123.

RULE 46. EXCEPTIONS UNNECESSARY

TEXT OF RULE

Exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has here-

tofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; but if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

RULE 47. JURORS

TEXT OF RULE

(a) Examination of Jurors. The court shall conduct the examination of prospective jurors unless in its discretion it permits the parties or their attorneys to do so. The court shall permit the parties or their attorneys to suggest additional questions to supplement the inquiry and shall submit to the prospective jurors such additional questions as it deems proper, or the court in its discretion may permit the parties or their attorneys themselves to make such additional inquiry as it deems proper.

(b) Alternate Jurors. The court may direct that one or two jurors in addition to the regular panel be called and impanelled to sit as alternate jurors as provided by law.

RULE 48. JURIES OF LESS THAN TWELVE—MAJORITY VERDICT

TEXT OF RULE

The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

RULE 49. SPECIAL VERDICTS AND INTERROGATORIES

TEXT OF RULE

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written

finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict, or may return the jury for further consideration of its answers and verdict or may

order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

RULE 50. MOTION FOR A DIRECTED VERDICT

TEXT OF RULE

(a) When Made: Effect. A motion for a directed verdict may be made at the close of the evidence offered by an opponent or at the close of all the evidence. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was re-

turned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) Appeal from Grant or Denial of Motion. If on appeal the Law Court finds that the court has erroneously entered a judgment notwithstanding the verdict, it may reinstate the verdict and direct the entry of judgment thereon. If on appeal the Law Court finds that the court has erroneously denied the motion for judgment notwithstanding the verdict, it may itself direct the entry of such judgment or order a new trial.

RULE 51. ARGUMENT OF COUNSEL; INSTRUCTIONS TO JURY

TEXT OF RULE

(a) Time for Argument. Counsel for each party shall be allowed one hour for argument. Counsel for the moving party shall argue first and be limited to 50 minutes. Opposing counsel shall then be allowed one hour. Counsel for the moving party shall be allowed 10 minutes for rebuttal. When multiple claims or multiple parties are involved in an action, the order and division of the arguments shall be subject to the direction of the court. Before commencement of argument the court may for good cause shown allow additional time, which shall in all cases be fixed and definite.

(b) Instructions to Jury; Objections. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stat-

ing distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

RULE 52. FINDINGS BY THE COURT

TEXT OF RULE

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall, upon the request of a party made as a motion within 5 days after notice of the decision, or may upon its own motion, find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall on such request similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a referee, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(b) Amendment. The court may, upon motion of a party made not later than 10 days after notice of findings made by the court, amend its findings or make additional findings and, if judgment has been entered, may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party

raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment.

RULE 53. REFEREES

TEXT OF RULE

(a) Appointment and Compensation. The court in which any action is pending may appoint one or more referees therein, not exceeding three in number. As used in these rules "referee" includes a master and an auditor, and the singular includes the plural. The compensation to be allowed to a referee shall be fixed by the court, and such compensation and necessary expenses incurred by a referee as allowed by the court shall be paid by the county on presentation of the proper certificate of the clerk.

(b) Reference.

(1) *Reference by Agreement.* The court may appoint a referee in all cases where the parties agree that the case may be so tried.

(2) *Reference without Agreement.* In absence of agreement of the parties, a reference shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when an investigation of accounts or an examination of vouchers is required; in an action to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.

(c) Powers. The order of reference to the referee may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the referee's report. When a party so requests, the referee shall make a record of the evidence of-

fered and excluded in the same manner and subject to the same limitations as provided in Rule 43(c) for a court sitting without a jury.

(d) Witnesses. The parties may procure the attendance of witnesses before the referee by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished by the court as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(e) Report.

(1) *Contents and Filing.* The referee shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. In cases where the reference is by agreement of the parties, the referee shall file with the clerk of the court the report, together with the original exhibits and together with any transcript which, at the election and expense of one or more of the parties, may be made of the proceedings and of the evidence before the referee. In cases where the reference is without agreement and where the action is to be tried without a jury, when the order of reference so provides, the referee shall file with his report and the original exhibits a transcript of the proceedings and of the evidence and the cost of such transcript shall be included in the necessary expenses incurred by the referee as provided in Rule 53(a). The clerk shall forthwith mail to all parties notice of the filing. [As amended January 19, 1960, effective February 1, 1960.]

(2) *In Non-Jury Actions.* (i) In an action where there has been a reference by agreement, the referee's conclusions of law and findings of fact shall be conclusive unless the order of reference reserves to the parties the right to object

to acceptance of the referee's report. If such right is so reserved, the court shall accept the referee's findings of fact unless clearly erroneous. (ii) In any other non-jury action the court shall accept the referee's findings of fact unless clearly erroneous. (iii) Except where the reference is by agreement without reservation of the right to object, any party may within 10 days after being served with notice of the filing of the report, serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). Except as otherwise provided in this paragraph (2), the court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) *In Jury Actions.* In an action to be tried by a jury the referee shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) *Draft Report.* Before filing his report a referee may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

VII. JUDGMENT

RULE 54. JUDGMENTS; COSTS

TEXT OF RULE

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings or the record of prior proceedings.

(b) Judgment upon Multiple Claims or Involving Multiple Parties. When multiple claims for relief or multiple parties are involved in an action, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every judgment shall grant the relief to which the party in whose favor it is rendered is entitled even if the party has not demanded such relief in his pleadings.

(d) Allowance of Costs. Costs shall be allowed as of course to the prevailing party, as provided by statute and by these rules, unless the court otherwise specifically directs.

(e) Taxation of Costs. Costs shall be taxed by the clerk upon a bill to be made out by the party entitled to them or, if no such bill is presented, upon inspection of the proceedings and files. If the adverse party has notified the clerk in writing of his desire to be present at the taxation of costs, no costs shall be taxed without notice to such adverse party.

(f) Schedule of Fees. The following schedule of fees shall be taxable as costs:

(1) *Attorneys.*

Summons and complaint, and writ of attachment if any	$3.60
Summons and complaint, and writ of replevin and bond	4.70
Travel: As provided by statute	
Attendance: For each term as provided by statute, except that (i) no costs shall be allowed, unless for cause shown, for any term when a case is continued by agreement; (ii) when an action is under an order of reference, the equivalent of one term's costs each shall be allowed on the issuance of the order and on the acceptance of the referee's report, but not for the intervening terms; and (iii) no costs shall be allowed after a defendant has defaulted.	
Drawing and filing judgment granting equitable relief when not requiring material alteration, each	5.00

(2) *Clerk for Use of Counties.*

Filing of action	1.00
Copy of summons, complaint, writ or other process, or abstract thereof, together with copy of order of notice thereon, not less than	1.00
Exemplifying copies, not less than	1.00
Commission to referee, auditor, surveyor or other officer appointed by the court	1.50
Warrant to make partition	1.00
Process to enforce a lien on personal property	2.00
Each certificate attached to renewed execution	.25
Copy of decree of divorce or certificate of same, not less than	1.00

Computing damages and taxing costs	.25
Writ of execution	.50
Execution for possession	.50
Writs of injunction	1.00
Every other writ and seal	1.00
Subpoena	.10
Blank summons or writ	.10

(3) *Miscellaneous.*

Service as taxed by the officer, subject to correction.

Surveyors, commissioners and other officers appointed by the court, fees as charged by them subject to correction.

Costs of reference as reported by the referee, and allowed by a justice of the court.

For hearing in damages or in costs, the clerk or referee appointed by the court shall have such reasonable compensation as a justice of the court may allow, and the same shall be paid by the county.

(g) Costs on Depositions. The taxing of costs in the taking of depositions shall be subject to the discretion of the court. No costs shall be allowed unless the court finds that the taking of the deposition was reasonably necessary, whether or not the deposition was actually used at trial. Taxable costs may include the cost of service of subpoena upon the deponent, the reasonable fee of the officer before whom the deposition is taken, the stenographer's reasonable fee for attendance, and the cost of the original transcript of the testimony or such part thereof as the court may fix.

RULE 55. DEFAULT

TEXT OF RULE

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise

defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) Judgment. Judgment by default may be entered as follows:

(1) *By the Clerk.* When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk shall, upon request of the plaintiff and upon affidavit of the amount due and affidavit that the defendant is not an infant or incompetent person, enter judgment for that amount and costs against the defendant, if he has been defaulted and has failed to appear. [As amended January 19, 1960, effective February 1, 1960.]

(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a guardian, guardian ad litem, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the plaintiff if he so requests.

(3) *Judgment on Negotiable Obligation.* No judgment by default shall be entered upon a claim based on a ne-

gotiable instrument or other negotiable obligation unless the instrument or obligation is filed with the clerk or unless the court for cause shown shall otherwise direct on such terms as it may fix.

(4) *Affidavit Required.* Notwithstanding the foregoing, no judgment by default shall be entered until the filing of an affidavit made by the plaintiff or his attorney, on the affiant's own knowledge, setting forth facts showing that the defendant is not a person in military service as defined in Article I of the "Soldiers' and Sailors' Civil Relief Act" of 1940, as amended, except upon order of the court in accordance with that Act.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

RULE 56. SUMMARY JUDGMENT

TEXT OF RULE

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declara-

tory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to

testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

RULE 57. DECLARATORY JUDGMENTS

TEXT OF RULE

The procedure for obtaining a declaratory judgment pursuant to 1954 Revised Statutes, Chapter 107, Sections 38 to 50 inclusive, shall be in accordance with these rules, and the right to trial by jury is preserved under the circum-

stances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

RULE 58. ENTRY OF JUDGMENT

TEXT OF RULE

Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the court shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs.

RULE 59. NEW TRIALS: AMENDMENT OF JUDGMENTS

TEXT OF RULE

(a) Grounds. The justice before whom an action has been tried may on motion grant a a new trial to all or any of the parties and on all or part of the issues for any of the reasons for which new trials have heretofore been granted in actions at law or in suits in equity in the courts of this state. On a motion for a new trial in an action tried without a jury, the justice before whom the action has been tried may

open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period either by the justice before whom the action has been tried for good cause shown or by the parties by written stipulation. Such justice may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the justice before whom the action has been tried of his own initiative may order a new trial for any reason for which he might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to Alter or Amend Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

RULE 60. RELIEF FROM JUDGMENT OR ORDER

TEXT OF RULE

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the Law Court,

and thereafter while the appeal is pending may be so corrected with leave of the Law Court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of bills of review are abolished as means of reopening judgments entered under these rules, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

RULE 61. HARMLESS ERROR

TEXT OF RULE

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in

anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

RULE 62. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT

TEXT OF RULE

(a) Automatic Stay, Exceptions — Injunctions and Receiverships. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 30 days after its entry or until the time for appeal from the judgment as extended by Rule 73(a) has expired. Unless otherwise ordered by the court, an interlocutory or permanent injunction or a judgment in a receivership action or, in an action for divorce, an order relating to the care, custody and support of minor children or to the separate support or personal liberty of the wife shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (d) of this rule govern the suspending, modifying, restoring or granting of an injunction during the pendency of an appeal. [As amended January 19, 1960, effective February 1, 1960.]

(b) Stay of Execution on Default Judgment. Execution in a personal action shall not issue upon a judgment by default against an absent defendant who has no actual notice thereof until one year after entry of the judgment except as provided by law.

(c) Order for Immediate Execution. In its discretion, the court on motion may, for cause shown and subject to

such conditions as it deems proper, order execution to issue at any time after the entry of judgment and before an appeal from the judgment has been taken or a motion made pursuant to Rule 50, 52(b), 59, or 60; but no such order shall issue if a representation, subject to the obligations set forth in Rule 11, is made that a party intends to appeal or to make such motion. When an order for immediate execution under this subdivision is denied, the court may, upon a showing of good cause, at any time prior to appeal or during the pendency of an appeal order the party against whom execution was sought to give bond in an amount fixed by the court conditioned upon satisfaction of the damages for delay, interest, and costs if for any reason the appeal is not taken or is dismissed, or if the judgment is affirmed.

(d) Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

(e) Stay upon Appeal. Except as provided in subdivisions (c) and (d) of this rule, the taking of an appeal from a judgment shall operate as a stay of execution upon the judgment during the pendency of the appeal, and no supersedeas bond or other security shall be required as a condition of such stay.

(f) Continuance of Attachment. An attachment of real or personal property or an attachment on trustee process or a bond given to vacate any such attachment or to release the defendant from arrest on capias writ shall, unless dissolved by operation of law, continue during the time within which an appeal may be taken from the judgment and during the

pendency of any appeal. When a judgment has become final by expiration of the time for appeal, by dismissal of an appeal, or on certificate of decision from the Law Court, any such attachment or bond shall continue for 60 days if the judgment is for the plaintiff but shall be dissolved forthwith if the judgment is for the defendant.

(g) Power of Law Court Not Limited. The provisions in this rule do not limit any power of the Law Court during the pendency of an appeal to suspend, modify, restore, or grant an injunction or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(h) Stay of Judgment upon Multiple Claims. When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

RULE 63. DISABILITY OF A JUSTICE

TEXT OF RULE

If by reason of death, resignation, removal, sickness, or other disability, a justice before whom an action has been tried is unable to perform his duties under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other justice may perform those duties; but if such other justice is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

RULE 64. REPLEVIN

TEXT OF RULE

(a) Availability of Replevin. A plaintiff claiming the possession of goods wrongfully taken or detained may replevy the goods on writ of replevin as provided by this rule or by law.

(b) Writ of Replevin: Form. The writ of replevin shall bear the signature or facsimile signature of the clerk, be under seal of the court, contain the name of the court, the names and residences of the parties and the date of the complaint, be directed to the sheriff or his deputies of the county within which the goods are located, and command them to replevy the goods, which shall be described with reasonable particularity and their respective values stated. As amended Nov. 2, 1959, eff. Dec. 1, 1959.

(c) Same; Service. The writ of replevin may be procured in blank from the clerk and shall be filled out by the plaintiff's attorney as provided in subdivision (b) of this rule. The plaintiff's attorney shall deliver to the officer replevying the goods the original writ of replevin upon which to make his return, and attached thereto the bond required by law, and a copy of the writ of replevin and bond for service on the defendant. The officer shall forthwith cause the goods to be replevied and delivered to the plaintiff. Thereupon the defendant shall be served, in the manner prescribed by Rule 4, with a copy of the writ of replevin and bond, with the officer's indorsement thereon of the date of execution of the writ, and with the summons and complaint.

(d) Allegations of Demand and Refusal; Title. If the action is for a wrongful detention only, a demand and refusal of possession before beginning the action shall be al-

leged by the plaintiff in replevin. Where the title to the goods of the plaintiff in replevin rests upon the title of a third person or upon a special property, the facts shall be alleged.

(e) Defenses; Counterclaim. All defenses shall be made by answer. If the defendant in replevin claims title to the goods or relies upon the title of a third person or upon a special property, the answer shall so state. All claims by the defendant in replevin for a return of the goods, for damages, or for a lien, shall be made by counterclaim.

(f) Replevin on Counterclaim, Cross-Claim or Third-Party Complaint. Goods may be replevied on writ of replevin by a party bringing a counterclaim, a cross-claim, or a third-party complaint in the same manner as upon an original claim, provided that the goods are located within the county where the action is pending.

(g) Equitable Replevin. There rules shall not be construed to extend or limit the availability of equitable replevin.

Effect of Amendment: The Nov. 2, 1959, amendment of Rule 64(b) added the last five words.

RULE 65. INJUNCTIONS

TEXT OF RULE

(a) Temporary Restraining Order; Notice; Hearing; Duration. No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. The verification of such affidavit or verified complaint shall be upon the affiant's own knowledge, information or belief; and, so far as upon information and belief, shall state that he believes this information to be

true. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(b) Preliminary Injunction; Notice. No preliminary injunction shall be issued without notice to the adverse party. The prayer for preliminary injunction may be included in the complaint or may be made by motion.

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully

enjoined or restrained, provided, however, that for good cause shown and recited in the order, the court may waive the giving of security.

A surety upon a bond or undertaking under this rule submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

(d) Form and Scope of Restraining Order or Injunction. Every restraining order and every order granting a preliminary or permanent injunction shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) Employer and Employee. These rules do not modify any statute relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee.

(f) Presentation to Other Justice. When an application for an injunction or for an order or decree under this rule is made to one justice and has been acted upon by him, it shall not be presented to any other justice except by direction of the first justice because of his necessary absence.

RULE 66. RESERVED

RULE 67. DEPOSIT IN COURT

TEXT OF RULE

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of 1954 Revised Statutes, Chapter 89, Section 100.

RULE 68. OFFER OF JUDGMENT

TEXT OF RULE

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.

RULE 69. EXECUTION

TEXT OF RULE

Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs other-

wise. Except as permitted by statute relating to issuance of execution after disclosure, no execution running against the body shall be issued unless after motion and hearing it is so ordered by the court, which shall not order such execution to issue on a judgment based on a contract, express or implied, or in an action on such a judgment. In addition to the procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution, as provided by law, the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions. As amended Nov. 2, 1959; eff. Dec. 1, 1959.

Effective Amendment: Addition to the second sentence was believed necessary, in view of the single form of action, to avoid confusion as to use of capias executions.

RULE 70. JUDGMENT FOR SPECIFIC ACTS

TEXT OF RULE

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party, except that the appointee of the court shall have no authority to execute a conveyance of land located outside the State of Maine. The court may also in proper cases adjudge the party in contempt.

RULE 71. PROCESS IN BEHALF OF AND AGAINST PERSONS NOT PARTIES

TEXT OF RULE

When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order

by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

IX. APPEALS

RULE 72. REPORT OF CASES

TEXT OF RULE

(a) Report by Agreement of Important or Doubtful Questions. The court may, where all parties appearing so agree, report any action to the Law Court if it is of the opinion that any question of law is involved of sufficient importance or doubt to justify the same, provided that the decision thereof would in at least one alternative finally dispose of the action.

(b) Report on Agreed Facts. The court may, upon request of all parties appearing, report any action to the Law Court for determination where there is agreement as to all material facts, if it is of the opinion that any question of law is involved of sufficient importance or doubt to justify the same.

(c) Report of Interlocutory Rulings. If the court is of the opinion that a question of law involved in an interlocutory order or ruling made by it in any action ought to be determined by the Law Court before any further proceedings are taken therein, it may on motion of the aggrieved party report the case to the Law Court for that purpose and stay all further proceedings except such as are necessary to preserve the rights of the parties without making any decision therein.

(d) Determination by the Law Court. Any action reported under this rule shall be entered in the Law Court and

heard and determined in the manner provided in case of appeals.

RULE 73. APPEAL TO THE LAW COURT

TEXT OF RULE

(a) When and How Taken. Whenever a judgment of the Superior Court or of a single justice of the Supreme Judicial Court is by law reviewable by the Law Court, such review shall be by appeal in accordance with these rules. Review by exceptions, motion, or otherwise than by appeal is abolished. The time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or making findings of fact or conclusions of law as requested under Rule 52(a); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

A party may appeal from the judgment by filing a notice of appeal with the clerk. An appeal may be dismissed by stipulation filed with the clerk, or, after the docketing of the appeal in the Law Court, with the clerk of the Law Court,

provided that after the appeal is argued to the Law Court, it may be dismissed only with leave of the Law Court.

Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal; but the appeal will be dismissed for appellant's failure to take any such further step within the time prescribed therefor unless the Law Court on petition shall determine that exceptional circumstances excuse the failure and justice demands that the appeal be heard.

(b) Notice of Appeal. The notice of appeal shall specify the parties taking the appeal and shall designate the judgment or part thereof appealed from. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to all the parties to the judgment other than the party or parties taking the appeal, but his failure so to do does not affect the validity of the appeal. The notification to a party shall be given by mailing a copy of the notice of appeal to his attorney of record or, if the party is not represented by an attorney, then to the party at his last known address, and such notification is sufficient notwithstanding the death of the party or of his attorney prior to the giving of the notification. The clerk shall note in the civil docket the names of the parties to whom he mails the copies, with date of mailing.

(c) Bond; Continuance in Effect. Any bond given at the commencement or during the pendency of an action shall, unless otherwise provided by law or by direction of the justice ordering the judgment appealed from, continue in effect until the final disposition of the action and until the conditions of such bond have been fulfilled.

(d) Filing Record on Appeal. Eighteen copies of the record on appeal as provided for in Rule 75 and 76, together with one additional copy for each of the parties of record,

shall be filed with the clerk within 90 days from the date of filing the notice of appeal; except that, when more than one appeal is taken from the same judgment, the court may prescribe the time for filing the record, which in no event shall be less than 90 days from the date of filing the first notice of appeal. In all cases the court in its discretion and with or without motion or notice may extend the time for filing the record on appeal, if its order for extension is made before the expiration of the period for filing as originally prescribed or as extended by a previous order.

(e) Certification of Record; Transmission to Law Court. It shall be the duty of the clerk promptly to examine and certify the copies of the record on appeal as true and correct. The clerk shall thereupon transmit 18 copies of the record to the clerk of the Law Court and furnish a copy of the record to counsel for each of the parties. The case shall be marked "law" on the docket and no further action shall be taken thereon until after certificate of decision from the Law Court. The case shall be docketed in the Law Court upon receipt of the record on appeal.

RULE 74. JOINT OR SEVERAL APPEALS

TEXT OF RULE

Parties interested jointly, severally, or otherwise in a judgment may join in an appeal therefrom; or any one or more of them may appeal separately or any two or more of them may join in an appeal.

RULE 75. RECORD ON APPEAL TO THE LAW COURT

TEXT OF RULE

(a) Designation of Contents of Record on Appeal. Not later than 30 days after an appeal to the Law Court is taken, the appellant shall serve upon the appellee and file with the clerk a designation of the portions of the record, proceed-

ings, and evidence to be contained in the record on appeal, unless the appellee has already served and filed a designation. In all cases the court in its discretion and with or without motion or notice may extend the time for serving and filing the designation, if its order for extension is made before the expiration of the period for serving and filing as originally prescribed or as extended by a previous order. Within 10 days after the service and filing of such a designation, any other party to the appeal may serve and file a designation of additional portions of the record, proceedings, and evidence to be included. If the appellee files the original designation, the parties shall proceed under subdivision (b) of this rule as if the appellee were the appellant.

(b) Transcript. If there be designated for inclusion any evidence or proceeding at a trial or hearing which was stenographically reported, the appellant shall file with his designation a copy of the reporter's transcript of the evidence or proceedings included in his designation. If the designation includes only part of the reporter's transcript, the appellant shall file a copy of such additional parts thereof as the appellee may need to enable him to designate and file the parts he desires to have added, and if the appellant fails to do so the court on motion may require him to furnish the additional parts needed. The copy so filed by the appellant shall be available for the use of the other parties. In the event that a copy of the reporter's transcript or of the necessary portions thereof is already on file, the appellant shall not be required to file an additional copy.

(c) Form of Testimony. Testimony of witnesses designated for inclusion shall be in question and answer form unless the parties agree upon a narrative form.

(d) Statement of Points. The appellant shall serve with his designation a concise statement of the points on which he intends to rely on the appeal, and any point not so stated

may be deemed waived. No such statement shall be deemed insufficient if it fairly discloses the contentions which the appellant intends to urge before the Law Court.

(e) Record to be Abbreviated. All matter not essential to the decision of the questions presented by the appeal shall be omitted. Formal parts of all exhibits and more than one copy of any documents shall be excluded. Documents shall be abridged by omitting all irrelevant and formal portions thereof. For any infraction of this rule the Law Court may withhold or impose costs as the circumstances of the case and discouragement of like conduct in the future may require; and costs may be imposed upon offending attorneys or parties.

(f) Stipulation as to Record. Instead of serving designations as above provided, the parties by written stipulation filed with the clerk may designate the parts of the record, proceedings, and evidence to be included in the record on appeal. At the same time the appellant shall file a statement of points as provided for under subdivision (d) of this rule.

(g) Appellant to Cause Record to be Prepared—Necessary Parts. It shall be the duty of the appellant or of the party aggrieved by a reported interlocutory ruling, at his own expense, to cause the record on appeal to be prepared and to file the required copies thereof with the clerk. In cases of facts agreed and stated by the parties or reported by consent of the parties, the same shall be done by the plaintiff at his own expense unless otherwise agreed by the parties or directed by the court. If the party whose duty it is to furnish the record neglects to do so, the court shall dismiss the appeal for want of prosecution.

The record on appeal shall include a copy of the matter designated by the parties, but also shall always include, whether or not designated, copies of the following: the ma-

terial pleadings without unnecessary duplication; the verdict or the findings of fact and conclusions of law together with the direction for the entry of judgment thereon; in an action tried without a jury, the referee's report, if any; the opinion; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and the statement by the appellant of the points on which he intends to rely.

(h) Power of Court to Correct or Modify Record. It is not necessary for the record on appeal to be approved by the court except as provided in subdivision (m) of this rule and in Rule 76, but, if any difference arises as to whether the record truly discloses what occurred, the difference shall be submitted to and settled by the court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the court, either before or after the record is transmitted to the Law Court, or the Law Court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk. All other questions as to the content and form of the record shall be presented to the Law Court.

(i) Exhibits. Except as hereinafter provided, exhibits designated by the parties shall be reproduced in the record on appeal either by printing, photostatic or photographic process, and the original exhibits shall not be filed in the Law Court. The copies of exhibits so prepared may be separately bound and but 12 sets filed with the Law Court. Whenever in the opinion of the justice before whom the case was heard any of such exhibits cannot be reproduced by printing, photostatic or photographic process, or can be so reproduced only at a cost which is excessive and dispropor-

tionate to the importance of such exhibits in affording a fair understanding of the case upon review, such justice shall so certify and by specific order direct that such original exhibits be transmitted by the clerk to the clerk of the Law Court as forming a part of the record on appeal. Whenever physical examination of exhibits printed or reproduced as a part of the record on appeal is necessary to afford a fair understanding of the same or their effect, the clerk, upon order of the justice before whom the case was heard, may transmit to the clerk of the Law Court such exhibit or exhibits as said justice may specify in his order. Nothing herein contained shall prevent the withdrawal of original exhibits and the substitution of copies thereof in the court below when the same is done by agreement of the parties and with the consent of the justice presiding. For the purposes of this rule such substituted copies shall be deemed the exhibits admitted in the case.

(j) Record for Preliminary Hearing in Law Court. If, prior to the time the complete record on appeal is settled and certified as herein provided, a party desires to docket the appeal in order to make in the Law Court a motion or dismissal, for a stay pending appeal, or for any intermediate order, the clerk at his request shall certify and transmit to the Law Court a copy of such portion of the record or proceedings below as is needed for that purpose.

(k) Several Appeals. When more than one appeal is taken to the Law Court from the same judgment, a single record on appeal shall be prepared containing all the matter designated or agreed upon by the parties, without duplication.

(l) Printing. The record on appeal shall be properly indexed and shall be printed or typewritten with at least double spacing on good paper of the size of 8 x 10½ inches.

(m) Appeals When No Stenographic Report Was Made. In the event no stenographic report of the evidence or pro-

ceedings at a hearing or trial was made, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection, for use instead of a stenographic transcript. This statement shall be served on the appellee who may serve objections or propose amendments thereto within 10 days after service upon him. Thereupon the statement, with the objections or proposed amendments, shall be submitted to the court for settlement and approval and as settled and approved shall be included in the record on appeal.

RULE 76. RECORD ON APPEAL TO THE LAW COURT; AGREED STATEMENT

TEXT OF RULE

When the questions presented by an appeal to the Law Court can be determined without an examination of all the pleadings, evidence, and proceedings in the court below, the parties may prepare and sign a statement of the case showing how the questions arose and were decided and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the questions by the Law Court.

The statement shall include a copy of the judgment appealed from, a copy of the notice of appeal with its filing date, and a concise statement of the points to be relied on by the appellant. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the questions raised by the appeal, shall be approved by the court and shall then be certified to the Law Court as the record on appeal.

RULE 76A. PROCEEDINGS IN THE LAW COURT

TEXT OF RULE

(a) Time of Hearing. Except as otherwise provided by statute, all appeals shall, unless the court otherwise directs,

be in order for hearing at the first term of the Law Court commencing not less than 35 days after the filing of the record on appeal.

(b) Brief for Law Court. Counsel for each party, at least 14 days before the commencement of the term at which a case is in order for hearing, shall furnish to the clerk of the Law Court 18 copies of a brief, together with one additional copy for each of the parties of record. The brief shall be properly indexed, and shall be printed or typewritten, with at least double spacing except for quotations, on good paper of the size of 8 x 10½ inches, and shall contain in the order here stated:

(1) A concise statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(2) A summary of the points of law relied upon.

(3) A brief of the argument exhibiting a clear statement of the points, both of law and fact, to be discussed, with appropriate reference to the pages of the record and the authorities relied upon in support of each point.

Either party may, at or before the argument of the appeal, file a supplemental brief strictly confined to matter in reply to the brief of the adverse party.

On the day after briefs are required to be filed or at such earlier time as briefs for all parties of record have been filed, the clerk of the Law Court shall forward copies of the briefs to all counsel. Ten days before the term at which the case is to be argued, the clerk shall forward copies of the briefs and record to the justices, reserving 6 copies for distribution to the justices for use at the time of argument and one copy for the reporter of decisions.

If both parties have neglected to comply with this rule, the case, when it is reached in its order on the docket, will

be continued, or the parties will be ordered to argue in writing, or judgment will be immediately entered at the discretion of the court. If one party has complied with the rule, and the other has not, only the party complying will be heard in oral argument, and the other party will be ordered to argue in writing, or the case may be decided without argument by the other party, at the discretion of the court.

(c) Time for Argument. Oral argument before the Law Court, including arguments in reply, shall be limited to one hour for each party, unless before the arguments are begun the court shall for cause shown fix a longer time.

(d) Costs in the Law Court. Costs in the Law Court shall be as follows:

(1) Travel and attendance as in the Superior Court, but for one term only.

(2) The prevailing party may tax one additional attorney's fee of $2.50.

(3) Transcripts of cases made by an official reporter may be taxed for at the rate actually paid to the reporter, not exceeding the rate established by statute. Printed copies of the record certified by the clerk may be taxed for at the rate actually paid for the printing, not exceeding $3.50 per page for pages averaging 240 words each (exclusive of initials "Q" and "A"). If a party prints his own record, compensation paid to the clerk for copies of papers and exhibits in his official custody may be taxed. In all cases there may also be taxed compensation to the clerk for preparing the manuscript for the printer when necessary, and for certifying the record, at the rate of 10 cents per printed page, for pages averaging 240 words each.

X. SUPERIOR COURTS AND CLERKS

RULE 77. SUPERIOR COURTS AND CLERKS

TEXT OF RULE

(a) Superior Courts Always Open. The Superior Courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.

(b) Trials and Hearings; Orders in Chambers. All trials upon the merits shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place either within or without the county where the action is pending.

(c) Clerk's Office and Orders by Clerk. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Sundays, legal holidays, and such Saturdays as the county commissioners of the several counties may in their discretion order such offices closed. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon every party affected thereby who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required

by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73(a).

(e) Facsimile Signature of the Clerk. A facsimile of the signature of the clerk imprinted at his direction upon any summons, writ, subpoena, order or notice, except executions and criminal process, shall have the same validity as his signature.

RULE 78. MOTION DAY

TEXT OF RULE

Unless local conditions make it impracticable, the Chief Justice of the Supreme Judicial Court shall establish for each county regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the court at any time or place and on such notice, if any, as it considers reasonable may make orders for the advancement, conduct, and hearing of actions.

To expedite its business or for the convenience of the parties, the court may make provision for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

RULE 79. BOOKS AND RECORDS KEPT BY THE CLERK AND ENTRIES THEREIN

TEXT OF RULE

(a) Civil Docket. The clerk shall keep the civil docket, and shall enter therein each civil action to which these rules are applicable. Actions shall be assigned docket numbers. Upon the filing of a complaint with the court, the Christian

and surname of each party and each trustee, and the name and address of the plaintiff's attorney shall be entered upon the docket. Thereafter the name and address of the attorney appearing or answering for any defendant or trustee shall similarly be entered. All papers filed with the clerk, all appearances, orders, verdicts, and judgments shall be noted chronologically upon the docket and shall be marked with the docket number. These notations shall briefly show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made.

(b) Civil Judgments and Orders. After the rendition of judgment the clerk shall, without unreasonable delay, make extended records of proceedings in real actions, including actions for the foreclosure of mortgages, in actions for flowage, and for partition. In other civil actions it shall be sufficient to record the names of the parties, the docket number, the date of the complaint, the date of service, the verdict of jury, if any, and the date of rendition of judgment, its nature and amount. In an action for divorce or annulment there shall be recorded a copy of the judgment, the residence of the parties, the date of marriage, the alleged grounds for relief, the names of children, if any, and the prayer, if any, for change of name. Notwithstanding the foregoing, no extension of records is required in petitions and decrees for changes in custody, support, reciprocal support, alimony, restraint and contempt. Upon application of any party made not later than 90 days after final judgment the court may order the preparation, upon payment of fees ordered by the court, of a full record in any action or such additional record as the party requests. The Chief Justice of the Supreme Judicial Court shall prescribe the form and manner of making and keeping such records and may prescribe such further records to be kept as he may deem appropriate. As amended Nov. 2, 1959, eff. Dec. 1, 1959.

(c) Custody of Papers by Clerk. The clerk shall be answerable for all records and papers filed with the court, and they shall not be taken from his custody without special order of the court; but the parties may at all times have copies.

(d) Other Books and Records. The clerk shall keep such other books and records as may be required from time to time by the Chief Justice of the Supreme Judicial Court.

Effect of Amendment: The Nov. 1, 1958, amendment deleted the first sentence of Rule 79(b) in its prior form and added the last sentence. It also inserted "a copy of the judgment" in the third sentence.

XI. SPECIAL RULES FOR CERTAIN ACTIONS

RULE 80. DIVORCE AND ANNULMENT

TEXT OF RULE

(a) Applicability to Divorce. These Rules of Civil Procedure shall apply to actions for divorce, except as otherwise provided in this rule.

(b) Commencement of Proceedings; Service. The complaint in an action for divorce shall be signed by the plaintiff, and service shall be made in accordance with Rule 4, except that service within the state shall be by delivery to the defendant personally unless otherwise ordered by the court. Attachment of real or personal property or on trustee process may be used in connection with the commencement of an action for divorce. When the residence of the defendant can be ascertained, it shall be stated in the complaint. When the residence of the defendant is not known by the plaintiff and cannot be ascertained by reasonable diligence, the complaint shall so allege under oath. When notice is

given by publication upon any complaint which sets out adultery as a ground for divorce, the name of any alleged paramour of the defendant, if set out in the complaint, shall be omitted from the published notice, and a copy of such complaint wherein are inserted, in place of such names, the words "a certain man named in the complaint" or "a certain woman named in the complaint," as the case may be, shall, if otherwise correct, be considered for all purposes a true copy of such complaint. Notwithstanding the provisions of Rule 17(b), an infant party to any proceeding under this rule need not be represented by next friend, guardian ad litem, or other fiduciary, unless the court so orders. [As amended January 19, 1960, effective February 1, 1960.]

(c) Orders Prior to Judgment. At any time prior to judgment in an action for divorce in which the court has personal jurisdiction over the husband, it may on motion order him to pay to the wife or to her attorney sufficient money for her defense or prosecution thereof and to make reasonable provision for her separate support, and may make such order as it deems proper for the care, custody and support of minor children. At any time prior to judgment in any action for divorce, the court may on motion enter such order as it deems proper for the custody of minor children within the state and may prohibit the husband from imposing any restraint on the personal liberty of the wife. Costs and counsel fees may be ordered on any motion under this subdivision, and the court may in all cases enforce obedience by appropriate processes on which costs and counsel fees shall be taxed as in other actions. Execution for counsel fees for prosecution or defense of the action for divorce shall not issue until the action for divorce has been heard. [As amended January 19, 1960, effective February 1, 1960.]

(d) No Judgment without Hearing; Appearance by Defendant. No judgment, other than a dismissal for want of

prosecution, shall be entered in an action for divorce except after hearing, which may be ex parte if the defendant does not appear. Even though the defendant does not file an answer, he may, upon entering a written appearance, be heard on issues of custody of children, alimony, support, and counsel fees.

(e) Counterclaim. A counterclaim may state any cause for divorce or nullity of marriage at the time of service of the counterclaim, and may be filed by leave of the court at any time prior to judgment. Failure of the defendant in an action for divorce to counterclaim for divorce or nullity of marriage or any other claim shall not bar a subsequent action therefor.

(f) Discovery. In an action for divorce, depositions and interrogatories pursuant to Rules 26 to 37 shall be taken only by order for good cause shown.

(g) Time of Trial. An action for divorce shall not be in order for hearing until 60 days or more after service of the summons and complaint.

(h) New Trial. A new trial shall not be granted nor shall either party or his legal representative be relieved from any judgment of divorce if the parties have cohabited or one of them has contracted a new marriage since such judgment.

(i) Nullity of Marriage. When the validity of a marriage is doubted, either party may file a complaint as for divorce, and the court shall order it annulled or affirmed according to the proof; but no such decree affects the rights of the defendant unless he has actual notice of the action.

(j) Motions after Judgment. Any proceedings for modification or enforcement of the judgment in an action for divorce shall be on motion, notice of which shall be served upon the party himself in the manner provided in Rule 5

and not upon the attorney or the clerk. [As amended January 19, 1960, effective February 1, 1960.]

RULE 80A. REAL ACTIONS

TEXT OF RULE

(a) Applicability to Real Actions. Writs of entry are abolished, and these Rules of Civil Procedure shall govern the procedure in real actions, except as otherwise provided in this rule.

(b) Commencement of Action; Service. An action to recover any estate in fee simple, in fee tail, for life, or for any term of years shall be commenced by complaint and service of summons as in other civil actions.

(c) Complaint. The demanded premises shall be clearly described in the complaint. The plaintiff shall declare on his own seizin within 20 years then last past, without naming any particular day or averring a taking of the profits, and shall allege a disseizin by the defendant. The plaintiff shall set forth the estate which he claims in the premises, but if he proves a lesser estate than he has alleged, amendment may be made to conform to the proof and judgment ordered accordingly. The plaintiff need not state in his complaint the origin of his title, but the court may, on motion of the defendant, order the plaintiff to file a statement of his title and its origin. The complaint shall include any claim against the defendant for damages which have accrued at the time of commencement of the action for the rents and profits of the premises or for any destruction or waste of the buildings or other property for which the defendant is by law answerable.

(d) Answer. All defenses shall be made by answer as in other actions. The defendant may defend for a part only of the premises, and when for a part only, it shall be described in the answer with like certainty as is required in

the complaint. If the defendant defends for a part only, the plaintiff shall, subject to the provisions of Rule 54(b), have judgment against him on the pleadings for recovery of possession of the part not defended. If the defendant by answer alleges that he has been in possession of a tract of land lying in one body for 6 years or more before the commencement of the action, that only part of it is demanded, and that the plaintiff has as good a title to the whole as to such part, proof of that fact shall defeat the action unless the complaint is amended so as to include the whole tract, which the court may allow without costs. A defendant not in possession of the premises when the action was commenced may defeat the action by disclaiming in his answer any right or title to the premises.

(e) No Abatement by Death or Intermarriage. No real action shall be abated by the death or intermarriage of either party after it has been commenced. The court shall proceed to try and determine such action, but only after such notice as the court orders has been given to all persons interested in his estate.

(f) Judgment. The judgment shall declare the estate, if any, in all or in any part of the demanded premises to which the plaintiff is entitled; and if the plaintiff shall recover judgment for title and possession of all or any part of the demanded premises, the court may order one or more writs of possession to issue in accordance with law. If either party dies before a writ of possession is executed or the action is otherwise disposed of, any money payable by the defendant may be paid by him, his executor or administrator, or by any person entitled to the estate under him, to the plaintiff, his executor or administrator with the same effect as if both parties were living. The writ of possession shall be issued in the name of the original plaintiff against the original defendant, although either or both are dead; and when executed, it shall enure to the use and benefit of

the plaintiff, or of the person who is then entitled to the premises under him, as if executed in the lifetime of the parties.

(g) Foreclosure of Mortgage. An action under this rule may be used for the purpose of the foreclosure of a mortgage of real estate as provided by law.

RULE 80B. REVIEW OF ADMINISTRATIVE ACTION

TEXT OF RULE

(a) Mode of Review. When a statute provides for review by the Superior Court of any action by a governmental agency, department, board, commission, or officer, whether by appeal or otherwise or when any judicial review of such action was heretofore available by extraordinary writ, proceedings for such review shall be instituted by filing a complaint with the court. The complaint shall include a concise statement of the grounds upon which the plaintiff contends he is entitled to relief, and shall demand the relief to which he believes himself entitled. No responsive pleading need be filed unless required by statute or by order of the court.

(b) Time Limits; Notice. The time within which review may be sought shall be as provided by statute, except that if no time limit is specified by statute, the complaint shall be filed within 30 days after the action of which review is sought unless the court enlarges the time in accordance with Rule 6(b). Written notice of the claim for review, together with a copy of the complaint, shall be given to the opposite party.

(c) Trial or Hearing; Judgment. These Rules of Civil Procedure, so far as they are applicable, shall govern any trial of the facts where provided by statute or otherwise. Such trial shall be without jury unless the Constitution of the State of Maine or a statute gives the right to trial by jury. The judgment of the court shall affirm, reverse, or modify the decision under review as provided by law.

(d) Review by the Law Court. Unless by statute or otherwise the decision of the Superior Court is final, review by the Law Court shall be by appeal or report in accordance with these Rules of Civil Procedure, and no other method of appellate review shall be permitted. If the statute provides for a speedy hearing by the Law Court on written arguments, the time limits and other provisions of the statute with respect thereto shall prevail.

XII. GENERAL PROVISIONS

RULE 81. APPLICABILITY OF RULES

TEXT OF RULE

(a) To What Proceedings Fully Applicable. These rules apply to all proceedings in suits of a civil nature in the Superior Court or before a single justice of the Supreme Judicial Court, with the exceptions set forth in subdivision (b) of this rule. They apply to proceedings on appeal to the Superior Court as the Supreme Court of Probate and proceedings in the Superior Court on appeal from a municipal court or trial justice in civil actions. A civil action under these rules is appropriate whether the suit is cognizable at law or in equity and irrespective of any statutory provisions as to the form of action.

(b) Limited Applicability. These rules do not alter the practice prescribed by the statutes of the State of Maine for beginning and conducting the following proceedings in the Superior Court or before a single justice of the Supreme Judicial Court:

(1) Proceedings under the writs of coram nobis or coram vobis to review criminal actions, or under the writs of mandamus, prohibition, certiorari, quo warranto, and habeas corpus and for replevying a person. Any review of administrative action hitherto available by extraordinary

writ shall be in accordance with procedure prescribed by Rule 80B.

(2) Proceedings in bastardy cases.

(3) Proceedings to compel the support of a wife or a minor child or children.

(4) Proceedings for the removal of an attorney or summary proceedings against an attorney for payment of collections.

(5) Applications for naturalization, judicial declarations of citizenship, or any other ex parte proceeding.

(6) Applications by any governmental agency, department, board, commission, or officer to enforce a subpoena, to compel the production of documents, or to require answer to pertinent questions.

(7) Proceedings with respect to contested elections for county or municipal office.

In respects not covered by statute, the practice in these proceedings shall follow the course of the common law, but shall otherwise conform to these rules, except that depositions shall be taken or interrogatories served only by order of the court on motion for cause shown.

Review by the Law Court, to the extent that review of any such proceeding is available, shall be by appeal or report in accordance with these rules, except that any such review in mandamus proceedings, proceedings for the removal of an attorney, or proceedings with respect to contested elections for county or municipal office shall conform to the procedure specified by statute therefor.

(c) Scire Facias Abolished. The writ of scire facias is abolished. Relief heretofore available by scire facias may be obtained by appropriate action or motion under the practice prescribed by these rules.

(d) Other Writs Abolished. Writs of waste, dower, partition and account are abolished. In any action for relief or damages because of waste, or for dower, partition or account, the practice and procedure, including the summons, shall be as in other civil actions.

(e) Terminology in Statutes. In applying these rules to any proceeding to which they are applicable, the terminology of any statute which is also applicable, where inconsistent with that in these rules or inappropriate under these rules, shall be taken to mean the device or procedure proper under these rules.

(f) When Procedure Is Not Specifically Prescribed. When no procedure is specifically prescribed, the court shall proceed in any lawful manner not inconsistent with the Constitution of the State of Maine, these rules or any applicable statutes.

RULE 82. JURISDICTION AND VENUE UNAFFECTED

TEXT OF RULE

These rules shall not be construed to extend or limit the jurisdiction of the Superior Court or the Supreme Judicial Court or the venue of actions therein.

RULE 83. DEFINITIONS

TEXT OF RULE

Unless specified to the contrary, the following words whenever used in these rules shall have the following meanings:

(1) The word "court" shall include any justice of the Superior Court and any single justice of the Supreme Judicial Court.

(2) The word "clerk" shall mean the clerk of courts in and for the county in which the action is pending.

(3) The term "plaintiff's attorney" or "defendant's attorney" or any like term shall include the party appearing without counsel.

RULE 84. FORMS

TEXT OF RULE

The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.

RULE 85. TITLE

TEXT OF RULE

These rules may be known and cited as the Maine Rules of Civil Procedure.

RULE 86. EFFECTIVE DATE

TEXT OF RULE

These rules will take effect on December 1, 1959. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

RULE 87. ADMISSION TO THE BAR

TEXT OF RULE

Applications for admission to the bar shall be heard by a single justice of the Supreme Judicial Court in open court and at such time and place as he may designate.

APPENDIX OF FORMS

(See Rule 84)

INTRODUCTORY STATEMENT

1. The following forms are intended for illustration only, but they are expressly declared by Rule 84 to be sufficient under the rules. They are limited in number. No attempt is made to furnish a manual of forms. Each form assumes the action to be brought in the Superior Court for Cumberland County.

2. Except where otherwise indicated each pleading, motion, and other paper should have a caption similar to that of the summons, with the designation of the particular paper substituted for the word "Summons". In the caption of the summons and of the complaint all parties must be named and their residence stated; but in other pleadings and papers, it is sufficient to state the name of the first party on either side, with an appropriate indication of other parties. See Rules 4(a), 4A(b), 4B(b), 64(b), 7(b) (2), and 10(a). In the forms where the seal of the court is required, the place for the seal is indicated at the lower left. See, e. g., Forms 1, 2, 2A, 14, 22, 30. The seal traditionally has been affixed at the upper left of writs and other court papers. It can under the rules be placed at the lower left as shown here or at the traditional upper left or at any other convenient place on the document.

3. Each pleading, motion, and other paper is to be signed in his individual name by at least one attorney of record (Rule 11). The attorney's name is to be followed by his address as indicated in Form 3. In forms following Form 3 the signature and address are not indicated.

4. If a party is not represented by an attorney, the signature and address of the party are required in place of those of the attorney.

5. The forms are for convenience given the same numbers as those in the Appendix to the Federal Rules. The omitted forms are inappropriate for state practice.

FORM 1. SUMMONS

STATE OF MAINE SUPERIOR COURT

CUMBERLAND, SS

Civil Action, Docket Number . . .

A. B., Plaintiff
of Bath,
Sagadahoc County
v.
C. D., Defendant
of Portland,
Cumberland County

Summons

To the above-named Defendant:

You are hereby summoned and required to serve upon ..... plaintiff's attorney, whose address is ....., an answer to the complaint which is herewith served upon you, within 20* days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Your answer must also be filed with the court. As provided in Rule 13(a), your answer must state as a counterclaim any related claim which you

may have against the plaintiff, or you will thereafter be barred from making such claim in any other action.

.....
Clerk of said Superior Court

[Seal of the Court]

Dated .....

Served on .....
date

.....
Deputy Sheriff

* Use 20 days, except that in the exceptional situations where a different time is allowed in which to answer, the different time should be inserted.

ALTERNATE FORM 1. SUMMONS
(for use in an action in another county)

STATE OF MAINE — SUPERIOR COURT

SAGADAHOC, SS

Civil Action, Docket Number ...
Cumberland County

A. B., Plaintiff
of Bath,
Sagadahoc County
v.
C. D., Defendant
of Portland,
Cumberland County

Summons

To the above-named Defendant:

You are hereby summoned to defend an action brought in the Superior Court for Cumberland County and required to

serve upon ..... plaintiff's attorney, whose address is ....., an answer to the complaint which is herewith served upon you, within 20* days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Your answer also must be filed with the court in Cumberland County. As provided in Rule 13(a), your answer must state as a counterclaim any related claim which you may have against the plaintiff, or you will thereafter be barred from making such claim in any other action.

.....
Clerk of said Superior Court

[Seal of the Court]
Dated .....

Served on .....
date

.....
Deputy Sheriff

* Use 20 days, except that in the exceptional situations where a different time is allowed in which to answer, the different time should be inserted.

FORM 2. WRIT OF ATTACHMENT

To the sheriffs of our several counties or either of their deputies:

We command you to attach the goods or estate of [name of defendant] of [defendant's place of residence, including town and county] to the value of [amount of plaintiff's demand for judgment, together with a reasonable allowance for interest and costs] as prayed for by [name of plaintiff] of [plaintiff's place of residence, including town and county] in an action brought by said [name of plaintiff] against said [name of defendant] on [date of complaint] in the

Superior Court for Cumberland County, and make due return of this writ with your doings thereon.

. . . . . .
Clerk of said Superior Court

[Seal of the Court]
Dated . . . . . .

ALTERNATE FORM 2. WRIT OF ATTACHMENT
(for use in an action in another county)

STATE OF MAINE — SUPERIOR COURT

SAGADAHOC, SS

Civil Action, Docket Number . . .
Cumberland County

A. B., Plaintiff
of Bath,
Sagadahoc County
v.
C. D., Defendant
of Portland
Cumberland County

Writ of Attachment

To the sheriffs of our several counties or either of their deputies:

We command you to attach the goods or estate of [name of defendant] of [defendant's place of residence, including town and county] to the value of [amount of plaintiff's demand for judgment, together with a reasonable allowance for interest and costs] as prayed for by [name of plaintiff] of [plaintiff's place of residence, including town and county] in an action brought by said [name of plaintiff] against said

[name of defendant] on [date of complaint] in the Superior Court for Cumberland County, and make due return of this writ with your doings thereon.

. . . . . .
Clerk of said Superior Court

[Seal of the Court]
Dated . . . . . .

FORM 2A. SUMMONS TO TRUSTEE

STATE OF MAINE — SUPERIOR COURT
CUMBERLAND, SS

Civil Action, Docket Number . . .

A. B., Plaintiff
v.
C. D., Defendant
E. F., Trustee

Summons to Trustee

To the above-named Trustee:

You are hereby summoned and required to serve upon . . . . . , plaintiff's attorney, whose address is . . . . . within 20 days after service of this summons upon you, exclusive of the day of service, a disclosure under oath of what cause, if any you have, why execution issued upon such judgment as the said plaintiff may recover against the said defendant in this action, if any, should not issue against his goods, effects, or credits in your hands and possession as trustee of said defendant to the value of [amount of plaintiff's demand for judgment, together with a reasonable allowance for interest and costs] as prayed for by the said plaintiff. If you fail to do so, you will be defaulted and

adjudged trustee as alleged. Your disclosure must also be filed with the court.

(Signed) .....
Clerk of said Superior Court

[Seal of the Court]
Dated .....

Served on .....
date
.....
Deputy Sheriff

ALTERNATE FORM 2A. SUMMONS TO TRUSTEE

(for use in an action in another county)

STATE OF MAINE — SUPERIOR COURT

SAGADAHOC, SS

Civil Action, Docket Number ...

Cumberland County

A. B., Plaintiff
v.
C. D., Defendant
E. F., Trustee

Summons to Trustee

To the above-named Trustee:

You are hereby summoned as trustee in an action brought in the Superior Court for Cumberland County and required to serve upon ..... plaintiff's attorney, whose address is ....., within 20 days after service of this summons upon you, exclusive of the day of service, a disclosure under oath of what cause, if any you have, why execution issued upon such judgment as the said plaintiff may recover against the said defendant in this action, if any, should not issue against his goods, effects, or credits in your

hands and possession as trustee of said defendant to the value of [amount of plaintiff's demand for judgment, together with a reasonable allowance for interest and costs] as prayed for by the said plaintiff. If you fail to do so, you will be defaulted and adjudged trustee as alleged. Your disclosure must also be filed with the court in Cumberland County.

(Signed) .....
Clerk of said Superior Court

[Seal of the Court]
Dated .....

Served on .....
date
.....
Deputy Sheriff

FORM 2B. RETURN OF SERVICE OF SUMMONS AND COMPLAINT

STATE OF MAINE
CUMBERLAND, SS

On the ..... day of ....., 19..., I made service of the complaint and within summons upon the defendant [name of defendant] by delivering a copy of the summons and of the complaint to [name of defendant] [name of person to whom delivery is made and address of place of delivery].

Service $

Attachment

Travel,
..... miles one way .....

Postage *Deputy Sheriff*

Amount $

FORM 3. COMPLAINT ON A PROMISSORY NOTE

1. Defendant on or about June 1, 1957, executed and delivered to plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant promised to pay to plaintiff or order on June 1, the sum of ten thousand dollars with interest thereon at the rate of six percent, per annum].

2. Defendant owes to plaintiff the amount of said note and interest.

Wherefore plaintiff demands judgment against defendant for the sum of ten thousand dollars, interest, and costs.

Signed: .....
Attorney for Plaintiff.

Address: .....

Dated* .....

* See the Nov. 2, 1959, amendment of Rule 10(a).

FORM 4. COMPLAINT ON AN ACCOUNT ANNEXED

Defendant owes plaintiff ten thousand dollars according to the account hereto annexed as Exhibit A.

Wherefore (etc. as in Form 3).

Note

At the trial of an action upon an account annexed, the plaintiff shall furnish a copy of the account for the court and an additional copy for the jury.

FORM 5. COMPLAINT FOR GOODS SOLD AND DELIVERED

Defendant owes plaintiff ten thousand dollars for goods sold and delivered by plaintiff to defendant between June 1, 1958 and December 1, 1958.

Wherefore (etc. as in Form 3).

FORM 6. COMPLAINT FOR MONEY LENT

Defendant owes plaintiff ten thousand dollars for money lent by plaintiff to defendant on June 1, 1958.

Wherefore (etc. as in Form 3).

FORM 7. COMPLAINT FOR MONEY PAID BY MISTAKE

Defendant owes plaintiff ten thousand dollars for money paid by plaintiff to defendant by mistake on June 1, 1958, under the following circumstances: [here state the circumstances with particularity—see Rule 9(b)].

Wherefore (etc. as in Form 3).

FORM 8. COMPLAINT FOR MONEY HAD AND RECEIVED

Defendant owes plaintiff ten thousand dollars for money had and received from one G. H. on June 1, 1958, to be paid by defendant to plaintiff.

Wherefore (etc. as in Form 3).

FORM 9. COMPLAINT FOR NEGLIGENCE

1. On June 1, 1958, in a public highway called Congress Street in Portland, Maine, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway and was in the exercise of due care.

2. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against defendant in the sum of ten thousand dollars and costs.

FORM 10. COMPLAINT FOR NEGLIGENCE WHERE PLAINTIFF IS UNABLE TO DETERMINE DEFINITELY WHETHER THE PERSON RESPONSIBLE IS C. D. OR E. F. OR WHETHER BOTH ARE RESPONSIBLE AND WHERE HIS EVIDENCE MAY JUSTIFY A FINDING OF WILFULNESS OR OF RECKLESSNESS OR OF NEGLIGENCE

A. B., Plaintiff
v.
C. D. and E. F., Defendants } *Complaint*

1. On June 1, 1958, in a public highway called Congress Street in Portland, Maine, defendant C. D. or defendant E. F., or both defendants C. D. and E. F. wilfully or recklessly or negligently drove or caused to be driven a motor vehicle against plaintiff who was then crossing said highway and was in the exercise of due care.

2. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against C. D. or against E. F. or against both in the sum of ten thousand dollars and costs.

FORM 11. COMPLAINT FOR CONVERSION

On or about December 1, 1958, defendant converted to his own use ten bonds of the ..... Company (here insert brief identification as by number and issue) of the value of ten thousand dollars, the property of plaintiff.

Wherefore plaintiff demands judgment against defendant in the sum of ten thousand dollars, interest, and costs.

FORM 12. COMPLAINT FOR SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY LAND

1. On or about December 1, 1958, plaintiff and defendant entered into an agreement in writing a copy of which is hereto annexed as Exhibit A.

2. In accord with the provisions of said agreement plaintiff tendered to defendant the purchase price and requested a conveyance of the land, but defendant refused to accept the tender and refused to make the conveyance.

3. Plaintiff now offers to pay the purchase price.

Wherefore plaintiff demands (1) that defendant be required specifically to perform said agreement, (2) damages in the sum of one thousand dollars, and (3) that if specific performance is not granted plaintiff have judgment against defendant in the sum of ten thousand dollars.

FORM 13. COMPLAINT ON CLAIM FOR DEBT AND TO SET ASIDE FRAUDULENT CONVEYANCE UNDER RULE 18(b)

A. B., Plaintiff
v.
C. D. and E. F., Defendants } *Complaint*

1. Defendant C. D. on or about ..... executed and delivered to plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant C. D. promised to pay to plaintiff or order on .... the sum of five thousand dollars with interest thereon at the rate of .... percent, per annum].

2. Defendant C. D. owes to plaintiff the amount of said note and interest.

3. Defendant C. D. on or about ..... conveyed all his property, real and personal [or specify and describe] to defendant E. F. for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness evidenced by the note above referred to.

Wherefore plaintiff demands:

(1) That plaintiff have judgment against defendant C. D. for ten thousand dollars and interest; (2) that the aforesaid conveyance to defendant E. F. be declared void and the judgment herein be declared a lien on said property; (3) that plaintiff have judgment against the defendants for costs.

FORM 14. WRIT OF REPLEVIN AND BOND

To the sheriff of our County of Cumberland, or either of his deputies:

We command you to replevy the goods and chattels following, viz.: [description of the goods and chattels with reasonable particularity and a statement of their respective values]* which goods and chattels belong to [name of plaintiff] of [plaintiff's place of residence, including town and county] and are now taken and detained by [name of defendant] of [defendant's place of residence, including town and county] at [location of goods] in this County; and them deliver unto said [name of plaintiff] provided the same are not taken and detained upon mesne process, warrant of distress, or upon execution as the property of said plaintiff; all as prayed for by said [name of plaintiff] in an action brought by said plaintiff against said [name of defendant] on [date of complaint] in this County, and make due return of this writ with your doings thereon;

Provided that the said plaintiff shall give bond to said defendant with sufficient sureties in the sum of ..... dol-

lars, being twice the value of said goods and chattels, conditioned as required by law.

.....
Clerk of said Superior Court

[Seal of the Court]
Dated .....

KNOW ALL MEN BY THESE PRESENTS, that we [names and places of residence of plaintiff and of sureties] are holden and stand firmly bound and obliged unto [name and place of residence of defendant] in the full sum of [twice value of goods and chattels to be replevied], to be paid to said defendant or his executors, administrators or assigns. To which payment, well and truly to be made, we hereby bind ourselves, and our respective heirs, executors and administrators, jointly and severally, in the whole and for the whole, firmly by these presents.

The condition of the above obligation is such that whereas said [plaintiff's name] has this day commenced against said [defendant's name] an action for replevin for goods and chattels as described in writ of replevin which said plaintiff says defendant has unlawfully taken and detained. Now therefore, if said plaintiff shall prosecute said action for replevin to the final judgment, and pay such damages and costs as said defendant shall recover against said plaintiff and also return and restore the same goods and chattels, in like good order and condition as when taken, in case such shall be the final judgment, then the said obligation to be void; otherwise to remain in full force.

Sealed with our seals and dated .....

Signed, Sealed and Delivered
in the presence of

....
....
....

* See the Nov. 2, 1959, amendment of Rule 64(b).

FORMS 15 TO 17. RESERVED

FORM 18. COMPLAINT FOR INTERPLEADER AND DECLARATORY RELIEF

1. On or about June 1, 1957, plaintiff issued to G. H. a policy of life insurance whereby plaintiff promised to pay to K. L. as beneficiary the sum of ten thousand dollars upon the death of G. H. The policy required the payment by G. H. of a stipulated premium on June 1, 1958, and annually thereafter as a condition precedent to its continuance in force.

2. No part of the premium due June 1, 1958, was ever paid and the policy ceased to have any force or effect on July 1, 1958.

3. Thereafter, on September 1, 1958, G. H. and K. L. died as the result of a collision between a locomotive and the automobile in which G. H. and K. L. were riding.

4. Defendant C. D. is the duly appointed and acting executor of the will of G. H.; defendant E. F. is the duly appointed and acting executor of the will of K. L.; defendant X. Y. claims to have been duly designated as beneficiary of said policy in place of K. L.

5. Each of defendants, C. D., E. F., and X. Y. is claiming that the above-mentioned policy was in full force and effect at the time of the death of G. H.; each of them is claiming to be the only person entitled to receive payment of the amount of the policy and has made demand for payment thereof.

6. By reason of these conflicting claims of the defendants, plaintiff is in great doubt as to which defendant is entitled to be paid the amount of the policy, if it was in force at the death of G. H.

Wherefore plaintiff demands that the court adjudge:

(1) That none of the defendants is entitled to recover from plaintiff the amount of said policy or any part thereof.

(2) That each of the defendants be restrained from instituting any action against plaintiff for the recovery of the amount of said policy or any part thereof.

(3) That, if the court shall determine that said policy was in force at the death of G. H., the defendants be required to interplead and settle between themselves their rights to the money due under said policy, and that plaintiff be discharged from all liability in the premises except to the person whom the court shall adjudge entitled to the amount of said policy.

(4) That plaintiff recover its costs.

FORM 19. MOTION TO DISMISS, PRESENTING DEFENSES OF FAILURE TO STATE A CLAIM, OF LACK OF SERVICE OF PROCESS, OF IMPROPER VENUE, AND OF LACK OF JURISDICTION UNDER RULE 12(b)

The defendant moves the court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the action or in lieu thereof to quash the return of service of summons on the grounds (a) that the defendant is a corporation organized under the laws of Delaware and was not and is not subject to service of process within the State of Maine, and (b) that the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of M. N. and X. Y. hereto annexed as Exhibit A and Exhibit B respectively.

3. To dismiss the action on the ground that it is in the wrong county because [here state the reasons why the venue is improper].

4. To dismiss the action on the ground that the court lacks jurisdiction because [here state the reasons why the court lacks jurisdiction].

Signed: .....
Attorney for Defendant

Address: .....

Notice of Motion

To: .....
Attorney for Plaintiff

Please take notice, that the undersigned will bring the above motion on for hearing before this Court at ....., on the ..... day of ....., 196.., at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Signed: .....
Attorney for Defendant

Address: .....

FORM 20. ANSWER PRESENTING DEFENSES UNDER RULE 12(b)

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

If defendant is indebted to plaintiffs for the goods mentioned in the complaint, he is indebted to them jointly with G. H. G. H. is alive; is a citizen resident of this state, is subject to the jurisdiction of this court; can be made a party but has not been made one.

Third Defense

Defendant admits the allegation contained in paragraphs 1 and 4 of the complaint; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint; and denies each and every other allegation contained in the complaint.

Fourth Defense

The right of action set forth in the complaint did not accrue within six years next before the commencement of this action.

Counterclaim

(Here set forth any claim as a counterclaim in the manner in which a claim is pleaded in a complaint.)

Cross-Claim Against Defendant M. N.

(Here set forth the claim constituting a cross-claim against defendant M. N. in the manner in which a claim is pleaded in a complaint.)

FORM 21. ANSWER TO COMPLAINT SET FORTH IN FORM 8, WITH COUNTERCLAIM FOR INTERPLEADER

Defense

Defendant denies the allegations contained in the complaint to the extent set forth in the counterclaim herein.

Counterclaim for Interpleader

1. Defendant received the sum of ten thousand dollars as a deposit from E. F.

2. Plaintiff has demanded the payment of such deposit to him by virtue of an assignment of it which he claims to have received from E. F.

3. E. F. has notified the defendant that he claims such deposit, that the purported assignment is not valid, and that he holds the defendant responsible for the deposit.

Wherefore defendant demands:

(1) That the court order E. F. to be made a party defendant to respond to the complaint and to this counterclaim.*

(2) That the court order the plaintiff and E. F. to interplead their respective claims.

(3) That the court adjudge whether the plaintiff or E. F. is entitled to the sum of money.

(4) That the court discharge defendant from all liability in the premises except to the person it shall adjudge entitled to the sum of money.

(5) That the court award to the defendant its costs and attorney's fees.

* Rule 13(h) provides for the court ordering parties to a counterclaim, but who are not parties to the original action, to be brought in as defendants.

FORM 21A. TRUSTEE'S DISCLOSURE UNDER RULE 4B(d)

A. B., Plaintiff
v.
C. D., Defendant
E. F., Trustee

Disclosure under Oath

Said E. F. ought not to be adjudged trustee of the defendant in this action because at the time of the service upon him of the summons to trustee in this action, to wit, on [date], he had not in his hands and possession any goods, effects or credits of said defendant, unless it shall be other-

wise adjudged from the following facts, to wit: [here state all the material facts concerning the transactions, if any, between the defendant and trustee].

The trustee thereupon submits himself to an examination upon oath and prays judgment and for his costs.

. . . . . .
Trustee

STATE OF MAINE
COUNTY OF . . . . . , SS

[date]

Personally appeared E. F. and made oath that the above disclosure by him subscribed is true.

Before me,

. . . . . .
Justice of the Peace

FORM 22. SUMMONS AND COMPLAINT AGAINST THIRD-PARTY DEFENDANT

STATE OF MAINE — SUPERIOR COURT
CUMBERLAND, SS

Civil Action, Docket Number . . .

A. B., Plaintiff
v.
C. D., Defendant and Third-Party Plaintiff — *Summons*
v.
E. F., Third-Party Defendant

To the above-named Third-Party Defendant:

You are hereby summoned and required to serve upon . . . . . , who is attorney for C. D., defendant and third-party plaintiff, whose address is . . . . . , an answer to the third-party complaint which is herewith served upon you

within 20 days after the service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint. Your answer must also be filed with the court. As provided in Rule 13(a), your answer must state as a counterclaim any related claim which you may have against C. D., the third-party plaintiff, or you will thereafter be barred from making such claim in any other action. There is also served upon you herewith a copy of the complaint of the plaintiff which you may answer.

. . . . . .
Clerk of said Superior Court

[Seal of the Court]
Dated . . . . . .

STATE OF MAINE — SUPERIOR COURT
CUMBERLAND, SS

Civil Action, Docket Number . . .

A. B., Plaintiff
v.
C. D., Defendant and Third-Party Plaintiff
v.
E. F., Third-Party Defendant

Third-Party Complaint

1. Plaintiff A. B. has filed against defendant C. D. a complaint, a copy of which is hereto attached as "Exhibit C".

2. (Here state the grounds upon which C. D. is entitled to recover from E. F., all or part of what A. B. may recover from C. D. The statement should be framed as in an original complaint.) Wherefore C. D. demands judgment against third-party defendant E. F. for all sums that may be adjudged against defendant C. D. in favor of plaintiff A. B.

Signed: . . . . . .
Attorney for C. D., Third-Party Plaintiff

Address: . . . . . .

FORM 23. MOTION TO INTERVENE AS A DEFENDANT UNDER RULE 24

A. B., Plaintiff
v.
C. D., Defendant
E. F., Applicant for Intervention

Motion to Intervene as a Defendant

E. F. moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in his proposed answer, of which a copy is hereto attached, on the ground that [here insert the grounds of intervention, either of right or in the discretion of the court.]

Signed: .....
Attorney for E. F., Applicant for Intervention

Address .....

Note

The motion should be accompanied by notice of motion, as in Form 19, and a copy of the proposed answer in conformity with Rule 12(b).

FORM 24. MOTION FOR PRODUCTION OF DOCUMENTS, ETC., UNDER RULE 34

Plaintiff A. B. moves the court for an order requiring defendant C. D.

(1) To produce and to permit plaintiff to inspect and to copy each of the following documents:

(Here list the documents and describe each of them.)

(2) To produce and permit plaintiff to inspect and to photograph each of the following objects:

(Here list the objects and describe each of them.)

(3) To permit plaintiff to enter (here describe property to be entered) and to inspect and to photograph (here de-

scribe the portion of the real property and the objects to be inspected and photographed).

Defendant C. D. has the possession, custody, or control of each of the foregoing documents and objects and of the above-mentioned real estate. Each of them constitutes or contains evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit A hereto attached.

Signed: .....
Attorney for Plaintiff.

Address: .....

Notice of Motion

(Contents the same as in Form 19)

Exhibit A

State of .....,

County of .....

A. B., being first duly sworn, says:

(1) (Here set forth all that plaintiff knows which shows that defendant has the papers or objects in his possession or control.)

(2) (Here set forth all that plaintiff knows which shows that each of the above mentioned items is relevant to some issue in the action.)

Signed: A. B.

[Jurat]

FORM 25. REQUEST FOR ADMISSION UNDER RULE 36

Plaintiff A. B. requests defendant C. D. within ..... days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents, exhibited with this request, is genuine.

(Here list the documents and describe each document.)

2. That each of the following statements is true.

(Here list the statements.)

Signed: .....
Attorney for Plaintiff.

Address: .....

FORM 26. ALLEGATION OF REASON FOR OMITTING PARTY

When it is necessary, under Rule 19(c), for the pleader to set forth in his pleading the names of persons who ought to be made parties, but who are not so made, there should be an allegation such as the one set out below:

John Doe named in this complaint is not made a party to this action because he is not subject to the jurisdiction of this court.

FORM 27. NOTICE OF APPEAL TO THE LAW COURT UNDER RULE 73(b)

Notice is hereby given that C. D. and E. F., defendants above named, hereby appeal to the Law Court (from the

Order (describing it)) (from the final judgment) entered in this action on ....., 19....

Signed .....
Attorney for Appellants C. D. and E. F.

Address: .....

FORM 28. JUDGMENT ON JURY VERDICT

STATE OF MAINE — SUPERIOR COURT

CUMBERLAND, SS

Civil Action, Docket Number ...

A. B., Plaintiff
v.
C. D., Defendant
} *Judgment*

This action came on for trial before the Court and a jury, Honorable William Blackstone presiding, and the issues having been duly tried and the jury on June 2, 1960, having rendered a verdict for the [plaintiff to recover of the defendant damages in the amount of $10,000,] [defendant,]

It is ORDERED and ADJUDGED that the [plaintiff recover of the defendant * the sum of $10,000 and his costs of action] [plaintiff take nothing, that the action is dismissed on the merits, and that the defendant recover of the plaintiff * his costs of action].

Dated at Portland, Maine, this 2nd day of June, 1960.

.....
Clerk of said Superior Court.

FORM 29. JUDGMENT ON TRIAL TO THE COURT

(Caption as in Form 28)

This action came on for [trial] [hearing] before the Court, Honorable William Blackstone presiding, and the Court on June 2, 1960, having ordered that judgment be entered for the [plaintiff to recover of the defendant damages in the amount of $10,000,] [defendant,]

It is ORDERED and ADJUDGED that the [plaintiff recover of the defendant* damages in the amount of $10,000 and his costs of action] [plaintiff take nothing, that the action is dismissed on the merits, and that the defendant recover of the plaintiff* his costs of action].

Dated at Portland, Maine, this 2d day of June, 1960.

. . . . . .
Clerk of said Superior Court.

* The judgment should properly state the full name and either the residence or the business address of the judgment debtor. See 6 Moore, Federal Practice § 54.03.

FORM 30. WRIT OF EXECUTION

A. B., Plaintiff
of Bath,
Sagadahoc County
v.
C. D., Defendant
of Portland,
Cumberland County

Execution

To the sheriffs of our several counties or any of their deputies:

Whereas said plaintiff on [date] recovered judgment in the Superior Court at Portland in the County of Cumberland against said defendant in this action for the sum of $. . . . . .

in debt or damage and $..... in costs of suit, as appears of record, whereof execution remains to be done,

We command you that of the goods, chattels, or lands of said defendant within your precinct you cause to be paid and satisfied unto the said plaintiff at the value thereof in money the aforesaid sums being $....., with legal interest on this Execution from the abovesaid date of judgment, together with 50¢ more for this writ, and thereof also satisfy yourself of your own fees, and make return of this writ with your doings thereon within 3 months from the date hereof.

.....
Clerk of said Superior Court.

[Seal of the Court]
Dated .....

MUNICIPAL COURT CIVIL RULES

I. SCOPE OF RULES — ONE FORM OF ACTION

RULE 1. SCOPE OF RULES

TEXT OF RULE

These rules govern the procedure in all suits of a civil nature in the municipal courts of the State of Maine with the exceptions stated in Rule 28. They shall not be construed to extend or limit the jurisdiction of the municipal courts or the venue of actions therein. They shall be construed to secure the just, speedy and inexpensive determination of every action.

RULE 2. DEFINITIONS

TEXT OF RULE

Unless specified to the contrary, the following words whenever used in these rules or in the Maine Rules of Civil Procedure incorporated by reference herein shall have the following meanings:

(1) The word "court" shall include any judge or associate judge of a municipal court or a recorder thereof in the performance of judicial functions.

(2) The term "clerk" or "recorder" shall include the clerk or recorder or judge or associate judge of any municipal court in the performance of non-judicial functions. As amended Nov. 2, 1959, eff. Dec. 1, 1959.

(3) The term "plaintiff's attorney" or "defendant's attorney" or any like term shall include the party appearing without counsel.

Effect of Amendment: The Nov. 2, 1959, amendment modified subparagraph (2) to assure the inclusion of the "clerk" of a municipal court within the meaning of "recorder."

RULE 3. ONE FORM OF ACTION

TEXT OF RULE

There shall be one form of action known as "civil action."

II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

RULE 4. COMMENCEMENT OF ACTION; WHEN RETURNABLE

TEXT OF RULE

A civil action is commenced by the service of summons and complaint. The summons shall be returnable to a term of court to be held not less than 7 nor more than 65 days from its date.

RULE 5. PROCESS

TEXT OF RULE

Rules 4, 4A, 4B, and 4C of the Maine Rules of Civil Procedure govern the issuance, form, service, and return of service of process, the attachment of real and personal property and on trustee process and arrest on capias writ, with the following exceptions:

(1) The summons shall notify the defendant of the day when the action is returnable and that unless he not later than 3 days after the return day serves upon the plaintiff's attorney and files with the court an answer to the complaint, judgment by default will be rendered against him for the relief demanded in the complaint.

(2) Service of the summons and complaint shall be made not less than 7 days before the return day.

(3) When service by publication is ordered by the court, one publication made within 20 days after the order is granted shall be sufficient.

(4) No attachment of real or personal property or on trustee process shall be made after service of the summons and complaint upon the defendant nor more than 65 days before the return day.

(5) A trustee shall serve upon the plaintiff's attorney and file with the court his disclosure under oath not later than 3 days after the return day.

RULE 6. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

TEXT OF RULE

Rule 5 of the Maine Rules of Civil Procedure governs the service and filing of pleadings and other papers.

RULE 7. TIME

TEXT OF RULE

Rule 6 of the Maine Rules of Civil Procedure governs the time for the doing of any act or the taking of any proceeding.

III. PLEADINGS AND MOTIONS

RULE 8. PLEADINGS, MOTIONS AND JOINDER

TEXT OF RULE

Rules 7 to 12, inclusive, and 15, 17, 18, 20, 21 and 25 of the Maine Rules of Civil Procedure govern pleadings, motions and joinder, so far as applicable, with the following exceptions:

(1) The defendant shall serve his answer and file it with the court not later than 3 days after the return day.

(2) Claims may be joined as provided in Rule 18(a) of the Maine Rules of Civil Procedure provided such claims are within the jurisdiction of the municipal courts and do not in the aggregate exceed $600 in amount.

RULE 9. COUNTERCLAIM

TEXT OF RULE

(a) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party which is within the jurisdiction of the municipal courts. The failure to assert any such counterclaim shall not preclude the pleader from bringing a later action for the same claim, whether or not it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(b) No Counterclaim outside Jurisdiction of Court. No counterclaim shall be filed which seeks equitable relief or demands an amount in excess of that for which judgment may be given in the municipal courts. A party desiring to state such a counterclaim can do so only after removal to the Superior Court as provided in Rule 27 or appeal to Superior Court as provided in Rule 23. After such removal or appeal, any counterclaim made compulsory by Rule 13 of the Maine Rules of Civil Procedure shall be stated in the Superior Court as provided in that rule.

(c) Other Provisions Concerning Counterclaims. The provisions of Rules 13(c), (d), (e) and (f) of the Maine Rules of Civil Procedure govern procedure in the municipal courts.

IV. DEPOSITIONS AND DISCOVERY

RULE 10. DEPOSITIONS

TEXT OF RULE

Depositions shall be taken only by order of the court on motion for cause shown. No such order shall be made except upon a showing that the deponent is likely to be unavailable as a witness at the trial by reason of death, disability, absence or other sufficient cause. When a deposition is ordered, the provisions of Rules 26, 28 to 32 inclusive, and 37 of the Maine Rules of Civil Procedure govern so far as applicable.

RULE 11. DISCOVERY AND PRODUCTION OF DOCUMENTS

TEXT OF RULE

Rule 34 of the Maine Rules of Civil Procedure governs the discovery and production of documents and things for inspection, copying, or photographing.

RULE 12. ADMISSION OF FACTS AND OF GENUINENESS OF DOCUMENTS

TEXT OF RULE

Rule 36 of the Maine Rules of Civil Procedure governs the admission of facts and of genuineness of documents except that no request for admission may be served before the return day.

V. TRIALS

RULE 13. DISMISSAL OF ACTION

TEXT OF RULE

Rule 41 of the Maine Rules of Civil Procedure governs dismissal of actions so far as applicable, except that the court

shall not be required to make findings as provided in Rule 41(b) of said rules.

RULE 14. TIME OF TRIAL

TEXT OF RULE

Unless the court otherwise directs, all actions except actions for forcible entry and detainer shall be in order for trial at the first term of court held after the return term.

RULE 15. EVIDENCE

TEXT OF RULE

Rule 43 of the Maine Rules of Civil Procedure governs evidence in actions in the municipal courts.

RULE 16. PROOF OF OFFICIAL RECORD

TEXT OF RULE

Rule 44 of the Maine Rules of Civil Procedure governs proof of an official record.

RULE 17. SUBPOENAS

TEXT OF RULE

Rule 45 of the Maine Rules of Civil Procedure governs the issuance, form and service of subpoenas.

VI. JUDGMENT AND APPEAL

RULE 18. DEFAULT

TEXT OF RULE

Rule 55 of the Maine Rules of Civil Procedure governs default and judgment thereon so far as applicable. A judgment by default shall not be different in kind from nor exceed in amount that prayed for in the demand for judgment.

RULE 19. OFFER OF JUDGMENT

TEXT OF RULE

Rule 68 of the Maine Rules of Civil Procedure governs offer of judgment in actions.

RULE 20. ENTRY OF JUDGMENT

TEXT OF RULE

Judgment after hearing shall be entered forthwith upon rendition of the decision. The notation of a judgment on the docket constitutes the entry of the judgment, and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs.

RULE 21. NEW TRIALS; AMENDMENTS OF JUDGMENTS

TEXT OF RULE

Rule 59 of the Maine Rules of Civil Procedure governs, so far as applicable, new trials on motion or on initiative of the court and motions to alter or amend a judgment, except that such motion shall be made or such action of the court on its own initiative shall be taken not later than 5 days after the entry of the judgment. The filing of such a motion shall terminate the running of the time for appeal to the Superior Court, and the full time for appeal commences to run from the date of the disposition of the motion.

RULE 22. RELIEF FROM JUDGMENT OR ORDER

TEXT OF RULE

Rule 60 of the Maine Rules of Civil Procedure governs actions in the municipal courts so far as applicable. A party aggrieved by a denial of a motion for relief from a judgment may appeal to the Superior Court and obtain a hearing de novo on the motion.

RULE 23. APPEAL TO SUPERIOR COURT

TEXT OF RULE

A party may appeal to the Superior Court by filing a notice of appeal at any time within 5 days after the judgment. Within said 5 days the appellant shall pay to the recorder the entry fee in and the cost of forwarding such appeal to the Superior Court; and in that case no execution shall issue. The recorder shall enter the appeal forthwith in the Superior Court where it shall be determined as a new entry. If by accident or mistake the required payment is not made within the time prescribed, the court may, on motion of either party, allow the late payment of the required fees and direct the recorder to enter the appeal in the Superior Court; but attachment or bail shall not thereby be revived or continued.

RULE 24. EXECUTION

TEXT OF RULE

No execution shall issue upon a judgment until the expiration of 5 days after its entry. Rule 69 of the Maine Rules of Civil Procedure governs executions in the municipal courts so far as applicable. As amended Nov. 2, 1959, eff. Dec. 1, 1959.

Effect of Amendment: The Nov. 2, 1959, amendment added the second sentence, particularly for the purpose of providing a method of determining when capias execution may issue.

VII. SPECIAL PROCEEDINGS

RULE 25. REPLEVIN

TEXT OF RULE

Rule 64 of the Maine Rules of Civil Procedure governs actions of replevin.

RULE 26. FORCIBLE ENTRY AND DETAINER

TEXT OF RULE

(a) Applicability to Forcible Entry and Detainer. These rules shall govern the procedure in forcible entry and detainer actions therein except as otherwise provided in this rule.

(b) Summons. The summons in forcible entry and detainer actions shall bear the signature or facsimile signature of the judge or the recorder, contain the name and address of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, and shall state the day when the action is returnable, which shall be not less than 7 days from the date of service of the summons; and shall notify the defendant that in case of his failure to appear and state his defense on the return day, judgment by default will be rendered against him for possession of the premises. The summons shall also notify the defendant that if the return day is on a holiday, he shall appear and state his defense on the day following the holiday.

(c) Defendant's Pleading. If the defendant claims title in himself or in another person under whom he claims the premises, he shall assert such claim by answer filed on or before the return day, and further proceedings in the action shall be as provided by law. Otherwise he may appear and defend without filing a responsive pleading.

(d) Frivolous Claim of Title. On the return day the plaintiff may file a written allegation that the defendant's claim of title is frivolous and intended for delay, in which event further proceedings in the action shall be as provided by law.

(e) Time of Trial. All forcible entry and detainer actions shall be in order for trial on the return day.

(f) Appeal and Recognizance. Either party may appeal as in other civil actions, and the appellant shall furnish the recognizance required by law.

(g) No Joinder of Other Actions. Forcible entry and detainer actions shall not be joined with any other action, nor shall a defendant in such action file any counterclaim.

RULE 27. REMOVAL TO SUPERIOR COURT

TEXT OF RULE

(a) Removal by Defendant. At any time before any action in which the damages exceed $20 is in order for trial, the defendant may move the action to the Superior Court for the county in which the municipal court is located. Removal shall be effected by filing notice thereof and paying to the recorder the required fees, including the entry fee in and the cost of forwarding the action to the Superior Court as in the case of appeals. The recorder shall thereupon file a copy of the record and all papers in the action in the Superior Court, shall pay the entry fee therefor, and record on the docket that the action has been removed to the Superior Court. If the defendant has not filed an answer in the municipal court, he shall forthwith file his answer in the Superior Court. Thereafter the action shall be prosecuted in the Superior Court as if originally commenced therein. If the party giving notice of removal does not comply with the requirements of this subdivision, the action shall be heard and determined in the municipal court as if no notice of removal had been given.

(b) Removal by Either Party. Either party may remove any action to the Superior Court in the county in which the municipal court is located if it appears by the pleadings that the title to real estate is in question. Such removal shall be effected and subsequent proceedings taken in the action as provided in subdivision (a).

VIII. GENERAL PROVISIONS

RULE 28. APPLICABILITY IN GENERAL

TEXT OF RULE

(a) To What Proceedings Inapplicable. These rules do not apply:

(1) To actions under the statutory small claims procedure.

(2) To any ex parte proceedings.

(3) To any proceedings to compel support of a wife or a minor child or children.

(4) To any proceedings for the care, custody, support and education of neglected children.

(5) To any proceedings for commitment or recommitment of insane persons.

(b) Other Applicable Rules. Rules 81(c), (d), (e) and (f) of the Maine Rules of Civil Procedure shall apply in actions in the municipal courts.

RULE 29. FORMS

TEXT OF RULE

The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.

RULE 30. TITLE

TEXT OF RULE

These rules may be known and cited as the Municipal Court Civil Rules.

RULE 31. EFFECTIVE DATE

TEXT OF RULE

These rules will take effect on December 1, 1959. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work an injustice, in which event the former procedure applies.

APPENDIX OF FORMS

1. The directions in the introductory statement to the Appendix of Forms in the Maine Rules of Civil Procedure shall govern actions in the municipal courts and the forms in said Appendix of Forms are, so far as applicable, appropriate for use in such actions.

2. The following additional forms are intended for illustration only, but they are expressly declared by Rule 29 to be sufficient under the rules.

FORM 1. SUMMONS

STATE OF MAINE MUNICIPAL COURT OF WATERVILLE

KENNEBEC, SS

Civil Action, Docket Number ....

A.B., Plaintiff
of Oakland,
Kennebec County
v.
C.D., Defendant
of Waterville,
Kennebec County

Summons

To the above-named Defendant:

The above-named Plaintiff has brought an action against you in said Municipal Court at the term thereof commencing on the first Monday of [name of month and year when the action is returnable]. You are hereby summoned and required to serve upon ....., plaintiff's attorney, whose address is ....., and file with said Court at [address of Court], an answer to the complaint which is herewith

served upon you, not later than 3 days after the first Monday of [name of month and year when the action is returnable]. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Signed: .....
Judge [or Recorder] of said Municipal Court

[Seal of the Court]

Dated .....

FORM 2. WRIT OF ATTACHMENT

To the sheriffs of our county of [name of county in which writ of attachment is to be served] or either of his deputies, or either of the constables of the town of [name of town in which writ of attachment is to be served] in the county of .....:

We command you to attach the goods or estate of [name of defendant] of [defendant's place of residence, including town and county] to the value of [amount of plaintiff's demand for judgment, together with a reasonable allowance for interest and costs] as prayed for by [name of plaintiff] of [plaintiff's place of residence, including town and county] in an action brought by said [name of plaintiff] against said [name of defendant] on [date of complaint] in the Waterville Municipal Court, and to make due return of this writ with your doings thereon.

Signed: .....
Judge [or Recorder] of said Municipal Court

[Seal of the Court]

Dated .....

FORM 3. SUMMONS TO TRUSTEE

STATE OF MAINE MUNICIPAL COURT OF WATERVILLE

KENNEBEC, SS

Civil Action, Docket Number .....

A.B., Plaintiff
v.
C.D., Defendant
E.F., Trustee

Summons to Trustee

To the above-named Trustee:

You are hereby summoned and required to serve upon ....., plaintiff's attorney, whose address is ....., and file with the Court at [address of Court], not later than 3 days after the first Monday of [name of month and year in which action is returnable], a disclosure under oath of what cause, if any you have, why execution issued upon such judgment as the said plaintiff may recover against the said defendant in this action, if any, should not issue against his goods, effects, or credits in your hands and possession as trustee of said defendant to the value of [amount of plaintiff's demand for judgment, together with a reasonable allowance for interest and costs] as prayed for by the said plaintiff. If you fail to do so, you will be defaulted and adjudged trustee as alleged.

Signed: .....
Judge [or Recorder] of said Municipal Court

[Seal of the Court]

Dated .....

FORM 4. SUMMONS: FORCIBLE ENTRY AND DETAINER

STATE OF MAINE — MUNICIPAL COURT OF WATERVILLE

KENNEBEC, SS

Civil Action, Docket Number .....

A.B., Plaintiff
of Oakland,
Kennebec County
v.
C.D., Defendant
of Waterville,
Kennebec County

Summons: Forcible Entry and Detainer

To the above-named Defendant:

You are hereby summoned to appear in said Municipal Court at [address of Court] on Monday, [day of month and year of return day], the day on which this summons is returnable, at 9 o'clock in the forenoon and then and there state your defense to the complaint of forcible entry and detainer which is herewith served upon you. If you fail to do so, judgment by default will be rendered against you for possession of the premises. If you claim title to said premises in yourself or in another person under whom you claim the premises, you shall assert such claim by answer filed in said Municipal Court on or before said Monday, [date, month and year of return day], at 9 o'clock in the forenoon. If the return day of this summons is on a holiday, you shall appear and state your defense as aforesaid on the following day.

Signed: .....
Judge [or Recorder] of said Municipal Court

[Seal of the Court]

Dated .....

FORM 5. COMPLAINT: FORCIBLE ENTRY AND DETAINER

1. Defendant before June 1, 1959, had lawful and peaceable possession of the lands and tenements of plaintiff situated in [here insert a description of the premises].

2. Plaintiff gave due notice in writing to defendant thirty days at least before June 1, 1959, terminating his estate in said premises.

3. Defendant has unlawfully refused and still refuses to quit the said premises.

Wherefore plaintiff demands judgment for possession of said premises and damages from defendant in the sum of twenty dollars and costs.

Dated .....

Signed: .....
Attorney for Plaintiff

Address: .....

Note

Note: The above form applies in cases of tenancy at will and should be varied to fit the facts of the case.

STATE OF MAINE

SUPREME JUDICIAL COURT
AND
SUPERIOR COURT
MAINE CRIMINAL RULES

All of the Justices of the Supreme Judicial Court and Superior Court concurring therein, the following Rules, known as the Maine Criminal Rules, are hereby adopted, prescribed and promulgated for the Superior Court, Supreme Judicial Court, the Supreme Judicial Court sitting as the Law Court, and so far as may be applicable, for the Municipal Courts.

Rule 1 hereof, entitled "Forms for Waiver of Indictment and Information" shall become effective on September 12, 1959, and, at the same time the present rule relating to the same subject matter adopted by the Superior Court on the 28th day of September 1955 shall be superseded.

All other rules hereof shall become effective on the first day of December, 1959, and at the same time all other present rules relating to criminal cases and matters shall be superseded.

Said rules shall be recorded in the Maine Reports.

Dated this _____ first _____ day of _____ September , 1959.

Approved:
s/ ROBERT B. WILLIAMSON
Chief Justice
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.
s/ THOMAS E. DELAHANTY

Justices of
Superior Court

RULE 1. FORMS FOR WAIVER OF INDICTMENT AND INFORMATION

The forms and petitions authorized by 1954 Revised Statutes, Chapter 147, Section 33, as amended, relating to waiver of indictment and proceedings on information shall be substantially as set forth in the appendix to these Criminal Rules.

*Source:** Superior Court Rule promulgated September 28, 1955.

RULE 2. CAPIAS UPON INDICTMENTS

On indictments found by the grand jury, the clerk shall issue a capias upon request of the attorney for the State *or* direction of the court. *In vacation,* he shall also issue capias against respondents not under bail upon request of the attorney for the State or direction of a justice of the court. In all cases the clerk shall enter a minute thereof on the docket. When a respondent has been sentenced to imprisonment but the mittimus has been stayed pending exceptions or appeal, or when such respondent has been admitted to bail awaiting the decision of the Law Court on his exceptions or appeal, the clerk shall issue the mittimus (1) forthwith upon receipt of the certificate of decision of the Law Court overruling the exceptions or denying the appeal, or (2) upon order of any justice of the court in term time or vacation upon failure of the respondent to perfect the exceptions or appeal.

Source: Revised Rules of Court 34.

* The Revised Rules of the Supreme Judicial and Superior Courts, 147 Me. 464-87, are here cited as Revised Rules of Court. The Rules applicable only to Proceedings in Supreme Judicial Court, 147 Me. 488-91, are here cited as Supreme Judicial Court Rules.

RULE 3. PRACTICE IN TAKING BAIL

Every bail commissioner upon taking bail shall endorse upon either the warrant or precept upon which the prisoner

is held the following facts: Date and place (town or city) of taking bail, court and term at which prisoner is required to appear, offense of which he is accused, amount of bail, names and residences for principal and each surety; or if the bail is taken after arrest and before the issuing of a warrant, shall forthwith deliver to the officer having the prisoner in charge a printed memorandum, signed by such bail commissioner, of the following form:

State of Maine

_____ ss. Memorandum of Recognizance

Date _____

Offense _____

Amount of Bail $_____

Returnable _____

_____ of _____ Principal.

_____ of _____ Surety.

_____ of _____ Surety.

_____ Bail Commissioner.

All recognizances taken by bail commissioners shall be reduced to writing in the usual form and be certified to by the commissioner and returned to the magistrate or clerk of the court at or before the time at which the principal is required to appear.

Source: Revised Rules of Court 45.

RULE 4. ATTORNEYS NOT TO BE BAIL OR WITNESSES

No attorney shall give bail or recognizance as surety in any criminal matter in which he is employed as counsel, nor shall any attorney without special leave of court, be permitted to take any part in the conduct before a jury of an action in which he is a witness for his client.

Source: Revised Rules of Court 38.

RULE 5. EXAMINATION OF WITNESSES

The examination and cross-examination of each witness shall be conducted by one counsel only on each side, except by special leave of court, and counsel shall stand while so examining or cross-examining unless the court otherwise permits. Any re-examination of a witness shall be limited to matters brought out in the last examination by the adverse party except by special leave of court.

Source: Revised Rules of Court 35.

RULE 6. ORDER OF EVIDENCE

A party who has rested his case cannot thereafter introduce further evidence except in rebuttal unless by leave of court.

Source: Revised Rules of Court 36.

RULE 7. LIMITATION OF TIME FOR ARGUMENT

After the evidence is closed, the attorney for the State shall argue and shall be limited to 50 minutes. The attorney for each respondent shall then argue and be limited to one hour. The attorney for the State shall be allowed ten minutes for rebuttal. The court may, before the commencement of argument, for good cause shown, allow further time which shall in all cases be fixed and definite.

Source: Revised Rules of Court 37.

RULE 8. EXCEPTIONS

Objections to the admission or exclusion of evidence must be noted at the time the ruling is made or regarded as waived.

Requested instructions shall be submitted in writing at the close of the evidence or at such earlier time during the trial as the court reasonably directs. The court shall inform counsel of its proposed action upon the requests prior to

their arguments to the jury, but the court shall instruct the jury after the arguments are completed. Objections to any portion of the charge or omission therefrom must be made before the jury retires to consider its verdict or be regarded as waived.

It shall not be necessary that exceptions be formally noted; but an exception shall be deemed to have been sufficiently taken if a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; but if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

Source: Revised Rules of Court 18 in part; the rest is new, to parallel Rules 51 (b) and 46 of Maine Rules of Civil Procedure.

RULE 9. MOTIONS IN ARREST OF JUDGMENT

Motions in arrest of judgment shall be filed and presented to the court for adjudication during the term at which the accused has been found guilty, whether exceptions be or be not filed and allowed; and if not so presented, the right to file the same shall be considered as waived.

Source: Revised Rules of Court 19.

RULE 10. MOTIONS FOR NEW TRIALS

Motions for new trials, whether made to have a verdict set aside as against the law and the evidence, or made for any other cause, must be in writing and must assign the reason therefor. No exceptions lie to the denial of a motion for a new trial in any criminal case, and no appeal may be taken from such denial except in a felony case.

Source: Revised Rules of Court 17. For appellate review in misdemeanor cases, see *State* v. *Simpson,* 113 Me.

RULE 11. BILLS OF EXCEPTIONS

Bills of exceptions to any judgment, order, or ruling to which exceptions lie shall, within the time provided by law, be presented to the justice rendering or making the same for allowance by him unless the time for presentation and filing of the exceptions be enlarged as hereinafter provided. Upon request therefor made prior to such judgment, order, or ruling, the justice shall fix the time within which exceptions must be presented to him for allowance and filed. Upon request therefor within the time for presentation of exceptions, such justice may in his discretion enlarge and fix the time for presentation of exceptions to him for allowance and for filing. Prior to the expiration of the enlarged time fixed by the justice for the presentation and filing of exceptions as aforesaid, said justice, for cause shown, may further enlarge the time therefor. If the justice disallows or fails to sign and return the exceptions so presented, or alters any statement therein, and either party is aggrieved, the truth of the exceptions presented may be established in the manner prescribed by statute or by Rule 12 of these Criminal Rules.

Source: Revised Rules of Court 18.

RULE 12. ESTABLISHING TRUTH OF EXCEPTIONS

A respondent desiring to establish before the Law Court the truth of exceptions presented to the justice presiding at trial and not allowed by him shall within ten days after notice of refusal to allow them, file in the court where they were taken his petition supported by affidavit and setting forth in full the bill of exceptions presented and all material facts relating thereto, and give a copy thereof to the attorney for the State. A transcript of so much of the official reporter's notes as relates to the exceptions must be filed with the petition. The affidavit may be made by the respondent or his attorney of record but must be positive,

based upon actual knowledge and not upon information or belief.

Within ten days after being served with a copy of the petition the attorney for the State may if he desires file in the same court an answer verified by a similar affidavit and setting forth any material facts against the petition.

Upon motion of either party made within ten days after the filing of an answer any justice of the court may appoint a commissioner to take the depositions of such witnesses as may be produced by either party, the depositions to be filed in the court where the exceptions were taken within such time as such justice may order.

The case thus made shall be entered and heard at the next law term upon certified copies as in other cases. If the truth of the exceptions be established, they will be heard and judgment rendered thereon as if originally allowed.

Source: Revised Rules of Court 40.

RULE 13. RECORD FOR THE LAW COURT

Except as provided in Rule 15, it shall be the duty of the respondent at his own expense to cause the record to be prepared. The record shall contain the substance of all the material pleadings, facts and documents on which the parties rely. Within 30 days after the allowance of a bill of exceptions or within 90 days after taking an appeal in a felony case, the respondent shall file with the clerk 18 copies of the record. In all cases the court in its discretion and with or without motion or notice may extend the time for filing the record, if its order for extension is made before the expiration of the period for filing as originally prescribed or as extended by a previous order. If the respondent neglects to file the record as required by this rule he shall have judgment rendered against him for want of prosecution, or such other judgment as the case may require.

It shall be the duty of the clerk promptly to examine and certify the copies of the record as true and correct. The clerk shall thereupon furnish a copy of the record to counsel for each party and shall transmit the rest of the copies to the clerk of the Law Court.

Source: Supreme Judicial Court Rule 5 in part; and new in part.

RULE 14. EXHIBITS IN LAW COURT

Except as provided in Rule 15, Rule 75(i) of the Maine Rules of Civil Procedure shall govern the presentation of exhibits to the Law Court in criminal cases.

Source: Supreme Judicial Court Rule 5, as amended, 152 Me. 57.

RULE 15. APPELLATE PROCEDURE FOR INDIGENT DEFENDANTS

Any person convicted of a felony, who has filed a motion for a new trial and has appealed from the denial of his motion, or who has noted his exceptions, who claims to be without financial means to employ counsel to prosecute his appeal or exceptions, or to obtain a stenographic transcript of the proceedings at his trial, for the purpose of securing an appellate review of his conviction, may file, during the term of court at which he is convicted, a petition requesting that counsel be assigned to represent him on appeal or exceptions, and that he be furnished with a stenographic transcript of the proceedings at his trial. The petition shall be verified by the petitioner and shall specify the grounds for the appeal or the exceptions, and shall allege facts showing that he was, at the time of his conviction, and is at the time of the filing the petition without financial means to employ counsel or to pay for the transcript.

The matter shall be heard forthwith by the presiding justice upon the issue of the indigency of the petitioner, and

upon the question of whether or not the appeal is frivolous or without merit or filed in bad faith.

If, after hearing, the presiding justice finds that the petitioner is without financial means with which to prosecute his appeal or exceptions, or with which to obtain a transcript of the proceedings at his trial, and that the petition has merit and is filed in good faith, he shall appoint competent counsel to represent the defendant on appeal or exceptions. Counsel for the petitioner and for the State may then, with the approval of the justice who presided at trial, designate by a written stipulation the parts of the record, proceedings, and evidence to be included in the record on appeal. By agreement of counsel for the petitioner and for the State, all or part of the testimony may be furnished in narrative form, rather than by question and answer. Such justice shall then order the court reporter to transcribe an original and two copies of such of the record as has been designated by counsel for the petitioner and for the State. The original transcript shall be filed with the clerk; a copy thereof shall be delivered to the petitioner without charge; and a copy thereof shall be delivered to the attorney for the State.

If the presiding justice finds that the petitioner has financial means with which to employ counsel or with which to pay for the transcript, or if he finds that the appeal or exceptions are frivolous or without merit or filed in bad faith, the petition shall be denied and the presiding justice shall file a decree setting forth his findings. From these findings, the petitioner may, within ten days after the filing thereof, appeal in writing to any justice of the Supreme Judicial Court, who, after notice to counsel for the State shall hear the matter *de novo,* and may affirm, modify, or reverse the findings of the justice below. If the findings of the presiding justice are modified or reversed, the matter shall be remanded to the court below for appropriate action

by the justice who presided at the term of court before which the petitioner was convicted. The decision of the reviewing justice shall be final.

In the hearings before the presiding justice, or, upon appeal, before a justice of the Supreme Judicial Court, the testimony of the witnesses shall be taken subject to the penalties of perjury.

In cases where the appellate review is based on exceptions, the presiding justice, shall, during the term, fix a time for the filing of the extended bill of exceptions, and in all cases, whether on exceptions or appeal, the presiding justice, shall, during the term, fix a time for the filing of the evidence, which times, for good cause shown, may be enlarged by the justice who presided at the term of court before which the petitioner was convicted.

The court reporter who prepares a transcript of the trial proceedings pursuant to an order of court shall be paid the same fee for preparing the transcript and copies as in other cases. The court reporter, and counsel appointed to represent the petitioner, shall be paid out of moneys appropriated for this purpose, on certification of the presiding justice, and approval and order by the Chief Justice of the Supreme Judicial Court.

Whenever the petition for the appointment of counsel and for the furnishing of a transcript is allowed, the presiding justice, notwithstanding the provisions of Rules 13 and 14, may, by order, specify the manner by which the record on appeal may be prepared and settled to the end that the petitioner may be able to present his case to the Law Court in the most economical manner. The presiding justice may provide in his order that the record shall consist of the original documents in the case, together with the original transcript or bill of exceptions. If the Law Court deems it necessary or advisable to have an enlargement of the rec-

ord, it may order such enlargement, or the matter may be remanded to the court below for appropriate action by the justice who presided at the term of court before which the petitioner was convicted.

Source: Supreme Judicial Court Rule 8, 153 Me. 221-24.

RULE 16. PROCEEDINGS IN LAW COURT

Except as provided in Rule 15, Rule 76A(a), (b) and (c) of the Maine Rules of Civil Procedure shall govern procedure in the Law Court in criminal cases.

Source: Supreme Judicial Court Rules 5, 6, and 4, as amended in 153 Me. 382 and 148 Me. 533.

RULE 17. ADMINISTRATION OF JUSTICE

No county attorney, assistant county attorney, clerk of courts, or deputy clerk of courts, and no judge, associate judge, recorder or clerk of a municipal court, or any trial justice, shall be retained or employed, or shall act as attorney for any respondent in any criminal proceeding or any writ of error coram nobis or coram vobis, or habeas corpus, arising from a criminal proceeding, in any court of the State.

No attorney holding himself out as a partner or associate of a judge, associate judge, or recorder of a municipal court or of any trial justice shall be retained or employed, or shall act as attorney for any respondent on the criminal side of such court or on appeal from any case originating there or any civil case involving the same facts. No attorney holding himself out as a partner or associate of a county attorney or assistant county attorney, clerk of courts or deputy clerk of courts shall be retained or employed, or shall act as attorney for any respondent on the criminal side of any court in the county of such officer or on appeal from any case origi-

nating in any such court or any civil case involving the same facts.

Source: Revised Rules of Court 47.

RULE 18. TITLE

These rules may be known and cited as the Maine Criminal Rules.

RULE 19. EFFECTIVE DATE

These rules will take effect on December 1, 1959, except for Rule 1, which will take effect on September 12, 1959. They govern all proceedings in criminal cases commenced after they take effect and also all further proceedings in criminal cases then pending except to the extent that in the opinion of the court their application in a particular case pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

APPENDIX

FORMS FOR WAIVER OF INDICTMENT AND INFORMATION

FORM 1. NOTIFICATION TO BOUND-OVER RESPONDENT

STATE OF MAINE ..... SS

Municipal Court for the City - Town of .....

STATE

vs.

.....

To ....., Respondent: .....

You were brought before this Court upon a Complaint charging you with the following crime: .....

.....

.....

.....

And after hearing had —waived—, probable cause has been found and you are now bound over to await the action of the grand jury for the County of ..... at the ..... term, A.D. 19.... of Superior Court.

Now this is to notify you of your right under the provisions of Revised Statutes, Chapter 147, Sec. 33, as amended, to file a petition addressed to the Superior Court, indicating your desire to waive in open Court prosecution by indictment for such alleged offense and have prompt arraignment, upon such waiver, by information instead of by indictment, for the offense with which you are charged.

Dated at ....., Maine ..... A.D. 19.....

Judge
Associate Judge

..... *Recorder*

FORM 2. NOTATION ON COMPLAINT AND WARRANT

..... A.D. 19...

Within respondent, this day notified by me of his rights under R. S. c. 147, Sec. 33, as amended.

.....
Judge — Associate Judge — Recorder

FORM 3. PETITION

STATE OF MAINE Superior Court

..... SS ..... Term, A.D. 19...

In vacation ..... A.D. 19...

To the Honorable Justice of the Superior Court now holden at ..... in and for the County of .....:

[To Honorable ....., Justice of the Superior Court] Respectfully represents ..... of ..... in the County of ..... and State of .....

that he is the person charged with an offense not punishable by life imprisonment, to wit, with the following crime: ..... against the peace of said State and contrary to the form of the statute in such case made and provided;

that for such charge he has been and is now bound over after complaint and hearing had —waived— and after probable cause found under date of ..... A.D. 19... by..... Judge — Associate Judge — Recorder of the Municipal Court for the City — Town of ..... in said County of ....., to await the action of the grand jury for the County of ..... at the ..... A.D. 19... term of this Court;

that he desires to waive in open court prosecution by indictment for such alleged offense or any lesser offense as is contained in the greater offense for which he has been bound over, and have his prompt arraignment upon such waiver;

that he hereby files this, his petition, with the Clerk of this Court and requests his prompt arraignment by information instead of by indictment, for such aforesaid offense or lesser offense.

Dated at ....., Maine, ... A.D. 19...

.....
Petitioner

..... A.D. 19...

I hereby consent to proceedings by information in this matter.

.....
[*(Assistant) County Attorney for the County of .....*] [*(Deputy) (Assistant) Attorney General*]

..... A.D. 19...

Petition granted for further proceedings in accordance with the provisions of Revised Statutes, Chapter 147, Sec. 33, as amended.

.....
Justice, Superior Court (Presiding)

FORM 4. WAIVER IN OPEN COURT

STATE OF MAINE Superior Court

..... SS ..... Term, A.D. 19...

In vacation ..... A.D. 19...

State vs. .....

I, ..., the above named respondent, who am the person charged with the following offense, to wit:

.....

against the peace of said State and contrary to the form of the statute in such case made and provided,

and who for such charge have been and am now bound over after complaint and hearing had —waived— and after probable cause found under date of ..... A.D. 19... by ....., Judge—Associate Judge—Recorder the Municipal Court for City—Town of ..... in said County of ....., to await the action of the grand jury for the County of ..... at the ..... A.D. 19... term of this Court,

having been advised—in this Court in open session thereof—before the Honorable ....., Justice of the Superior Court in vacation—of the nature of the above offense and of my rights and especially but without limitation thereto, of my rights by virtue of Article I, Section 7 of the Constitution of Maine and Revised Statutes of Maine, Chapter 147, Sec. 1, as amended,

DO HEREBY WAIVE in open court prosecution by indictment for such alleged offense or any lesser offense as is contained in the greater offense for which I have been bound over, and request prompt arraignment and process by information instead of by indictment.

Dated at ....., Maine, ... A.D. 19...

.....

Respondent

FORM 5. INFORMATION

STATE OF MAINE Superior Court

..... SS ..... Term, A.D. 19...

In vacation ..... A.D. 19...

State vs. .....

I, ... [(Assistant) County Attorney for the County of .....] [(Deputy) (Assistant) Attorney General] charge:

That

. . . . . .
. . . . . .
. . . . . .

against the peace of said State and contrary to the form of the statute in such case made and provided.

Dated at . . . . . , Maine . . . . . A.D. 19. . .

. . . . . .
[*(Assistant) County Attorney for the County of* . . . . . .] [*(Deputy) (Assistant) Attorney General*]

STATE OF MAINE
. . . . . SS

Then personally appeared the above named . . . . . in his capacity as . . . . . and made oath that the above Information by him signed is true to the best of his information and belief.

Dated . . . . . Before me,

. . . . . .
Notary Public—Justice of the Peace

FORM 6. NOTICE OF ELECTION TO PROSECUTE FOR ADDITIONAL OFFENSES

STATE OF MAINE
. . . . . SS Superior Court

. . . . . Term, A.D. 19. . .

In vacation . . . . . A.D. 19. . .

State vs. . . . . .

To . . . . . , the above-named respondent;

You, ... having been bound over to this Court from the Municipal Court for the City—Town of

..... upon a charge of .....
.....
.....
and having petitioned to waive indictment and to proceed by information, are hereby notified that I in my official capacity as ..... have elected to charge you with (an) other offense(s) not punishable by life imprisonment and not alleged in the Complaint upon which you have been so bound over, to wit:

.....
.....
.....
and that I have prepared and signed (an) information(s) under oath setting forth such other offense(s), have filed the same with the clerk of courts, and (do) (have) cause(d) an attested copy thereof to be served upon you.

Dated at ..... Maine, ... A.D. 19..

.....
[*(Assistant) County Attorney for the County of .....*] [*(Deputy) (Assistant) Attorney General*]

FORM 7. WAIVER AND AFFIDAVIT

(For use in information process for an additional offense other than that for which respondent was bound over)

STATE OF MAINE
..... SS Superior Court
..... Term, A.D. 19...
In vacation ..... A.D. 19...

State vs. .....

I, ..., the above named respondent, the prosecuting officer having given me notice of his election to charge me with (an) other offense(s) not punishable by

life imprisonment and not alleged in the complaint upon which I have been bound over, to wit:

. . . . . .
. . . . . .
. . . . . .

against the peace of said State and contrary to the form of the Statute in such case made and provided,

in an information by . . . . . [(Assistant) County Attorney for . . . . . County] [(Deputy) (Assistant) Attorney General] dated . . . . . A.D. 19. . . and duly served upon me by attested copy on . . . . . A.D. 19. . .

having been advised—in this Court in open session thereof—before the Honorable . . . . . , Justice of the Superior Court in vacation—of the nature of the above offense and of my rights and especially but without limitation thereto, of my rights by virtue of Article I, Section 7 of the Constitution of Maine and Revised Statutes of Maine, Chapter 147, Sec. 1, as amended,

DO HEREBY WAIVE AND SOLEMNLY SWEAR that I waive prosecution for such alleged offense by indictment and request prompt arraignment and such process by information instead of by indictment.

Dated at . . . . . , Maine, ... A.D. 19. . .

. . . . . .
Respondent

. . . . . , Maine, ... A.D. 19. . .

Subscribed and sworn to, by the said . . . . . .

Before me,

. . . . . .
Notary Public - Justice of the Peace

STATE OF MAINE

SUPREME JUDICIAL COURT

AMENDMENTS TO MAINE RULES OF CIVIL PROCEDURE AND MUNICIPAL COURT CIVIL RULES

All of the Justices concurring therein, the following amendments to the rules adopted, prescribed and promulgated on June 1, 1959, for the Municipal and Superior Courts, Supreme Judicial Court, and Supreme Judicial Court sitting as the Law Court, are hereby adopted, prescribed and promulgated to become effective on the first day of December, 1959. Said rules as thus amended shall be recorded in the Maine Reports.

Dated the first day of September, 1959.

ROBERT B. WILLIAMSON
Chief Justice
DONALD W. WEBBER
WALTER M. TAPLEY, JR.
FRANCIS W. SULLIVAN
F. HAROLD DUBORD
CECIL J. SIDDALL

Received and filed
September 1, 1959
FREDERICK A. JOHNSON,
Clerk

AMENDMENTS OF MAINE RULES OF CIVIL PROCEDURE

Rule 1, 1. 5, Change "exceptions" to "limitations".

Rule 4 (d) (1), at end. Change period to semi-colon and add:

"or to be made by publication pursuant to subdivision (g) of this rule if the court deems publication to be more effective."

Rule 4 (d) (3) l. 4. Insert "to" before "the director".

Rule 4 (g) (1), l. 3. Delete "of a summons".

Rule 4 (g) (2). Rewrite to read as follows:

"(2) *Contents of Order.* An order for service by publication shall include (i) a brief statement of the object of the action; (ii), if the action may affect any property or credits of the defendant described in subdivision (f) of this rule, a description of any such property or credits; and (iii) the substance of the summons prescribed by subdivision (a) of this rule. The order shall also direct its publication once a week for 3 successive weeks in a designated newspaper of general circulation in the county where the action is pending; and the order shall also direct the mailing to the defendant if his address is known."

Rule 4 (h). Insert after the 2nd sentence the following:

"His filing of such proof of service with the court shall constitute a representation by him, subject to the obligations of Rule 11, that the copy of the complaint delivered to the officer for service was a true copy."

Rule 4A (b), last line. Insert after the word "judgment" the following:

", together with a reasonable allowance for interest and costs,"

Rule 4B (a), l. 6. Delete "the," before the word "damages."

Rule 4B (b), l. 5. Insert after "attorney," the following:

"the amount for which the goods or credits of the defendant are attached on trustee process,"

Rule 4B (b). Add at the end the following:

"The amount so attached shall not exceed the demand for judgment together with a reasonable allowance for interest and costs."

Rule 4B (c), l. 12. Change "thereon" to "thereof".

l. 14. Change "(h)" to "(g)".

Rule 4B (f). At end, change period to comma, and add:

"provided that the trustee resides or, if a corporation, maintains a usual place of business, in the county where the action is pending. If the counterclaim is compulsory under Rule 13(a), the party stating it may use trustee process, even though the trustee does not reside or maintain a usual place of business in the county where the action is pending."

Rule 4C (a). Add at end:

"The court on motion of any party or upon its own initiative may order the defendant to be released from arrest upon such terms and conditions as it deems just, at any time when justice so requires."

Rule 4C (b). Add at end:

"A defendant who has been arrested on a capias writ shall be released from arrest if the complaint is not filed with the court within 10 days after the arrest, and the action may be dismissed on motion and notice as provided in Rule 3. A certificate by the clerk that the complaint has not been so filed shall be furnished on request and shall be sufficient evidence of the fact."

Rule 5 (d). Change heading to read:

"Filing; No Proof of Service Required."

Add at end the following:

"Such filing by a party's attorney shall constitute a representation by him, subject to the obligation of Rule 11, that a copy of the paper has been or will be served upon each of the other parties as required by subdivision (a) of this rule. No further proof of service is required unless an adverse party raises a question of notice."

Rule 5 (f), 1. 3. Change "file" to "docket".

Rule 7 (a), 1. 1. Insert after "answer" the following:

", and a disclosure under oath, if trustee process is used;"

Rule 8 (e) (2), 1. 2. Change "alternately" to "alternatively".

Rule 10 (a), 1. 3. Change "file number" to "docket number".

Rule 19 (b), 1. 4. Delete "as to both service of process and venue".

1. 7. Delete "as to either service of process or venue".

Rule 25 (c), 1. 4. Insert "the" after "Service of".

Rule 28 (a), 1. 7. Delete "of the United States or".

Rule 28 (d), 1. 8. Insert "30 (d)," after "Rule".

Rule 33, 11. 6-7. Change "10 days after such commencement" to "20 days after service upon the defendant".

Rule 36 (a), 11. 5-6. Change "10 days after commencement of the action" to "20 days after service upon the defendant,".

Rule 38 (c), 1. 9. Insert after "action" the following:

"or any issue or issues".

Rule 39 (a), 1. 1. Change "39 (b)" to "39 (c)".

Rule 43 (b), 1. 5. Change "a partnership or" to "an".

Rule 45 (d) (1), 1. 3. Delete "by the clerk".

Rule 46, 1. 5. Change "ground" to "grounds".

Rule 47 (c). Delete.

Rule 52 (a), 1. 2. Insert after "made" the following: "as a motion".

Rule 52 (b). Change first sentence to read:

"The court may, upon motion of a party made not later than 10 days after notice of findings made by the court, amend its findings or make additional findings and, if judgment has been entered, may amend the judgment accordingly."

Rule 54. Heading. Change colon to semi-colon.

Rule 54 (f) (2). Add the following at end:

"Blank summons or writ . 10"

Rule 55 (b) (1). Add at end: "and if he is not an infant or incompetent person."

Rule 55 (b) (4), 1. 3. Insert after "knowledge", the words "setting forth facts showing".

1. 4. Delete "an infant or incompetent person or"

1. 6. Change period to a comma and add "except upon order of the court in accordance with that Act."

Rule 62 (f), 1. 3. Insert after "attachment" the following: "or to release the defendant from arrest on capias writ".

Rule 62 (g), 1. 1. Change "Appellate" to "Law".

Rule 64 (c), 11. 9-10. Delete "and of the officer's return thereon" and insert "with the officer's endorsement thereon of the date of execution of the writ".

Add **Rule 64 (g)** reading as follows:

"(g) **Equitable Replevin.** These rules shall not be construed to extend or limit the availability of equitable replevin."

Rule 65 (c), 11. 5-6. Delete comma and "to be".

Rule 72 (a), 1. 2. Change "the parties" to "all parties appearing".

72 (b), 11. 2-3. Change "the parties" to "all parties appearing".

72 (c), 1. 2. Insert after the word "that" the following:

"a question of law involved in".

Rule 73 (a), 1. 15. Insert after "Rule 50 (b);" the following:

"or making findings of fact or conclusions of law as requested under Rule 52(a);"

Rule 73 (a), 2d. par. Add to end the following:

", provided that after the appeal is argued to the Law Court, it may be dismissed only with leave of the Law Court."

Rule 73 (a). Add a 3d paragraph at the end, reading as follows:

"Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal; but the appeal will be dismissed for appellant's failure to take any such further step within the time prescribed therefor unless the Law Court on petition shall determine that exceptional circumstances excuse the failure and justice demands that the appeal be heard."

Rule 75 (a), 1. 5. Insert additional sentence after 1st sentence, reading as follows:

"In all cases the court in its discretion and with or without motion or notice may extend the time for serving and filing the designation, if its order for extension is made

before the expiration of the period for serving and filing as originally prescribed or as extended by a previous order."

Rule 75 (d), 1. 3. Change "shall be deemed waived" to "may be deemed to be waived."

Rule 75 (e), 11. 5-7. Delete "or for the unnecessary substitution by one party of evidence in question and answer form for a fair narrative statement proposed by another".

Rule 75 (f). Add sentence, reading as follows:

"At the same time the appellant shall file a statement of points as provided for under subdivision (d) of this rule."

Rule 75 (g), 1. 2. Insert "or of the party aggrieved by a reported interlocutory ruling." after "appellant".

1. 5. Delete "or by order of the court".

75 (g). Delete last sentence of 1st paragraph.

Rule 76A (a), 1. 1. Change "All" to "Except as otherwise provided by statute, all"

Rule 79 (a), 1. 3, 1. 9. Change "file" to "docket".

79 (b). Change to read as follows:

"**(b) Civil Judgments and Orders.** The clerk shall keep, in such form and manner as the Chief Justice of the Supreme Judicial Court may prescribe, a correct copy of every final judgment or appealable order, and of every order affecting title to or lien upon real or personal property, and of any other order which the court may direct to be kept. After the rendition of judgment the clerk shall, without unreasonable delay, make extended records of proceedings in real actions, including actions for the foreclosure of mortgages, in actions for flowage, and for partition. In other civil actions it shall be sufficient to record the names of the parties, the docket number, the date of

the complaint, the date of service, the verdict of jury, if any, and the date of rendition of judgment, its nature and amount. In an action for divorce or annulment there shall also be recorded the residence of the parties, the date of marriage, the alleged grounds for relief, the names of children, if any, and the prayer, if any, for change of name. Notwithstanding the foregoing, no extension of records is required in petitions and decrees for changes in custody, support, reciprocal support, alimony, restraint and contempt. Upon application of any party made not later than 90 days after final judgment the court may order the preparation, upon payment of fees ordered by the court, of a full record in any action or such additional record as the party requests."

Rule 80 (b), 1. 3. Change period to comma and add:

"except that service within the state shall be by delivery to the defendant personally unless otherwise ordered by the court."

Rule 80B (a), 1. 2. Change "administrative action by any" to "any action by a".

1. 3. Insert before "proceedings" the following:

"or when any judicial review of such action was heretofore available by extraordinary writ,"

Rule 80B (c). Change the first sentence into 2 sentences reading as follows:

"These Rules of Civil Procedure, so far as they are applicable, shall govern any trial of the facts where provided by statute or otherwise. Such trial shall be without jury unless the Constitution of the State of Maine or a statute gives the right to trial by jury."

Rule 80B (d), 11. 1-2. Change the first two lines to read as follows:

"**(d) Review by the Law Court.** Unless by statute or otherwise the decision of the Superior Court is final, review by the Law Court shall be by appeal or report in accordance with these"

Rule 81 (b), last paragraph, 1. 2. Insert "or report" after "appeal".

Appendix of Forms, Introductory Statement, Par. 2. Add the following at the end:

"In the forms where the seal of the court is required, the place for the seal is indicated at the lower left. See, *e.g.*, Forms 1, 2, 2A, 14, 22, 30. The seal traditionally has been affixed at the upper left of writs and other court papers. It can under the rules be placed at the lower left as shown here or at the traditional upper left or at any other convenient place on the document."

Forms 1, 2A, 22, 28. Change "File Number" in caption to "Docket Number".

Form 1 and Form 22 (Summons). Insert after the 2d sentence the following: "Your answer must also be filed with the court."

Alternative Forms 1, 2, and 2A. Add the following forms:

ALTERNATE FORM 1. SUMMONS

(for use in an action in another county)

STATE OF MAINE SUPERIOR COURT
SAGADAHOC, SS

Civil Action, Docket Number .....
Cumberland County

A. B., Plaintiff of Bath,
Sagadahoc County
v.
C. D., Defendant
of Portland,
Cumberland County

Summons

To the above-named Defendant:

You are hereby summoned to defend an action brought in the Superior Court for Cumberland County and required to serve upon ..... plaintiff's attorney, whose address is ....., an answer to the complaint which is herewith served upon you, within 20* days after service of this summons upon him, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Your answer also must be filed with the Court in Cumberland County. As provided in Rule 13(a), your answer must state as a counterclaim any related claim which you may have against the plaintiff, or you will thereafter be barred from making such claim in any other action.

.....
Clerk of said Superior Court

[Seal of the Court]
Dated .....

Served on .....
Date

.....
Deputy Sheriff

* Use 20 days, except that in the exceptional situations where a different time is allowed in which to answer, the different time should be inserted.

ALTERNATE FORM 2. WRIT OF ATTACHMENT

(for use in an action in another county)

STATE OF MAINE SUPERIOR COURT

SAGADAHOC, SS

Civil Action, Docket Number .....

Cumberland County

A. B., Plaintiff
of Bath,
Sagadahoc County
v.
C. D., Defendant
of Portland,
Cumberland County

Writ of Attachment

To the sheriffs of our several counties or either of their deputies:

We command you to attach the goods or estate of [name of defendant] of [defendant's place of residence, including town and county] to the value of [amount of plaintiff's demand for judgment, together with a reasonable allowance for interest and costs] as prayed for by [name of plaintiff] of [plaintiff's place of residence, including town and county] in an action brought by said [name of plaintiff] against said [name of defendant] on [date of complaint] in the Superior Court for Cumberland County, and make due return of this writ with your doings thereon.

.....
Clerk of said Superior Court

[Seal of the Court]

Dated .....

ALTERNATE FORM 2A. SUMMONS TO TRUSTEE

(for use in an action in another county)

STATE OF MAINE
SAGADAHOC, SS

SUPERIOR COURT

Civil Action, Docket Number .....
Cumberland County

A. B., Plaintiff
v.
C. D., Defendant
E. F., Trustee

Summons to Trustee

To the above-named Trustee:

You are hereby summoned as trustee in an action brought in the Superior Court for Cumberland County and required to serve upon ..... plaintiff's attorney, whose address is ..... within 20 days after service of this summons upon you, exclusive of the day of service, a disclosure under oath of what cause, if any you have, why execution issued upon such judgment as the said plaintiff may recover against the said defendant in this action, if any, should not issue against his goods, effects, or credits in your hands and possession as trustee of said defendant to the value of [amount of plaintiff's demand for judgment, together with a reasonable allowance for interest and costs] as prayed for by the said plaintiff. If you fail to do so, you will be defaulted and adjudged trustee as alleged. Your disclosure must also be filed with the court in Cumberland County.

(Signed) .....
Clerk of said Superior Court

[Seal of the Court]
Dated .....

Served on .....
date
.....
Deputy Sheriff

Form 2, 1. 4. Insert within the brackets after "demand for judgment" the following:

", together with a reasonable allowance for interest and costs]"

Form 2A, 1. 4. Insert after "service," the following: "a disclosure under oath of".

Form 2A, end of 1st sentence. Delete period and add the following:

"to the value of [amount of plaintiff's demand for judgment together with a reasonable allowance for interest and costs] as prayed for by the said plaintiff."

Form 2A, Add at end the following: "Your disclosure must also be filed with the court."

Form 2B. Put "]" after "defendant" at the end of 1. 3. and delete the rest, substituting: [name of person to whom delivery is made and address of place of delivery]."

Form 12. Heading should read "Form 12."

Form 14, 1. 9. Add after "execution" the following: "as property of said plaintiff".

Form 20, Second Defense, 1. 4. Delete "as to both service of process and venue".

Form 22. Add the following:

STATE OF MAINE — SUPERIOR COURT
CUMBERLAND, SS

Civil Action, Docket Number .....

A. B., Plaintiff
v.
C. D., Defendant and Third-Party Plaintiff
v.
E. F., Third-Party Defendant

Third-Party Complaint

1. Plaintiff A. B. has filed against defendant C. D. a complaint, a copy of which is hereto attached as "Exhibit C".

2. (Here state the grounds upon which C. D. is entitled to recover from E. F., all or part of what A. B. may recover from C. D. The statement should be framed as in an original complaint.) Wherefore C. D. demands judgment against third-party defendant E. F. for all sums that may be adjudged against defendant C. D. in favor of plaintiff A. B.

Signed: .....
Attorney for C. D., Third Party Plaintiff

Address: .....

AMENDMENTS OF MUNICIPAL COURT CIVIL RULES

Rule 5 (1), 1. 2. Change "within 3 days thereafter he" to "he not later than 3 days after the return day".

Rule 5 (2), 1. 2. Change "term" to "day."

Rule 5 (4). Change order of sentence so that it will read as follows:

"(4) No attachment of real or personal property or on trustee process shall be made after service of the summons and complaint upon the defendant nor more than 65 days before the return day."

Rule 5 (5), 11. 2-3. Change "within" to "not later than"; delete "commencement of the"; and change "term" to "day".

Rule 8 (1), 1. 2. Change to read "not later than 3 days after the return day".

Rule 12, 11. 3-4. Delete "commencement of the" and change "term" to "day".

Rule 22, 11. 3-4. Change "as from an original judgment" to "and obtain a hearing de novo on the motion."

Forms 1, 3 and 4. Change "File Number" to "Docket Number" in caption.

Form 1, 1. 7. Change "within" to "not later than".

Form 2, 1. 7. Insert after "demand for judgment" in the brackets the following:

", together with a reasonable allowance for interest and costs]"

Form 3, 1. 3. Change "within" to "not later than".

1. 4. Insert before "what cause" the words "a disclosure under oath of".

1. 8. Delete period and add the following:

"to the value of [amount of plaintiff's demand for judgment together with a reasonable allowance for interest and costs] as prayed for by the said plaintiff."

STATE OF MAINE

SUPREME JUDICIAL COURT

AMENDMENTS TO

MAINE RULES OF CIVIL PROCEDURE

AND

MUNICIPAL COURT CIVIL RULES

All of the Justices concurring therein, the following amendments to the rules adopted, prescribed and promulgated on June 1, 1959, as amended on September 1, 1959, for the Municipal and Superior Courts, Supreme Judicial Court, and Supreme Judicial Court sitting as the Law Court, are hereby adopted, prescribed and promulgated to become effective on the first day of December, 1959. Said rules as thus amended shall be recorded in the Maine Reports.

Dated the 2nd day of November, 1959.

ROBERT B. WILLIAMSON
Chief Justice
DONALD W. WEBBER
WALTER M. TAPLEY, JR.
FRANCIS W. SULLIVAN
F. HAROLD DUBORD
CECIL J. SIDDALL

Received and filed
November 2, 1959
FREDERICK A. JOHNSON,
Clerk

AMENDMENT OF RULES

November 2, 1959

MAINE RULES OF CIVIL PROCEDURE

Rule 4 (f). Change "may" to "shall" in 4th line.

Rule 4C. Strike out the first sentence of Rule 4C (a) and substitute the following:

"In connection with the commencement of any action under these rules, a capias writ may be used to arrest the defendant only in the manner and to the extent provided by 1954 Revised Statutes, Chapter 120, Section 2, as amended."

Rule 7 (d). Strike out subdivision (d) and substitute the following:

"**(d) Pleading in Actions Appealed from Probate Court.** On an appeal to the Superior Court sitting as the Supreme Court of Probate, the appellant shall, within 34 days from the date of the proceeding appealed from, file with the clerk of the Superior Court copies, attested by the register of probate, of the reasons of appeal, the appeal bond, and the petition, account, complaint in equity or other document and the decree thereon which is the subject matter of the appeal. No other pleadings shall be required."

Rule 10 (a). Add at end an additional sentence reading:

"The complaint shall be dated."

Rule 30 (d). Add at end an additional sentence reading:

"A single justice of the Supreme Judicial Court may, in any case pending before him, hear such motion and make any such order."

Rule 64 (b). Add at end: "and their respective values stated."

Rule 69. Insert after the first sentence an additional sentence reading as follows:

"Except as permitted by statute relating to issuance of execution after disclosure, no execution running against the body shall be issued unless after motion and hearing it is so ordered by the court, which shall not order such execution to issue on a judgment based on a contract, express or implied, or in an action on such a judgment."

Rule 79 (b). Strike out first sentence.

In the fourth sentence of Rule 79 (b) strike out the word "also" (in line 14) and insert after the remaining words, "In an action for divorce or annulment there shall be recorded", the following: "a copy of the judgment,".

At the end of Rule 79 (b) add a new sentence reading as follows:

"The Chief Justice of the Supreme Judicial Court shall prescribe the form and manner of making and keeping such records and may prescribe such further records to be kept as he may deem appropriate."

Alternate Form 1. Change "him" to "you" in 5th line of body of form.

Form 3. Insert "Dated ....." to left of plaintiff's attorney's signature.

Form 14. Insert "and a statement of their respective values" after "particularity" in 3rd line of body of form.

Insert "at [location of goods] in this County" after "county]" in 6th line of body of form.

Form 30. Insert "in the Superior Court at Portland in the County of Cumberland" after "judgment" in the 1st line.

MUNICIPAL COURT CIVIL RULES

Rule 2. Strike out paragraph (2) and substitute therefor the following:

"(2) The term 'clerk' or 'recorder' shall include the clerk or recorder or judge or associate judge of any municipal court in the performance of non-judicial functions."

Rule 24. Add "Rule 69 of the Maine Rules of Civil Procedure governs executions in the municipal courts so far as applicable."

Form 5. Insert "Dated ....." to left of plaintiff's attorney's signature.

STATE OF MAINE

SUPREME JUDICIAL COURT
AMENDMENTS TO
MAINE RULES OF CIVIL PROCEDURE
AND
MUNICIPAL COURT CIVIL RULES

All of the Justices concurring therein, the following amendments to the rules adopted, prescribed and promulgated on June 1, 1959, as amended on September 1, 1959, and November 2, 1959, for the Municipal and Superior Courts, Supreme Judicial Court, and Supreme Judicial Court sitting as the Law Court, are hereby adopted, prescribed and promulgated to become effective on the first day of February, 1960. Said rules as thus amended shall be recorded in the Maine Reports.

Dated the 19th day of January, 1960.

ROBERT B. WILLIAMSON
Chief Justice
DONALD W. WEBBER
WALTER M. TAPLEY, JR.
FRANCIS W. SULLIVAN
F. HAROLD DUBORD
CECIL J. SIDDALL

AMENDMENTS OF MAINE RULES OF CIVIL PROCEDURE

Effective February 1, 1960

Rule 4A (c). Strike the following words at the end of the third sentence of Rule 4A (c), "and of the return of service thereof"; and substitute therefor the following:

"with the officer's endorsement thereon of the date or dates of execution of the writ."

Rule 4B (c). Strike the following words at the end of the fourth sentence of Rule 4B (c), "and of the return of service thereof"; and substitute therefor the following:
"with the officer's endorsement thereon of the date or dates of service upon the trustee or trustees."

Rule 53 (e) (1). Strike the entire subdivision (e) (1) and substitute therefor the following:

"(1) *Contents and Filing.* The referee shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. In cases where the reference is by agreement of the parties, the referee shall file with the clerk of the court the report, together with the original exhibits and together with any transcript which, at the election and expense of one or more of the parties, may be made of the proceedings and of the evidence before the referee. In cases where the reference is without agreement and where the action is to be tried without a jury, when the order of reference so provides, the referee shall file with his report and the original exhibits a transcript of the proceedings and of the evidence and the cost of such transcript shall be included in the necessary expenses incurred by the referee as provided in Rule 53 (a). The clerk shall forthwith mail to all parties notice of the filing."

Rule 55 (b) (1). Strike the entire subdivision (b) (1) and substitute therefor the following:

"(1) *By the Clerk.* When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk shall, upon request of the plaintiff and upon affidavit of the amount due and affidavit that the defendant is not an infant or in-

competent person, enter judgment for that amount and costs against the defendant, if he has been defaulted and has failed to appear."

Rule 62 (a). Insert after the words "receivership action" in the second sentence of Rule 62 (a) the following:

"or, in an action for divorce, an order relating to the care, custody and support of minor children or to the separate support or personal liberty of the wife"

Rule 80 (b). Add the following sentence to Rule 80 (b):

"Notwithstanding the provisions of Rule 17 (b), an infant party to any proceeding under this rule need not be represented by next friend, guardian ad litem, or other fiduciary, unless the court so orders."

Rule 80 (c). Strike the entire subdivision (c) and substitute therefor the following:

"**(c) Orders Prior to Judgment.** At any time prior to judgment in an action for divorce in which the court has personal jurisdiction over the husband, it may on motion order him to pay to the wife or to her attorney sufficient money for her defense or prosecution thereof and to make reasonable provision for her separate support, and may make such order as it deems proper for the care, custody and support of minor children. At any time prior to judgment in any action for divorce, the court may on motion enter such order as it deems proper for the custody of minor children within the state and may prohibit the husband from imposing any restraint on the personal liberty of the wife. Costs and counsel fees may be ordered on any motion under this subdivision, and the court may in all cases enforce obedience by appropriate processes on which costs and counsel fees shall be taxed as in other actions. Execution for counsel fees for prosecution or defense of the action for divorce shall not issue until the action for divorce has been heard."

Rule 80 (j). Add a subdivision (j) to Rule 80, reading as follows:

"**(j) Motions after Judgment.** Any proceedings for modification or enforcement of the judgment in an action for divorce shall be on motion, notice of which shall be served upon the party himself in the manner provided in Rule 5 and not upon the attorney or the clerk."

PROBATE RULE AMENDMENTS

STATE OF MAINE

To the Honorable Justices of the Supreme Judicial Court:

The undersigned Judges and Registers of the Probate Court, duly appointed and qualified pursuant to Section 50, Chapter 153 of the Revised Statutes of 1954 as amended by Chapter 323 of the Public Laws of 1955, authorized and directed to make new rules and blanks or amendments to existing rules and blanks for use in the Probate Courts of the State, have prepared and respectfully submit for your approval the annexed amendments to the existing rules, to take effect in all Probate Courts of the State on and after December 1, 1959.

EMERY O. BEANE, SR.
LOUIS C. STEARNS 3D
NATHANIEL M. HASKELL
HENRY A. PEABODY
J. WOODROW VALLELY

October 23, A.D. 1959

STATE OF MAINE

SUPREME JUDICIAL COURT

Whereas, it is provided by Section 50, Chapter 153, of the Revised Statutes of 1954, as amended by Chapter 323 of the Public Laws of 1955, that a Commission composed of three Judges and two Registers of Probate appointed by the Governor, may make new rules and blanks or amendments to existing rules and blanks, which shall, when approved by the Supreme Judicial Court, or a majority of the Justices thereof, take effect and be in force in all Courts of Probate, and Whereas a Commission, duly appointed and qualified as aforesaid, has prepared certain amendments to the existing rules for use in said Courts of Probate, which are hereunto annexed and have submitted them to the Supreme Judicial Court for approval in accordance with said Statute.

Said rules and amendments having been examined by the Justices of the Supreme Judicial Court,

IT IS HEREBY ORDERED, that the rules and amendments be approved and that they take effect and be in force in all Courts of Probate in this State on and after December 1, 1959.

Augusta, Maine, November 2, A.D. 1959.

STATE OF MAINE
Cumb. ss. Clerk of Courts Office
SUP. JUD. COURT
Received and Filed
November 2, 1959
FREDERICK A. JOHNSON,
Clerk

ROBERT B. WILLIAMSON,
Chief Justice
DONALD W. WEBBER
WALTER M. TAPLEY, JR.
FRANCIS W. SULLIVAN
F. HAROLD DUBORD
CECIL J. SIDDALL

AMENDMENTS TO PROBATE COURT RULES

Rule XLVI relating to Equity Rule Days is hereby revoked.

Rule XLVII relating to Equity Rules is hereby revoked.

Rule XLVIII is hereby revoked and the following Rule adopted in place thereof:

XLVIII

EQUITY PROCEDURE

Complaints in equity shall be captioned as follows:

State of Maine — Probate Court

..... SS. — In Equity, Docket Number .....

A.D. Plaintiff
of .....
..... County
V.
C.D. Defendant
of .....
..... County

Complaint.

They shall be addressed:

"To the Judge of the Probate Court for the County of ..... In Equity. A.B. of ..... complains against C.D. of ..... and says:

First - - - - - - - - - - - -". etc.

The Maine Rules of Civil Procedure shall be the rules of equity procedure in the Probate Courts so far as they are applicable. Of said Rules, Rule 2 providing for one form of action and Rule 13 relating to counterclaims shall not apply to Probate Courts.

STATE OF MAINE

To the Honorable Justices of the Supreme Judicial Court:

The undersigned Judges and Registers of the Probate Court, duly appointed and qualified pursuant to Section 50, Chapter 153 of the Revised Statutes of 1954 as amended by Chapter 323 of the Public Laws of 1955, authorized and directed to make new rules and blanks or amendments to existing rules and blanks for use in the Probate Courts of the State, have prepared and respectfully submit for your approval the annexed new blanks and amendments to the existing blanks, to be used in all Probate Courts of the State agreeable to said statute.

It is recommended that existing blanks Numbers 189, 190 and 190A be superseded by new blank Number 189, and existing blanks Numbers 138, 139, 167, 180, 180A, 181, 181A, 182 and 183 be discontinued and superseded by new blanks bearing the same numbers.

EMERY O. BEANE, SR.
LOUIS C. STEARNS 3D
NATHANIEL M. HASKELL
HENRY A. PEABODY
J. WOODROW VALLELY

January 15, A.D. 1960

STATE OF MAINE

SUPREME JUDICIAL COURT

Whereas, it is provided by Section 50, Chapter 153, of the Revised Statutes of 1954, as amended by Chapter 323 of the Public Laws of 1955 that a Commission composed of three Judges and two Registers of Probate appointed by the Governor, may make new rules and blanks or amendments to existing rules and blanks, which shall, when approved by the Supreme Judicial Court, or a majority of the Justices thereof, take effect and be in force in all Courts of Probate, and Whereas a Commission, duly appointed and qualified as aforesaid, has prepared certain new blanks and amendments to existing blanks for use in said Courts of Probate, which are hereunto annexed and have submitted them to the Supreme Judicial Court for approval in accordance with said Statute.

Said blanks having been examined by the Justices of the Supreme Judicial Court, and it being understood that only certain formal changes may be made to adapt the blanks for use in the several Counties, such as inserting the name of the County, the place of holding Court therein, and the name of the Judge whose teste they shall bear,

IT IS HEREBY ORDERED, that existing blanks numbered 189, 190 and 190A be discontinued and be superseded by the annexed new blank numbered 189, and existing blanks numbered 138, 139, 167, 180, 180A, 181, 181A, 182 and 183 be discontinued and be superseded by the annexed new blanks bearing the same numbers, that said new blanks be approved and that they take effect and be in force in all

Courts of Probate in this State on and after January 22, A.D. 1960.

Augusta, Maine, January 21, A.D. 1960

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

INDEX

INDICTMENTS

If the meaning of an indictment is clear, the verbal, grammatical, clerical, or orthographical errors are not fatal.

State v. *Osborne*, 391.

See *State* v. *Mottram* (time averment), 394.

INHERITANCE TAX

See Taxation, *Bragdon Tr.* v. *Worthley et al.*, 284.

INSANITY

See Torts, *Hurley* v. *Towne et al.*, 433.

INSURANCE

In suits on insurance policies which insure against death as a result of "bodily injuries effected solely through external violent and accidental means" the plaintiff has the burden of proof as to accident whereas in suits upon policies which insure against death with a proviso avoiding the policy "if the insured dies by his own act" the defendant from the inception has the burden of proof as to suicide which is raised as an affirmative defense.

There is an affirmative presumption of "accident" arising from the negative presumption "against suicide."

Disputable presumptions are not themselves evidence nor are they entitled to be weighed in the scales of evidence. They perform the office of locating the burden of going forward with evidence, but having performed that office, they disappear in the face of countervailing evidence. They compel a finding of a presumed fact in the absence of contrary evidence.

Disputable presumptions—persistence or disappearance as a matter of law: Wherever no countervailing evidence is offered, or that which is offered is but a scintilla, or amounts to no more than a speculation and surmise, the presumed fact will stand as though proven and the jury will be so instructed; when evidence contrary to the presumption comes from such sources and is of such a nature that rational unprejudiced minds could not reasonably or properly differ as to the nonexistence of the presumed fact, the presumption will disappear as a matter of law.

If the insured does a voluntary act, the natural, usual, and to be expected result of which is to bring injury upon himself, then a death so occurring is not accidental.

The absence of a suicide motive *alone* will not suffice under the facts of the instant case to support a plaintiff's verdict or take the case to the jury.

When the privilege against self-incrimination is claimed, the ruling should not be to exclude the question, if otherwise proper, but to grant or refuse the request. Art. I, Sec. 6, Const. of Maine.

As to each question the court must determine whether the answer to that particular question would subject the witness to "real danger of x x x crimination."

Hinds v. *John Hancock Ins.*, 349.

INTEREST

See Wills, *In re Moody*, 325.

The Maine Constitution relating to the expenditure of public money for public purposes and to the separation of church and state, carry no more stringent prohibitions than the First and Fourteenth Amendments to the Constitution of the United States.

A municipality may not accomplish by police power that which is repugnant to and in derogation of the established policy of the State in its general scheme or plan for the promotion of education.

Squires et al. v. *Augusta*, 151.

PRESUMPTIONS

See Insurance, *Hinds* v. *John Hancock Ins. Co.*, 349.

PROBATE

See Appeal.

PROCESS

Rule 5 of the Rules of Court require that pleas or motions in abatement, or to the jurisdiction, in actions originally brought, must be filed within two days after the entry of the action.

The service of a complaint in accordance with statutory direction but without the sanction of any court order is effectual when the respondent appears generally and the court has jurisdiction over the subject matter of that category of cases to which the controversy belongs with the power and authority to compel respondent's attendance.

Law is a practical science and rules must not impede or thwart justice.

Howard et al. v. *Saco*, 252.

RELEASE

See Accord and Satisfaction.

RES ADJUDICATA

See Bankruptcy, *Cianchette* v. *Verrier et al.*, 74.

RESTATEMENT

Judgments, Section 68, *Cianchette* v. *Verrier et al.*, 74.
Trusts, Section 187, *Swasey et al.* v. *Chapman et al.*, 408.
Trusts, Section 234, *Swasey et al.* v. *Chapman et al.*, 408.
Trusts, Section 236, *Swasey et al.* v. *Chapman et al.*, 408.

RULES OF COURT

See Appeal (Probate), *In re Wagner*, 257.
See Process, *Howard et al.* v. *Saco*, 252.

SCHOOLS

See *Squires et al.* v. *Augusta*, 151.

SELF DEFENSE

A person assaulted, when without fault, may stand his ground and repel force with force to the extent which seems to him reasonably necessary to defend himself.

Resistance must not exceed the bounds of defense.

The right to use force does not exist in the first instance in ejecting a trespasser who has peaceably entered.

If a trespasser uses actual force in gaining entrance a request to leave is not necessary, nor is it necessary where it would be useless, or dangerous, or could not be effectively made.

Instructions given by the trial court should state the law applicable to the particular facts in issue, which the evidence of the case tends to prove; abstract propositions, even though correct, should not be given.

State v. *Benson*, 115.

SETTLEMENT

See Accord and Satisfaction.

SPECIFIC PERFORMANCE

There is a fiduciary relationship created by and inherent in the nature of an escrow agreement.

While as a general rule an instrument cannot be deposited with the agent or attorney of the obligor or obligee, such person may so act if it involves no violation of duty to the principal and the person acts *as an individual* and *not as an agent.*

Where a plaintiff with no lack of diligence has performed his part of an escrow agreement, the defendant is without right to rescind the escrow agreement or interfere with the performance of the duties of the escrow agent.

Progressive Corp. v. *Eastern Milling Co.*, 16.

STATUTES CONSTRUED

REVISED STATUTES 1954

R. S., 1954, Chap. 17, Secs. 2, 4,
Oxford Paper Co. v. *Johnson*, 380.
R. S., 1954, Chap. 22, Sec. 83,
Farm Bureau Mut. Ins. Co. v. *Kelley*, 276.
R. S., 1954, Chap. 22, Sec. 88,
Tinker v. *Trevett*, 426.
R. S., 1954, Chap. 91A, Sec. 3,
Emple Knitting Mills v. *Bangor*, 270.
R. S., 1954, Chap. 108, Sec. 6,
State v. *Fleming*, 342.
R. S., 1954, Chap. 113, Sec. 60,
Nevico v. *Greeley*, 103.
R. S., 1954, Chap. 113, Sec. 64,
Farina v. *Sheridan Corp.*, 234.
R. S., 1954, Chap. 124, Sec. 9,
Blaisdell v. *Daigle*, 1.
R. S., 1954, Chap. 139, Sec. 18,
State v. *Bussiere*, 331.
R. S., 1954, Chap. 145, Sec. 14,
State v. *Mottram*, 394.
R. S., 1954, Chap. 153, Sec. 34,
In re Wagner, 257.
R. S., 1954, Chap. 160, Sec. 34,
Swasey et al. v. *Chapman et al.*, 408.
R. S., 1954, Chap. 166, Sec. 43,
Marino v. *Marino*, 346.

STATUTORY CONSTRUCTION

See Municipal Corporations, *Cloutier* v. *Lewiston*, 300.
See *Squires et al.* v. *Augusta*, 151.

STIPULATION

See Divorce, *Dionne* v. *Dionne*, 377.

SUICIDE

See Insurance, *Hinds* v. *John Hancock Ins. Co.*, 349.

TAXATION

The fundamental rule in the construction of a statute is legislature intent.

The provision of R. S., 1954, Chap. 91-A, Sec. 3 providing for the "average amount" formula as method of determining the tax upon "personal property employed in trade" based upon the "average amount kept on hand *for sale*" during the year is equally applicable to the finished products as well as materials which make up the finished product. The legislature did not intend that only goods ready *for sale* should be assessed on the average amount formula and remaining property assessed on an "on hand" April 1, basis.

Emple Knitting Mills v. *Bangor*, 270.

The doctrine of equitable contribution is applicable to Federal Estate Taxes since Congress intended that the entire estate tax should be paid out of the estate as a whole and applicable state law as to the devolution of property at death should govern the distribution of the remainder and the ultimate impact of the Federal Tax.

A trustor or testator may designate any portion of his estate from which the Federal Estate Tax should be paid.

The intention to change the application of the rule of equitable contribution should be clearly expressed.

Where a careful examination of the language used in a trust indenture limits the payment of taxes to assets which passed under the trust and no other, the trustee is entitled to equitable contribution from inter vivos transferees for a proportionate share of the tax paid on their behalf.

Bragdon Tr. v. *Worthley et al.*, 284.

The State Tax Assessor may not by regulation so limit the exemption of R. S., 1954, Chap. 17, Secs. 2 and 4 and P. L., 1955, Chap. 144

The omission of a child under R. S., 1954, Chap. 169, Sec. 9, although presumed to be as a result of forgetfulness, infirmity or misapprehension, may be shown to be intentional and extrinsic evidence is admissible to support such showing.

The words "I want the money from my share in father's farm deposited . . . for Henry" . . . creates a trust under the facts of the existing case and the words "*I want*" are not merely precatory or advisory where such a construction defeats the intent of the testator.

The phrase "it (the money) can be used to build a house for him (Henry) on the lot . . ." is precatory.

Jordan et al. v. *Jordan et al.*, 5.

A will is not operative until the death of the maker, it then speaks his or her intentions at the time of its execution.

In determining the admissibility of extrinsic evidence, the court must consider the principle that it is the province of the court to construe, but not rewrite a will.

Where doubt or ambiguity exist, evidence of surrounding circumstance, known to the testator at the time of making his will, are admissible for the purpose of showing testator's intent.

Extrinsic evidence is always admissible to identify a devisee or legatee since bequests are not to be defeated by more misnomers. This principle applies where the description of a will fits more than one person.

Extrinsic evidence may also be admissible to identify one where the will contemplates their future identification by methods set forth in the will.

The testator's *declaration of intent*, whether made before or after the making of a will, are alike inadmissible.

Cf. Incorporation of papers by reference.

Under the circumstances of this case, the allowance of testimony for the purpose of showing the intent of the testator as to the purposes of a corporation not in existence, or for the purpose of identifying such a corporation as the named beneficiary, could in many cases not only lead to uncertainty, misunderstanding, mistake, or imposition, but also, in effect might allow a testator to modify his will other than in the manner required by statute.

A bequest cannot be construed as executory where to do so would constitute a rewriting of the will rather than an interpretation or construction of it.

The cy pres doctrine is inapplicable where the name of the devisee has no charitable significance and the court is unable to determine the general purposes of the alleged devisee either from the will, or from any evidence in the case which the court is permitted to consider under the rules of evidence.

The rule is well settled in Maine that the lapsed portion of a residuary devise or bequest does not inure to the benefit of the other residuary beneficiaries under a residuary devise or bequest to several beneficiaries not as a class, but becomes intestate property unless the contrary intention of the testator clearly appears from the language of the will. This rule applies where a legacy is void rather than lapsed.

First Portland National v. *Kaler-Vaill*, 50.

The word "Issue" does not have such a fixed and limited meaning that it cannot vary with the intention of a testator who uses it.

While the court as a matter of judicial policy refrains from deciding

WITNESSES

WORDS AND PHRASES

WORKMEN'S COMPENSATION

In an employer petition to reduce compensation because of diminished incapacity, an employer need not offer evidence of specific job opportunities which the employee is capable of performing since the burden of going forward falls upon the employee to show that he has used reasonable efforts to obtain such work, once the employer has established a partial capacity to work.

Although the burden of proof rests upon the moving party, there is no burden to offer an employee work or to prove some particular kind of work is available which he could perform.

The term "light work" is broad enough in its scope to include many types of work "ordinarily available" in the community.

An employee may not impose unnecessary or improper limitations upon his own employability.

Pelchat v. *Portland Box Co.*, 226.

The removal of an eye with 3 3/10% of normal vision when such removal results from a compensable accident is not the "loss of an eye" within the schedule of injuries of Sec. 13 of the Workmen's Compensation Act entitling the claimant to compensation for presumed total incapacity for 100 weeks since the words "loss of an eye" referred to in Section 13 of the Act means removal or enucleation of an eye useful in industry with at least 1/10 of normal vision, with glasses.

The basic purpose of the Act is to provide compensation for loss of earning capacity from actual or legally presumed incapacity to work arising from accidents in industry.

The relationship of *loss* to *loss of use* in terms of presumed total incapacity has been established since 1929. It is a further recognition that it is *loss of use* not loss or removal in itself that brings about loss of earning capacity.

The words "with glasses to 1/10 of normal vision" is the legislative standard for industrial blindness.

Cook v. *Colby et al.*, 306.

WRIT OF ENTRY

See Foreclosure, *Pepperell Trust Co.* v. *Mehlman et al.*, 318.